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Commission on
International
Trade Law**

YEARBOOK

Volume XXV: 1994



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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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CONTENTS

	<i>Page</i>
INTRODUCTION	v
 Part One. Report of the Commission on its annual session; comments and action thereon	
THE TWENTY-SEVENTH SESSION (1994)	
A. Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session (New York, 31 May-17 June 1994) (A/49/17)	3
B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board on the first part of its forty-first session (TD/B/41(1)/14) (Vol.1)	31
C. General Assembly: report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session: report of the Sixth Committee (A/49/739)	31
D. General Assembly resolutions A/RES/49/54 and A/RES/49/55 of 9 December 1994 .	32
 Part Two. Studies and reports on specific subjects	
I. PROCUREMENT	
A. Report of the Working Group on the New International Economic Order on the work of its sixteenth session (Vienna, 6-17 December 1993) (A/CN.9/389)	37
B. Working paper submitted to the Working Group on the New International Economic Order at its sixteenth session: draft model legislative provisions on procurement of services: note by the Secretariat (A/CN.9/WG.V/WP.38)	56
C. Report of the Working Group on the New International Economic Order on the work of its seventeenth session (New York, 14-25 March 1994) (A/CN.9/392)	59
D. Working paper submitted to the Working Group on the New International Economic Order at its seventeenth session: draft amendments to the UNCITRAL Model Law on Procurement of Goods and Construction to incorporate procurement of services (A/CN.9/WG.V/WP.40)	89
E. Draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction: note by the Secretariat (A/CN.9/394)	108
II. GUARANTEES AND STAND-BY LETTERS OF CREDIT	
A. Report of the Working Group on International Contract Practices on the work of its twentieth session (Vienna, 22 November-3 December 1993) (A/CN.9/388)	113
B. Working paper submitted to the Working Group on International Contract Practices at its twentieth session: further revision of draft Convention: articles 1 to 17: note by the Secretariat (A/CN.9.WG.II/WP.80)	129
C. Report of the Working Group on International Contract Practices on the work of its twenty-first session (New York, 14-25 February 1994) (A/CN.9/391)	133
III. ELECTRONIC DATA INTERCHANGE (EDI)	
A. Report of the Working Group on Electronic Data Interchange on the work of its twenty-sixth session (Vienna, 11-22 October 1993) (A/CN.9/387)	149
B. Working papers submitted to the Working Group on Electronic Data Interchange at its twenty-sixth session	
1. Draft uniform rules on the legal aspects of electronic data interchange (EDI) and related means of trade data communication: note by the Secretariat (A/CN.9/WG.IV/WP.57)	173

	<i>Page</i>
2. Proposal by the United Kingdom of Great Britain and Northern Ireland: note by the Secretariat (A/CN.9/WG.IV/WP.58).....	183
C. Report of the Working Group on Electronic Data Interchange (EDI) on the work of its twenty-seventh session (New York, 28 February-11 March 1994) (A/CN.9/390) ..	186
D. Working paper submitted to the Working Group on Electronic Data Interchange at its twenty-seventh session: revised articles of draft uniform rules on the legal aspects of electronic data interchange (EDI) and related means of data communication: note by the Secretariat (A/CN.9/WG.IV/WP.60)	205
IV. INTERNATIONAL COMMERCIAL ARBITRATION	
Draft guidelines for preparatory conferences in arbitral proceedings: report of the Secretary-General (A/CN.9/396 and A/CN.9/396/Add.1)	211
V. POSSIBLE FUTURE WORK	
A. Legal aspects of receivables financing: report of the Secretary-General (A/CN.9/397)	229
B. Cross-border insolvency: report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency: note by the Secretariat (A/CN.9/398)	239
C. Build-operate-transfer projects: note by the Secretariat (A/CN.9/399)	242
VI. INTERNATIONAL PAYMENTS	
A. UNCITRAL Model Law on International Credit Transfers: note by the Secretariat (A/CN.9/384)	245
B. United Nations Convention on International Bills of Exchange and International Promissory Notes: note by the Secretariat (A/CN.9/386)	251
VII. LIABILITY OF OPERATORS OF TRANSPORT TERMINALS	
United Nations Convention on the Liability of Operators of Transport Terminals in International Trade: note by the Secretariat (A/CN.9/385)	257
VIII. COORDINATION OF WORK	
Uniform Customs and Practice for Documentary Credits: report of the Secretary-General (A/CN.9/395)	263
IX. STATUS OF UNCITRAL TEXTS	
A. Status of Conventions: note by the Secretariat (A/CN.9/401)	287
B. Status of the Hamburg Rules: note by the Secretariat (A/CN.9/401/Add.1)	294
X. TRAINING AND ASSISTANCE	
Training and Technical Assistance: note by the Secretariat (A/CN.9/400)	299
Part Three. Annexes	
I. UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES	307
II. GUIDE TO ENACTMENT OF UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES (A/CN.9/403)	323
III. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE PREPARATION OF UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES	347
IV. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL: NOTE BY THE SECRETARIAT (A/CN.9/417)	421
V. CHECK-LIST OF UNCITRAL DOCUMENTS	433
VI. LIST OF DOCUMENTS REPRODUCED IN THE PREVIOUS VOLUMES OF THE YEARBOOK	437

INTRODUCTION

This is the twenty-fifth volume in the series of *Yearbooks* of the United Nations Commission on International Trade Law (UNCITRAL).¹

The present volume consists of three parts. Part one contains the Commission's report on the work of its twenty-seventh session, which was held in New York from 31 May to 17 June 1994, 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 twenty-seventh 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 before the Working Groups.

Part three contains the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the Guide to Enactment of the Model Law, a bibliography of recent writings related to the Commission's work, a list of documents before the twenty-seventh 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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¹To 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.</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
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

THE TWENTY-SEVENTH SESSION (1994)

A. Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session (New York, 31 May-17 June 1994) [Original: English]*

CONTENTS

<i>Chapter</i>	<i>Paragraphs</i>
INTRODUCTION	1-2
I. ORGANIZATION OF THE SESSION	3-10
A. Opening of the session	3
B. Membership and attendance	4-7
C. Election of officers	8
D. Agenda	9
E. Adoption of the report	10
II. DRAFT UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES	11-110
A. Introduction	11-13
B. Discussion of articles	14-89
C. Report of the drafting group	90-96
D. Adoption of the Model Law and recommendation	97
E. Discussion of the draft Guide to Enactment	98-110
III. INTERNATIONAL COMMERCIAL ARBITRATION	111-195
A. Introduction	111-112
B. Discussion of draft Guidelines for Preparatory Conferences in Arbitral Proceedings	113-193
C. Conclusion	194-195
IV. GUARANTEES AND STAND-BY LETTERS OF CREDIT	196-197
V. LEGAL ISSUES IN ELECTRONIC DATA INTERCHANGE	198-201
VI. CASE-LAW ON UNCITRAL TEXTS (CLOUT)	202-207
A. Introduction	202
B. Considerations by the Commission	203-207
VII. FUTURE WORK	208-229
A. Legal aspects of receivables financing	208-214
B. Cross-border insolvency	215-222
C. Build-operate-transfer projects	223-228
D. Implementation of other proposals made at the UNCITRAL Congress ..	229
VIII. ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP 500)	230-231

*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17) (15 July 1994) (hereafter referred to as "Report").

	<i>Paragraphs</i>
IX. TRAINING AND TECHNICAL ASSISTANCE	232-239
X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS	240-252
XI. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS	253-259
A. General Assembly resolution on the work of the Commission	253-255
B. Bibliography	256
C. Date and place of the twenty-eighth session of the Commission	257
D. Sessions of working groups	258-259

	<i>Annexes</i>	<i>Page</i>
I. UNCITRAL Model Law on Procurement of Goods, Construction and Services		31
II. List of documents before the Commission at its twenty-seventh session		31

INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-seventh session, held in New York from 31 May to 17 June 1994.

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 (UNCTAD).

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-seventh session on 31 May 1994. The session was opened by Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel.

B. Membership and attendance

4. General Assembly 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 General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 19 October 1988 and on 4 November 1991, 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:¹

Argentina (1998), Austria (1998), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1998), China (1995), Costa Rica (1995), Denmark (1995), Ecuador (1998), Egypt (1995), France (1995), Germany (1995), Hungary (1998), India (1998), Iran (Islamic Republic of) (1998), Italy (1998), Japan (1995), Kenya (1998), Mexico (1995), Morocco (1995), Nigeria (1995), Poland (1998), Russian Federation (1995), Saudi Arabia (1998), Singapore (1995), Slovakia (1998), Spain (1998), Sudan (1998), Thailand (1998), Togo (1995), Uganda (1998), United Kingdom of Great Britain and Northern Ireland (1995), United Republic of Tanzania (1998), United States of America (1998) and Uruguay (1998).

5. With the exception of Costa Rica, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Algeria, Antigua and Barbuda, Australia, Belarus, Belize, Bolivia, Brazil, Colombia, Cyprus, Czech Republic, El Salvador, Finland, Guatemala, Indonesia, Iraq, Jordan, Lebanon, Libyan Arab Jamahiriya, Malta, Myanmar, Pakistan, Panama, Republic of Korea, Romania, South Africa, Sweden, Switzerland, Syrian Arab Republic, Turkey, Ukraine, Viet Nam, Yemen and Zambia.

¹Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its forty-third session on 19 October 1988 (decision 43/307) and 19 were elected at its forty-sixth session on 4 November 1991 (decision 46/309). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-third session will expire on the last day prior to the opening of the twenty-eighth regular annual session of the Commission, in 1995, while the term of those members elected at its forty-sixth session will expire on the last day prior to the opening of the thirty-first session of the Commission, in 1998.

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

(a) *United Nations bodies*: World Bank (International Bank for Reconstruction and Development)

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Committee (AALCC); Inter-American Development Bank; International Institute for the Unification of Private Law (UNIDROIT); Permanent Court of Arbitration, The Hague.

(c) *Other international organizations*: Cairo Regional Centre for International Commercial Arbitration; Comité Maritime International; Grupo Latinoamericano de Abogados para el Derecho de Comercio Internacional (GRULACI); INSOL International; International Bar Association (IBA); International Chamber of Commerce (ICC); International Council for Commercial Arbitration (ICCA); International Women's Insolvency and Restructuring Confederation (IWIRC); The Chartered Institute of Arbitrators; The Law Association for Asia and the Pacific (LAWASIA).

C. Election of officers²

8. The Commission elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Vice-Chairmen: Mr. Olivér Glatz (Hungary)
Mr. José María Abascal Zamora (Mexico)
Mr. Ahmed Choukri (Morocco)

Rapporteur: Mr. Visoot Tuvayanond (Thailand)

D. Agenda

9. The agenda of the session, as adopted by the Commission at its 520th meeting, on 31 May 1994, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. New international economic order: procurement.
5. International commercial arbitration: draft Guidelines for Preparatory Conferences in Arbitral Proceedings.
6. Electronic data interchange.

7. International contract practices: draft Convention on Independent Guarantees and Stand-by Letters of Credit.
8. Case-law on UNCITRAL texts (CLOUT).
9. Future programme of work.
10. ICC Uniform Customs and Practice for Documentary Credits (UCP 500).
11. Status and promotion of UNCITRAL legal texts.
12. Training and assistance.
13. General Assembly resolutions on the work of the Commission.
14. Other business.
15. Date and place of future meetings.
16. Adoption of the report of the Commission.

E. Adoption of the report

10. At its 546th meeting, on 17 June 1994, the Commission adopted the present report by consensus.

II. DRAFT UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES

A. Introduction

11. At its twenty-sixth session, in 1993, the Commission adopted the UNCITRAL Model Law on Procurement of Goods and Construction.³ At that session, the Commission recalled that a decision had been made to limit work at the initial stage to the formulation of model legislative provisions on procurement of goods and construction. Having completed work on model statutory provisions on procurement of goods and construction, the Commission decided to proceed with the elaboration of model statutory provisions on procurement of services and assigned this work to the Working Group on the New International Economic Order. The Working Group discussed draft model provisions on procurement of services at its sixteenth and seventeenth sessions. The reports of those sessions are contained in documents A/CN.9/389 and A/CN.9/392, the latter containing in its annex the draft text of the Model Law on Procurement of Goods, Construction and Services as agreed on by the Working Group.

12. The Commission noted that the Working Group at its seventeenth session had considered the form that the model statutory provisions on procurement of services should take. It was noted that the Working Group had decided that the provisions should be presented in a consolidated model statute dealing with goods, construction and services, by way of making amendments to the UNCITRAL Model Law on Procurement of Goods and Construction so as to encompass procurement of services. However, in order to

²The election of the Chairman took place at the 520th meeting, on 31 May 1994, the election of the Vice-Chairmen at the 534th meeting, on 9 June 1994, and the election of the Rapporteur took place at the 526th meeting, on 4 June 1994. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), section II, paragraph 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, para. 14 (*Yearbook of the United Nations Commission on International Trade Law, vol. 1: 1968-1970* (United Nations publication, Sales No. E.71.V.1), part two, I, A, para. 14).

³*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, annex I.

limit changes to the existing provisions related to goods and construction, the Working Group decided that those provisions on procurement of services that would provide a separate method of procurement only for services should be included in the Model Law in a separate chapter IV *bis*. It was further noted that the approach recommended would leave intact the Model Law as it had been adopted by the Commission and recommended by the General Assembly for use by those States that wished to adopt legislation with a scope limited to procurement of goods and construction.

13. Before entering into a substantive discussion of the articles of the draft Model Law, the Commission considered the manner in which it could conduct its deliberations, in particular as regards the concern that the Model Law contained a large number of procurement methods. In that regard, it was pointed out that the Model Law did not, as such, contain an excessive number of methods of procurement since, as explained in the Guide to Enactment (A/CN.9/393, para. 16), the three methods set forth in article 17 were optional and an enacting State might wish not to enact all of them in its law. It was therefore suggested that a better way to proceed would be to consider the amended Model Law on an article-by-article basis, while giving particular attention to the question of the number of methods of procurement in the context of the discussion on article 16. It was further noted that the work at the current session of the Commission was limited to considering only those changes that would need to be made to the Model Law to make it applicable to procurement of services.⁴

B. Discussion of articles

Title of the Model Law

14. The Commission considered the title of the Model Law. There was general agreement that, although a short title such as "UNCITRAL Model Law on Procurement" might have been preferable, it would have the drawback of not being specific as to the exact scope of the Model Law, specificity that would be desirable in view of the continued existence of the UNCITRAL Model Law on Procurement of Goods and Construction. It was suggested that, since the title should reflect the contents of the Model Law, the title proposed in the Working Group draft, "UNCITRAL Model Law on Procurement of Goods, Construction and Services", would be more appropriate as it reflected that the Model Law was a consolidated text dealing with goods, construction and services. Furthermore, it was felt that that title would also have the benefit of signifying the difference in scope between the existing Model Law on Procurement of Goods and Construction and the current Model Law, which contained provisions on procurement of services. A proposal was made to include a footnote in the consolidated text of the Model Law so as clearly to indicate the continued existence and availability of the UNCITRAL Model Law on Procurement and Construction for those States that wished to enact legislation limited to goods and construction. It was also suggested that further clarification on this point could be made in the Guide to Enactment. After deliberation, the Commission decided to maintain the

⁴The following table indicates new article numbers assigned to the provisions of the UNCITRAL Model Law on Procurement of Goods, Construction and Services upon adoption by the Commission, the articles as they were presented in the draft Model Law before the Commission and also as they appear in the previous Model Law on Procurement of Goods and Construction.

<i>No. of article in Model Law</i>	<i>No. of draft article before the Commission</i>	<i>No. of article in previous Model Law</i>
Preamble	Preamble	Preamble
1	1	1
2	2	2
3	3	3
4	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
10	10	10
11(1)(a) to (i)	11(1)(a) to (i)	11(a) to (i)
11(1)(j)	11(1) and (1) <i>bis</i>	—
11(1)(k)	—	—
11(1)(l) and (m)	11(1)(j) and (k)	11(1)(j) and (k)
12	11 <i>bis</i>	33
13	11 <i>ter</i>	—
14	12	12
15	13	13
16	14	14
17	15	15
18	16	16
19	17	17
20	18	18
21	19	19
22	20	20
23	21	21
24	22	22
25	23	23

⁴(continued)

<i>No. of article in Model Law</i>	<i>No. of draft article before the Commission</i>	<i>No. of article in previous Model Law</i>
26	24	24
27	25	25
28	26	26
29	27	27
30	28	28
31	29	29
32	30	30
33	31	31
34	32	32
35	34	34
36	35	35
37	41 <i>bis</i>	—
38	41 <i>ter</i>	—
39	41 <i>quater</i>	—
40	41 <i>quinquies</i>	—
41	41 <i>sexies</i> (1)	—
42	41 <i>sexies</i> (2)	—
43	41 <i>sexies</i> (3)	—
44	41 <i>sexies</i> (4)	—
45	41 <i>septies</i>	—
46	36	36
47	37	37
48	38	38
49	39	39
50	40	40
51	41	41
52(a)	42(a)	42(a)
52(b)	42(a <i>bis</i>)	—
52(c)-(f)	42(b)-(e)	42(b)-(e)
53	43	43
54	44	44
55	45	45
56	46	46
57	47	47

title "UNCITRAL Model Law on Procurement of Goods, Construction and Services" and to insert a footnote to that title as suggested so as to indicate clearly the continued existence of the earlier Model Law.

Preamble

15. The Commission adopted the preamble unchanged.

Chapter I. General provisions

Article 1. Scope of application

16. The Commission adopted article 1 unchanged.

Article 2. Definitions

17. The Commission adopted the definitions of the terms "procurement" (subparagraph (a)) and "procuring entity" (subparagraph (b)) unchanged.

"goods" (subparagraph (c))

18. A query was raised as to whether, in a procurement contract for the supply of goods, the transport services associated with the delivery of those goods to the procuring entity would be considered as "incidental services". In reply, it was pointed out that this would depend on whether the procurement contract for the supply of the goods also included the transport of the goods. In such a case the transport would be considered as a service incidental to a procurement of goods if the value of the incidental service were less than that of the goods. However, if the contract for the transport of the goods were separate from the contract for the purchase of the goods, the transport would not be treated as an incidental service. After deliberation, the Commission adopted the definition of "goods" unchanged.

"construction" (subparagraph (d))

19. A proposal was made to delete the definition of the term "construction". In explanation of the proposal, it was stated that the procurement of construction should be treated in the same manner as procurement of services since, in construction, the abilities and qualifications of the supplier or contractor were of crucial significance. It was also pointed out that the procurement of construction was treated in some legal systems as a case of procurement of services. The Commission however noted that the proposal would make changes to the Model Law on Procurement of Goods and Construction as already finalized and adopted. The Commission thus adopted the definition of "construction" unchanged.

"services" (subparagraph (d bis))

20. The Commission transmitted to the drafting group a concern that the text within parentheses at the end of the definition ("the enacting State may specify certain categories of services") might be misinterpreted as a vehicle for excluding certain categories of services from the application of the Model Law. It was also suggested that further clarification might need to be included in this regard in the

Guide to Enactment. Subject to the above possible drafting change, the Commission adopted the definition of "services".

21. The Commission adopted the definitions of the terms "supplier or contractor" (subparagraph (e)), "procurement contract" (subparagraph (f)), "tender security" (subparagraph (g)) and "currency" (subparagraph (h)) unchanged.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

22. The Commission adopted article 3 unchanged.

Article 4. Procurement regulations

23. The Commission adopted article 4 unchanged, noting a suggestion that examples of issues related to procurement of services that might be addressed in procurement regulations could be usefully mentioned in the Guide to Enactment.

Article 5. Public accessibility of legal texts

24. The Commission adopted article 5 unchanged.

Article 6. Qualifications of suppliers and contractors

25. The concern was expressed that the current formulation of paragraph (6) might lead to unfair results, in that a supplier or contractor could be disqualified for errors that did not affect the substance of a bid and were easily repairable, for example, when one year's financial reports were inadvertently left out of the bid. In order to alleviate that concern, it was suggested that the criterion for disqualification should be whether the incompleteness or inaccuracy of the information submitted in relation to the qualifications of the supplier or contractor involved the substance of the bid. The prevailing view was that the existing formulation, arrived at after considerable discussion at the last session of the Commission, was preferable. It was noted that a failure to submit financial reports could be remedied under the existing language in the Model Law. After deliberation, the Commission adopted article 6 unchanged.

Article 7. Prequalification proceedings

Paragraph (1)

26. The Commission adopted paragraph (1) and referred to the drafting group a suggestion to add a reference to chapter IV *bis*.

Paragraph (2)

27. The Commission adopted paragraph (2) unchanged.

Paragraph (3)

28. It was suggested that the reference in paragraph (3) (b)(ii) to article 41 *ter* (f) might be redundant, in view of

paragraph (3)(a)(iii). The Commission referred the matter to the drafting group. A proposal to delete paragraph (3)(a)(v) on the ground that it put an undue burden on the procuring entity did not receive support. It was noted that the purpose of paragraph (3)(a)(v) was to establish basic transparency and that the provision recognized that the procuring entity could set further requirements that would allow it to eliminate, early in the procurement proceedings, suppliers or contractors that were not suitably qualified to perform the contract. The Commission also affirmed the necessity of including paragraph (3)(b)(ii).

Paragraphs (4)-(8)

29. The Commission adopted paragraphs (4)-(8) unchanged.

Articles 8-10

30. The Commission adopted unchanged articles 8-10, entitled: Participation by suppliers or contractors; Form of communications; and Rules concerning documentary evidence provided by suppliers and contractors.

Article 11. Record of procurement proceedings

31. It was suggested that it might be useful to require that the procuring entity maintain a record relating to its decision to apply one of the limited solicitation procedures foreseen in article 41 *bis*. A question was raised as to the purpose of the words "or the basis for determining the price" and of the words "if these are known to the procuring entity". As to the first set of words, it was pointed out that the intention was to address the instances in which the procuring entity would have only a basis for determining the price, as, for example, in case a consultant was employed on an hourly basis, rather than knowing the actual price of the contract. As to the second set of words, it was explained that it was meant to address, for example, the cases in which the procuring entity would not know the price until the evaluation of a supplier or a contractor on the basis of its qualifications, as in the "two-envelope system", a system which would not require the opening of the "price envelope" for those suppliers and contractors whose proposals had been rejected on technical grounds.

Article 11 bis. Rejection of all tenders, proposals, offers or quotations

32. The Commission adopted article 11 *bis* unchanged.

Article 11 ter. Entry into force of the procurement contract

33. A proposal to add at the end of paragraph (2) the words "or accepted" did not attract support, in particular since transparency required disclosure prior to the preparation and submission of bids.

Article 12. Public notice of procurement contract awards

34. The view was expressed that it might be useful to require that early notice of the procurement proceedings be given, at least in cases of single-source procurement. It was noted that, at the current stage, such notice could only be mentioned in the Guide to Enactment. The concern was raised that setting, in paragraph (3), a monetary-value threshold below which the publication requirement would not apply would make periodic amendment of the Model Law necessary in order to take account of inflation. It was pointed out that this concern could be addressed in the Guide to Enactment, including a recommendation to set the threshold in the procurement regulations, which presumably would be amended more easily. After deliberation, the Commission adopted article 12 unchanged.

Article 13. Inducements from suppliers or contractors

35. The question was raised as to whether the conduct of a former officer or former employee was relevant to the conduct of the procuring entity. In response, it was pointed out that the intention of the Model Law was to address all possible abusive practices, including acts of former officers or employees that might have an impact on the procurement proceedings. It was noted that the reference to both officers and employees was necessary since, for example, a member of the board of a company could be considered an "officer" rather than an "employee". After deliberation, the Commission adopted article 13 unchanged.

Article 14. Rules concerning description of goods, construction or services

36. A number of suggestions were made with regard to article 14. One suggestion was that the words "that create obstacles to participation" should be deleted since they were vague. Another suggestion was that reference to services in the second sentence of paragraph (2) of article 14 was not appropriate since trade marks, brand names, patents and other items referred to therein were relevant to goods but not to services. After deliberation, the Commission adopted article 14 unchanged.

Article 15. Language

37. The Commission adopted article 15 unchanged.

Chapter II. Methods of procurement and their conditions for use

Article 16. Methods of procurement

38. A proposal was made to delete paragraph (3)(b) since, except for tendering and request for proposals for services, the other methods of procurement would not be applicable to procurement of services. In support of the proposal, it was stated that, in practice, procurement of

services was carried out by means of either tendering or request for proposals. Furthermore, it was stated that the availability of a multiplicity of methods of procurement for procurement of services might make it difficult for procuring entities to decide which method to use. Along the same lines, a view was expressed that it was incorrect to reverse, in the case of services, the general rule that tendering proceedings should be the preferred method of procurement since it contained the most open and competitive procedures.

39. In response to the above concerns, it was recalled that the Working Group had considered at some length the question of which of the methods available for procurement of goods and construction should also be available for procurement of services. The Working Group had found that the existing approach was a workable compromise, in particular since States might wish not to enact into their law all the procurement methods available for goods and construction. Furthermore, it was pointed out that, in procurement of services, it might be appropriate in some instances to use methods of procurement other than tendering or request for proposals for services. After deliberation, the Commission decided to retain paragraph (3)(b) unchanged. It was also agreed that the Guide to Enactment could further explain the optional nature of some of the methods of procurement.

40. Proposals of a drafting nature were that the word "procedures" in the *chapeau* of paragraph (3) should be replaced by the word "method" and that it should be made clear that, in paragraph (4), the reference to subparagraphs (a) and (b) of paragraph (3) was only a reference to the subparagraphs themselves and not to the *chapeau* of paragraph (3). Referring these proposals to the drafting group for implementation, the Commission adopted article 16.

Articles 17 and 18

41. No comments were made on articles 17 and 18, entitled: Conditions for use of two-stage tendering, request for proposals or competitive negotiation; and Conditions for use of restricted tendering.

Article 19. Conditions for use of request for quotations

42. The concern was noted and referred to the drafting group that, in paragraph (1), the word "provided" was used twice but with different meanings and that this might create uncertainty.

Article 20. Conditions for use of single-source procurement

43. In reference to paragraph (1)(d), it was suggested that the Guide to Enactment could call attention to the possibility of using procurement regulations to guard against abusive resort to single-source procurement in order to maintain standardization.

Articles 21-35

44. No comments were made on articles 21-35, entitled: Domestic tendering; Procedures for soliciting tenders or applications to prequalify; Contents of invitation to tender and invitation to prequalify; Provision of solicitation documents; Contents of solicitation documents; Clarifications and modifications of solicitation documents; Language of tenders; Submission of tenders; Period of effectiveness of tenders; modification and withdrawal of tenders; Tender securities; Opening of tenders; Examination, evaluation and comparison of tenders; Prohibition of negotiations with suppliers or contractors; and Acceptance of tender and entry into force of the procurement contract.

Chapter IV. Procedures for procurement methods other than tendering

45. It was suggested that the title of chapter IV might need to be adjusted since chapter IV *bis* also contained procedures for a method of procurement "other than tendering". Various suggestions, including using the phrase "alternative methods of procurement", were made and referred to the drafting group.

Articles 36-41

46. No comments were made on articles 36-41, entitled: Two-stage tendering; Restricted tendering; Request for proposals; Competitive negotiation; Request for quotations; and Single-source procurement.

Chapter IV bis. Request for proposals for services

General remarks

47. The question was raised generally as to the advisability of including in the Model Law a special method for procurement of services ("request for proposals for services"), the procedures for which were set forth in chapter IV *bis*, while, in accordance with article 16(3)(b), also making available for the procurement of services the request for proposals procedures as set forth in article 38. In this connection, it was pointed out that there appeared to be a degree of overlap with regard to the two methods of procurement, as regards, for example, the question of which of the two methods to use in cases in which the procuring entity was seeking various proposals as to different possible ways of meeting its procurement needs. The view was expressed that therefore, in order to avoid the appearance of complexity and the possibility of confusion, and with a view to giving the clearest possible guidance in particular to States with limited experience in enacting procurement legislation, it would be preferable to forgo, at the least, the applicability to services of the request for proposals procedures under article 38.

48. In pondering the above question, the Commission noted that the Working Group had considered, but had not been in a position to agree on, possible approaches other than the one embodied in the current draft, which made

available for the procurement of services not only the procedures in chapter IV *bis*, but also the other procurement methods, in particular those referred to in article 17. One such alternative approach would have been to incorporate all of the special procedures for services into the existing methods of procurement for goods and construction, without adding a separate method for services. Another approach would have been to add such a separate method and to exclude the availability of the other methods for services, at least the ones set forth in article 17. It was observed in this regard that the lack of unanimity in the deliberations of the Working Group as to which approach to take reflected the fact that different enacting States might make different choices as to the array of procurement methods to be available for the procurement of services. In this light, the Commission was generally agreed that it should be made clear, in a footnote on the face of the Model Law and in the Guide to Enactment, that the Model Law was presenting options to the legislatures of enacting States as regards the methods of procurement to be made available for services and that States might wish not to incorporate all of the optional methods into their legislation.

49. It was also noted that such an approach would be fully in line with the purpose of the Model Law and in line with its relationship with multilateral instruments such as the GATT Agreement on Government Procurement and the procurement directives of the European Union. Those multilateral instruments set forth general principles to be implemented by member States, but it needed to be understood that those States still had to adopt their own national legislation. The Model Law set forth a model for a statute that would be in line with the principles enunciated in those multilateral instruments.

50. There was some hesitation in the Commission to accept the title of chapter IV *bis*, in view in particular of its similarity to the name of the procurement method under article 38 (Request for proposals), which would lead to confusion. The drafting group was requested to attempt to find an alternative, for example, "special method for procurement of services". The Commission also favourably referred to the drafting group a proposal to relocate chapter IV *bis* so that it would immediately follow chapter III (Tendering proceedings). It was felt that such a location was more appropriate since the chapter concerned the normal method for procurement of services.

Article 41 bis. Solicitation of proposals

Title

51. It was generally agreed that a more precise title for article 41 *bis* should be found, in particular one that reflected the element of notice that was central to the provision. The drafting group was requested to identify such a title.

Paragraph (1)

52. A question was raised as to whether paragraph (1) should assume that publication in an official gazette or other official publication would always ensure timely notice, since in some States such publications might appear in print at a point in time after the procurement proceedings

had already transpired. A view was also expressed that paragraph (1) should not go into such details as the price, but should touch on the question of the required qualifications of suppliers or contractors. However, the Commission declined to make any alterations in the text of paragraph (1). It was generally felt that the paragraph, which mirrored the analogous provision in the Model Law on Procurement of Goods and Construction, was appropriate.

Paragraph (2)

53. The view was expressed that the obligation of international solicitation imposed by paragraph (2) was onerous for the procuring entity. As had been the case when a similar concern was expressed with respect to the analogous rule in the Model Law on Procurement of Goods and Construction, the prevailing view was that the principle of open competition, and the attendant rule of wide solicitation, was a key element in the type of highly competitive and transparent procurement regime being codified by the Commission. At the same time, it was recognized that that principle would be subject to a degree of exception by virtue of paragraphs (2) and (3), the latter of which the Commission would consider next.

Paragraph (3)

54. At the outset, the Commission was prompted, by a proposal to delete paragraph (3), to consider generally the appropriateness of including exceptions of the type contained in paragraph (3) to the principle of wide solicitation. Concerns that were cited in support of deleting paragraph (3) in its entirety included the fact that paragraph (2) already referred to certain exceptions and that further exceptions would unduly limit the extent of competition achieved by this, the main method for procurement of services. However, the Commission was generally persuaded by countervailing considerations in favour of retaining all or at least parts of paragraph (3). Those considerations revolved around the need for a certain degree of flexibility with regard to the wide solicitation rule, so as to provide enough flexibility to take account of the differing circumstances in enacting States, and thus to avoid steering procuring entities away from chapter IV *bis* to less competitive procurement methods or encouraging the wholesale exclusion of categories of services from the application of the Model Law. At the same time, there was a general receptivity to ensuring that access to the exceptions was adequately circumscribed by including both a record and an approval requirement with regard to paragraph (3).

Subparagraphs (a) and (b)

55. As regards the detailed provisions of paragraph (3), the Commission affirmed that, whatever its breadth, paragraph (3) should constitute an exception simultaneously to the domestic and international solicitation requirements set forth in paragraphs (1) and (2), since paragraph (3) referred to cases of "direct solicitation". The drafting group was requested to consider whether this point might be made clearer by referring to direct solicitation in the *chapeau* of paragraph (3).

56. Particular attention was paid by the Commission to the difference in formulation between subparagraph (a),

which provided for direct solicitation when the services were only available from a limited number of suppliers or contractors "that are known to the procuring entity", and the analogous provision for restricted tendering (article 18 (a)). The view was expressed that the latter provision contained no such reference to the knowledge of the procuring entity and might thus be regarded as leaving less room for abuse than subparagraph (a) of the current paragraph (3). While the concern was expressed that the reference to the knowledge of the procuring entity should be retained so as to give an adequate degree of flexibility to the procuring entity, the prevailing view was that the current provision should track the formulation used in article 18(a).

Subparagraph (c)

57. Differing views were expressed as to whether to retain subparagraph (c), which provided for an exception to wide solicitation where, because of the nature of the services to be procured, economy and efficiency could be promoted only by way of direct solicitation. The concern was voiced that the provision was vague and that referring merely to the "nature of the services" and to "economy and efficiency" would invite exclusion of wide solicitation in precisely the type of cases in which wide solicitation should be promoted. It was further stated that there was no exclusion along the line of subparagraph (c) for restricted tendering and that a sufficient degree of flexibility was afforded by the exceptions in subparagraphs (a) and (b).

58. In support of retaining subparagraph (c), a variety of considerations were referred to, in particular the need to retain an adequate degree of flexibility for the procuring entity to deal with special circumstances that might arise in the procurement of services. It was emphasized that the acceptability of the special method for procurement for services, as well as that of the Model Law as a whole, depended upon there being an appropriate degree of flexibility with regard to the wide solicitation requirement, so as to give adequate weight to economy and efficiency and other interests of the enacting State.

59. The Commission considered a number of proposals aimed at accommodating the various concerns and considerations that had been raised in the debate as to whether to retain subparagraph (c). One set of proposals centred on an attempt to sharpen the provision by making a more specific reference to what should be understood by the reference to the "nature of the services". Proposals in this respect included, for example, to refer to the "professional", "highly complex and specialized", "intellectual" or "confidential" nature of the services. Various possible combinations of those descriptions were considered, including a proposal to list most or all of those factors, a proposal that would have the provision refer only to cases in which there was a need for confidentiality, and a proposal to refer simply to cases in which the nature of the services did not warrant wide solicitation.

60. After considering but failing to agree on a solution based on a modification of the reference to the nature of the services, the Commission agreed that, rather than focusing on a more specific definition of the nature of the services

contemplated, a more precise avenue would be to refer to special circumstances that required confidentiality or to requirements based on national interest. The Commission referred that decision to the drafting group for implementation and requested it to consider a proposal to move the reference to economy and efficiency from subparagraph (c) to the *chapeau* of paragraph (3).

Paragraph (4)

61. The Commission referred to the drafting group a suggestion that paragraph (4) should contain an express reference to the provision of the request for proposals in cases of direct solicitation. The paragraph was otherwise adopted unchanged.

Article 41 ter. Contents of requests for proposals for services

62. A view was expressed that the requirement to furnish all the information set forth in article 41 *ter* was unduly onerous for the procuring entity. By way of example, it was stated that subparagraphs (d) and (e) referred to information that need not be contained in the request for proposals, that subparagraph (k) required the procuring entity to provide too many details and that subparagraphs (s) and (t) required the procuring entity to provide information about the law whereas the obligation should be on the suppliers and contractors to verify and be aware of the applicable procurement law. It was therefore suggested that some of those subparagraphs could be deleted.

63. In response to the above concerns, it was noted that article 41 *ter*, which generally tracked a similar provision in chapter III, was aimed at providing a level of transparency and openness equivalent to that provided for in tendering proceedings since chapter IV *bis* provided the main method for procurement of services. After deliberation, the Commission decided not to delete any of the subparagraphs in article 41 *ter*.

64. The Commission noted that the proviso "if price is a relevant criterion" at the beginning of subparagraphs (j) and (k), although meant to indicate that price might not be a relevant criterion in some instances in procurement of services, could unduly diminish the significance of price. The Commission agreed that this erroneous impression could be changed by moving the proviso to the end of both subparagraphs and using a formulation such as "unless price is not a relevant criterion". It was further suggested that the Guide to Enactment could indicate the instances in which price might not be a relevant criterion.

65. With regard to subparagraph (n), a query was raised as to whether it was possible to indicate an exchange rate in the request for proposals since exchange rates were subject to fluctuations. In response, it was pointed out that, for purposes of clarity and transparency, it was important to refer to an exchange rate, which could be indicated, for example, as the rate prevailing at a particular financial institution on a particular date.

Article 41 quater. Criteria for the evaluation of proposals

Paragraph (1)

Chapeau

66. A number of concerns were raised with regard to paragraph (1). One concern was that the words "may concern only" would preclude the procuring entity from applying other criteria, such as confidentiality, national interest, transfer of technology and export promotion. In reference to that concern, it was noted that the words "may concern only" were intended to limit the scope of criteria on the basis of which the procuring entity might evaluate proposals, without requiring their use in all cases. At the same time, it was pointed out that the criteria mentioned above either would fall under the category of criteria listed in subparagraph (d) or could be added in the law of the enacting State.

67. Another concern was that the environmental impact of the proposals was not among the evaluation criteria listed in article 41 *quater*. In response, it was pointed out that any particular environmental concerns could be accommodated by way of article 41 *ter* (g) dealing with the description of services. It was suggested that this approach was evident in that the Commission had not included the environmental impact as one of the criteria used in the procurement of goods and construction, despite the fact that goods and construction might well be considered as generally posing a greater risk for the environment than services.

68. Yet another concern was that in the request for proposals the burden to notify suppliers and contractors of the criteria to be used might be excessive for the procuring entity. In response, it was pointed out that notifying the suppliers or contractors of the evaluation criteria was essential for fostering transparency and fairness in competition. In addition, it was stated that methods of procurement other than request for proposals were available for cases in which it would not be possible for the procuring entity to set clearly such evaluation criteria.

69. After deliberation, the Commission adopted the *chapeau* of paragraph (1) unchanged.

Subparagraph (a)

70. A number of proposals were made with a view to improving the formulation of subparagraph (a): that the word "relevant" should be added before the word "qualifications" (it was pointed out however that while the adjective "relevant" would be applicable to the experience of the suppliers or contractors, it could not apply to reputation and reliability); that the words "in the field of assignment" should be added after the word "experience"; and that the meaning of the reference to "personnel" should be made clearer, since there might be uncertainty, for example, as to the applicability to independent contractors to be engaged by the winning bidder or utilization of personnel who had not been notified to the procuring entity by the winning bidder. The Commission adopted subparagraph (a) and referred the matter of its precise formulation to the drafting group.

Subparagraph (b)

71. The Commission adopted subparagraph (b) unchanged.

Subparagraph (c)

72. The concern was expressed that subparagraph (c) might give the mistaken impression that price was a relevant criterion in most cases, without specifying the ways in which it might be expressed. It was noted that price could not be applied in a traditional manner as a criterion in the procurement of a number of services. After deliberation, the Commission was of the view that the concern was adequately addressed and thus adopted subparagraph (c) unchanged.

Subparagraph (d)

73. A general suggestion was made, and accepted by the Commission, that the drafting group examine the possibility of fully aligning paragraph (d) with article 32(4)(c)(iii), in particular as regards the mention of technology transfer, which was lacking in subparagraph (d).

Paragraph (2)

74. It was noted that the application of a margin of preference in favour of domestic contractors as a technique of achieving national economic objectives was generally agreeable. However, a view was expressed that the objectives of that technique could be more appropriately achieved by crediting domestic suppliers or contractors in the procurement proceedings for their knowledge of the region and the language. After deliberation, the Commission adopted paragraph (2) unchanged.

Article 41 quinquies. Clarification and modification of requests for proposals

75. The concern was raised that it might be too onerous for the procuring entity to be required to communicate to all suppliers and contractors the clarifications sought by and given to one or some of them. It was therefore suggested to make such communication of clarifications subject to request. In deciding to retain the provision unchanged, the Commission noted that making such clarifications available to contractors only upon request would not be sufficient since they would have no independent way of finding out that a question had been raised and a clarification had been given.

Article 41 sexies. Selection procedures

76. A suggestion was made that, in order to better differentiate between the three methods of selection set forth in paragraphs (2), (3) and (4) of article 41 *sexies*, they should be given subtitles or divided into separate articles. While subtitles were objected to as being inconsistent with the current format of the Model Law, interest was expressed in the idea of separate articles. Various proposals were made for titles or headings, all generally aimed at indicating the difference between the three selection methods with regard to negotiations. After deliberation, the Commission re-

quested the drafting group to implement the desire of the Commission to distinguish better the procedures set forth in the three paragraphs in question.

Paragraph (1)

77. A concern was expressed that the current formulation of subparagraph (c) could cause confusion as to whether it referred to the use of panels of experts independent of and external to the procuring entity or the use of experts within the internal staff of the procuring entity. The view was also expressed that the provision should make it clear that panels of experts only had an advisory role in the selection process and that the final responsibility of selection lay with the procuring entity.

78. The Commission noted that the Working Group had considered at some length the question of how to frame the provision on the use of expert panels and had decided not to deal in the Model Law with such issues as the exact manner in which panels could be used. After deliberation the Commission decided to maintain the subparagraph unchanged, subject to a drafting modification to clarify that the reference was to the use of an external panel of experts. It was also suggested that the Guide to Enactment could provide further guidance on the use of such panels.

Paragraph (2)

79. Concern was expressed that the word "threshold" in subparagraph (a) did not properly capture the intention of the provision, which was to provide the procuring entity with the opportunity to establish a minimum quality and technical level below which proposals would not be considered. It was further suggested that the paragraph could better explain the mechanics of how such a threshold could be established. The latter suggestion was, however, objected to as going in the direction of providing too much guidance on the mechanics of carrying out certain procedures, an approach that the Commission had decided to avoid. After deliberation, the Commission decided to maintain the subparagraph unchanged, subject to a drafting clarification that the term "threshold level" referred to the setting up of a minimum level of quality that proposals would have to attain.

Paragraph (3)

Subparagraph (a)

80. The concern was expressed that subparagraph (a) was unclear since it did not specify the grounds for rejection of proposals. In response, it was pointed out that the understanding of the Working Group at its seventeenth session had been that rejection would be on the basis of a failure to satisfy a basic criterion such as a professional qualification and not necessarily on the basis of a failure to meet a certain threshold. In line with that understanding, the suggestion was made that subparagraph (a) should be amended to read as follows: "If the procuring entity uses the procedure provided for in this paragraph, it shall engage in negotiations with suppliers or contractors who have submitted acceptable proposals and may seek or permit revisions to such proposals, provided that the opportunity to participate in negotiations is extended to all such

suppliers or contractors." The view was expressed that the formulation would be acceptable, in particular if it were to refer to "technically acceptable proposals". The clarity of the words "if the procuring entity . . . paragraph" in the Arabic text of paragraphs (2), (3) and (4) was questioned. The Commission adopted subparagraph (a) and referred the matter of its exact formulation to the drafting group.

Subparagraphs (b) and (c)

81. A proposal was made to delete subparagraphs (b) and (c) on the grounds that the procuring entity should be entitled to structure the negotiations as it saw fit. However, the prevailing view was that both subparagraphs (b) and (c) should be retained unchanged in the interest of transparency and efficiency and in order to ensure that the evaluation of the technical and other non-price aspects of proposals was a sound one, not affected by the price. The Commission declined to refer explicitly in subparagraph (c) to the "two-envelope system".

Subparagraph (d)

82. The view was expressed that the meaning of the words "best meets the needs of the procuring entity" were not clear. The prevailing view though was that the evaluation criteria set forth in article 41 *quater* gave a clear indication as to what could be considered as best meeting the needs of the procuring entity. After deliberation, the Commission adopted subparagraph (d) unchanged.

Paragraph (4)

Subparagraphs (a), (b) and (c)

83. The Commission adopted subparagraphs (a), (b) and (c) unchanged.

Subparagraph (d)

84. The concern was expressed that subparagraph (d), requiring the procuring entity to inform suppliers or contractors that they had not attained the required threshold level, was imposing an undue burden on the procuring entity. In response, it was pointed out that this was a requirement of basic fairness to suppliers and contractors, who would be allocating human and other resources, so as to be able to perform if awarded the procurement contract. As an alternative, it was suggested that article 11 should be amended so as to make part of the record which suppliers or contractors met the threshold level and such information could be disclosed upon request. After deliberation, the Commission adopted subparagraph (d) unchanged.

Subparagraph (e)

85. The concern was expressed that the words "if it appears . . ." and other elements in the provision introduced some uncertainty and the possibility of arbitrariness. The Commission adopted subparagraph (e) subject to a clearer formulation by the drafting group.

Subparagraph (f)

86. The Commission affirmed that the procuring entity was not permitted to reopen negotiations with suppliers or

contractors with whom it had already terminated negotiations, so as to avoid open-ended negotiations since they could lead to abuse and unnecessary delay. The Commission felt that the provision now reflected all the discretion necessary for the procuring entity, and it was suggested that this point should be more clearly reflected in the Guide to Enactment. The Commission adopted subparagraph (f) unchanged.

Article 41 septies. Confidentiality

87. The view was expressed that the article was inappropriate as it denied the procuring entity the opportunity to engage in negotiations with suppliers and contractors since this would involve the exchange of information on the proposals. In response to that view, it was pointed out that the article, which was in line with a similar rule found elsewhere in the Model Law, was important in order to maintain integrity in the procurement proceedings by ensuring that the procuring entity did not utilize the negotiations as a means inappropriately to play the suppliers and contractors against each other. Furthermore, it provided protection to any confidential information that might be contained in the proposals. The Commission therefore adopted article 41 *septies* unchanged.

Further general remarks concerning chapter IV bis

88. Having completed its review of the procedures involved in the special method of procurement of services, the Commission reviewed further the manner in which the special method should be presented in relation to the other procurement methods in the Model Law. The Commission did not favour a number of suggestions that were put forth, including, for example, deleting article 16(3)(b) and the references to services in articles 17-20, with an explanation in the Guide of the option to use those methods for services, or deleting chapter IV *bis* as a whole. The Commission affirmed that the preferable path would be to retain the approach in the existing draft, with a footnote of the type discussed above indicating that the Model Law presented legislatures with a choice as to which procurement methods to incorporate into domestic legislation (see paragraph 48 above). As to the content of that footnote, the dominant preference in the Commission was for emphasis to be placed on the fact that the Model Law presented two principal methods, along with alternative methods for cases in which the principal methods were inappropriate. It was also widely felt that the footnote should be neutral as regards which combination of methods enacting States should incorporate.

Chapter V. Review

89. A view was expressed that certain aspects of the review procedures (articles 42-47) were inconsistent with the approaches found in some States and that a number of provisions might be regarded as onerous for the procuring entity. Reference was made in particular to the provisions on suspension of the procurement proceedings, to the various time limitation periods and to the requirement of notice of the review proceedings to all suppliers or contractors. The prevailing view, however, was that the procedures

on review should be retained unchanged, subject to the review by the drafting group of the precise formulation of the provisions referring to services in article 42(2)(a *bis*). It was noted that the current text was otherwise identical to that in the Model Law on Procurement of Goods and Construction. It was further noted that the current draft also included an asterisk footnote recognizing that, because of constitutional or other considerations, States might not see fit to incorporate the articles on review.

C. Report of the drafting group

90. The entire text of the draft Model Law was submitted to a drafting group for implementation of the decisions of the Commission and revision to ensure consistency within the text among the language versions. The Commission, at its 535th and 536th meetings, held on 9 and 10 June 1994, considered the report of the drafting group.

91. A suggestion was made that the title "UNCITRAL Model Law on Procurement of Goods, Construction and Services" did not make it sufficiently clear that the Model Law which had been adopted by the Commission at the twenty-sixth session and which was limited to procurement of goods and construction was still valid. A suggestion to differentiate the two Model Laws by referring to the year of adoption of the latter one was objected to on the basis that, in some jurisdictions, legislation was only dated if it superseded earlier legislation on the same subject, which was not the intention here. After deliberation, the Commission agreed that the footnote to the title should make it clear that the current Model Law did not supersede the earlier Model Law.

92. A query was raised as to why the reference to article 41 *ter* (f) had been deleted from article 7(3)(b)(ii). In response, it was pointed out that the deletion was purely a drafting matter since the information referred to in article 41 *ter* (f) was already required pursuant to article 7(3)(a)(iii).

93. With regard to the footnote to article 16, the view was expressed that the intention had been to indicate that the enacting State had the option not to extend the methods of procurement set forth in article 17 to procurement of services. It was noted that the footnote as drafted mentioned the availability of the two principal methods of procurement, mentioned that there were alternative methods of procurement and then informed that States might choose not to enact all those methods into their national legislation. It was stated that the footnote dealt with the question of choice of methods of procurement in a very general manner and might lead to uncertainty with regard to choice of procurement methods in the already existing Model Law on Procurement of Goods and Construction, which did not contain a footnote in this regard, although the Guide to Enactment of that Law did refer to options. After deliberation, the Commission agreed that it might be preferable to have a short footnote which would simply indicate that States had the choice not to incorporate all the methods of procurement in their national law. Such a footnote, it was agreed, could then make a reference to the Guide to Enactment, where a more detailed explanation would be found.

94. It was suggested that, with regard to article 41 *bis* (3), the Guide to Enactment should provide further clarification on the mechanics of carrying out direct solicitation and how the procuring entity might deal with unsolicited proposals.

95. The Commission noted that the title of chapter III *bis* ("Special method for procurement of services") might create the misimpression that this method was the only one available for procurement of services. The Commission therefore agreed that a clearer title would be "Principal method for procurement of services".

96. With regard to article 41 *sexies ter* (1), it was proposed that the provision, rather than make a reference to "acceptable proposals", should provide that the procuring entity engage in negotiations with suppliers and contractors that had attained a rating above a "minimum level" similar to that established under the other two selection procedures. This proposal was not accepted, on the basis that it involved a change in substance since no such minimum level had been established for the selection procedure with simultaneous negotiations. The Commission, after deliberation, decided to replace the words "minimum level" with the word "threshold" in articles 41 *sexies bis* and 41 *sexies quater* on the rationale that the words "minimum level" might give the impression that the procuring entity should aim at receiving proposals of minimum quality.

D. Adoption of the Model Law and recommendation

97. The Commission, after consideration of the text of the draft Model Law as revised by the drafting group,⁴ adopted the following decision at its 545th meeting, on 15 June 1994:

"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 large portion of public expenditure in most States,

"Recalling its adoption of the UNCITRAL Model Law on Procurement of Goods and Construction at its twenty-sixth session,

"Recalling also its decision at the twenty-sixth session to draw up model legislative provisions on procurement of services while leaving intact the UNCITRAL Model Law on Procurement of Goods and Construction,

"Noting that model legislative provisions on procurement of services establishing procedures designed to foster integrity, confidence, fairness and transparency in

the procurement process will also promote economy, efficiency and competition in procurement and thus lead to increased economic development,

"Being of the opinion that the establishment of model legislative provisions on procurement of services that are acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

"Being convinced that model legislative provisions on services contained in a consolidated text dealing with procurement of goods, construction and services will significantly assist all States, including developing countries and States whose economies are in transition, in enhancing their existing procurement laws and formulating procurement laws where none presently exist,

"1. Adopts the UNCITRAL Model Law on Procurement of Goods, Construction and Services as it appears in annex I to the report of its current session;

"2. Requests the Secretary-General to transmit the text of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, together with the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, to Governments and other interested bodies;

"3. Recommends that all States give favourable consideration to the UNCITRAL Model Law on Procurement of Goods, Construction and Services when they enact or revise their laws, in view of the desirability of improvement and uniformity of the laws of procurement and the specific needs of procurement practice."

E. Discussion of the draft Guide to Enactment

98. The Commission engaged in a discussion on the draft Guide to Enactment of the Model Law on Goods, Construction and Services on the basis of document A/CN.9/394. It was noted that, although the draft Guide was presented in the form of amendments to the already existing Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods and Construction, the actual intention was not to make amendments to that Guide but to prepare a second document, without disturbing the existing Guide to Enactment.

99. It was suggested that, since the procurement of construction sometimes involved elements in the selection criteria that were similar to those for the procurement of services, the Guide should indicate that States might wish to consider using the provisions on procurement of services also for procurement of construction. The Commission then turned to a consideration of comments with respect to specific paragraphs of the annex to document A/CN.9/394.

Paragraph 1

100. It was suggested that comment 1 *bis* should make it clear that at the current session the Commission was not

actually amending the UNCITRAL Model Law on Procurement of Goods and Construction, but was in fact adopting a second text dealing with procurement of goods, construction and services.

Paragraph 3

101. It was suggested that the use of the word "commodity" in describing services was open to ambiguity and that a word such as "object" or "item" should be used.

Paragraph 5

102. A suggestion was made that the characterization of the selection procedure set forth in article 41 *sexies* (12) as "akin to tendering" should be deleted. It was also suggested that, in the last sentence of the paragraph, it should be made clear that, under the selection procedure set forth in article 41 *sexies* (14), the procuring entity could not go back and reopen negotiations with suppliers and contractors with whom negotiations had been terminated.

Paragraph 12

103. It was suggested that, because of the rather wide definition of services, the Guide should provide some examples of items, in particular real property, whose classification might usefully be clarified in the Model Law.

Paragraph 13

104. It was suggested that, with reference to procurement of services, the Guide should indicate that the procurement regulations could deal with such questions as conflicts of interest.

Paragraph 16

105. It was pointed out that the reference to the information "known" to the procuring entity should focus on those situations where the price of certain proposals would not become revealed before the conclusion of the procurement proceedings.

Paragraph 18

106. It was suggested that the Guide should provide some examples of services that could be procured by means of tendering proceedings. With reference to comment 2, it was suggested that the use of the word "should" in the first sentence might give the erroneous impression that the requirement to keep a record was not mandatory.

Paragraph 21

107. It was suggested that, in comment 1 under article 41 *quater*, where reference was made to the other articles in the Model Law where similar criteria were listed, there should be specific references to those articles.

108. It was pointed out that, in the last sentence of comment 2 under article 41 *sexies*, it should be stated that the selection procedures in article 41 *sexies* (3) and (4) were in fact unlike tendering in that they allowed for negotiations.

109. With regard to comment 5 under article 41 *sexies*, it was suggested that the restriction on the procuring entity to reopen negotiations should not be cast as making the method of selection less competitive but as meant to provide a certain amount of discipline in the procurement proceedings.

110. Subject to the implementation by the Secretariat of the changes necessary in order to reflect the decisions of the Commission on the Model Law, and the other suggestions made by the Commission, the Commission adopted the Guide.

III. INTERNATIONAL COMMERCIAL ARBITRATION

A. Introduction

111. The Commission, at its twenty-sixth session, in 1993, considered a note by the Secretariat entitled "Guidelines for pre-hearing conferences in arbitral proceedings" (A/CN.9/378/Add.2).⁵ The note, observing the useful application of the principle of flexibility and discretion in the conduct of arbitral proceedings, pointed out that in some circumstances that principle might make it difficult for the participants in an arbitration to prepare for the various stages of the arbitral proceedings. In addition, the note described how those difficulties could be avoided by holding at an early stage of arbitral proceedings a "pre-hearing conference" in order to discuss and plan the proceedings. Furthermore, the note suggested that the Commission should prepare guidelines for pre-hearing conferences and gave a tentative outline of topics that might be addressed in such guidelines. The Commission accepted the suggestion and requested the Secretariat to prepare a draft of such guidelines.⁶ The Secretariat in preparing such Guidelines considered that the term "preparatory conferences" was more appropriate than "pre-hearing conferences" because the conferences envisaged might take place at other stages of the arbitral proceedings.

112. At the current session the Commission had before it documents A/CN.9/396 and Add.1, which contained draft Guidelines for Preparatory Conferences in Arbitral Proceedings. (For the conclusion of the discussions, see paragraphs 194 and 195 below.)

B. Discussion of draft Guidelines for Preparatory Conferences in Arbitral Proceedings

1. Text as a whole

113. There was general support in the Commission for the project of preparing the Guidelines, and the draft as contained in document A/CN.9/396/Add.1 was regarded as a good basis for the discussions. It was considered that the Guidelines would provide welcome assistance to practitioners and would also have a significant educational effect. It was also observed that the Guidelines would be

⁵Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 291-296.

⁶Ibid., paras. 293 and 296.

helpful in ad hoc arbitrations as well as arbitrations administered by arbitral institutions.

114. It was considered that the draft text should emphasize that the advisability of holding one or more preparatory conferences and the time of holding such conferences depended on the circumstances of the case. It was considered that wherever in the text reference was made to "a preparatory conference" drafting changes should be made to indicate the possibility of more than one such conference. If such a conference was to be convened, flexibility should be the governing principle in organizing and timing one or more preparatory conferences. It was stressed that the Guidelines should not convey an impression that holding a preparatory conference was a matter of systematic practice, but that it was useful to the extent that savings in costs and time could be achieved. A view was expressed that a preparatory conference might not be useful when the parties demonstrated an uncooperative or confrontational attitude, but another view was that the decision as to whether to hold a conference was to be made by the arbitral tribunal taking into account principally the desirability of promoting efficient arbitral proceedings.

115. It was noted that the topics discussed in chapter III of the draft Guidelines were relevant to planning arbitral proceedings irrespective of whether a special preparatory conference was convened. It was therefore suggested that the focus of the Guidelines might be broadened so that the text would, instead of only presenting the topics on which early procedural decisions might be useful as agenda items for such conferences, deal with those topics in the context of the various possible approaches to planning arbitral proceedings, of which preparatory conferences were a part.

116. It was observed that some issues that might be dealt with at a preparatory conference touched upon substantive, as opposed to procedural, issues between the parties, and that the decisions taken at or as a result of the preparatory conferences should not prejudice those substantive issues and should be taken in a manner that fully observed the procedural rights of the parties.

117. The expression "Guide" was mentioned as a possible alternative to the expression "Guidelines" in the title. As alternatives for the term "preparatory conference" the following expressions were suggested: "planning conference", "preparatory meeting", "consultation" and "preparatory deliberations".

118. It was suggested that the usefulness of the Guidelines would possibly be enhanced by preparing an index and also that, in addition to the Guidelines, a summary check-list of agenda items without accompanying remarks covered in the Guidelines would be helpful to practitioners.

2. Draft chapter I, "General considerations"

119. A suggestion was made to indicate in paragraph 2 that, in addition to provisions of rules agreed to by the parties, specific agreements by the parties might constitute a further limitation to the discretion of the arbitral tribunal. It was suggested that appropriate drafting changes be made throughout the Guidelines to reflect that.

120. As to paragraph 3, it was proposed to delete the reference to the preferred procedural style since such preferences might not be shared by all the parties in the arbitration and since a shared preference was not necessary for a decision by the arbitral tribunal to use a particular manner of proceeding.

121. A proposal was made that it would be useful to mention in paragraph 6 the reasons that might prompt the arbitrators to hold a preparatory conference. Furthermore, it was noted that not all matters considered at a preparatory conference could be regarded as details of procedure.

122. As to paragraph 15, it was suggested that the Guidelines should express that established practice at the place of arbitration was another factor to be borne in mind in carrying out preparatory conferences. In opposition, it was said that arbitration practice, to the extent that it was not incorporated into the agreed arbitration rules, was difficult to ascertain and not binding, and that therefore it was inappropriate to refer to an obligation to observe such practice.

123. One view supported deletion of paragraph 17 and of those parts of paragraph 16 that referred to modifications of the arbitration rules agreed upon by the parties. It was said that the arbitration rules became applicable as a result of agreement of the parties and that, while it was implicit that the parties could decide to modify their agreement, it was inappropriate for the arbitral tribunal to raise at the preparatory conference the question of any such modification. Another view was that the text under discussion was useful to the extent that it contained a warning about possible difficulties resulting from modifications of arbitration rules.

3. Draft chapter II, "Convening and conducting preparatory conference"

124. The concern was expressed that the last sentence of paragraph 19 might be understood as implying that there was always an inherent risk that the preparatory conferences might add to the costs or complicate the administration of the proceedings. In order to alleviate that concern, it was suggested to refer in positive terms to the advantages of preparatory conferences in lowering costs by establishing efficient arrangements for the arbitral proceedings.

125. The suggestion was made that the last sentence of paragraph 21 should be deleted since the fact that one of the parties might object to the holding of a preparatory conference did not necessarily mean that the conference would not meet its objectives. It was pointed out that planning efficient proceedings should not be barred by objections of one of the parties. Nevertheless, the opinion was expressed that it might indeed not be appropriate for the arbitral tribunal to hold a preparatory conference if one of the parties objected and failed to participate in it, as described in paragraph 22. In case such a preparatory conference was held anyway in the absence of a party, it was considered necessary to emphasize that the tribunal in taking decisions had to observe the principles of due process of law.

126. With regard to paragraph 23, one view was that it should be retained with some amendments. In support of that view, it was stated that it was useful to clarify who the participants of a preparatory conference might be. It was suggested that paragraph 23 should state first what was usual, namely that, when the parties were represented by legal counsel or other agents, typically the representatives of the parties would attend the preparatory conference, and then explain the reasons that might make it necessary or useful for the parties themselves to be present. Another suggestion was to mention that the invitation to the preparatory conference should indicate also the issues to be addressed at the conference. Another view was that paragraph 23 should be deleted since it was inappropriate for the arbitral tribunal to make suggestions to the parties as to who should participate in the preparatory conference on their behalf.

127. With regard to paragraph 24, the view was expressed that the decision to confer by telecommunications (e.g., by telefax or multilateral telephone conversation) depended on a number of factors and not only on the number of procedural issues to be resolved.

128. The suggestion was made that it might be useful to consider in the context of paragraph 25 the possibility of planning the proceedings on the basis of a questionnaire that the tribunal might address to the parties or on the basis of written submissions of the parties.

129. As to paragraph 31 it was suggested that holding more than one preparatory conference need not be limited to exceptional cases and that time and cost were not the only factors to be considered in determining whether to hold more than one conference, but rather that a relevant factor to be considered was the extent to which a conference could lead to more efficient arbitral proceedings.

130. Differing views were expressed with regard to paragraph 33. One view was that it should be deleted since it was not necessary for the Guidelines to enter into the difficult question of categorization of decisions taken at a preparatory conference. Another view was that the paragraph should be retained but amended without distinguishing between issues of substance and issues of procedure, because it might be difficult to make that distinction. One suggested amendment was to delete the reference to the substance of the dispute since preparatory conferences were intended to settle procedural and not substantive matters. Another suggestion was that examples of issues to be resolved at a preparatory conference should be given without categorizing the issues. It was observed that, while the purpose of the preparatory conference was not for the arbitral tribunal to take decisions on the substance of the dispute, the parties should be able at the conference to define or narrow by agreement the scope of issues to be decided by the arbitral tribunal (as discussed in particular in chapter III, items D and E).

131. A suggestion was made to mention in paragraph 33, or elsewhere, that the preparatory conference presented an opportunity to the parties to enter into agreements that could exclude or reduce the possibility of bringing a recourse action against an award or of raising objections

against recognition and enforcement of the award. The suggestion was opposed on the ground that in many legal systems the question of recourse to courts was governed by provisions that could not be derogated from; furthermore, it was inappropriate for the arbitral tribunal to suggest to the parties to renounce any rights of recourse against the award that they might have.

132. It was observed that the two approaches referred to in paragraph 34 with regard to the way in which decisions were arrived at and recorded were not mutually exclusive. It was noted that certain agreements of the parties should be in writing (e.g., article 1(1) of the UNCITRAL Arbitration Rules envisaged modifications of the Rules to be in writing), and the suggestion was to draw attention to such cases in the Guidelines.

133. The concern was expressed that the first sentence of paragraph 35 might create an undesirable impression that it was beneficial for the arbitrators to limit their discussions with the parties concerning decisions to be taken.

134. With respect to paragraph 36, it was suggested that the level of detail of the decisions taken at a preparatory conference should depend largely on whether the information available to the arbitrators at the time enabled them to formulate specific decisions.

4. *Draft chapter III, "Annotated check-list of possible topics for preparatory conference"*

135. It was considered that it should be made clear in draft chapter III that some of the topics mentioned in the check-list were suitable for being addressed at an early stage of the proceedings, when all the points at issue might not yet have been presented to the arbitral tribunal, whereas some other topics in the check-list could properly be taken up at a later stage, after the parties had stated their claims and defences. Examples of topics in the first category were, for example, rules governing the arbitral procedure (item A), language of proceedings (item M) or place of arbitration (item P); examples of topics in the second category were the definition of issues and the order of deciding them (item D), stipulations that certain facts or issues were undisputed (item E) and matters relating to the taking of evidence (items F-J).

136. While one suggestion was to leave to the arbitral tribunal a degree of discretion as to the manner of preparing the agenda of the preparatory conference, another suggestion was to recommend in the introductory part of chapter III that the agenda should be prepared in consultation with the parties.

137. It was observed that according to paragraph 38, as a matter of general rule qualified by the discretion of the arbitral tribunal, topics that had not been announced in the agenda should not be raised at the preparatory conference. The view was expressed that the paragraph should indicate a somewhat broader scope for a party to be able to raise a topic outside the agenda.

(a) *Topic A, "Rules governing arbitral procedure"*

138. Some support was expressed for the view that item A should be deleted from the check-list. It was pointed out that, in view of the great number of sets of rules available to be agreed upon, the discussions concerning the choice might be difficult and inordinately lengthy, thus delaying the case or providing an opportunity for dilatory tactics, and therefore might add another contentious issue to the existing ones. Moreover, it would be necessary to modify the rules chosen at that stage of the proceedings to delete provisions that were no longer applicable, such as those governing initial pleading and formation of the arbitral tribunal, and that such modifications might be a complex task because rules often included intertwined provisions. In addition, if the rules chosen were ones prepared for arbitrations administered by an institution, adjustments to the rules might affect the functions of the institution necessary to the operation of their rules, which would complicate the discussions or introduce an element of uncertainty into the procedure.

139. However, there was support for the view that the item should be retained since it might be useful to remind the parties, at an early stage of the proceedings, that they might wish to consider agreeing on a set of arbitration rules if they had not done so. It was pointed out that considerations to agree on a set of rules would not delay the proceedings since, if it appeared that agreement could not be reached promptly by the parties, the tribunal could seek to discontinue the discussion.

(b) *Topic B, "Jurisdiction and composition of arbitral tribunal"*

140. Differing views were expressed as to whether item B should be retained in the Guidelines. One view was that it should be retained, since an early clarification as to whether the parties agreed that the arbitral tribunal had been properly constituted and as to whether the tribunal had jurisdiction over the dispute would be useful so as to avoid the possibility of later objections raised merely to delay the proceedings or enforcement of the award.

141. Another view, which received considerable support, was to delete item B. Attention was drawn to provisions in laws and rules on arbitral procedure (such as article 16(2) of the UNCITRAL Model Law on International Commercial Arbitration and article 21 of the UNCITRAL Arbitration Rules), according to which objections concerning jurisdiction had to be raised not later than the submission of the statement of defence or as soon as the matter alleged to be beyond the authority of the tribunal was raised during the arbitral proceedings. With reference to those laws it was said that, if the preparatory conference was held before the submission of the statement of defence, it was inappropriate to call upon the party to express its position on jurisdiction before it had fully considered and submitted its defence; on the other hand, if the preparatory conference was held after the submission of the statement of defence, it would ordinarily be too late for objections concerning jurisdictions.

142. Furthermore, it was stressed that any objection as to jurisdiction or composition of the arbitral tribunal should

be left entirely to the parties, and that it was inappropriate for the arbitral tribunal at a preparatory conference to request the parties to pronounce themselves on the issue. To the extent the term "composition of the arbitral tribunal" could be understood as covering also any intention to challenge an arbitrator because of circumstances giving rise to doubts as to its impartiality or independence, it was also considered that that question was only for the parties to raise and that arbitration laws and rules usually contained a strict system for challenges (such as article 13 of the UNCITRAL Model Law on International Commercial Arbitration and article 11 of the UNCITRAL Arbitration Rules).

(c) *Topic C, "Possibility of settlement"*

143. The views differed as to whether it was appropriate for the arbitral tribunal on its own initiative to raise the question of a possible settlement and as to the manner in which the arbitral tribunal might be involved in any settlement negotiations. It was stated that in some legal systems it was considered incompatible with the function of the arbitrator to inquire about settlement; moreover, it was said that such an inquiry might worsen the procedural atmosphere, might put a party in an uncomfortable situation of having to refuse to settle, might raise doubts about the impartiality of the arbitrators and, in case of unsuccessful conciliation, increase the likelihood of objections against the award.

144. Statements were made about legal systems where an inquiry about possible settlement was provided for by the law governing court proceedings and where such an inquiry was sometimes also considered acceptable and desirable in arbitral proceedings, provided that it was done in a way that did not compromise the impartiality of the tribunal.

145. As to the case where the parties on their initiative requested the arbitral tribunal to assist them in reaching a settlement, one view was that the roles of an arbitrator and a conciliator were difficult to reconcile and that it was therefore appropriate for the arbitrators to refuse to act as conciliators or to be reserved in responding to such an initiative. Another view was that, while the arbitral tribunal should always be careful to maintain its impartiality, the benefits of a settlement justified the arbitral tribunal in being forthcoming in responding to such requests of the parties.

146. One suggestion based on those discussions was that the Guidelines, with appropriate warnings, should mention the divergent views and practices and that it should be left to the practitioners to decide, in line with the applicable laws and practices, on the most appropriate manner of proceeding. The opposite suggestion was to delete remarks 1 and 2 and to retain only remark 3 so as to make it clear that any settlement negotiations should concern the arbitral tribunal only as a factor affecting scheduling of the proceedings. It was said that a description of differing views and practices along the lines of remarks 1 and 2 would not provide a sufficiently clear guidance to practitioners as to how they should act.

147. It was observed that, while there was a direct connection between the agenda item and remark 3, no such direct connection existed with remarks 1 and 2.

(d) *Topic D, "Defining issues and order of deciding them"*

Item (i)

148. It was suggested to delete in the last sentence of remark 1 the reference to the request that the proceedings be conducted on the basis of documents only. It was said that in any circumstances it was inappropriate for the arbitral tribunal to take an initiative for dispensing with oral hearings, since one or more parties might regard oral arguments on issues of law as being just as important as oral arguments on issues of fact.

149. On the other hand, some merit was found in the sentence in that it gave an example of how costs of arbitration could be limited after the points at issue had been defined. A suggestion was made to clarify in the example that instead of dispensing with oral hearings their scope might be reduced. It was said that, if the example were to be retained, it should make clear that the parties had an unqualified right to oral hearings irrespective of the nature of the issue to be decided, subject only to any contrary provision in applicable rules or in an agreement of the parties. It was also proposed that the example should not encourage the arbitral tribunal to take the initiative concerning dispensing with, or limiting, oral hearings, and leave any such initiative to the parties.

150. There was a suggestion that it depended on the applicable law which facts had to be proved for a party to establish its case, and that, therefore, points at issue could be fully defined only if it was clear which law applied to the substance to the dispute. Thus, topics D and E should not be placed on the agenda if at the time of holding the preparatory conference it was not settled which law governed the substance of the dispute.

Item (ii)

151. It was considered that remarks 6 and 7 should be deleted since they commented on the substance of the dispute and since they might lead to doubts and uncertainties.

Item (iii)

152. As to remark 9, it was suggested that, in determining the order of deciding issues, the arbitral tribunal should be careful not to appear to be prejudging, or expressing an opinion on, the substance of an issue.

153. It was observed that sometimes a determination of the order in which issues were to be decided might subsequently need to be changed and that the Guidelines might refer to such a possibility.

154. With respect to the last sentence of remark 9, it was suggested that the criterion for the order of deciding the issues should be whether one issue was preliminary with respect to other issues. Reservations were expressed about using other criteria for determining that order, as mentioned

in the last sentence of remark 9, in so far as the use of those other criteria might constitute an unwarranted and premature indication about the likelihood of success of a claim or might interfere with the manner in which a party wished to argue its case.

155. One view was that remarks 10 and 11 relating to partial, interim and interlocutory awards were useful as they further elaborated points made in remark 9. The opposite view was that the remarks should be deleted since they went beyond the scope of the discussion of the agenda item, because there did not exist a generally accepted definition of partial, interim and interlocutory awards, and because it was not possible to give a proper explanation of that complex subject-matter in the limited space that could be devoted to it.

(e) *Topic E, "Undisputed facts or issues"*

156. It was considered that remark 3 should be deleted. It was said that the Guidelines should not suggest that the arbitral tribunal should make an announcement concerning costs of arbitration as envisaged in remark 3, since such an announcement might be perceived as coercion and since remark 3 gave undue prominence to only one of the factors to be taken into account in apportioning costs.

(f) *Topic F, "Arrangements concerning documentary evidence"*

Item (ii)

157. It was suggested that in remarks 4 and 5 the term "presumption" should be replaced by another term.

Item (v)

158. With respect to requests for production of documents, a suggestion was made that the remarks should clarify the need for respecting the confidentiality of the produced documents. A special reason for such a need was that privileged documents (e.g., communications between a client and its legal counsel) might lose their privileged status if their confidentiality was not respected. Article 20 of the UNCITRAL Conciliation Rules was mentioned as a possible model for devising an approach to the issue of confidentiality.

159. A view was expressed that the sentence of remark 11 that dealt with requests for "internal" documents should be deleted since it might unduly restrict requests for certain types of internal documents (e.g., minutes of shareholders' meetings or memoranda sent within a company) even if the arbitral tribunal would consider a request for their production reasonable. It was noted, however, that in a number of legal systems the conditions for requests for the production of documents and in particular of internal documents were rather restricted and that, for that reason, it was necessary to find a solution that was generally acceptable.

160. With respect to the reference to the right to refuse to take a self-incriminating action (remark 13), it was suggested that such a right was relevant in a criminal court but not in an arbitration.

(g) *Topic G, "Arrangements concerning physical evidence"*

161. It was proposed that the last sentence of remark 3 should be reviewed so as to avoid the impression that the Guidelines suggested that employees of a party might be heard as witnesses during an on-site inspection of property or goods.

(h) *Topic H, "Arrangements concerning evidence of witnesses"**Item (i)*

162. The view was expressed that the last sentence of remark 3 should be deleted since the sentence indicated a bias against oral, as opposed to written, testimony. It was said that the sentence unduly impinged upon the principle that any decision to forgo oral testimony should be left entirely to the parties.

163. It was observed that under some legal traditions the oath was regarded as an important, and in certain situations a necessary, element of a witness's testimony. Thus it was said that, in order to replace a traditional oath by a signed declaration, as referred to in remark 6, the consent of both parties was necessary.

164. It was indicated that differing methods were used for protocolizing signatures on statements of witnesses, and that those methods were in some cases governed by international treaties. It was stated that, in view of those differences, the Guidelines should not attempt to discuss, or provide advice on, the various methods used for preparing written statements by witnesses; rather, the Guidelines should be limited to a reminder that, before the parties were called upon to produce written statements of witnesses, there should be a common understanding as to how those statements were to be prepared.

Item (ii)

165. It was suggested that remarks 8-12 should be deleted. In support of the suggestion it was said that the limited scope of the Guidelines did not permit an appropriate description of the different methods of hearing witnesses. Moreover, such a description was not necessary since the purpose of the Guidelines was to indicate the matters on which early procedural decisions were necessary, but not to attempt to give advice as to the possible content of those decisions. It was observed that some legal systems contained mandatory provisions concerning the formalities to be observed with respect to oaths.

166. Another suggestion was to delete only remarks 8 and 9. The other remarks under item (ii) were said to serve a useful purpose as they drew attention to matters that gave rise to problems in practice.

Item (iii)

167. It was stated that, as regards procedures for taking evidence of witnesses, in many legal systems persons affiliated with a party were not treated differently from other persons, and that therefore remark 15, and in particular its first sentence, should be reviewed.

(i) *Topic I, "Arrangements concerning evidence of experts"*

168. No comments were made concerning topic I.

(j) *Topic J, "Arrangements concerning written submissions"*

169. It was suggested that remark 2 was too detailed. It was said that, instead of describing various kinds of documents that might be presented, the remark should only remind the arbitral tribunal to inquire what kind of documents the parties intended to present.

170. It was stated that the advantages and disadvantages of consecutive and simultaneous submissions depended on a number of considerations, some of which were not mentioned in remark 5 (e.g., speed of proceedings), that the evaluation of those considerations was within the discretion of the arbitral tribunal and that the Guidelines should not attempt to guide the arbitrators as to how they should exercise the discretion.

(k) *Topic K, "Practical details concerning exhibits and writings"*

171. It was noted that the agenda under topic K was more detailed than some other agenda items, and that the remark to topic K was short compared to other remarks. In discussing what was the desirable level of detail of agenda items and remarks, it was said that the answer depended partly on the form and content of a summary check-list of issues covered in the Guidelines, which was suggested to be prepared (see paragraph 118 above). For example, if such a summary were to be prepared as a check-list of agenda items to be published separately from the Guidelines, the agenda items should be sufficiently detailed to be useful standing alone.

(l) *Topic L, "Hearings"**Introductory remarks and item (i)*

172. The view was expressed that it might be useful to address at a preparatory conference the question of the confidentiality of hearings.

173. It was pointed out that decisions concerning hearings could properly be taken only after the parties had stated their claims and defences and the arbitral tribunal could anticipate the extent of evidence to be taken. It was suggested that the Guidelines should reflect that factor (see also paragraph 135 above).

174. An observation was made that topic L, and the draft Guidelines in general, were too detailed and placed undue emphasis on formalities that approximated arbitral procedures to judicial procedures, which was not in accordance with the principle of flexibility of arbitration.

175. It was suggested that the wording of the *chapeau* of the agenda did not adequately express that holding hearings was a usual manner of proceeding and that documents-only proceedings were an exception.

176. As to remark 2, second sentence, it was stated that the arbitral tribunal, by revealing to the parties its interim views on the merits of the case, would compromise its impartiality. It was therefore suggested to delete the sentence. Another statement was that the sentence was too simplistic in that, if the arbitral tribunal decided to reveal its interim views on the merits of the case, that should be done with utmost caution and, for example, only when all the arbitrators agreed that a party was wasting money and time by unnecessarily pursuing a certain line of argument or evidence. A similar criticism was expressed regarding the last sentence of remark 5.

177. Also in connection with the discussion of the second sentence of remark 2, it was suggested that the entire remark 2 as well as remark 5 should be deleted because the Guidelines should not venture into explaining the advantages and disadvantages of oral hearings and how those hearings were to be carried out. Such explanations were beyond the proper scope of the Guidelines, which should only discuss the types of decisions to be taken and not deal with the substance of those decisions.

178. It was said that remark 7 might be understood as advice against fixing definitive dates for hearings; such advice should not be made since in many cases fixing definitive dates was desirable.

Item (iii)

179. While it was approvingly recognized that remark 13 pointed out that the procedural patterns referred to in remarks 11 and 12 were examples to be adapted to the circumstances of the case, it was argued that remarks 11 and 12 should be deleted since it was not possible in such a brief fashion to explain all aspects to be taken into account in deciding the order of presentations at hearings, and since the Guidelines should not attempt to guide arbitrators as to how they should exercise their discretion. In addition, some apprehension was expressed that the remarks might be misunderstood as being a qualification by UNCITRAL of the principle that each party had to be given a full opportunity of presenting its case; such a misunderstanding might result in the remarks being relied upon in court proceedings in which a party was opposing recognition and enforcement of the award.

Item (iv)

180. According to one view, the discussion in remarks 14 and 15 was useful. Another view was that the Guidelines should mention only the need to clarify whether any notes of oral arguments were intended to be handed over, and should not discuss the possible solutions as to the time of handing over such notes and their scope and content. It was suggested to review the remarks bearing in mind existing rules on the closure by the arbitral tribunal of hearings (e.g., article 29 of the UNCITRAL Arbitration Rules).

(m) Topic M, "Language of proceedings"

181. It was suggested to reconsider the order in which topic M, and possibly other topics, appeared in draft chapter III, and that some guidance concerning the order of

topics could be drawn from the order of articles in the UNCITRAL Arbitration Rules and the UNCITRAL Arbitration Model Law.

182. As to the question of which documents delivered in their original language were to be accompanied by a translation into the language of the proceedings, which was dealt with in remark 2, it was suggested to review the remark in the light of article 17 of the UNCITRAL Arbitration Rules.

(n) Topic N, "Administrative support"

183. It was suggested to express in the remarks that the kinds of administrative services mentioned in the agenda were provided also by international arbitral institutions, and that some of those institutions had entered into co-operation agreements among them with a view to offering mutual assistance in providing administrative services.

(o) Topic O, "Secretary or registrar of arbitral tribunal"

184. It was observed that at some arbitration venues arbitral institutions appointed persons, referred to as "rapporteurs", whose functions included maintaining the files of the proceedings, preparing information materials and providing assistance to the arbitrators concerning aspects of the form of the award and other decisions.

(p) Topic P, "Place of arbitration"

185. It was stated that the list of the factors in remark 2 left unclear what was the relative importance of the factors; for instance, the enforcement regime of the award (factor (g)) might be misunderstood as being the least important by virtue of being at the bottom of the list. The suggestion made in connection with that statement was that remark 2 should not attempt to clarify the various factors, but that the entire remark should be deleted since the Guidelines should be limited to raising the question of the determination of the place of arbitration, without discussing the factors on the basis of which that place should be chosen.

(q) Topic Q, "Mandatory provisions governing arbitral proceedings"

Item (i)

186. It was considered that agenda item (i) and the corresponding remarks should be deleted because, *inter alia*, they interfered with the principle that it was typically the duty of the arbitral tribunal to obtain knowledge of and interpret the law governing arbitral procedure.

Item (ii)

187. A view was expressed that agenda item (ii) and the corresponding remarks should be deleted since compliance with requirements concerning filing or registering the award, or concerning the method of delivery of the award, was not a matter to be planned at the early stage of proceedings at which preparatory conferences were usually held. Furthermore, raising the issue in the Guidelines might create the impression that the filing or registering of the

award was an obligation of the arbitral tribunal, an impression that in many cases was inaccurate.

188. Hesitation was expressed about the proposal for the deletion of agenda item (ii) since it was considered important to remind the participants in arbitration of the requirements mentioned in the agenda item and of the sometimes harsh consequences for failure to comply with those requirements.

(r) *Topic R, "Multi-party arbitration"*

189. It was suggested that planning multi-party arbitral proceedings touched upon several topics in the draft Guidelines (e.g., arrangements concerning evidence and hearings). A further suggestion was made that the discussion on multi-party arbitration, instead of being presented as an agenda item, should be incorporated into a separate section of the Guidelines.

190. As to remark 4, it was suggested to delete the text after the first sentence, since the purpose of the Guidelines was not to provide advice on matters which arbitration rules and laws typically left to the discretion of the arbitral tribunal.

191. With respect to remark 6, it was stated that the Guidelines should avoid creating an impression that it was not entirely up to each party to decide at which hearings it wished to participate. In connection with that statement it was suggested that remark 6 should be deleted.

(s) *Topics S, "Deposits for costs"; and T, "Any other procedural matter"*

192. No comments were made on topics S and T. (In relation to topic T, see paragraph 137 above.)

5. *Possible further issues to be covered in the Guidelines*

193. Suggestions were made to consider addressing in the Guidelines the following matters:

(a) Designation of an appointing authority if such an authority had not been designated (e.g., for the purpose of being able to refer to it any challenge or replacement of an arbitrator, or to obtain from it assistance concerning fixing the amount of fees of the arbitral tribunal or fixing the amount of deposits);

(b) Confidentiality of information disclosed during the arbitral proceedings (see also paragraphs 158 and 172 above);

(c) The use of electronic data interchange (EDI) in the conduct of arbitral proceedings (e.g., for the purposes of transmitting evidence, arguments or information), the manner of presenting EDI records and messages as evidence, and their evidential value;

(d) Establishing ground rules for communications between the parties and the arbitral tribunal (e.g., concerning limitations on *ex parte* communications, the number of copies to be transmitted; routing of written communications; and the use of telefax, telephone and conference telephone calls).

C. Conclusion

194. The Commission requested the Secretariat to revise the draft Guidelines in the light of the discussions at the current session and to submit a revised draft to the Commission at its twenty-eighth session in 1995 with a view to the finalization of the text at that session.

195. The Commission noted with satisfaction that the XIIth International Arbitration Congress, to be held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994, would provide a welcome opportunity for practitioners from different parts of the world to comment on the draft Guidelines.

IV. GUARANTEES AND STAND-BY LETTERS OF CREDIT

196. The Commission, at its twenty-second session, in 1989, decided that work on a uniform law on guarantees and stand-by letters of credit should be undertaken and entrusted that task to the Working Group on International Contract Practices.⁷ At its current session, the Commission had before it the reports of the twentieth and twenty-first sessions of the Working Group (A/CN.9/388 and A/CN.9/391), at which the latter had continued the preparation of a draft convention on independent guarantees and stand-by letters of credit. Previously, the Working Group had devoted its thirteenth to nineteenth sessions to that task. The reports of those sessions were contained in documents A/CN.9/330, A/CN.9/342, A/CN.9/345, A/CN.9/358, A/CN.9/361, A/CN.9/372 and A/CN.9/374. The Commission noted that the Working Group had modified the title of the draft convention to refer to "independent guarantees and stand-by letters of credit", rather than using the term "guaranty letters".

197. The Commission expressed its appreciation for the work accomplished so far by the Working Group and requested the Working Group to proceed with its work expeditiously so as to present the draft convention to the Commission at the twenty-eighth session in 1995.

V. LEGAL ISSUES IN ELECTRONIC DATA INTERCHANGE

198. At its twenty-fifth session, in 1992, the Commission entrusted the preparation of legal rules on electronic data interchange (EDI) to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.⁸ At its twenty-sixth session, in 1993, the Commission had before it the report of the Working Group on the work of its twenty-fifth session (A/CN.9/373). The Commission noted that the Working Group had started discussing the content of a uniform law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text.⁹

⁷Ibid., *Forty-fourth Session, Supplement No. 17 (A/44/17)*, para. 244.

⁸Ibid., *Forty-seventh Session, Supplement No. 17 (A/47/17)*, paras. 140-148.

⁹Ibid., *Forty-eighth Session, Supplement No. 17 (A/48/17)*, paras. 263-268.

199. At its current session, the Commission had before it the reports of the Working Group on the work of its twenty-sixth and twenty-seventh sessions (A/CN.9/387 and A/CN.9/390). The Commission expressed its appreciation for the work accomplished by the Working Group and noted that the Working Group had decided to use the term "model statutory provisions" in order to reflect the special nature of the text as a variety of statutory rules that an enacting State would not necessarily incorporate as a whole or together in any one particular place in its statutes (A/CN.9/390, paras. 16-17).

200. As to the time schedule for completion of the current work of the Working Group, the view was expressed that it might be difficult to complete the current work within one year and submit the model statutory provisions to the Commission at its next session since a number of issues, such as scope of application and party autonomy, still remained to be resolved, and that, at any rate, the Commission might not have sufficient time available on the agenda of its next session to consider the rules. The prevailing view, however, was that a draft set of basic, "core" provisions could be completed by the Working Group at its twenty-eighth or twenty-ninth session, in particular since it had been decided that the relationships between EDI users and public authorities, as well as consumer transactions, should not be the focus of the model statutory provisions (A/CN.9/390, para. 21). It was pointed out that further provisions could be added at a later stage, in particular since that was an area of rapid technological development.

201. As to possible future topics, the Commission noted that, at its twenty-seventh session, the Working Group had adopted a recommendation to the Commission that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as it had completed the preparation of the model statutory provisions (A/CN.9/390, para. 155). That recommendation received general support. Another suggestion was that a broader approach should be adopted so as to include in any future work the negotiability of rights in securities. That suggestion was objected to on the ground that it might be particularly difficult to achieve uniformity on that concept in view of the high degree of regulation at the national level. Yet another suggestion, which received some support, was that the Commission should consider the legal issues arising in the context of the relationships between EDI users and service providers, such as electronic communications networks. However, recalling the discussion of that suggestion at the twenty-seventh session of the Working Group (A/CN.9/390, para. 159), the Commission was of the view that, at least at the current stage, the liability of service providers was better dealt with in communications agreements and that, at any rate, it would be very difficult to devise rules that would apply to all types of electronic communications services. Yet another suggestion was to prepare a study on legal issues of encryption. With regard to that suggestion, the view was expressed that the matter fell more appropriately within the mandate of specialized national or international bodies.

VI. CASE-LAW ON UNCITRAL TEXTS (CLOUT)

A. Introduction

202. Pursuant to a decision taken by the Commission at its twenty-first session, the Secretariat established CLOUT ("Case-Law on UNCITRAL Texts").¹⁰ The mechanism for the operation of CLOUT was set forth in document A/CN.9/SER.C/GUIDE/1.

B. Considerations by the Commission

203. At its current session, the Commission noted with appreciation the existence of three editions of the CLOUT abstracts series containing abstracts on 52 court decisions and arbitral awards relating to the United Nations Convention on Contracts for the International Sale of Goods and the UNCITRAL Model Law on International Commercial Arbitration (A/CN.9/SER.C/ABSTRACTS/1, 2 and 3). The conviction was widely expressed that CLOUT would be beneficial, in particular in promoting the uniform interpretation and application of the statutory texts of UNCITRAL.

204. The Commission noted that National Correspondents had to collect decisions and arbitral awards, prepare abstracts and forward the abstracts along with the full texts of decisions and awards to the Secretariat, and emphasized that for CLOUT to reach its full capacity the network of National Correspondents had to be complete and that they needed to perform their tasks promptly. The Commission also noted that the Secretariat's work of editing abstracts, storing decisions and awards in their original form, translating abstracts into the other five United Nations languages, publishing them in the six United Nations languages and forwarding abstracts and full texts of decisions and awards to interested parties upon request would substantially increase as the number of decisions and awards covered by CLOUT. The Commission therefore requested the Secretariat to ensure that adequate resources were allocated for the effective operation of CLOUT. The Commission expressed its appreciation to the National Correspondents and the Secretariat for their work and urged States to cooperate with the Secretariat in the operation of CLOUT and to facilitate the carrying out of the tasks of the National Correspondents.

205. A number of suggestions were made with a view to enhancing the utility of CLOUT. One suggestion was to prepare an index on the basis of legal issues rather than one exclusively on the basis of the texts in which the issues might be encountered. In order to promote the dissemination of CLOUT, it was suggested that CLOUT documents should be made available through electronic communications systems to users at several locations throughout the world, including academic institutions, arbitration centres and United Nations information centres.

¹⁰For background information on CLOUT, see A/CN.9/267; *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, para. 377; A/CN.9/312; and *Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17)*, paras. 98-109.

206. The Commission noted that, based on the decision of National Correspondents taken at their fifth annual meeting (Vienna, 22 July 1993), copyright on CLOUT documents was assigned by National Correspondents to, and rested with, the United Nations. The Commission also recalled the discussion which had taken place at its twenty-first session¹¹ and noted that emphasis should be placed upon the importance of the widest possible dissemination of CLOUT documents. The Commission was agreed that the primary purpose for publishing CLOUT documents under United Nations copyright was to avoid distortion of their contents by unauthorized users and that, should copyright impede the widest possible dissemination of CLOUT, it would have to be re-evaluated.

207. Finally, the Commission agreed that, while policy matters related to CLOUT fell within its mandate, the specific details of the operation of CLOUT should be left to the discretion of the National Correspondents. In that connection the concern was expressed that, in order to enhance the importance of the meetings of National Correspondents, efforts should be made towards achieving a broader participation of National Correspondents in annual meetings and reporting to the Commission on important matters arising with regard to the operation of CLOUT.

VII. FUTURE WORK

A. Legal aspects of receivables financing

208. At its twenty-sixth session (1993), the Commission had before it a note by the Secretariat on assignment of claims and related matters (A/CN.9/378/Add.3). The note described briefly some of the legal issues in assignment of claims that gave rise to problems in international trade. On the basis of that note, the Commission requested the Secretariat to prepare a study identifying the area in which unification work might appear to be promising with a view to facilitating a decision of the Commission on the feasibility of such work. The Commission requested the Secretariat to prepare that study, in cooperation with UNIDROIT and other international organizations, in order to avoid duplication of work.

209. Pursuant to that request, the Secretariat submitted to the Commission, at its current session, a report (A/CN.9/397) discussing the possible scope of work. It suggested that work might be both desirable and feasible, in particular, if it were limited to assignment of international commercial receivables, i.e., claims for payment of sums of money that arose from international commercial transactions, including assignments by way of sale or by way of security, non-notification assignment, factoring to the extent that it was not covered in the UNIDROIT Convention on International Factoring (Ottawa, 1988), forfaiting of non-documentary receivables, securitization and project finance. The report described a number of possible topics, such as non-assignment agreements, bulk assignments, form of assignment, effects of assignment between the assignor and the assignee towards the debtor and towards

third parties, as well as the related issue of priorities among claimants laying a claim on the assigned receivables. In addition, it referred to the possibility of international registration as a possible solution to the problem of priorities. It noted that the mechanism of registration raised issues that went beyond assignment of receivables and also might at some point be relevant to work in other areas such as negotiability of rights in goods, which the Working Group on Electronic Data Interchange had recommended to the Commission as a possible future topic (see A/CN.9/390, para. 157, as well as para. 201 of the present report), and the topic of securities, which had been proposed during the Congress as a possible future topic, the feasibility of which was currently being examined.

210. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, which was preparing a draft convention on security interests in mobile equipment, and with the European Bank for Reconstruction and Development (EBRD), which had prepared a Model Law on Secured Transactions. Steps taken included the submission of a draft of document A/CN.9/397 to UNIDROIT and EBRD for comments and the oral presentation of its final version to the UNIDROIT Governing Council at its recent meeting (Rome, 9-14 May 1994). The Commission endorsed the conclusion (A/CN.9/397, paras. 52-56) that work in the area of receivables financing was both desirable and feasible, in view, in particular, of the fact that a basis had been laid, at the last session, for cooperation and coordination with a view to avoiding overlap and other potential difficulties. The Commission requested the Secretariat to prepare a study that would discuss in more detail the issues that had been identified, possibly accompanied by a first draft of uniform rules. Some reservations were expressed, however, as to the advisability of dealing with the legal aspects of the establishment and operation of an international register.

211. It was noted that the study would be prepared in cooperation with UNIDROIT and other interested international organizations, such as the International Bank for Reconstruction and Development and the Inter-American Development Bank, as well as national agencies involved in law reform in the area of receivables financing, as was traditionally done in UNCITRAL projects. In particular the importance of close cooperation with UNIDROIT was emphasized for a number of reasons.

212. One reason was the link between receivables financing and factoring. In that connection, it was pointed out that the work of the Commission on receivables financing would not interfere in substance with the UNIDROIT Convention on International Factoring, since the Convention covered only certain types and aspects of international factoring, and not the broad area of receivables financing or other important aspects, such as the issue of priorities between several claimants laying a claim on the assigned receivables. It was stated that the prospects for the wider possible adoption of that Convention, which as reported was being considered for adoption by a number of States, would be enhanced should the Commission prove to be able to devise a uniform rule settling the issue of priorities (A/CN.9/397, paras. 36-42). In particular, in order to preclude giving rise to the possible inference that the work of

¹¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 103.

the Commission in the area of receivables financing might justify delaying adoption of the Factoring Convention, or that the Convention had to be revised or updated, the Commission expressed the view that States should consider adopting the Convention.

213. Another reason was that international registration (A/CN.9/397, paras. 43-51) was being envisaged in the context of UNIDROIT's work on a draft convention on security interests in mobile equipment, as a basis for the new international security interest to be established by the draft convention having effects towards third parties and for settling the issue of priorities among several adverse claimants. Yet another reason was the need to avoid duplication of efforts with the broader project envisaged by UNIDROIT with regard to security interests in general (A/CN.9/397, para. 8).

214. Wide support was voiced in the Commission for the views expressed and the suggestions made in the report. However, the feasibility of encompassing securitization was questioned in view of the fact that securities markets were highly regulated at the national level. On the other hand, it was pointed out that securitization should be included in the scope of work in view of its fundamental importance for international trade, which was primarily attributable to the fact that it allowed banks to refinance their credits, thus enhancing expanded financing of trade. A recommendation was made that issues involving separate commercial circles should be considered to determine if broad rules were feasible. It was also suggested that rules should be based on commercial practice. The question was also raised as to the feasibility of devising a uniform rule dealing with the issue of the effects of assignment towards third parties in view of its complexity. The Commission did not reach a definitive decision on whether any particular issues should be dealt with in any future legal text.

B. Cross-border insolvency

215. At its twenty-sixth session (1993), the Commission, on the basis of a note by the Secretariat (A/CN.9/378/Add.4), agreed that it should consider in detail the desirability and feasibility of undertaking work in cross-border insolvency, in view of the increasing practical problems caused by disharmony among national laws governing cross-border insolvencies. The Secretariat was requested to prepare for a future session of the Commission an in-depth study on the desirability and feasibility of harmonized rules of cross-border insolvencies.¹²

216. At the current session it was reported that, as an initial step in gathering information for the feasibility assessment requested by the Commission, the Secretariat, with the co-sponsorship and organizational assistance of INSOL International, had held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994). INSOL is an international association of practitioners from the various professions that participate in cross-border insolvency cases. The Colloquium, attended by approximately 90 participants

from various countries, was geared to enabling the Commission to assess from a practical standpoint the desirability and feasibility of any future work that it might consider undertaking in that area.

217. The view was widely shared at the Colloquium that there was a need to develop legal mechanisms for limiting the extent to which disparities and conflicts between national laws created unnecessary obstacles to the achievement of the basic economic and social objectives of insolvency proceedings, and thereby hampered commercial activity. It was widely reported that in the prevailing legal environment, fragmentation and compartmentalization along national lines were prevalent in the administration of cross-border insolvencies.

218. By way of conclusions, it was noted that at the Colloquium there was a high degree of receptivity to the interest expressed by the Commission in a possible project on cross-border insolvency and that the Secretariat would continue its work relating to the assessment of the feasibility of work in that area requested by the Commission, in cooperation with interested organizations.

219. The Secretariat reported that, based on a current assessment of feasibility and drawing on the discussion at the Colloquium and the consultations there with practitioners and interested organizations, it was possible at the current stage to identify a number of sub-areas of the cross-border insolvency subject in which it would appear that some work by the Commission would be not only welcome, but also feasible and useful. Moreover, it would appear possible to conduct work in those sub-areas without necessarily straying into what was generally recognized at the Colloquium as not, at least at the current stage, a feasible, or necessarily even desirable, area of work, namely, the unification of substantive insolvency law. The first sub-area concerned judicial cooperation. It was reported that INSOL International had proposed to co-sponsor with UNCITRAL and organize, in conjunction with a regional conference to be held by INSOL at Toronto in March 1995, a colloquium for judges on judicial cooperation in cross-border insolvency. The judges' colloquium would have as its aim to elicit the views of judges as to the extent to which judicial cooperation was possible under current law, for example, by application of the notion of comity; to explore limits to cooperation under current law; and to determine what rules might be necessary to enable judicial cooperation as a first step in dealing with difficulties that arose as a result of parallel proceedings and potentially conflicting legal regimes and jurisdictions.

220. A second sub-area, broadly referred to as "access and recognition", concerned the granting of access to the courts to representatives of foreign insolvency proceedings or creditors, and to giving recognition to orders issued by foreign courts administering insolvency proceedings. Preliminary work in that area could identify the advantages and disadvantages of the different possible legislative approaches for access and recognition, taking particular account of legislative-reform efforts at the national and multilateral levels, and assess the appropriateness of formulating uniform rules on access and recognition.

¹²Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 302-306.

221. A third possible project that might in due time be undertaken by the Commission was the formulation of a set of model legislative provisions on insolvency. While the following was not the conclusion of the Colloquium, it was observed that, without attempting a comprehensive unification of substantive law, a model insolvency code might eventually be important not only for Governments concerned with the modernization of law, but also for the commercial community and for legal practitioners. To avoid the difficulties that would be raised by attempting a global unification of the substantive law of insolvency, and to take into account the different policy options that a State would wish to consider in drafting its insolvency law, the model could present alternative provisions for implementing those various policy options. Reference was made, with a view to possible cooperation in that area with Committee J of the Section on Business Law of the International Bar Association, to the exploratory work being conducted by that body on fundamental concepts of a model insolvency code.

222. The Commission expressed its appreciation for the work that had been carried out and requested the Secretariat to proceed on the basis described above, with particular emphasis being placed at the current stage on the issues of judicial cooperation and of access and recognition.

C. Build-operate-transfer projects

223. The Commission had before it a note on possible future work in the area of build-operate-transfer (BOT) projects (A/CN.9/399). It was noted that at its twenty-sixth session, in 1993, the Commission had had before it a note on possible future work (A/CN.9/378) in which the Secretariat had informed the Commission that it was monitoring the work by the United Nations Industrial Development Organization (UNIDO) on the preparation of "Guidelines for the Development, Negotiating and Contracting of BOT Projects". At that session, the Commission had emphasized the relevance of BOT and had noted with appreciation the Secretariat's intention to submit a note to the Commission on possible future work in the area. The note under consideration was intended to apprise the Commission of the current situation in this regard.

224. The Commission noted that in its most basic form a BOT project was one in which a Government granted a concession for a period of time to a private consortium for the development of a project; the consortium then built, operated and managed the project for a number of years after its completion and recouped its construction costs and derived a profit out of the proceeds coming from the operation and commercial exploitation of the project and, at the end of the concession period, the project was transferred to the Government. The Commission also noted that the lack of expertise in putting together a BOT project, particularly within Governments, acted as a hindrance in the negotiating process.

225. It was reported that the fact that the responsibility for repayment of any loans shifted from the traditional "client" (the Government) to the private consortium implied

an increased risk to the lenders. Lenders were therefore placed in a situation where they had to look for additional means of reducing their risks, including insurance. That element of non-traditional distribution of risks between the various parties made the pre-contractual stage of a BOT project usually fairly complex.

226. It was also reported that another aspect that sometimes acted as a barrier in establishing BOT projects was the lack of legal certainty in some States regarding the realization of particular aspects of a project. In other instances, there might be lack of clarity as to the legal basis and effect of certain long-term contractual assurances that the Government would need to make to the private consortium. Enabling legislation to make the underlying legal framework attractive for BOT projects might therefore need to be enacted.

227. The Commission noted that the above-mentioned problems, among others, and the potential for the development of BOT projects, had led UNIDO to initiate the preparation of "Guidelines for the Development, Negotiation and Contracting of BOT Projects". In addition to disseminating information on BOT projects, the objective of the Guidelines was to enable States and all other interested parties to devise and formulate the appropriate approach in the promotion and development of BOT projects. It was further noted that the Secretariat had been monitoring the progress within UNIDO on the Guidelines, which were expected to be finalized in September 1994.

228. Strong support was expressed in the Commission for undertaking work in the area of BOT projects. It was observed that, although legal aspects of BOT would form part of the UNIDO Guidelines, it might not be possible to deal in that text with those aspects in a detailed manner. Particular interest was expressed in the intention of the Secretariat, once the UNIDO Guidelines had been finalized, to study the desirability and feasibility of further work by the Commission on some of the problems raised with regard to BOT projects. It was suggested that that might include, for example, the creation of an enabling legal framework for BOT projects, in particular for the concession agreement, or guidance to the parties on contracting issues, for example, by supplementing the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. A suggestion was also made that possible future work could be considered in the area of procurement for BOT projects.

D. Implementation of other proposals made at the UNCITRAL Congress

229. Upon completion of the discussion of the above three topics, it was brought to the attention of the Commission that, pursuant to proposals made at the UNCITRAL Congress in 1992, the first Willem C. Vis International Commercial Arbitration Moot, organized by the Institute of International Commercial Law at Pace University, New York, had been held at Vienna in March 1994. It was also reported that the Secretariat, in order to explore implementation of the proposal to establish a mechanism for monitoring implementation of the Convention on the

Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), would hold consultations with Committee D of the International Bar Association.

VIII. ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP 500)

230. The Commission had before it a note containing a request by the International Chamber of Commerce (ICC) to the Commission that it should consider recommending the use in international trade of the 1993 revision of UCP, as had been the case with earlier versions of UCP in 1962, 1974 and 1983 revisions of UCP. The Commission agreed to make such a recommendation, adopting the following resolution:

"The United Nations Commission on International Trade Law,

"Expressing its appreciation to the International Chamber of Commerce for having transmitted to it the revised text of 'Uniform Customs and Practice for Documentary Credits', which was approved by the Commission on Banking Technique and Practice of the International Chamber of Commerce and adopted by the Council of the International Chamber of Commerce on 23 April 1993, with effect from 1 January 1994,

"Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by bringing up to date its rules on documentary credit practice to allow for developments in the transport industry and new technological applications, and to improve the functioning of the rules,

"Noting that 'Uniform Customs and Practice for Documentary Credits' constitutes a valuable contribution to the facilitation of international trade,

"Commends the use of the 1993 revision in transactions involving the establishment of a documentary credit."

231. In the discussion that preceded the adoption of the above resolution, the concern was widely expressed in the Commission that a strict application of the copyright held by ICC in UCP (or similarly for ICC's INCOTERMS or the model forms of the International Federation of Freight Forwarders Associations (FIATA)), at least as regards governmental and teaching uses of the text, was inappropriate for such a uniform legal text designed for worldwide use. It was widely felt that a restrictive approach that affected even governmental and teaching functions was detrimental to the objectives of the harmonization of law and dissemination of information and at odds with the aim of securing judicial recognition and other forms of legal support for the text. The Commission requested the Secretariat to convey the concerns that had been raised. As to the endorsement of UCP, the view was expressed that UNCITRAL should not endorse work done by non-governmental organizations without careful consideration. The Commission also expressed interest in the possibility of considering in more general terms questions raised in the discussion as to the endorsement by the Commission of legal texts formulated by other organizations, an activity within the mandate of the Commission.

IX. TRAINING AND TECHNICAL ASSISTANCE

232. The Commission had before it a note by the Secretariat (A/CN.9/400) indicating that it was continuing to conduct an active programme of training and assistance, though what was possible within limited human and financial resources met only a portion of the need and interest.

233. It was reported that, in view of the relative cost-effectiveness of national seminars compared to regional seminars, the Secretariat had continued its emphasis on the holding of national seminars. Since the previous session, national seminars had taken place in: (a) Mongolia (September 1993), in cooperation with the Government of Mongolia, and attended by approximately 30 participants; (b) Karachi, Pakistan (29 and 30 September 1993), in cooperation with the Training Institute of the Customs Authority and the Research Society for International Law, and attended by approximately 35 participants; (c) Bishkek, Kyrgyzstan (5-7 October 1993), in cooperation with the Government of Kyrgyzstan, and attended by approximately 15 participants; (d) Buenos Aires, Argentina (20 and 21 October 1993), in cooperation with the Government of Argentina, and attended by approximately 130 participants; (e) Rio de Janeiro, Brazil (25 and 26 October 1993), lectures on UNCITRAL texts held in cooperation with Candido Mendes University and PETROBRAS, and attended by approximately 65 participants; (f) Istanbul, Turkey (25-27 April 1994), in cooperation with Marmara University and the Union of Turkish Chambers of Commerce, and attended by approximately 50 participants.

234. At the regional level, a four-day UNCITRAL seminar was held within the framework of the biennial conference of the Law Association for Asia and the Pacific (LAWASIA), LAWASIA'93, at Colombo, from 13 to 16 September 1993. It was noted that Secretariat members had participated in and contributed to conferences, seminars and courses related to international trade law organized by other organizations. Furthermore, the Secretariat had agreed to co-sponsor the three-month International Trade Law Postgraduate Course to be organized in 1994 by the University Institute of European Studies and the International Training Centre of the International Labour Organisation in Turin, Italy. Issues of harmonization of international trade law and various items on the Commission's work programme would be covered in the course.

235. It was reported that a two-day programme focusing on legal texts of the Commission had taken place in New York, on 25 and 26 May 1994, organized by the Union Internationale des Avocats, sponsored by the American Bar Association, the Association of the Bar of the City of New York and the New York County Lawyers Association and hosted by the School of Law of Fordham University.

236. The Secretariat reported that growing awareness of the UNCITRAL legal texts in many countries, in particular developing and newly independent States, was resulting in increased requests from countries considering adoption of legislation based on UNCITRAL texts. This frequently involved the review of draft legislation relating to UNCITRAL texts. It was reported that the Secretariat expected to intensify even further its efforts to organize or co-sponsor

seminars and symposia on international trade law. For the remainder of 1994, additional seminars were being planned for Botswana, Kenya, Namibia, Uganda, the United Republic of Tanzania and Zimbabwe. It was planned that additional requests for seminars and briefing missions on UNCITRAL texts that had been received from various African, Latin American and Caribbean countries and also from countries in eastern Europe and Central Asia would be met in 1994 to the extent possible under existing material constraints.

237. It was emphasized by the Secretariat that its ability to implement these plans was contingent upon the receipt of sufficient funds in the form of contributions to the Trust Fund for Symposia. It was also noted that no funds for the travel of participants and lecturers had been provided for in the regular budget. As a result, expenses had to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia, which remained at an insufficiently low level and was in fact declining despite the increasing demand for training and technical assistance.

238. With regard to contributions made to the UNCITRAL Trust Fund for Symposia, the Commission noted that a contribution on a multi-year basis had been made by Canada. Those kinds of contribution were of particular value because they permitted the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. In addition, contributions from France and Switzerland had been used for the seminar programme.

239. The Commission expressed its appreciation to all those who had given financial assistance to the programme of seminars and the UNCITRAL Trust Fund for Symposia. Recognizing the crucial importance of training and technical assistance in the dissemination of information on UNCITRAL texts, the Commission noted the need for States to consider making contributions to the UNCITRAL Trust Fund for Symposia so as to enable the Secretariat to meet the increasing demands for training and technical assistance, especially in developing countries and newly independent States. The Commission also noted the need for the Secretariat to ensure that sufficient human resources would be available for meeting the increasing demands for seminars and technical assistance. Particular note was made of the value that an adequate expenditure on training and technical assistance would add to the much more substantial expenditures by the Organization and Member States in the formulation of the texts. In addition, the Commission noted the intention of the Secretariat to establish cooperation and coordination with the United Nations Development Programme and other development assistance agencies.

X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

240. The Commission considered the status of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) ("the Limitation Convention"), the Protocol amending the Limitation Convention

(Vienna, 1980), the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention"), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) ("the UNCITRAL Bills and Notes Convention") and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) ("the United Nations Terminal Operators Convention"). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Arbitration Model Law").

241. The Commission was pleased to note that, since the report submitted to the Commission at its twenty-sixth session (1993), the Czech Republic had deposited an instrument of succession to the ratification by the former Czechoslovakia of the Limitation Convention. It similarly noted the succession by Bosnia and Herzegovina to the accession to that Convention by Yugoslavia, as well as the ratification by Ukraine and the accession by the United States of America. The Commission noted with pleasure that the Czech Republic had also deposited an instrument of succession with regard to the Protocol amending the Limitation Convention, and that the United States of America had acceded to the Protocol.

242. The Commission was pleased to note that Austria had deposited an instrument of ratification and that Cameroon had deposited an instrument of accession with regard to the Hamburg Rules.

243. The Commission noted with pleasure that Bosnia and Herzegovina and Slovenia had deposited instruments of succession to the ratification by Yugoslavia of the United Nations Sales Convention, that the Czech Republic had deposited an instrument of succession to the ratification of the Convention by the former Czechoslovakia and that Estonia had deposited an instrument of accession to the Convention.

244. The Commission was pleased to note that since the last session Croatia and the former Yugoslav Republic of Macedonia had deposited instruments of succession to the accession by Yugoslavia to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, that the Czech Republic had deposited an instrument of succession to the ratification of the Convention by the former Czechoslovakia and that Estonia, Georgia and Saudi Arabia had deposited instruments of accession to the Convention.

245. The Commission noted with pleasure that legislation based on the UNCITRAL Arbitration Model Law had been enacted in Bermuda, Egypt, Finland, Mexico and Russian Federation. In this connection, it was reported that the basic principles underlying the Model Law had been incorporated in the new Italian law on international commercial arbitration.

246. The Commission noted that there was some uncertainty as to whether newly formed States considered themselves bound by the Conventions to which their predecessor States had been parties. It therefore called upon those newly formed States to clarify their position and to notify the Secretary-General accordingly.

Hamburg Rules

247. The Commission, on the basis of a note by the Secretariat entitled "Status of the Hamburg Rules" (A/CN.9/401/Add.1), discussed the status of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), which entered into force on 1 November 1992 and currently had 22 States parties. The note pointed out that the Hamburg Rules had been prepared with a view to replacing the "Hague" liability regime; the Hague regime had been based on the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 ("the Hague Rules"), which some States had adopted with the amendments contained in the Protocol of 23 February 1968 ("the Hague-Visby Rules") or with further amendments contained in the Protocol of 21 December 1979. The note referred to some major differences between the Hamburg Rules and the Hague regime and described problems caused by the disparateness of the regimes.

248. It was regretted that the process of adoption by States of the Hamburg Rules was slow and that the disparity of national laws was indeed increasing in that some States had adopted, or were considering adopting, laws that combined solutions from the Hamburg Rules, the Hague regime and non-unified solutions.

249. Serious concern was expressed about the problems that arose as a result of the coexistence of different liability regimes. As a salient example of the problems, it was pointed out that goods carried in a single vessel were subject to different liability regimes, depending on the States where the particular parts of the cargo were loaded or unloaded, or where the transport contract documents for the parts of the cargo were issued. Such mixing of legal regimes increased legal costs, made it difficult for the carrier to assess its liability exposure, complicated settlement negotiations, hindered the use of uniform transport documentation, distorted competition among carriers and resulted in an unequal treatment of the carrier's customers.

250. It was noted that some persons had suggested that, in view of the fact that carriers in some countries opposed adherence to the Hamburg Rules, an attempt should be made to revise the Hamburg Rules with a view to elaborating a regime that would be more widely acceptable. The Commission was of the view that such a course of action was undesirable. It was considered that it was unlikely that the disparity of law would be overcome in that way, in particular since there was no convergence of opinion as to the provisions of the Hamburg Rules that might be modified or as to the thrust of any modification. A further reason against revision was that throughout the preparatory work towards the Hamburg Rules all interest groups had participated in the negotiations and the adopted solutions reflected the well-considered mutual concessions between

the groups. The text adopted was broadly approved in that, of the 71 States involved in the universal conference of plenipotentiaries that had adopted the Convention, 68 States had voted in favour, three had abstained and none had voted against. It was pointed out that the Hamburg Rules constituted an important part of the national laws of those States that adhered to the Convention and there was no initiative from those States for a modification. While it was recognized that States were, of course, free to adopt whichever liability system they preferred, it was suggested with particular emphasis that, in order to overcome the current unsatisfactory situation, the Hamburg Rules should be adopted broadly within a short space of time, which would allow the functioning of the system to be monitored and new solutions to be added if and when they were necessary as a result of developments in practice and new transport techniques.

251. The Commission heard a statement on behalf of the Comité Maritime International (CMI) informing the Commission of the concern of CMI about the lack of harmony in the legal regime governing the carriage of goods by sea, about the considerations within the Executive Council of CMI of the problems arising therefrom and about the interest of CMI in working together with the Commission towards a solution that would produce uniformity of law. The Commission expressed its appreciation for the statement and welcomed the prospect of cooperation with CMI.

252. Emphasis was placed on the need for the Secretary-General to increase efforts to promote wider adherence to the Hamburg Rules, including by disseminating information and in-depth explanations about the benefits to be drawn from adherence to the Hamburg Rules for all participants in the carriage of goods by sea.

XI. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS

A. General Assembly resolution on the work of the Commission

253. The Commission took note with appreciation of General Assembly resolution 48/32 of 9 December 1993 on the report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session. In particular, the Commission noted that, in paragraph 5 of that resolution, the General Assembly had requested the Secretary-General to establish a separate trust fund for the Commission to grant travel assistance to developing countries that were members of the Commission, at their request and in consultation with the Secretary-General. It was observed in that regard that the trust fund was in the process of being established and that Member States would be informed once the process of establishment was finalized.

254. The Commission also took note of the outcome with regard to the holding of consecutive meetings of the Commission's working groups, which had been recommended by the General Assembly in paragraph 13 of its resolution 47/34 of 25 November 1992 and had been discussed by the Commission at its twenty-sixth session. It

was observed that, as a result of scheduling by the Office of Conference Services of the United Nations Secretariat, two instances of consecutive meetings had been held, one involving a four-week period and the other a six-week period. It was observed that the experience at those sessions had brought out the disadvantages of holding consecutive meetings of different working groups to the work of the Commission, disadvantages that had been discussed at the twenty-sixth session of the Commission.¹³

255. The Commission also took the opportunity to confirm the need to continue with the preparation of summary records for the portions of the session of the Commission at which legal texts were being considered for adoption, as the summary records were an important part of the *travaux préparatoires*.

B. Bibliography

256. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/402).

C. Date and place of the twenty-eighth session of the Commission

257. It was decided that the Commission would hold its twenty-eighth session from 2 to 26 May 1995 at Vienna, which duration was considered necessary in view of the

¹³Ibid., paras. 340 and 341.

expectation that three draft legal texts would be submitted to the Commission for finalization and adoption.

D. Sessions of working groups

258. It was decided that the Working Group on International Contract Practices would hold its twenty-second session from 19 to 30 September 1994 at Vienna and, in the event that an additional session was necessary, the twenty-third session from 9 to 20 January 1995 in New York.

259. It was decided that the Working Group on Electronic Data Interchange would hold its twenty-eighth session from 3 to 14 October 1994 at Vienna and its twenty-ninth session from 27 February to 10 March 1995 in New York.

ANNEX I

UNCITRAL Model Law on Procurement of Goods, Construction and Services,

[Annex I is reproduced in part three, I of this Yearbook.]

ANNEX II

List of documents before the Commission at its twenty-seventh session,

[Annex II is reproduced in part three, V of this Yearbook.]

B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board on the first party of its forty-first session (TD/B/41(1)/14) (Vol. I)*

"Item 8. Other matters in the field of trade and development:

(a) Progressive development of the law of international trade: twenty-seventh annual report of the United Nations Commission on International Trade Law

1. At its 847th meeting, on 20 September 1994, the Trade and Development Board took note of the report of the United Nations Commission on International Trade Law on its twenty-seventh session (A/49/17), which was before the Board under cover of a note by the UNCTAD secretariat (TD/B/41(1)/12)."

*Official records of the General Assembly, Forty-ninth Session, Supplement No. 15 (A/49/15), vol. II, sect. I, B.

C. General Assembly: report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session: report of the Sixth Committee (A/49/739)

I. INTRODUCTION

1. The item entitled "Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session" was included in the provisional agenda of the forty-ninth session of the General Assembly pursuant to Assembly resolution 48/32 of 9 December 1993.

2. At its 3rd plenary meeting, on 23 September 1994, the General Assembly, on the recommendation of the General Committee, decided to include the item in its agenda and to allocate it to the Sixth Committee.

3. For its consideration of the item, the Sixth Committee had before it the following documents:

(a) Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session;¹

(b) Report of the Secretary-General on the implementation of paragraphs 5 and 6 of resolution 48/32 (A/49/427).

4. The Sixth Committee considered the item at its 3rd to 5th, 36th and 37th meetings, on 26, 29 and 30 September and 16 and 17 November 1994. The summary records of those meetings contain the views of the representatives who spoke during the Committee's consideration of the item (A/C.6/48/SR.3-5, 36 and 37).

5. At the 3rd meeting, on 26 September, the Chairman of the United Nations Commission on International Trade Law at its twenty-seventh session, introduced the Commission's report on the work of that session.

6. At the 5th meeting, on 30 September, the Chairman of the Commission made a closing statement.

II. CONSIDERATION OF PROPOSALS

A. Draft resolution A/C.6/49/L.11

7. At the 36th meeting, on 16 November, the representative of Austria, on behalf of *Argentina, Australia, Austria, Azerbaijan, Belarus, Belgium, Belize, Cambodia, Canada, Cyprus, the Czech Republic, Denmark, the Dominican Republic, Finland, France, Germany, Honduras, Hungary, Italy, Morocco, Nicaragua, Norway, Poland, Portugal, the Russian Federation, Singapore, Slovakia, Sweden, Thailand, Ukraine and the United Kingdom of Great Britain and Northern Ireland*, introduced a draft resolution entitled "Model Law on Procurement of Goods, Construction and Services of the United Nations Commission on

International Trade Law" (A/C.6/49/L.11). Subsequently, *Bulgaria and Guatemala* joined in sponsoring the draft resolution.

8. At its 37th meeting, on 17 November, the Committee adopted draft resolution A/C.6/49/L.11 without a vote (see paragraph 12, draft resolution I).

B. Draft resolution A/C.6/49/L.13

9. At the 36th meeting on 16 November, the representative of Austria, on behalf of *Algeria, Argentina, Australia, Austria, Belgium, Belize, Brazil, Cambodia, Canada, China, Cyprus, the Czech Republic, Denmark, the Dominican Republic, Finland, France, Germany, Greece, Honduras, Hungary, Italy, Japan, Morocco, Myanmar, Nicaragua, Norway, Portugal, Singapore, Slovakia, Sweden and Thailand*, introduced a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session" (A/C.6/49/L.13). Subsequently, *Guatemala, Iceland, India, Turkey and Uruguay* joined in sponsoring the draft resolution.

10. At its 37th meeting, on 17 November, the Committee adopted draft resolution A/C.6/49/L.13 without a vote.

11. The representative of the Russian Federation made a statement in explanation of position after the adoption of the draft resolution (see A/C.6/49/SR.37).

III. RECOMMENDATIONS OF THE SIXTH COMMITTEE

12. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolutions:

[The texts are not reproduced in this section. Draft resolutions I and II were adopted, with editorial changes, as General Assembly resolutions A/RES/49/54 and A/RES/49/55 (see section D below).]

D. General Assembly resolutions A/RES/49/54 and A/RES/49/55 of 9 December 1994

49/54. *Model Law on Procurement of Goods, Construction and Services of the United Nations Commission on International Trade Law*

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created 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,

Noting that procurement constitutes a large portion of public expenditure in most States,

Recalling the completion and adoption by the United Nations Commission on International Trade Law at its twenty-sixth session of the Model Law on Procurement of Goods and Construction,¹

Recalling also the decision of the Commission at its twenty-sixth session to draw up model legislative provisions on procurement of services, while leaving intact the Model Law on Procurement of Goods and Construction of the United Nations Commission on International Trade Law,

Noting that model legislative provisions on procurement of services establishing procedures designed to foster integrity, confidence, fairness and transparency in the

¹Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1).

¹Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17, (A/48/17), annex I.

procurement process will also promote economy, efficiency and competition in procurement and thus lead to increased economic development.

Being of the opinion that the establishment of model legislative provisions on procurement of services that are acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

Convinced that model legislative provisions on services contained in a consolidated text dealing with procurement of goods, construction and services will significantly assist all States, including developing countries and States whose economies are in transition, in enhancing their existing procurement laws and formulating procurement laws where none presently exist,

1. *Takes note with satisfaction* of the completion and adoption by the United Nations Commission on International Trade Law of the Model Law on Procurement of Goods, Construction and Services² together with the Guide to Enactment of the Model Law;³

2. *Recommends* that, in view of the desirability of improvement and uniformity of the laws of procurement, all States give favourable consideration to the Model Law when they enact or revise their procurement laws;

3. *Recommends also* that all efforts be made to ensure that the Model Law together with the Guide become generally known and available.

84th plenary meeting
9 December 1994

²Ibid., Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I.

³To be issued under the symbol A/CN.9/403.

49/55. *Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session*

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created 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 conviction that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic cooperation among all States on a basis of equality, equity and common interest and to the elimination of discrimination in international trade and thereby to the well-being of all peoples,

Stressing the value of participation by States at all levels of economic development and with different legal systems in the process of harmonizing and unifying international trade law,

Having considered the report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session,¹

Mindful of the valuable contribution to be rendered by the Commission within the framework of the United Nations Decade of International Law, *inter alia*, as regards the dissemination of international trade law,

Concerned about the relatively low incidence of expert representation from developing countries at sessions of the Commission and particularly of its working groups during recent years, owing in part to inadequate resources to finance the travel of such experts,

Having considered the report of the Secretary-General,²

Concerned also about the fact that the need for and interest in the training and assistance programme of the Commission can only partially be met, in view of the limited human and financial resources available, and that the work of the Secretariat in the context of the Case-Law on the United Nations Commission on International Trade Law Texts would substantially increase as the number of the court decisions and arbitral awards covered thereby grows,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session;

2. *Welcomes* the ongoing work of the Commission, as described in its report, and appreciates the many proposals on possible future work made during the Congress on International Trade Law of the United Nations Commission on International Trade Law, held in New York from 18 to 22 May 1992;

3. *Reaffirms* 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 order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law, and in this connection recommends that the Commission, through its secretariat, continue to maintain close cooperation with the other intergovernmental and non-governmental organizations, including regional organizations, active in the field of international trade law;

4. *Also reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law;

¹Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1).

²A/49/427.

5. *Expresses* the desirability for the Commission to sponsor seminars and symposia to provide such training and assistance, and in this connection:

(a) *Expresses* its appreciation to the Commission for organizing seminars in Argentina, Brazil, Kyrgyzstan, Mongolia, Pakistan and Sri Lanka, as well as in Botswana, Kenya, Namibia, Uganda, the United Republic of Tanzania and Zimbabwe, and for assisting the Pacific Economic Cooperation Council with its initiative to promote harmonization of international trade law in the Asia-Pacific region;

(b) *Expresses* its appreciation to the Governments whose contributions enabled the seminars to take place, and appeals to Governments, the relevant United Nations organs, organizations, institutions and individuals to make voluntary contributions to the Trust Fund for the United Nations Commission on International Trade Law symposia and, where appropriate, to the financing of special projects, and otherwise to assist the secretariat of the Commission in financing and organizing seminars and symposia, in particular in developing countries, and in the award of fellowships to candidates from developing countries to enable them to participate in such seminars and symposia;

(c) *Appeals* to the United Nations Development Programme and other United Nations bodies responsible for development assistance to support the training and technical assistance programme of the Commission and to co-operate and coordinate their activities with those of the Commission;

6. *Welcomes* the completion of the setting up of the Trust Fund for the United Nations Commission on International Trade Law to grant travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General,

pursuant to paragraph 5 of resolution 48/32 of 9 December 1993;

7. *Appeals* to Governments, the relevant United Nations organs, organizations, institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the trust fund referred to in paragraph 6 above;

8. *Decides*, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to continue its consideration in the competent Main Committee during the forty-ninth session of the General Assembly on granting travel assistance, within existing resources, to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

9. *Requests* the Secretary-General to ensure that adequate resources are allocated for the effective implementation of the programmes of the Commission;

10. *Stresses* the importance of bringing into effect the conventions 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 those conventions;

11. *Also requests* the Secretary-General to submit a report on the implementation of paragraph 8 above to the General Assembly at its fiftieth session.

84th plenary meeting
9 December 1994

Part Two

**STUDIES AND REPORTS
ON SPECIFIC SUBJECTS**

I. PROCUREMENT

A. Report of the Working Group on the New International Economic Order on the work of its sixteenth session (Vienna, 6-17 December 1993) (A/CN.9/389) [Original: English]

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-8
I. DELIBERATIONS AND DECISIONS	9
II. CONSIDERATION OF DRAFT MODEL LEGISLATIVE PROVISIONS ON PROCUREMENT OF SERVICES	10-78
General remarks	10-17
Title	18
Preamble	19
CHAPTER I. GENERAL PROVISIONS	20-36
Article 1. Scope of application	20-21
Article 2. Definitions	22-26
Articles 3-5	27
Article 6. Qualifications of suppliers and contractors	28-29
Articles 7 and 8	30
Article 9. Form of communications	31
Article 10. Rules concerning documentary evidence provided by suppliers or contractors	32
Article 11. Record of procurement proceedings	33
Articles 12 and 13	34
Article 14. Rules concerning description of goods or construction ..	35
Article 15. Language	36
CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE	37-52
Article 16. Procurement methods	37-45
Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiations	46-47
Article 18. Conditions for use of restricted tendering	48-49
Article 19. Conditions for use of request for quotations	50
Article 20. Conditions for use of single-source procurement	51-52
CHAPTER III. TENDERING PROCEEDINGS	53-62
Article 21. Domestic tendering	53
Article 22. Procedures for soliciting tenders or applications to prequalify	54
Article 23. Contents of invitation to tender and invitation to prequalify	55
Article 24. Provision of solicitation documents	56
Article 25. Contents of solicitation documents	57
Articles 26-31	58
Article 32. Examination, evaluation and comparison of tenders ...	59
Article 33. Rejection of all tenders	60
Article 34. Prohibition of negotiations with suppliers or contractors	61

	<i>Paragraphs</i>
Article 35. Acceptance of tender and entry into force of the procurement contract	62
CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING	63-77
Article 36. Two-stage tendering	63
Article 37. Restricted tendering	64
Article 38. Request for proposals	65-74
Article 39. Competitive negotiation	75
Article 40. Request for quotations	76
Article 41. Single-source procurement	77
CHAPTER V. REVIEW	78
III. FURTHER CONSIDERATION OF VARIOUS PROVISIONS OF THE MODEL LAW	79-143
Preamble	79
Article 1	80
Article 2	81-83
Article 6	84-89
Article 7	90
Article 8	91
Article 11	92
Article 14	93
Article 16	94-99
Article 17	100
Article 20	101-104
Article 23	105-109
Article 25	110-113
Article 28	114-115
Article 31	116
Article 32	117
Article 40	118
Article 42	119
Article 46	120
New article on special procedures for procurement of services	121-143
IV. OTHER ISSUES	144-151
V. FUTURE WORK	152-153

INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. The Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). It devoted its eleventh to fifteenth sessions to the preparation of the Model Law on Procurement of Goods and Construction (the reports of the tenth to fifteenth sessions are contained in documents A/CN.9/315, 331, 343, 356, 359 and 371). The Working Group decided that it would be preferable to first finalize provisions for the procurement of goods and construction before

elaborating such provisions for the procurement of services (A/CN.9/315, para. 25). A principal reason for this decision was that certain aspects of the procurement of services are governed by different considerations from those that govern the procurement of goods and construction. The UNCITRAL Model Law on Procurement of Goods and Construction was adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993).

2. At that twenty-sixth session, on the basis of a note on possible future work on the procurement of services prepared by the Secretariat (A/CN.9/378/Add.1), the Commission agreed to undertake work in the area and entrusted the preparation of draft model legislative provisions on the procurement of services to the Working Group. The Commission was agreed that the Working Group should finalize

its work on draft model provisions on procurement of services in time for consideration by the Commission at its twenty-seventh session.

3. The Working Group, which was composed of all States members of the Commission, held its sixteenth session in Vienna from 6 to 17 December 1993. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Canada, China, France, Germany, Iran (Islamic Republic of), Japan, Mexico, Nigeria, Poland, Russian Federation, Saudi Arabia, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

4. The session was attended by observers from the following States: Armenia, Belarus, Bolivia, Brazil, Colombia, Croatia, Indonesia, Peru, Qatar, Republic of Korea, Switzerland, Turkey, Ukraine and Uruguay.

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

- (a) *United Nations bodies*: World Bank;
- (b) *Intergovernmental organizations*: Asian-African Legal Consultative Committee (AALCC), European Space Agency (ESA);
- (c) *International non-governmental organizations*: International Bar Association (IBA).

6. The Working Group elected the following officers:

Chairman: Mr. David Moran Bovio (Spain)

Rapporteur: Mr. Abdolhamid Faridi Eraghi (Islamic Republic of Iran)

7. The Working Group had before it the following documents:

- (a) Provisional agenda (A/CN.9/WG.V/WP.37);
- (b) Procurement of services: note by the Secretariat (A/CN.9/378/Add.1);
- (c) Procurement: Draft model legislative provisions on procurement of services: note by the Secretariat (A/CN.9/WG.V/WP.38);
- (d) UNCITRAL Model Law on Procurement of Goods and Construction.¹

8. The Working Group adopted the following agenda:

- 1. Election of officers.
- 2. Adoption of the agenda.
- 3. Model legislative provisions on procurement of services.
- 4. Other business.
- 5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

9. The Working Group first read through the Model Law on Procurement of Goods and Construction with a view to identifying those changes that could be made to encompass

procurement of services. The Working Group then reviewed the Model Law a second time discussing those changes that had been identified in more detail including various draft proposals that were presented. The deliberations and decisions of the Working Group with regard to its first reading of the Model Law are set forth below in chapter II of this report. Further deliberations and decisions of the Working Group during its second reading of the Model Law are set out in chapter III of this report. After its deliberations, the Working Group requested the Secretariat to prepare a revised version of the Model Law reflecting the deliberations and decisions that had taken place.

II. CONSIDERATION OF DRAFT MODEL LEGISLATIVE PROVISIONS ON PROCUREMENT OF SERVICES

General remarks

10. At the outset, the Working Group took note of the concern that elaboration of model statutory provisions on the procurement of services involved the difficult task of formulating provisions that would be in harmony with the work still to be completed within the General Agreement on Tariffs and Trade (GATT) in the area of free access of service providers to the government procurement market. It was further noted that this concern had been raised when the Commission decided, at its twenty-sixth session, upon adoption of the UNCITRAL Model Law on the Procurement of Goods and Construction, to expand the Model Law to cover services.

11. There was general agreement as a working method with the approach contained in the two proposals presented to the Working Group by the Secretariat, namely, to make adjustments and additions to the Model Law with a view in the end to a consolidated text covering the procurement of goods, construction and services. At the same time, it was recognized that the exercise being undertaken by the Working Group would reveal the extent to which such an approach would be feasible, or whether, in the alternative, it would be necessary to formulate a free-standing model law dealing with procurement of services. It was also suggested that consideration might be given to incorporating some elements of the proposals in A/CN.9/378/Add.1, such as the idea of a separate chapter dealing with some aspects of procurement of services, with some elements of the proposals in A/CN.9/WG.V/WP.38, such as the addition to the request for proposals procedures of special measures for services.

12. The Working Group considered generally the scope of the services to be covered by the Model Law. In this regard, the question was raised as to whether the Model Law should exclude certain types of services that were unlikely to be obtained by procuring entities by way of the types of procedures set forth in the Model Law. Particular reference was made to personal service or employment contracts and to professional services. As regards the former, the Working Group noted that the hiring of personnel was an activity beyond the ambit of the Model Law; as regards professional services, while a view was expressed that they also fell outside of the sphere of procurement

¹Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), annex I.

procedures of the type in the Model Law, the general view was that professional services were one of the principal categories of services to be covered by the Model Law since they comprised a significant percentage of government procurement.

13. At the same time, the Working Group was of the view that it would not be advisable or even feasible in the Model Law to attempt to list the types of services to be covered, or to list the types of services that enacting States might wish to exclude. An attempt to make such a listing would be complicated by the fact that there were many different categories and subcategories of services, some of which might inadvertently be left out of such a listing. It was felt more appropriate to have flexibility in the Model Law, leaving it up to enacting States to define in their respective legislation the types of services to be covered. It was further generally agreed that it would be advisable for the Model Law to make provision for enacting States to exclude certain services from among those that would fall under a general definition, rather than to provide for an inclusive listing of services to be covered.

14. It was generally agreed that all the methods of procurement currently available under the Model Law for goods and construction should also be made available for the procurement of services, though there would probably have to be greater discretion accorded to the procuring entity in selecting the procurement method used in any given case. Specific attention was drawn to the need to examine the applicability of the general rule in article 16(1) on the use of tendering proceedings. The Working Group felt that some straightforward types of services, the details of which could be specified, would be appropriate for tendering, though the majority would probably be more appropriately dealt with through the use of other methods. It was agreed that no attempt could be made in the Model Law to indicate the procurement method to be used for specific types of services, though it was suggested that some assistance in this regard might be included in the Guide to Enactment.

15. The Working Group noted that the existing procedures for all of the methods would have to be examined in order to identify the extent of any changes necessary to deal with the specific characteristics of procurement of services. For example, the question was raised as to whether it might not be appropriate to include a negotiation procedure when tendering proceedings were to be used for procurement of services, in order to accommodate the use of negotiations for the assessment of qualifications and technical capability. Furthermore, it was noted that attention would also have to be paid to the appropriateness for services of the conditions for use of methods of procurement other than tendering presently in the Model Law. For example, it was suggested that the Guide to Enactment should point out that the value-threshold for the use of certain methods of procurement might be set lower for services than for goods and construction.

16. The Working Group considered several terminological changes suggested in paragraphs 5-7 of A/CN.9/WG.V/WP.38. Those changes included: the replacement throughout the Model Law of the expressions "goods or

construction to be procured" and the expression "goods or construction" by the word "procurement", the addition of the words "or services" in various places in the Model Law, and similar changes. The Working Group noted that at several points in the Model Law the implementation of those general drafting suggestions did not appear to provide the desired meaning or degree of clarity and that the implementation of the proposed changes would have to be reviewed on a case-by-case basis.

17. Upon concluding the above exchange of general remarks, the Working Group decided to engage in an article-by-article survey of the existing text of the Model Law with a view to identifying changes that would have to be made to encompass the procurement of services and in order to assess the proposals that had been made.

Title

18. The Working Group decided to consider the proposal to change the title of the Model Law to read "UNCITRAL Model Law on Procurement" after it had completed its review of possible changes to the body of the Model Law.

Preamble

19. It was noted that the wording of the Preamble would have to be modified to reflect coverage of services. (For further discussions see also paragraph 79.)

Chapter I. General provisions

Article 1. Scope of application

20. As noted above, in paragraph 13, the Working Group favoured flexibility for the enacting State in determining the scope of services covered and agreed that this flexibility should take the form of a provision in the Model Law in which certain services could be excluded, either in the law itself or by way of the procurement regulations. Such an approach corresponded to the flexibility appropriate for a model law, while emphasizing the transparency that should be inherent in the process of excluding application of the Model Law. It was suggested that the Guide to Enactment should point out that some regulatory-type of body or procedure might have to be established in the enacting State with the aim of identifying those items that would be treated as services.

21. The question was raised as to whether the exclusion provision contained in paragraph (2)(b) was already suitably formulated to be applied for the purposes of excluding certain types of services. In this regard, it was suggested that that provision had been formulated more with a view to excluding entire economic sectors and, if applied to services, might inadvertently invite an undesirable degree of exclusion of services. Support was expressed for the addition of a subparagraph specifically for exclusion of services or, in the alternative, treatment of the matter in the Guide to Enactment. (For further discussions see also paragraph 80.)

Article 2. Definitions

22. The Working Group accepted a proposal to modify the definition of procurement in article 2(a) to read as follows:

"Procurement means the acquisition by any means, including by purchase, rental, lease or hire purchase, of goods, construction or services."

23. A suggestion to shorten the definition by deleting the words "including by purchase, rental, lease or hire purchase" was regarded as one to be dealt with by a drafting group.

24. A proposal was made to add a reference to incidental services at the end of the definition of goods in subparagraph (c) as follows: "and includes services incidental to the supply of the goods if the value of those incidental services does not exceed the value of the goods themselves". This proposal was accepted, as it was necessitated by the need to distinguish between procurement contracts for services proper, from contracts for the procurement of goods that also contained incidental elements of services.

25. The Working Group was of the view that the Model Law should contain a definition of "services". It was felt that the need for a definition was heightened by the type of flexible approach that had been adopted with respect to the scope of the services covered. The definition favoured was along the lines of a possibility suggested by the Secretariat (A/CN.9/WG.V/WP.38, note following para. 3), namely, that the term "services" would cover products that were neither goods nor construction.

26. The Working Group agreed that the option of the enacting States to include additional categories of goods should be maintained, but that a similar option with regard to the definition of "services" would not be necessary in view of the nature of that definition. (For further discussions on article 2 see also paragraphs 81-83.)

Articles 3-5

27. No comments were made on articles 3-5 entitled: International obligations of this State relating to procurement (and intergovernmental agreements within (this State)); Procurement regulations and Public accessibility of legal texts.

Article 6. Qualifications of suppliers and contractors

28. The Working Group adopted and referred to the drafting stage a proposal to add wording, particularly in paragraph (1)(b)(i), that would be better geared to the requirements in procurement of services, in particular professional services. It was also pointed out that, though not all the criteria in article 6 were relevant to the procurement of services, the procuring entity would, under the existing approach, only have to apply qualification criteria that were appropriate in any given case.

29. A proposal was made that paragraph (5) would need to be amended to preclude the possibility of the procuring entity establishing qualification criteria or other objectively unjustifiable criteria in the procurement of services that would have the effect of discriminating against or among suppliers or contractors on the basis of nationality. It was proposed that this could be done by adding the words "that is not objectively justifiable or that is not required by other provisions of law" after the word "procedure". A suggestion was made that this problem might already be taken care of in article 8(1) which allowed for the limitation of participation in procurement proceedings on the basis of other provisions of law. It was however pointed out that articles 6(5) and 8(1) had a somewhat different focus; article 6(5) only dealt with the setting of qualifications by the procuring entity, while article 8(1) dealt with the larger issue of non-discrimination on the basis of nationality, except in certain specified circumstances. It was stated that it might be conceivable that even in cases where the intention was not to limit participation on the basis of nationality in the procurement of services, the procuring entity could establish qualification criteria in such a way that they had the effect of discriminating against foreign suppliers. It was stated that the procuring entity could do this by, for example, requiring suppliers to have local licences that were not otherwise required in any other provisions of law. It was agreed that paragraph (5) should be modified to preclude such a possibility. (For further discussions on article 6 see paragraphs 84-89.)

Articles 7 and 8

30. No comments were made on articles 7 and 8 entitled: Prequalification proceedings and Participation by suppliers or contractors.

Article 9. Form of communications

31. The Working Group noted that any amendments to article 9(2) to add those communications in procurement of services to which it would be applicable could only be made after the review of other possible changes to the Model Law.

Article 10. Rules concerning documentary evidence provided by suppliers or contractors

32. No comments were made on article 10.

Article 11. Record of procurement proceedings

33. An observation was made that some of the provisions in article 11 were oriented to the procurement of goods or construction and did not fit well with procurement of services. As an example, it was stated that in paragraph (1)(d) the price of the tender seemed to be given a prominence that would not necessarily be appropriate in the case of procurement of services. It was agreed that a decision on whether to make any changes to article 11 could only be made after the Working Group had reviewed the remainder of the Model Law from the standpoint of covering procurement of services. (For further discussions on article 11, see also paragraph 92.)

Articles 12 and 13

34. No comments were made on articles 12 and 13 entitled: Public notice of procurement contract awards and Inducements from suppliers or contractors.

Article 14. Rules concerning description of goods or construction

35. It was pointed out that article 14 was drafted in a manner that took into account the physical characteristics of the procurement, something that would not generally be relevant to the procurement of services. It was therefore suggested that the article should also contain wording more relevant to procurement of services. It was suggested that this might include, for example, a reference to franchises or the requirement of establishment of local offices. While the proposal was accepted, it was pointed out that the issue of establishment of local offices might have to be dealt with as a separate issue as it involved other matters such as market access. (For further discussions on article 14, see also paragraph 93.)

Article 15. Language

36. It was pointed out that it would be necessary to mention in the Guide to Enactment that there might be a different threshold as regards what would be considered a low-value procurement of services and what would be considered a low-value procurement of goods and construction.

Chapter II. Methods of procurement and their conditions for use

Article 16. Procurement methods

Paragraph (1)

37. The Working Group considered generally the extent to which it would be desirable or feasible to integrate the procurement of services into the approach of the existing provisions on procurement methods. A key aspect of that question was whether to apply to services also the presumption in article 16(1) that tendering was the normal method of procurement and that, in effect, any choice of another method should be justified. One view was that procurement of services should be integrated into the existing approach in the Model Law. In support of that view it was stated that the applicability to services of the rule in paragraph (1) should not be discounted as many services could be procured through tendering.

38. It was also suggested that the procurement of services in cases in which tendering was not appropriate could basically be accommodated within the existing provisions of the Model Law. It was suggested that such an approach would be in line with the approach in the Directive applicable to procurement of services in the European Community and the current revision of the GATT Agreement on Government Procurement, neither of which provided special procedures for procurement of the services covered. It was also stressed that the Model Law, already referring to

seven methods of procurement, could not bear the addition of procedures of a different kind for services. It was emphasized that such an added layer of complexity would diminish transparency and jeopardize the acceptability of the Model Law.

39. A countervailing view, one which drew wider support, was that some substantial adjustments would have to be made in the existing provisions on procurement methods in order to accommodate services. According to that view, it would be inappropriate to apply the rule in article 16(1) to services as it was felt that the majority of service procurement cases would not be appropriately handled through tendering proceedings, that a focus on tendering would give undue weight to the price factor in the services context, and that generally more flexibility should be accorded to the procuring entity in selecting the appropriate method of procurement.

40. An initial question in implementing the prevailing view referred to in the previous paragraph concerned the manner in which the rule on selection of procurement methods for services should be presented. One suggestion was to have a "two-track" approach involving an additional chapter ("II bis") setting forth the rule concerning the choice of methods to be used for procurement of services, an approach aimed in particular at avoiding alterations of the existing provisions on the choice of procurement methods for goods and construction. Another approach that at this stage appeared to draw somewhat more support was to instead add those additional provisions as separate clauses in article 16, so as to minimize the risk of added complexity.

41. Another question raised in fleshing out the details of the prevailing view in the Working Group concerned the actual extent of the flexibility to be accorded to the procuring entity in selecting the appropriate method of procurement. The Working Group noted that it would be necessary to decide whether in those cases in which tendering would be a feasible method it should be mandated or remain discretionary. A mandatory approach might use wording inspired by the approach in article 17(1) along the following lines: "unless it is feasible to formulate detailed specifications, in which case tendering proceedings are to be used, the procuring entity may . . .". In support of a more discretionary approach, which appeared to attract greater interest in the Working Group, it was stated that in some cases in which it might be feasible to conduct tendering proceedings, tendering might nevertheless not be the most appropriate method.

42. The Working Group then turned to the question of the guidance or direction to be given to the procuring entity in selecting the procurement method. A widely shared concern was that restricted tendering and single-source procurement should remain exceptional methods. The Working Group noted that the use of those methods, along with request for quotations, for services would essentially be subject to the same restrictions presently imposed in the Model Law.

43. As was the case in the general discussion referred to above in paragraph 14, there was little support for linking specific methods of procurement to a classification or categorization of various types of services. It was noted,

however, that some example or advice in this direction might usefully be provided in the Guide to Enactment. More interest was shown in a proposal to refer to the selection by the procuring entity of the procurement method most likely to fulfil the objectives set forth in the Preamble. It was suggested that such an approach would provide a normative rule in the Model Law, which could then be explained and illustrated in the Guide to Enactment. However, doubts were raised as to the utility and effectiveness of a rule that comprised merely a reference to the Preamble. It was suggested that instead an attempt should be made to include a more specific rule, such as one directing the procuring entity to select the most competitive procurement method in the circumstances. Such a formulation would refer to factors to be taken into account by the procuring entity in selecting the method (e.g., the importance of the intellectual ability or skill of the service provider for the performance of the procurement contract in question).

44. After deliberation, the Working Group decided that the rule in paragraph (1) should be reversed with respect to services, and that the selection of the procurement method should be left to the discretion of the procuring entity. That discretion, however, should be exercised within parameters based on the objectives of the Model Law.

Paragraph (2)

45. Support was expressed for the application of the record requirement in paragraph (2), though perhaps in modified form, in view of its importance in particular for supervisory bodies monitoring the procuring entity. (For further discussions on article 16, see also paragraphs 94-99.)

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiations

46. It was noted that a discretionary approach to the selection of the method of procurement for services, which was favoured by the Working Group in its discussion of article 16, might obviate the need to formulate specific conditions for use in article 17 geared to services.

47. The question was raised as to the appropriateness or necessity of dealing with research and development contracts within the sphere of procurement of goods, as was presently the case pursuant to article 17(1)(b) as well as article 20(1)(e), if the scope of the Model Law were expanded to deal with services. (For further discussions on article 17, see also paragraph 100.)

Article 18. Conditions for use of restricted tendering

48. It was generally agreed that, notwithstanding a discretionary approach with respect to the use for services of the procurement methods of tendering and the methods referred to in article 17, it would still be advisable to maintain restrictions on the availability for services of restricted tendering, request for quotations and single-source procurement.

49. In addition to noting that the wording of article 18 would have to be adjusted to reflect its application to services, the Working Group heard a cautionary view that

the condition for use of restricted tendering set forth in subparagraph (a) might be more prone to abuse in the context of services than in the context of goods or construction.

Article 19. Conditions for use of request for quotations

50. The Working Group was generally in agreement that this method of procurement should be available for the procurement of services. An example that was cited was the procurement of plumbing services for repairs in a particular facility. At the same time, the Working Group noted that the wording of article 19 would need to be reviewed to make any adjustments necessary to accommodate services. It was also suggested that the Guide to Enactment should point out that the threshold value below which procurement by way of request for quotations would be available for services might be set lower than the threshold for procurement of goods.

Article 20. Conditions for use of single-source procurement

51. The Working Group agreed that in principle the provisions of article 20 were applicable to services, subject however to drafting revisions necessary to cover services. Particular reference was made in this regard to subparagraph (d) of paragraph (1), which authorized the awarding of a follow-on procurement contract to the original supplier or contractor in certain limited cases. A concern was also voiced that the circumstance referred to therein might be more prone to abuse in the context of services than in the context of goods or construction. The question was also raised whether subparagraph (d) should be limited to goods and construction, though it was recognized that analogous cases might arise in the sphere of services. It was reported that, as a safeguard against abuses that might result from such a procedure, the procurement legislation of some States prohibited a consultant from bidding on the procurement contract consequent to the consultant's preparatory work.

52. The Working Group noted a concern that the circumstance referred to in paragraph (2) as an exceptional procedure might be particularly prone to abuse in procurement of services. It was pointed out, however, that the socio-economic cases of the type referred to in paragraph (2) would typically be well publicized, thus mitigating the risk of abuse. It was also pointed out that the existing safeguards in paragraph (2) provided a procedure that would limit abuse. As a drafting matter, it was pointed out that the reference to article 32(4)(c)(iii) involved text that itself needed to be reviewed from the standpoint of including services. (For further discussions on article 20, see also paragraphs 101-104.)

Chapter III. Tendering proceedings

Article 21. Domestic tendering

53. It was suggested that the Guide to Enactment should point out that the threshold level as regards procurement of goods and construction might be higher than that for procurement of services.

Article 22. Procedures for soliciting tenders or applications to prequalify

54. It was noted that it might be necessary to add wording that would better suit application of the article to procurement of services, for example, by stating in paragraph (2) that the invitation to tender could also be published in a relevant professional publication.

Article 23. Contents of invitation to tender and invitation to prequalify

55. It was suggested that there might be a need to modify paragraph (1)(d) depending on the amendments that would be made to article 6(1)(b). (For further discussions on article 23 see also paragraphs 105-109.)

Article 24. Provision of solicitation documents

56. No comments were made on article 24.

Article 25. Contents of solicitation documents

57. The Working Group agreed that the wording in, for example, subparagraphs (d), (g) and (i) would need to be modified to accommodate the procurement of services. (For further discussions on article 25 see also paragraphs 110-113.)

Articles 26-31

58. No comments were made on articles 26-31 entitled: Clarifications and modification of solicitation documents; Language of tenders; Submission of tenders; Period of effectiveness of tenders; Modification and withdrawal of tenders; Tender securities and Opening of tenders.

Article 32. Examination, evaluation and comparison of tenders

59. The Working Group agreed that, once a clear approach had developed as to how the procurement of services would be dealt with in the Model Law, it might be necessary to re-examine article 32(4)(c)(ii) with a view to ensuring its consistency with that approach. (For further comments on article 32, see also paragraph 17.)

Article 33. Rejection of all tenders

60. No comments were made on article 33.

Article 34. Prohibition of negotiations with suppliers or contractors

61. It was proposed that procurement of services should be exempted from the rule in article 34 barring negotiations with suppliers and contractors. In support of that proposal it was stated that, although the rule embodied an important principle regarding procurement of goods and construction, it did not reflect a common practice in procurement of

services, in particular professional services, where negotiations with suppliers and contractors would normally be held. In opposition to the proposal, however, it was stated that article 34 established a cardinal principle in procurement by way of tendering proceedings and should thus not be changed. It was pointed out that, if a procuring entity decided to carry out procurement by way of tendering proceedings, it should be made to follow the discipline inherent in that method; and, in those instances where tendering was inappropriate, the procuring entity could use one of the other methods provided for in the Model Law. After deliberation, the Working Group agreed to retain article 34 without any changes.

Article 35. Acceptance of tender and entry into force of the procurement contract

62. No comments were made on article 35.

Chapter IV. Procedures for procurement methods other than tendering

Article 36. Two-stage tendering

63. It was suggested that the evaluation of tenders in two-stage tendering and in tendering generally, because it was of a numerical character, might not be suitable in procurement of the many services for which the evaluation criteria could not be quantified in a numerical or arithmetical form. It was, however, agreed that this was an issue that could be discussed further only after the Working Group had further discussed the possible addition of an article specifically on procurement of services.

Article 37. Restricted tendering

64. No comments were made on article 37.

Article 38. Request for proposals

65. The starting point for the Working Group's discussion was a proposal to incorporate additional provisions into article 38 tailored specifically to the procurement of services (A/CN.9/WG.V/WP.38, paras. 9-11). The view was again expressed that such an approach would unnecessarily complicate the Model Law since the array of procurement methods currently available under the Model Law was already sufficiently broad to accommodate the procurement of services. The prevailing view, however, continued to be that special considerations affecting the procurement of services necessitated the elaboration of some special procedures.

66. At the same time, the Working Group was of the view that it would be preferable to establish a separate, free-standing article containing the types of procedures being proposed, rather than to attempt to interpolate them into the existing request-for-proposals procedures. It was felt that such an approach, while it would borrow substantial elements from request for proposals, would be clearer and less likely to encumber the existing procedures in the Model Law. In support of such a separate approach, it was

pointed out that the existing procedures for request for proposals were predicated to a large measure on a scenario involving the procurement of goods or construction in which the procuring entity, not sure of the ultimate form of the goods or construction, would solicit various proposals for possible types of solutions. It was suggested that this was not the typical scenario in the procurement of services. A related question was whether, in the wake of the decision to establish a free-standing procedure, it would still be advisable to make available for the procurement of services also those procurement methods under article 17 that may have been included by the enacting State (two-stage tendering, request for proposals or competitive negotiation). The view of the Working Group was to make those other methods available as well.

67. An observation of a general character was made to the effect that some of the special procedures being considered might also be made applicable in other methods of procurement already available under the Model Law; for example, consideration might be given, it was suggested, to permitting negotiations in tendering proceedings when services were the subject of the procurement.

68. The Working Group then turned to a discussion of specific aspects of the proposed procedures as well as to a review generally of the extent to which the request-for-proposals procedures in article 38 could be incorporated into the separate procedure to be added for services. An initial question was whether the solicitation procedures in article 38(1) and (2) were sufficient, or whether a broader degree of solicitation should be required. Concerns cited in favour of utilizing the same type of solicitation procedure included that the article 38(1) and (2) approach was balanced and provided for an effective degree of competition, without excessively burdening the procuring entity, and that a broader approach for procurement of services might throw doubt on the degree of competition required under article 38 for request-for-proposals proceedings. Greater interest was shown, however, in using for the procurement of services a solicitation procedure broader than the one in article 38(1) and (2). Interest in a broader approach was motivated in particular by the expectation that the special method envisaged for procurement of services would, despite the availability of other methods, probably be the main method used for procurement of services under the Model Law. It was therefore regarded as important that the solicitation procedures be sufficiently broad, so as to promote openness and competition. One suggestion in this direction was to use as a model the solicitation procedures applicable in tendering proceedings. Another less ambitious suggestion was to include a two-track solicitation procedure of the type in article 38(2) (wide advertisement seeking "expressions of interest") as mandatory, rather than subject to an exception on the grounds of economy and efficiency, and to specify in the Model Law where notices seeking expressions of interest should be published.

69. The Working Group agreed that it would be necessary to review the evaluation criteria in article 38(3) in order to determine whether they could be mirrored in the new article or whether they might need to be modified in order to capture the elements often predominant in the evaluation of proposals for services, in particular the

importance of the experience and intellectual resources, abilities and skills of the service provider.

70. The Working Group next considered the provision in paragraph (2)(a) of the proposal in A/CN.9/WG.V/WP.38 (para. 10) requiring the procuring entity, in evaluating proposals, to establish a threshold level with respect to quality and technical aspects that the proposals would have to meet in order to merit further consideration. While a question was raised as to why such a procedure would be applied to services but not to goods and construction, and why the matter might not be dealt with simply by way of prequalification proceedings, the Working Group was generally favourable to the proposal. It did, however, prefer to make the threshold procedure discretionary so as not to tie excessively the hands of the procuring entity in an area of procurement generally calling for greater flexibility.

71. Differing views were expressed as to whether it would be appropriate to provide in the special services procedure for the application of a margin of preference in favour of local suppliers and contractors. The view was expressed that this would not be necessary since the type of evaluation procedures being envisaged already afforded a sufficient degree of flexibility. It was further suggested that the margin of preference, while appropriate in the more "automatic" or "numerical" evaluation procedure in tendering proceedings, would be less well adapted to the more flexible evaluation setting in the procedures being contemplated. The prevailing view, however, was that provision should be made for the application of a margin of preference, since this would recognize the practical needs of enacting States, in particular those seeking to foster the development of fledgling services sectors of their economies. It was also pointed out that this method of favouring local suppliers and contractors would generally be more transparent than other methods to which resort might otherwise be made. Beyond the question of the margin of preference, the Working Group noted the possibility of including in the new provision, not only the evaluation criteria in article 38(3), but additional evaluation factors such as those referred to in article 32(4)(c)(iii).

72. The Working Group next turned to paragraph (3) of the proposed special evaluation procedures, that paragraph providing for the selection of the successful proposal on the basis of lowest price, highest combined evaluation of price and technical capacity, or after negotiations. It was agreed in the first place that whatever the precise selection method or criterion to be used, it would have to be predisclosed to suppliers and contractors. The Working Group endorsed the notion of providing for the selection of the successful proposal on the basis of lowest price, as well as on the basis of a combination of price and technical-capacity rating, both of which might be linked to a threshold procedure (see above, paragraph 70). The Working Group noted that the Guide to Enactment might usefully illuminate the policy and practical considerations that might underlie the choice of a particular selection method, including the use of the threshold technique. It was generally agreed, however, that it would not be appropriate to refer to negotiation as a third selection criterion (as found in paragraph (3)(b)(iii) of the new article proposed in A/CN.9/WG.V/WP.38, para. 10) as negotiation was not,

properly speaking, a selection criterion. Rather, it was suggested, the negotiation provision should be free-standing.

73. As regards the drafting of the combined price and technical approach in the special procedures, a question was raised as to the appropriateness of referring to the "highest" combined evaluation in view of the confusion that might be caused if it were juxtaposed with the notion of the lowest price. A further observation was that perhaps it might be advisable in formulating the provision to take account of the probability that such technical factors in the context of procurement of services would, unlike the case of goods and construction, not be expressed or quantified in monetary terms. A suggestion in this regard was that the Guide to Enactment should explain that a system using "merit" points might be used in rating proposals, rather than adjusting the price to reflect the relative technical merit of a proposal.

74. The next aspect considered by the Working Group was the manner in which a negotiation procedure should be incorporated into the special procedure being crafted. The Working Group noted that the proposal before it provided for negotiation as an optional method for selecting the successful proposal, but only within the terms of one traditional approach to negotiations in the procurement of services. Under that traditional approach, negotiations concerning price take place in a serial fashion, with one supplier or contractor at a time, in the order indicated by the comparative technical and qualification rating of the proposals received. Criticism of this method was expressed, in view of the lack of competition in such an approach as regards price. The view was expressed that such a traditional approach could in many cases run counter to the objectives of the Model Law, in particular transparency and competition, and should therefore not be included. The prevailing view, however, was that inclusion of this method was probably unavoidable, but that it should only be optional and that provision needed to be made for negotiations with more than one supplier or contractor at a time in order to permit the procuring entity to obtain the benefits of competition. Furthermore, there was general agreement that provision should be made in such a wider negotiation procedure for, at the last stage, obtaining best and final offers ("BAFO") from suppliers and contractors. However, it was not determined at this stage of the deliberations what the relationship would be between such a wider negotiation procedure and selection procedures on the basis of lowest price or on the basis of a combined price and technical evaluation. (For further comments on article 39 *bis*, Request for proposals for services, see also paragraphs 121-143.)

Article 39. Competitive negotiation

75. No comments were made on article 39.

Article 40. Request for quotations

76. It was suggested that article 40 would require some re-wording to express better its applicability to procurement of services. (For further comments on article 40, see also paragraph 118.)

Article 41. Single-source procurement

77. It was noted that article 41 might require some modification in the wording to make it better suited for procurement of services, in particular subparagraphs (a) and (d) of paragraph (1).

Chapter V. Review

78. Articles 42-47 were found generally acceptable and applicable to the procurement of services. (For further discussions on articles 42 and 46, see also paragraphs 119 and 120.)

III. FURTHER CONSIDERATION OF VARIOUS PROVISIONS OF THE MODEL LAW

Preamble

79. Upon a further reading of the Preamble, it was suggested that it would be necessary to change the tone of some of the wording so as to take into account procurement of services. As an example, it was suggested that, by way of making a reference to professional services, subparagraph (b) could mention the promotion of the exchange of skills. While there was agreement that some of the wording, especially the reference only to goods and construction would need review, it was pointed out that the proposed change for subparagraph (b) might raise issues beyond the scope of the Model Law, such as the transfer of technology.

Article 1

80. The Working Group agreed that, in order to minimize the additions to be made to the Model Law, it would be sufficient to mention in the Guide to Enactment that, under paragraph (2)(b), States had the option to exclude certain types of services as well as other types of procurement from the application of the Model Law, thereby obviating the need to add a new paragraph (2)(d) referring specifically to exclusion of certain services.

Article 2

81. Upon further consideration, the Working Group agreed that the option of enacting States to include other categories should be mentioned not only in the definition of "goods" but also in the definition of "services". It was agreed that this would enable States to more clearly differentiate between what would be considered goods and what would be considered services in their jurisdictions. A proposal to specifically provide for the exclusion of certain types of services did not receive support. It was agreed that, for the sake of transparency, any exclusions should only be carried out under article 1. It was also pointed out that the decision of the Working Group to define services as anything that was neither goods nor construction could lead to the anomalous situation of real estate being defined as a service. It was however suggested that simply excluding real estate from the Model Law would be inappropriate since in some States procuring entities used

traditional procurement methods (though not necessarily tendering) at least to obtain occupancy rights in buildings. It was also noted that some legal systems classified certain rights regarding real estate as personal rights, while other legal systems classified those same rights as property rights, which could complicate the matter from the standpoint of model statutory provisions. It was agreed that the Guide to Enactment could mention that, because of its special characteristics, enacting States may wish to consider excluding acquisition of immovable property from the application of the Model Law, but that no specific exclusion would be made in the Model Law.

82. It was pointed out that, since the definition of "goods" in paragraph (2)(c) only provided examples of what could be considered goods and was not an exhaustive list, providing for the option to include additional categories in this list might lead to an inference that the list was supposed to be exhaustive. A suggestion to change the word "includes" to "means" so as to make the list exhaustive was considered unacceptable because such an exhaustive definition would place a great burden on the enacting State by having to list in the Model Law everything that would be considered as goods in its jurisdiction. It was agreed that the matter could be considered at the drafting stage.

83. The Working Group agreed that, having included the reference to incidental services in the definition of "goods", it would also be necessary to add a reference to incidental services in the definition of "construction".

Article 6

84. A proposal was made to modify article 6(1)(b)(i) as follows:

- "(i) that they possess the necessary qualifications, professional and technical competence, financial resources, equipment . . .".

85. This proposal was found to be generally acceptable. It was, however, pointed out that, since the title to article 6 referred to "qualifications", another reference to qualifications in subparagraph (1)(b)(i) might lead to ambiguity. The Working Group agreed to refer to the drafting stage a suggestion that the problem could be solved by using the expression "necessary professional qualifications, professional and technical competence . . .".

86. The Working Group then considered a proposal to amend paragraph (5) as follows:

- "Subject to articles 8(1), 32(4) and 39 *bis* (4), the procuring entity shall establish no criterion, requirement or procedure with respect to the *requirements to be met by suppliers or contractors that discriminates against or among suppliers or contractors and against categories thereof on the basis of nationality, or that is not objectively justifiable*;"

87. A suggestion was made to replace the word "or" after the word "nationality" by the word "and" so as to rule out indirect discrimination that was not objectively justifiable.

This modification, however, was rejected on the basis that the wording in the proposal was necessary to convey the intended meaning.

88. A view was expressed that paragraph (5) did not make it clear whether discrimination based on the provisions of law of another State was ruled out. It was however pointed out that this was an issue that could be better dealt with under article 8.

89. After deliberation, the Working Group accepted the proposed amended version of paragraph (5), subject to possible drafting changes.

Article 7

90. The view was expressed that the formulation of the *chapeau* of paragraph (3), which indicated the required contents of the prequalification documents in part by reference to the requirements for an invitation to tender, should be reviewed since the provisions on prequalification proceedings were meant to have general application.

Article 8

91. A suggestion was made to add to paragraph (1) a justification for the use of nationality-based restrictions on participation that were "objectively justifiable", in order to align the text with the decision of the Working Group to add wording along those lines to article 6(5). Some interest was expressed in this proposal as a potential consequence of the decision to produce a consolidated text covering goods, construction and services. Doubts were widely shared, however, as to the necessity and appropriateness of such a change. The concern underlying those doubts was that the addition of such wording would run counter to the objective of transparency and might unnecessarily invite a greater degree of restriction on participation. It was also felt that such wording was of doubtful necessity because of the difference in function between articles 6(5) and 8(1), a difference that might need to be clarified in the Guide to Enactment. For similar reasons, the Working Group decided against a replacement of the words "other provisions of law" by the words "other provisions of law of this or any other State".

Article 11

92. It was recalled that the Working Group had noted upon its first reading of article 11 that the review of the remaining articles and proposals from the viewpoint of inclusion of services might reveal the necessity of some modification of article 11. Having completed a first reading of the Model Law, the Working Group was satisfied that no modifications of substance were necessary in article 11. It was observed, however, that it might still be necessary to eventually make some adjustments of a drafting nature. For example, the wording of subparagraph (d) (referring to price) might be modulated to reflect that price might not be identifiable in some services contexts at the time that the record is prepared. A question was also raised with regard to subparagraph (i) as concerns the record requirement for the use of non-tendering methods for procurement of

services, since tendering would not be the normal method under the Model Law. Lastly, it was pointed out that the use of a margin of preference pursuant to the special procedure for services would have to be reflected under paragraph (1)(e).

Article 14

93. The Working Group accepted a set of proposed drafting changes to article 14 designed to cover services. Those modifications involved: replacing in paragraphs (1), (2) and (3)(a) the words "characteristics of the goods or construction to be procured" by the words "characteristics of the goods, construction or services to be procured"; replacement in paragraph (1) of the words "and terminology, that creates" by the words "and terminology, or description of services, that create"; replacement in paragraph (2) of the words "designs and requirements shall be based" by the words "designs and requirements or descriptions of services shall be based".

Article 16

94. The Working Group considered the following proposal for a revised text of article 16:

- (1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.
- (2) In the procurement of goods or construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 17, 18, 19 or 20, and, if it does, it shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that particular method of procurement.
- (3) In the case of procurement of services, a procuring entity shall use the procedures set forth in article 39 *bis*, unless the procuring entity determines that:
 - (a) it is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the service to be provided; or
 - (b) it would be more appropriate to use a method of procurement referred to in article 17, or, in the case of the methods referred to in articles 18 to 20, the method in respect of which the conditions for use are satisfied.
- (4) The procuring entity shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of a method of procurement pursuant to paragraph (3)(b).

95. The Working Group accepted the proposed amendments to paragraphs (1) and (2), which were intended to confine those provisions to the procurement of goods and construction, the selection of procurement methods for services being left to paragraph (3).

96. The Working Group noted that, according to the approach embodied in paragraph (3), the new special procedure for services (see below, paragraph 121) would be

the preferred method of procurement for services. Additionally, in accordance with subparagraphs (a) and (b), other methods would be available. Under subparagraph (a), tendering proceedings would be permitted if detailed specifications could be drawn up and if tendering was determined to be the more appropriate procurement method. Under subparagraph (b), resort could be had to any of the methods under article 17 that had been included by the enacting State in its legislation if one of those methods was determined to be more appropriate by the procuring entity, or to one of the methods under articles 18-20, if the conditions for use for the particular method were satisfied.

97. The view was expressed that the approach in paragraph (3) was inappropriate because it permitted the procuring entity to opt for an article 17 method without having to meet any conditions for use other than a determination by the procuring entity that the use of such another method was appropriate. According to this view, the special procedure being contemplated for services (see below, paragraph 121) should be the exclusive method for procurement contracts involving "professional services", i.e., procurement contracts the main aim of which was to obtain the personal judgement and discretion of the service provider. According to that view, the use of the methods in article 17 would be permitted only in accordance with the conditions for use of those methods and only for procurement involving primarily the other broad category of services, referred to as "ministerial" services.

98. The prevailing view, however, was that the proposed approach should be retained. It was generally felt to be inappropriate to confine the category of professional services to the new special method. It was noted that this would cause difficulties in particular in enacting States that had limited previous experience with the types of relatively involved procedures being contemplated for the special procedure for services and that States should not be obligated to impose such a procedure in all cases. It was also generally felt to be unnecessary and probably not feasible in the Model Law to attempt to define services according to various categories. In opposition to the notion of exclusivity of use of a particular method, it was pointed out that such an approach would not be workable, for example, it would not permit the use of single-source procurement in cases of urgency. However, as a limitation on the discretion of the procuring entity, the Working Group was inclined to the view that the resort to a method under article 17 should be subject to approval. Drafting changes were suggested for paragraph (3), including the deletion of the words "case of" in the *chapeau* and replacement of the words "services to be provided" in subparagraph (a) by the words "services to be procured".

99. The Working Group endorsed the record requirement in paragraph (4), and decided that it should be expanded to cover also the selection of tendering under subparagraph (a). It was recognized that, due to the competitive nature of tendering, a case could be made for excluding application of the record requirement to its use for the procurement of services. It was pointed out, however, that a record requirement would assist supervisory bodies in detecting inappropriate resort to tendering by procuring entities seeking to avoid the more appropriate but perhaps more complicated special procedure.

Article 17

100. It was suggested that, in paragraph (1)(a)(i), the reference to "proposals" should be broadened to read "tenders, proposals or offers", in view of the different procurement method available under article 17. In terms of the relevance to services of the wording used for the conditions for use, it was proposed to add a separate phrase to paragraph (1)(a)(ii) referring to services along the following lines: "because of the nature of the service, it is desirable to negotiate with suppliers and contractors".

Article 20

101. In a further consideration of the suitability to services of the conditions for use of single-source procurement set forth in article 20(1), the Working Group agreed that what needed to be made clear in subparagraph (a), and analogously in subparagraph (d), was the unique or special character that a service was required to have in order to fall under the purview of those provisions. This aspect drew attention because of a concern that the types of situations referred to in subparagraphs (a) and (d) were probably more prone to abuse in the context of procurement of services than in the goods or construction context. It was noted that a wide spectrum of services was being contemplated for coverage in the Model Law, and that single-source procurement should be available for only exceptional cases. Those might include, for example, the necessary granting of a follow-on contract to the designer of customized software, or the purchase of a particular art treasure for a national museum.

102. It was generally agreed that not all purchases of art should be automatically subject to single-source procurement, since there would be instances in which a design or other artistic competition would be indicated (e.g., the purchase of art for public buildings). Mention was made in the discussion that one possibility would be for the enacting State to exclude certain categories of artistic services from the Model Law. However, the Working Group agreed that, while this possibility might be referred to in the Guide to Enactment, no mention should be made in the Model Law of an exclusion of artistic services, so as not to give undue emphasis to exclusion over competition. It was suggested that consideration should be given to dealing in the special services procedures with the use of juries in design competitions.

103. The Working Group noted that the wording of subparagraph (b) would need to be reviewed taking into account that, for services, tendering would not be the standard method of procurement.

104. The concern was expressed that, if any rewording of paragraph (2) were to be needed to encompass services, it should not have the effect of loosening what was intended to be a very exceptional procedure.

Article 23

105. The Working Group considered a proposal to add to paragraph (1)(b) the words "or the nature and place of delivery of services". This led to the consideration by the

Working Group of the extent to which the notion of "place of delivery" was applicable to services. A particular concern revolved around the risk that such wording, if applied to services, might give rise to the imposition of requirements that the service provider maintain an office in the procuring entity's territory when such requirements would not be objectively justifiable, thus depressing competition. It was generally agreed that this risk of the misuse of place of delivery as an evaluation criterion should be addressed in the Model Law, though the question was raised whether the matter might not rather be addressed under article 6(5).

106. At the same time, it was pointed out that there would generally be a "place of delivery" for services that would have to be indicated to the supplier or contractor, though the degree to which the place of delivery was material might vary from case to case. For example, in the case of a consultancy contract where all that was required was the submission of a report, it might be that the place of delivery would mean merely the address to which the consultant's report would be sent. It might be relevant also in other instances, for example, in terms of the determination of the law applicable to the procurement contract. Proposals aimed at taking the above into account included adding the words "if relevant" or "if appropriate" before the words "the place of delivery of services". Doubts were raised as to the sufficiency of such expressions, since they might be too loose and since, as noted above, the place of delivery would generally be relevant to one degree or another.

107. It was further pointed out that a distinction might have to be drawn between place of delivery and place of performance. In the example given above, it might be irrelevant where the service was performed, i.e., where the report was written. By contrast, there would be procurement contracts for services where the place of performance would be relevant (e.g., a catering contract). It was suggested that the types of services likely to be procured through tendering proceedings may be more likely to be ones in which the place of performance would be relevant. Proposals along the following lines were made, aimed at taking into account the notion of place of performance: "place of development or delivery of services"; and, "place of performance or delivery, if appropriate given the nature of the services".

108. As regards paragraph (1)(c), the Working Group noted that both the notion of time of supply and the notion of time of completion might be relevant in the context of services. A proposal aimed at encompassing both notions was to use wording such as "schedule requirements".

109. After deliberation, the Working Group requested the Secretariat to revise article 23 taking into account the observations and proposals that had been made. The Working Group also noted that issues had been raised that might usefully be mentioned in the Guide to Enactment.

Article 25

110. A proposal was made to amend article 25(d) as follows:

The nature and required technical and quality characteristics, in conformity with article 14, of the goods or construction *or services* to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction *or services* are to be effected; and the desired or required time when the goods are to be delivered or the construction *or services* are to be effected.

111. It was suggested that, in the proposal, the existing reference to incidental services had been deleted. The Working Group, however, agreed that such a reference, having been retained in the definition of goods, should also be retained in subparagraph (d). The proposal was otherwise generally acceptable.

112. The Working Group also considered a proposal to add a sentence at the end of subparagraph (i) to read as follows: "For services, this provision shall be applied by analogy". Although the Working Group agreed with the substance of the proposal, it was felt not appropriate to use a formulation such as "by analogy". It was agreed that the intention was to apply the examples given in subparagraph (i) to services where applicable, and that adding the words "any applicable" before the word "transportation" might result in a better formulation.

113. The view was expressed that, since it was difficult to envisage alternative tenders in procurement of services, subparagraph (g) should only apply to the procurement of goods and construction. It was, however, generally felt that it might be possible to have alternative tenders, even for services in the context of tendering, and that therefore the possibility should not be excluded from the Model Law.

Article 28

114. A proposal was made to add a sentence at the end of paragraph (5)(b) along the following lines:

"Such other form may also be used in order to provide a sufficient degree of confidentiality with regard to particular services, as, for example, area planning, architecture and civil engineering or data processing."

115. It was explained that this proposal was aimed at providing for confidentiality in cases in which a part of the tender would be submitted in the form of a model as would normally happen with the examples given. It was explained that, in most of such cases, the tender would have an artistic component and that selection of the successful tender would be done by a jury. The Working Group, however, agreed that, although there indeed might be a problem with regard to the confidentiality of models, it would not be appropriate to make any changes to paragraph (5)(b), which focused on the issue of submission of tenders by electronic data interchange (EDI) and other similar technologies. It was suggested the matter of confidentiality might be considered adequately addressed by article 32(8) on non-disclosure of information regarding tenders.

Article 31

116. It was suggested that tenders for services would, in most instances, contain information beyond the price of the tender and that article 31(2), which provided that all suppliers and contractors should be permitted to be present at the opening of the tenders, would compromise the confidentiality of such information. The Working Group felt, however, that article 31 embodied an important rule for purposes of transparency in tendering proceedings and that it should therefore remain unchanged. Furthermore, it was noted that, in accordance with paragraph (3), only the addresses of the suppliers or contractors and the prices of the tenders would be announced to those present.

Article 32

117. It was suggested that the non-price factors mentioned in article 32(4)(c)(ii) would not generally be applicable to procurement of services. One suggestion to deal with this problem was to differentiate clearly in the subparagraph those factors that would be applicable only to goods and construction from those that would be applicable also to services. Another suggestion was to add wording to make it clear that the intention was to apply only some of those factors to services. It was agreed to leave the matter to the drafting stage.

Article 40

118. It was pointed out that the wording in paragraph (1) referring to transport and other charges should be aligned with the approach agreed on by the Working Group relative to services in other similar provisions.

Article 42

119. The Working Group agreed that there would be a need to add to article 42 those aspects of the new procedures for procurement of services that would be exempt from review. It was suggested that these could include the decision to reject all proposals. It was, however, agreed that this type of modification of article 42 could only be done comprehensively after finalization of all the provisions on procurement of services.

Article 46

120. A view was expressed that the possibility of suspension of the procurement proceedings should be excluded for some services, especially in those instances where it would be harmful to the procuring entity for the provision of the services to be delayed or discontinued even for a short period. It was pointed out, however, that suspension of the procurement proceedings was a procedure that was available only under the conditions specified in article 46 and that was subject to avoidance by the procuring entity, in accordance with paragraph (4), by way of a certification that urgent public interest required that the procurement proceedings not be suspended.

New article on special procedures for procurement of services

121. Subsequent to its discussion of article 38 (see paragraphs 65-74), the Working Group considered the following text of a new article setting forth special procedures for procurement of services:

Article 39 bis. Request for proposals for services

(1) A procuring entity shall solicit proposals for services or, where applicable, applications to prequalify by causing an invitation for proposals or an invitation to prequalify, as the case may be, to be published in . . . (the enacting State specifies the official gazette or other official publication in which the invitation for proposals or to prequalify is to be published).

(2) The invitation for proposals or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade or professional publication of wide international circulation.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this article the procuring entity may:

(a) where the services to be procured are available only from a limited number of suppliers or contractors, solicit proposals only from those suppliers or contractors; or

(b) where the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, solicit proposals from a sufficient number of suppliers and contractors to ensure effective competition.

(4) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) the relative qualifications, experience, reputation, reliability, professional and managerial competence of the supplier or contractor;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;

(c) the price submitted by the supplier or contractor for carrying out its proposal including any ancillary or related costs;

(d) the effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of (this State), the extent of participation by local suppliers and contractors, the encouragement of employment, the economic development potential offered by the proposal, the development of local experience, . . . (the enacting State may expand subparagraph (b) by including additional factors));

(e) if authorized by the procurement regulations (and subject to approval by . . . (each State designates an organ to issue the approval),) in evaluating and comparing the proposals, a procuring entity may grant a

margin of preference for the benefit of proposals by domestic suppliers or contractors which shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the services to be procured and the location where the services are to be provided;

(c) the factors to be used by the procuring entity in determining the successful proposal, including any margin of preference and any factors to be used pursuant to paragraph (4)(d) of this article and the relative weight of such factors; and

(d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.

(6) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the procurement proceedings.

(7) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(8) In evaluating proposals in the procurement of services, the procuring entity shall apply only the criteria referred to in paragraph (4) of this article.

(9) The procuring entity, in ascertaining the successful proposal may use any of the methods provided for in paragraphs (10), (11) and (12) of this article.

(10) (a) The procuring entity may establish a threshold level with respect to quality and technical aspects of the proposals and, without considering the price of the proposals, rate each proposal in accordance with the factors for evaluating the proposals as set forth in paragraph (4) of this article and the relative weight and manner of application of those factors as set forth in the request for proposals. The procuring entity shall then compare the proposals that have attained a rating at or above the threshold level.

(b) The successful proposal shall then be:

(i) the proposal with the lowest price; or

(ii) the proposal with the highest combined evaluation of the price and of technical capacity as rated in accordance with subparagraph (a) of this article.

(11) The procuring entity may engage in negotiations with suppliers and contractors. Such negotiations shall either:

(a) be carried out in accordance with paragraphs (7), (8), (9) and (10) of article 38; or

(b) be carried out in accordance with paragraph (12) of this article.

(12) (1) Any negotiations pursuant to paragraph (11)(b) of this article shall be confidential.

(2) Subject to article (11), one party to the negotiations shall not reveal to any other person any technical, price or any other information relating to the negotiations without the consent of the other party.

(3) The procuring entity shall:

(a) establish a threshold level in accordance with paragraph (10)(a) of this article;

(b) invite for negotiations on the price or other aspects of its proposal the supplier or contractor that has attained the highest rating in accordance with paragraph (10)(a) of this article;

(c) inform the suppliers or contractors that attained ratings above the threshold level that they may be considered for negotiation if the negotiations with the suppliers or contractors with higher ratings do not result in a procurement contract;

(d) inform the other suppliers or contractors that they did not attain the required threshold level;

(e) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (12)(3)(b) of this article will not result in a procurement contract, 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 highest 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 for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

Title

122. The Working Group was sympathetic to the concern that the proposed title of the provision might not indicate with sufficient clarity that the procedures to follow were independent and separate from the procedures under article 38 for request for proposals. Several proposals were adduced including: to retain the present title, but to rename article 38 "Request for proposals for goods or construction"; to rename the new provision "Call for expressions of interest"; and to rename it "Special procedures for request for proposals for services". The greatest degree of interest was shown in the latter proposal, as it was felt to highlight the character of the provision as special for procurement of services and to avoid alteration of the existing title of article 38. The Working Group requested the Secretariat to consider the matter further prior to the next session, and decided to include provisionally, in square brackets, both the existing title and the preferred alternative.

Paragraphs (1), (2) and (3)

123. The Working Group next considered the solicitation procedures set forth in the above paragraphs of the proposed new article. It noted that the proposed text, in

paragraphs (1) and (2), required a wider solicitation procedure, one patterned essentially on the solicitation requirements for tendering proceedings, and that paragraph (3) provided for limited solicitation in a manner based substantially on the requirements for restricted tendering.

124. A spectrum of views and concerns were expressed as regards the above solicitation procedures. On one end of the spectrum was the view that the proposed extensive solicitation requirements should be retained because they reflected that the new procedure was intended to be used in the bulk of service procurement and were therefore necessary to promote the objectives of the Model Law. It was pointed out in this regard that the procedures set out in paragraphs (1) and (2) only involved the publication of the notice of the procurement and not the solicitation documents themselves. On the other end of the spectrum was the view that the proposed solicitation requirement placed an excessive, unrealistic burden on the procuring entity, thus causing inefficiency in procurement. In support of that view, it was stressed that the imposition of a wide solicitation requirement would in some cases have an anti-competitive effect, since it would cause suppliers or contractors to refrain from participating in procurement proceedings in view of the low mathematical chance of being selected and the high cost of preparing proposals. It was also observed that, even where a threshold rating was applied to reduce the number of proposals to be finally considered, some degree of consideration or evaluation was involved. It was further pointed out that precisely because of such considerations professional services were traditionally procured through the use of a limited solicitation procedure. This point prompted the observation that the scope of the services to be covered would extend beyond merely professional services. In response to that observation, it was suggested that the bulk of such other services might anyway be procured through tendering proceedings.

125. A third line of approach, occupying to some degree a middle ground between the two views cited above, involved in one form or another an attempt to determine the extent of the solicitation requirement according to the value of the procurement contract. This type of approach would be aimed at avoiding the imposition of complicated procurement procedures for routine, low-value service contracts that did not justify the use of such procedures. One method of accomplishing this end might be to point out in the Guide to Enactment that low-value service contracts might be excluded by the enacting State by way of article 1(2) of the Model Law. It was suggested that another, more targeted way of achieving the same result, without necessarily excluding the entirety of the Model Law, would be to add a provision specifically excluding the broad solicitation requirements in the case of low-value service contracts.

126. Faced with the above spectrum of views, the Working Group felt that it would be desirable to engage at the next session in further deliberations on the question of the extent of solicitation requirements. Accordingly, it requested the Secretariat to prepare for that session variants reflecting the views that had been presented. In addition to the views that had been expressed on the basic question of the extent of the solicitation requirement, the Working

Group noted several other observations that were made, some of which might be reflected in a future draft. They included that: the public solicitation procedures should not preclude the procuring entity from additionally engaging in direct solicitation; consideration should be given to providing that no right to have a proposal evaluated was conferred by virtue of the solicitation procedures; mechanisms should be included in the Model Law, or at least mentioned in the Guide to Enactment, to ease, where appropriate, the burden imposed on the procuring entity; for example, a three-stage evaluation process might be relevant, the first stage of which would be a quick check as to whether proposals met certain mandatory requirements; the provisions in paragraph (3)(a) should mirror more closely the strict corresponding rule for restricted tendering, namely, by requiring solicitation in the cases concerned from "all" suppliers of the service in question. A variant of the latter proposal was to require solicitation in such cases from "all known" suppliers or contractors so as to avoid placing excessive research tasks on the procuring entity, though the practicability of that proposal, along with that of the proposal to add only the word "all", was questioned.

Paragraphs (4) and (5)

127. A proposal was made to re-order the paragraphs in article 39 *bis* so as to better reflect the actual sequence in which the various procedures would take place. It was, for example, suggested that the current paragraph (5), on the contents of the request for proposals, should follow paragraph (3) on solicitation procedures. It was agreed to leave this matter to the drafting stage.

128. It was pointed out that one issue that arose in the provision of most professional services was the eligibility of the supplier or contractor in providing the services because of licensing requirements. It was however suggested that, though the issue of eligibility might be important to include in paragraph (4)(a), it was different from the question of licensing, which had more to do with qualification and which was dealt with under article 6. There was general agreement that paragraph (5) should provide that any eligibility requirements should be notified in the request for proposals.

129. A proposal was made that the last sentence of the chapeau to paragraph (4) should end with the word "only". It was explained that the intention was to limit the procuring entity to applying only those criteria mentioned in paragraph (4). It was, however, pointed out this would not be appropriate because the criteria in paragraph (4) might not be all encompassing and, because the procuring entity might wish to apply additional criteria, it should be entitled to do so as long as the additional criterion was not discriminatory. It was agreed that the crucial requirement in this regard was that, in accordance with paragraph (5), the procuring entity should pre-disclose to all suppliers and contractors the criteria it would apply and also the method to be used in the selection of the successful proposal.

130. Other proposals of a drafting nature included the following: that the word "responsibility" should be added to and the word "relative" deleted from paragraph (4)(a);

that in paragraph (4)(b) the words "effectiveness of the proposal" might not correctly capture the requirement that the proposal was intended to address; and that the word "reflected" in paragraph (4)(e) should be replaced by the word "included". It was also noted that the language in paragraph (5)(b) regarding the location where the services were to be provided should be aligned with the language agreed on for the other similar provisions (see paragraphs 105-107).

Paragraphs (6)-(10)

131. It was pointed out that paragraphs (8) and (9) should make it clear that, in evaluating and ascertaining the successful proposal, the procuring entity should only use the criteria and method of selection that had been notified to the suppliers and contractors in the request for proposals.

132. Another issue raised in regard to paragraph (9) was that, though it referred to the methods of ascertaining the successful proposal as set out in paragraphs (10), (11) and (12), paragraph (12) was not actually being presented as a separate method, but only set rules for negotiations in accordance with the method in paragraph (11)(b). It was therefore agreed that paragraph (11)(b) should be moved to paragraph (12).

133. It was suggested that there should be a general provision allowing for pre-evaluation negotiations, even in cases where the procuring entity intended to select the successful proposal by using the method provided for in paragraph (10). It was stated that such negotiations would be useful in enabling the procuring entity and the suppliers and contractors to arrive at a common understanding of the requirements of the procuring entity. It was, however, pointed out that it might not be appropriate to allow for pre-evaluation negotiations as this procedure could be open to abuse. It was agreed that a better alternative would be to establish in article 39 *bis* that the procuring entity could convene a meeting similar to the one provided for in article 26(3), at which clarifications on the request for proposals could be made.

134. A view was expressed that the threshold established under paragraph (10)(a) was not relevant to those cases where the procuring entity would select the successful tender on the basis of a combined evaluation of the price and technical aspects of the proposal in accordance with paragraph (10)(b)(ii). It was, however, pointed out that, even in such cases, the threshold would be of use to the procuring entity because it would limit the risk of selecting a proposal with an attractive price but of very low technical merit.

135. It was pointed out that a common practice in the evaluation of services was to use a two-envelope mechanism so as keep the technical aspects of the proposals separate from the price and to reveal the prices only after the technical evaluation was completed. It was stated that this was an important mechanism for avoiding the possibility of the price influencing the technical evaluation and that, although this separation was alluded to in paragraph (10)(a), it was important to make it clearer.

Paragraphs (11) and (12)

136. The Working Group was favourably disposed to including in the Model Law the various types of negotiation and evaluation procedures set forth in paragraphs (11) and (12). The former provision provided for selection of the lowest price proposal, or of the best proposal on the basis of a combined price and technical rating, while paragraph (12) provided for selection of a proposal after negotiations with the highest technically rated supplier or contractor. It was suggested that the fact that paragraphs (11) and (12) presented alternative paths for the procuring entity needed to be made clearer. Particular emphasis was also placed on the need to make it clear that the request for proposals should predisclose the type of evaluation and selection approach to be used by the procuring entity.

137. By way of general remarks, the Working Group was urged to consider whether the totality of the various evaluation and selection methods presented should suffice to make the new special article the sole method for procurement of services, other than for those services that could be procured through tendering, request for quotations or single-source procurement. It was suggested that such an approach would be more focused and simpler to apply for the procuring entity than the approach currently agreed under article 16(3). It was said that the new article would contain the essential features in particular of request for proposals and competitive negotiation, thus obviating the need in article 16(3)(b) to make available to the procuring entity a potentially confusing or complicated range of choices of procurement methods. However, the Working Group agreed that the new article should not be a substitute for two-stage tendering, request for proposals, or competitive negotiations.

138. As regards the content of paragraph (11), the Working Group expressed a preference in subparagraph (a) for avoiding the use of the cross-reference method of incorporating the negotiation procedures, including the BAFO process, from request for proposals. It was felt that a clearer distinction would be drawn between the new special article on services and the provisions on request for proposals for goods and construction if those negotiation procedures were to be restated in the new article. It was also suggested that the cross-reference to article 38(9) was not appropriate since slightly different evaluation criteria were provided in the new provision. Another suggestion was that subparagraph (b) should form a unit with paragraph (12), rather than being a part of paragraph (11). A further suggestion was that, due to the length of the proposed new article, consideration might be given to presenting in a separate article paragraph (12), which it was incidentally remarked needed to be renumbered to accord with the style used in the Model Law. A last point made with regard to paragraph (12) was that it should refer in paragraph (3)(b) to the negotiation of a "reasonable" price.

139. In the discussion of paragraphs (11) and (12), several speakers alluded to the lack of an express provision providing for the rejection by the procuring entity of all proposals, akin to the provision set forth in article 33 for tendering proceedings. It was agreed that such a right to reject all submissions was an important right that should be available for all procurement methods. The Secretariat was

therefore requested to present to the Working Group at its next session a draft of a provision on the matter, to be included in chapter I. The Working Group was motivated by the concern that a mention of the right to reject all submissions in the new article might leave the unintended implication that such a right was present only for those methods in which it was mentioned expressly. At the same time, the Working Group stressed that amendments to the Model Law at the present point should be kept to a clear minimum and that the only amendments that should be considered were amendments that resulted from the expansion of the Model Law to cover services and that would improve the text, without altering its principles.

140. Various suggestions were proffered as to the content of a general provision on rejection of all submissions. One suggestion was that a clear distinction should be drawn between the rejection of all submissions on the basis of a qualitative assessment and the rejection of all submissions pursuant to a change in policy or attributable to a budgetary shortfall. Another view was that it would be preferable not to make any such distinction, but to refer to rejection of all submissions "if it is in the public interest to do so". A further view, more in the latter direction, was that the present formulation of article 33 should be retained in crafting the new general provision. The Working Group was also reminded that a line might somehow have to be drawn between the period of time during which the rejection of all submissions would be permissible and the point of time when the procuring entity would be required to conclude a procurement contract. Lastly, there was broad agreement on two points: that the right to reject all submissions should be subject to the prior disclosure in the solicitation or analogous documents, and that the exercise of the right should be exempt from review under article 42, as was presently the case with article 33.

141. Another question that came up in the discussion of paragraphs (11) and (12) concerned the extent to which any provisions should be included in particular on the formation of the contract that would emerge from the negotiations or other method of selection employed under the new procedure. It was generally agreed that more needed to be said about the contract than was presently the case, bearing in mind that the new procedure was designed to be the principal method for the procurement of services. It was agreed that the rules set forth for tendering proceedings in article 35 should generally be applicable to the new procedures for services, an end that might be achieved by way of a cross-reference. The Working Group was also strongly urged to include a requirement that the request for proposals for services should include a copy of the form of the contract to be signed. It was suggested that this would help to protect the interests of the public purchaser, since contracts drafted by the supplier or contractor would naturally not be drawn up from the primary perspective of the interests of the public purchaser. Support was expressed for the suggestion, though it was questioned whether a preferable, more flexible approach might not be to mention the procedure as an option.

142. Some interest was also expressed in the possibility that it might be appropriate, in the light of the addition of the new procedures, to attempt to include in chapter I a

provision on formation of contract applicable to various methods of procurement. Hesitation was expressed as to the proposed inclusion of a general provision on formation of contract. It was recalled that the decision to include a provision on contract formation only for tendering proceedings had been a conscious one, thus leaving that matter, in the case of other procurement methods, to the applicable contract law. It was noted that, because of the variable circumstances and less formal procedures involved in some of those other methods, it might be difficult to draft a meaningful general rule. The Working Group did decide, however, to consider the matter on the basis of an assessment by the Secretariat of the feasibility of a general provision, to be presented to the next session.

143. After deliberation, the Working Group requested the Secretariat to revise the new procedures, taking into account its deliberations and decisions. The Working Group also noted the view of some delegations that it would be preferable to attempt to reintegrate the special procedures for services into article 38.

IV. OTHER ISSUES

144. It was suggested that either the Model Law or the Guide to Enactment should include some discussion with respect to the techniques and practice of rating tenders, proposals or offers with a view to avoiding inappropriate or corrupt application. A suggestion was also made that there should be a provision in article 39 *bis* giving some direction to the procuring entity as to the machinery of Government appropriate for ascertaining the successful proposal, including how to carry out the ratings. It was however pointed out that a similar proposal had been made during the Commission's deliberations on the Model Law and had been rejected as going too far in dictating to enacting States how to organize their internal governmental machinery.

145. The Working Group also considered a proposal to provide in article 39 *bis* that the successful proposal could be selected by way of a design contest. It was pointed out that this was a method that was commonly used in the evaluation of proposals that had an aesthetic content. It was stated such a provision could deal with such issues as the composition and impartiality of the selecting jury or panel, and that such a selection process should be limited to the aesthetic component of the proposal. It was also pointed out that such a provision would only be appropriate where the jury makes the award or provides a decision that is binding on the procuring entity. It was agreed that the draft of such a provision would be presented to the next session of the Working Group for discussion. A concern was expressed, however, that such a provision should not be drafted in such a manner as to lead to the conclusion that the use of design contests was limited to procurement of services. It was also suggested that the use of the word "jury" or "juries" should be avoided in view of the differing connotations that it might have.

146. A concern was expressed that, in defining procurement as "acquisition by any means", the question would arise as to whether the Model Law was intended to cover services that were provided to public entities free of

charge. The Working Group was of the view that, beyond raising the issues of lobbyists and consultants that would be paid for by third parties, and beyond the possibility that services might be provided to Governments for free or for altruistic purposes, the question concerned the legislative framework that regulated government ethics and went beyond the provisions of article 13 of the Model Law on inducements from suppliers and contractors. The Working Group agreed that it would be sufficient to deal with the problem by making it clear that the Model Law regulated acquisition in return for payment. A view was expressed that this might be accomplished by using an expression along the lines of "acquisition for compensation".

147. A question was also raised regarding the definition of "goods" as earlier agreed on by the Working Group. It was noted that this definition only gave examples of objects that could be regarded as goods and provided the enacting State with the option of adding to the list of examples. It was suggested that, considering that the definition of "services" included everything that was neither goods nor construction, it would be preferable to have a definitive definition of goods, so as to avoid two open-ended definitions. It was therefore suggested that a definition of goods could provide as follows:

"'Goods' means objects of every kind and description including raw materials, products, and equipment, and objects in solid or gaseous form, and electricity and includes services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves."

148. The Working Group decided to consider this proposal further at its next session.

149. The view was again expressed that, considering that the present formulation of article 39 *bis* included various methods that involved negotiations, including negotiations as provided for under article 38, it should be possible to limit procurement of services to be carried out only by means of either tendering or article 39 *bis*. It was pointed out that this would have the benefit of simplifying the Model Law by precluding the availability of all the other methods and also article 39 *bis* for procurement of services. A view was expressed that the Working Group would have another opportunity to review the matter at the next session.

150. It was also suggested that the Secretariat should consider where the new article should be located, bearing in mind that it would now provide the preferred method for procurement of services.

151. A view was expressed that the Guide to Enactment should mention that, as an enacting technique, some States may consider putting the general principle in the law itself and leaving the more detailed rules for the procurement regulations.

V. FUTURE WORK

152. Views were strongly expressed that there would be need to hold an additional meeting of the Working Group so as to consider the outstanding issues before presenting a

final draft text to the Commission at its twenty-seventh session. It was noted that the next session of the Working Group was scheduled to be held in New York from 14 to 25 March 1994. It was stated that it would otherwise be impossible to report to the Commission on the basis of the work done at the present session.

153. A suggestion was also made that consideration should be given as to how the Model Law should be presented in its final form. In this regard, support was expressed for

presenting a consolidated text including both the Model Law and the Guide to Enactment in which the articles of the Model Law would be followed by the sections of the Guide in which they are discussed. It was also noted that a list of the amendments to the Model Law to cover services would be a useful tool for States that had already adopted legislation based on the Model Law. It was, however, pointed out that the form in which the final text of the Model Law will be presented was dependent on the availability of sufficient financial resources.

B. Working paper submitted to the Working Group on the New International Economic Order at its sixteenth session: Draft model legislative provisions on procurement of services: note by the Secretariat

(A/CN.9/WG.V/WP.38) [Original: English]

CONTENTS

	<i>Page</i>
INTRODUCTION	56
DRAFT AMENDMENTS AND ADDITIONS TO THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION TO ENCOMPASS PROCUREMENT OF SERVICES	57

INTRODUCTION

1. The Working Group commenced its work on the topic of procurement at its tenth session, held from 17 to 25 October 1988, and devoted its eleventh to fifteenth sessions to the preparation of the Model Law on Procurement of Goods and Construction (the reports of the tenth to the fifteenth sessions are contained in documents A/CN.9/315, 331, 343, 356, 359 and 371). At its tenth session, the Working Group decided to limit the Model Law, at least initially, to the procurement of goods or construction and not to deal at that stage with the procurement of services (A/CN.9/315, para. 25). The UNCITRAL Model Law on Procurement of Goods and Construction was adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993).¹

2. At the twenty-sixth session, the Commission had before it a note prepared by the Secretariat on possible future work on the procurement of services (A/CN.9/378/Add.1). The note addressed: the desirability and feasibility of preparing model legislative provisions on the procurement of services; the main differences between procurement of services and procurement of goods or construction; and the possible contents of model legislative provisions on the procurement of services. In its annex, the note presented the proposed text of possible amendments and supplements

to the UNCITRAL Model Law on Procurement of Goods and Construction that would be designed to expand its scope to cover the procurement of services.

3. After deliberation, the Commission decided that the Working Group should proceed with the preparation of draft provisions on the procurement of services. While differing views were expressed as to the best possible way in which to proceed in formulating the model provisions, it was agreed that they should be presented in a manner that would be suitable both for States that had adopted the Model Law on Procurement of Goods and Construction and for States considering simultaneous adoption for goods and construction as well as for services.²

4. The present note contains proposed draft amendments and supplements to the Model Law that would expand its scope to also cover the procurement of services and that represent an alternative to the possible approach presented in the annex to document A/CN.9/378/Add.1. The main difference between the two proposals is that, while the proposal in document A/CN.9/378/Add.1 is to add, in a chapter IV *bis* to the Model Law, special evaluation procedures to be applied when using tendering for procurement of services, the alternative in the present note would maintain tendering proceedings as they are and add to the provisions on request for proposals special evaluation procedures for procurement of services. This approach might be

¹Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), annex I.

²Ibid, paras. 261-262.

considered preferable because, while tendering proceedings can be used for the procurement of some services, in particular services whose technical and quality parameters and also those of the suppliers can be objectively measured and specified, the procurement of many other types of services would not be carried out by means of tendering proceedings. This is mainly because the tender-evaluation procedures in tendering might, in many cases, be considered not well suited for the procurement of services where the quality and abilities of the supplier are a more significant evaluation factor than the price.

5. The request-for-proposals method in the Model Law would also seem better suited for procurement of services because it would allow the procuring entity to address the request for proposals to a limited number of suppliers or contractors, which is a common practice in the procurement, for example, of consultancy services. It also would provide for advertisements to solicit expressions of interest from suppliers or contractors not directly approached by the procuring entity, but without imposing an obligation on the procuring entity to pursue every single expression of interest it received.

6. The present proposal provides various options to the procuring entity as regards the method of evaluation and selection of a supplier of services in request-for-proposals proceedings. The proposed additional article 39 *bis* would maintain the procedures in article 38 (request for proposals) for the procurement of services except that it would establish different evaluation procedures aimed at taking into account the main differences in the evaluation procedures for goods and construction and for services. The procedures for evaluation in article 39 *bis* would provide for the establishment of a quality and technical threshold, with the successful proposal being chosen from those proposals which attain an evaluation at or above the threshold level. This would be done either through a price-based competition, a competition based on a combination of the technical quality and the price, or through negotiations with the suppliers.

DRAFT AMENDMENTS AND ADDITIONS TO THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION TO ENCOMPASS PROCUREMENT OF SERVICES

1. Change the title of the Model Law to read "UNCITRAL Model Law on Procurement".

2. In article 2(a), add services to the definition of "procurement" and delete the reference to "incidental services" so that the definition of "procurement" would read as follows:

"'Procurement' means the acquisition by any means, including by purchase, rental, lease or hire purchase, of goods, construction or services."

3. In article 2(c), add a reference to "incidental services" to the definition of "goods" as follows:

"'goods' includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity,

and includes services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves."

Comment: In view of the deletion of the reference to incidental services from the definition of "procurement", the effect of this addition is to enable the procuring entity to procure incidental services that are an integral part of a contract for the procurement of goods in accordance with the provisions in the Model Law that regulate the procurement of goods rather than in accordance with the provisions on the procurement of services. Such a reference to incidental services is already found in the definition of "construction".

(Note to the Working Group): The Working Group might wish to consider providing a definition of services, especially if the Model Law were to contain provisions applicable only to the procurement of services. One approach to the definition would be to provide that the term "procurement of services" covers products that are neither goods nor construction. This, for example, would seem to be the effective meaning of the term "public service contracts" under the European Community Directive on the Coordination of Procedures for the Award of Public Service Contracts (Directive EEC 92/50). Another approach might be to provide a blank space in the Model Law in which the enacting State would provide its own definition or listing of what are to be treated as services in its jurisdiction. This would provide flexibility, since some products might be treated as services in some States and not in others, while also providing for transparency, since the enacting State would be called upon to indicate in its legislation what would be regarded as services.

4. Except in the articles mentioned in paragraph 5 hereunder, make the following changes throughout the Model Law:

(i) where the words "goods or construction" are followed by the words "to be procured", replace the words "goods or construction to be procured" by the word "procurement";

(ii) where the words "goods or construction" are not followed by the words "to be procured", replace the words "goods or construction" by the words "the procurement".

5. Add the words "or services" after the word "goods" in articles 19(1), 20(1)(d) and 23(1)(c), and, in articles 18(a) and 25(g), after the word "construction". In article 20(1)(a), (b) and (c), replace the words "goods or construction" by the words "goods, construction or services".

6. In article 9(2), add a reference to article 39 *bis* (5)(c)(i), (ii) and (iii), so as to cover those communications in the procurement of services to which article 9(2) would be applicable.

7. In articles 19(1) and 40(1), add the words "or services" after the word "goods".

Comment: This would enable the procuring entity to use, for procurement of services, the request-for-quotations method currently found in the Model Law.

8. In article 23 (1)(b), add the words "or a description of the services to be procured" after the words "to be effected".

9. In article 38, add a paragraph (7) *bis* as follows:

"(7) *bis*. In the procurement of services, in place of the procedures provided for in paragraphs (7), (8) and (9) of article 38, the procuring entity shall evaluate the proposals in accordance with article 39 *bis*."

Comment: The effect of this addition would be to apply the evaluation procedures in article 39 *bis* to the procurement of services by means of request for proposals, in place of the evaluation procedures provided for in article 38(7), (8) or (9), which would then only be used for the procurement of goods and construction.

(*Note to the Working Group*) The Working Group may wish to consider whether the conditions for use of request for proposals as set out in article 17(1) are broad or flexible enough to encompass the types of cases in procurement of services for which tendering proceedings would not be the preferred method of procurement.

10. Add an article 39 *bis* as follows:

"Article 39 *bis* *Evaluation of proposals for procurement of services*

(1) In evaluating proposals in the procurement of services, the procuring entity shall apply only the criteria referred to in article 38(3).

(2) (a) The procuring entity shall establish a threshold level with respect to quality and technical aspects that the proposals shall have to attain in order to merit further consideration under paragraph (3) of this article.

(b) Without considering the price of the proposals, the procuring entity shall rate each proposal in accordance with the factors for evaluating the proposals as set forth in article 38(3) and the relative weight and manner of application of those factors as set forth in the request for proposals. The procuring entity shall then rank the proposals in accordance with the ratings.

(3) (a) The procuring entity shall then compare the proposals that have attained a rating at or above the threshold level established in accordance with paragraph (2)(a) of this article.

(b) The successful proposal shall be either:

- (i) the proposal with the lowest price; or
- (ii) the proposal with the highest combined evaluation of the price, and of technical capacity as rated in accordance with paragraph (2)(b) of this article; or
- (iii) the proposal which the procuring entity selects after negotiations in accordance with paragraph (4) of this article.

(4) (a) The procuring entity may engage in negotiations with suppliers and contractors as a means of ascertaining the successful proposal in accordance with

paragraph (3)(b)(iii) of this article if it has so specified in the request for proposals.

(b) (i) Any negotiations between the procuring entity and a supplier or contractor shall be confidential.

(ii) Subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or any other information relating to the negotiations without the consent of the other party.

(c) The procuring entity shall:

(i) invite for negotiations on the price or other aspects of its proposal the supplier or contractor that has attained the highest rating in accordance with paragraph (2)(b) of this article;

(ii) inform the suppliers or contractors that attained ratings above the threshold level that they may be considered for negotiation if the negotiations with the suppliers or contractors with higher ratings do not result in a procurement contract;

(iii) inform the other suppliers or contractors that they did not attain the required threshold level;

(iv) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (4)(c)(i) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations.

(d) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second highest 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 for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals."

Comment: Article 39 *bis* is meant to take account of the fact that, in many cases, the major factor in the examination and evaluation of proposals in the procurement of services is the technical competence and ability of the supplier or contractor. The establishment of a threshold level enables the procuring entity to, in particular, apply a price-based criterion for the evaluation of the proposals in those circumstances where it is appropriate to do so.

The procuring entity is presented with three options as to how to select the successful proposal. The first option, in paragraph (3)(b)(i), is presented because, if the qualification threshold is set at a sufficiently high level, then all those suppliers or contractors that attain a rating at or above that level would in all probability be able to provide the services needed by the procuring entity at more or less the same level of quality. This would permit the procuring entity to subject those proposals to a straightforward price competition.

In the second option, as set out in paragraph (3)(b)(ii), the procuring entity would, using a pre-disclosed formula, weight the technical aspects of the proposals, weight the

price of the proposals as a separate criterion, and then combine the results of the evaluations according to the two weighted criteria in rating each proposal. It would then compare the ratings of the proposals on the basis of the combined evaluations, and the proposal with the highest combined rating would be the successful one.

While paragraphs (3)(b)(i) and (3)(b)(ii) do not envisage negotiations, under the procedures in paragraph (3)(b)(iii) the procuring entity may negotiate with suppliers so as to ascertain the successful proposal. Such negotiations are to be conducted in accordance with paragraph (4) of this article.

It would appear that negotiation to ascertain the successful proposal as now set out in paragraph (3)(b)(iii) is commonly used in the procurement of consultancy services. Paragraph (4) aims at ensuring that the negotiations are fair to both the procuring entity and the suppliers and contractors. It provides for confidentiality and respect for the ranking in the technical rating, while leaving the procuring entity some flexibility in determining which supplier or contractor best meets its needs.

(Note to the Working Group): It is, however, conceivable that under certain circumstances the procuring entity may wish to negotiate with a number of suppliers so as to enable them to submit their best and final offers before a final evaluation. This is not provided for in article 39 *bis*, where the negotiations under paragraph (4) may only be held with one supplier at a time with the intention of entering into a procurement contract. The Working Group may wish to consider whether to provide for such broader negotiations, prior to the evaluation procedures provided under article 39 *bis*.

11. In article 42(2), add a subparagraph (e) *bis* as follows:

"(e)*bis* a selection of the method of evaluation in the procurement of services pursuant to article 39 *bis*;"

Comment: This would exempt the selection of the evaluation procedure by the procuring entity from the review procedures.

(Note to the Working Group)

(i) Paragraph (1) of article 39 *bis* states that the procuring entity may only apply those criteria that are provided for in article 38(3). The assumption here is that those criteria that are peculiar to the procurement of services, in particular the experience and qualifications of the supplier and of the personnel proposed to provide the services, are covered by the criterion in article 38(3)(a) which refers to the managerial and technical competence of the supplier. The Working Group may, however, wish to consider whether it would be necessary to expand the criteria in article 38(3) in order to take into account the specific requirements peculiar to the procurement of services;

(ii) In the evaluation procedures, there is no provision on the application of margins of preference for domestic suppliers or contractors for the procurement of services. The assumption is that, if the procuring entity wishes to apply margins of preference, it could so specify in the request for proposals. However, a narrow interpretation of the criteria in article 38(3) and of their manner of application in article 39 *bis* might not lead to this conclusion. The Working Group may therefore wish to consider whether to provide expressly for the application of margins of preference in the evaluation of the proposals for the procurement of services;

(iii) The Working Group may also wish to consider whether, considering that article 39 *bis* establishes an evaluation procedure that is carried out in two stages (by first considering and evaluating the technical aspects of the offer before considering the price) and considering that paragraph (4) provides for negotiation as a procedure for evaluation in the procurement of services through request for proposals, there is a need to maintain two-stage tendering or competitive negotiations as methods that may be used for procurement of services.

C. Report of the Working Group on the New International Economic Order on the work of its seventeenth session (New York, 14-25 March 1994)

(A/CN.9/392) [Original: English]

CONTENTS

	Paragraphs
INTRODUCTION	1-9
I. DELIBERATIONS AND DECISIONS	10
II. CONSIDERATION OF DRAFT AMENDMENTS TO THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION ..	11-114
General remarks	11-15
Title	16-18
Preamble	19
CHAPTER I. GENERAL PROVISIONS	20-50
Article 1. Scope of application	20-21
Article 2. Definitions	22-30

	<i>Paragraphs</i>
Articles 3-5.....	31
Article 6. Qualifications of suppliers and contractors	32-37
Article 7. Prequalification proceedings	38-40
Article 8. Participation by suppliers or contractors	41
Article 9. Form of communications	42
Article 10. Rules concerning documentary evidence provided by suppliers and contractors	43
Article 11. Record of procurement proceedings	44-45
Article 11 <i>bis</i> . Rejection of all tenders, proposals or offers	46
Article 11 <i>ter</i> . Entry into force of the procurement contract	47
Articles 12 and 13	48
Article 14. Rules concerning description of goods or construction	49
Article 15. Language	50
CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE	51-103
Article 16. Methods of procurement	51-55
Article [39] <i>bis</i> . [Request for proposals for services] [Special procedure for request for proposals for services] [Special procedure for procurement of services]	56-84
Article 16. Methods of procurement	85-95
Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation	96-98
Article 18. Conditions for use of restricted tendering	99
Article 19. Conditions for use of request for quotations	100
Article 20. Conditions for use of single-source procurement.....	101-103
CHAPTER III. TENDERING PROCEEDINGS	104-106
Articles 21-24.	104
Article 25. Contents of solicitation documents	105
Articles 26-35.	106
CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING	107-111
Article 36. Two-stage tendering	107-108
Article 37. Restricted tendering	109
Article 38. Request for proposals	110
Articles 39-41.	111
CHAPTER V. REVIEW	112-114
Article 42. Right to review	112-113
Articles 43-47.	114
III. REPORT OF THE DRAFTING GROUP.....	115-130
IV. FUTURE WORK	131-132
	<i>Page</i>
<i>Annex.</i> [Draft UNCITRAL Model Law on Procurement of Goods, Construction and Services]	73

INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. The

Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). It devoted its eleventh to fifteenth sessions to the preparation of the Model Law on Procurement of Goods and Construction (the reports of the tenth to

fifteenth sessions are contained in documents A/CN.9/315, 331, 343, 356, 359 and 371). The Working Group decided that it would be preferable to first finalize provisions for the procurement of goods and construction before elaborating such provisions for the procurement of services (A/CN.9/315, para. 25). A principal reason for this decision was that certain aspects of the procurement of services are governed by different considerations from those that govern the procurement of goods and construction. The UNCITRAL Model Law on Procurement of Goods and Construction was adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993).

2. At that twenty-sixth session, on the basis of a note on possible future work on the procurement of services prepared by the Secretariat (A/CN.9/378/Add.1), the Commission agreed to undertake work in the area and entrusted the preparation of draft model legislative provisions on the procurement of services to the Working Group. The Commission agreed that the Working Group should finalize its work on draft model provisions on procurement of services in time for consideration by the Commission at its twenty-seventh session.

3. At its sixteenth session held at Vienna from 6 to 17 December 1993, the Working Group reviewed the Model Law in order to identify possible amendments that would enable the Model Law to encompass procurement of services. The Secretariat was requested to prepare a revised version of the Model Law reflecting the deliberations and decisions that had taken place.

4. The Working Group, which was composed of all States members of the Commission, held its seventeenth session in New York from 14 to 25 March 1994. The session was attended by representatives of the following States members of the Working Group: Argentina, Bulgaria, Canada, China, France, Germany, Iran (Islamic Republic of), Japan, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Slovakia, Spain, Thailand, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

5. The session was attended by observers from the following States: Colombia, Cyprus, Holy See, Mongolia, Myanmar, Panama, Republic of Korea and Switzerland.

6. The session was also attended by observers from the following international organizations: Asian-African Legal Consultative Committee (AALCC), Inter-American Development Bank and International Bar Association (IBA).

7. The Working Group elected the following officers:

Chairman: Mr. David Moran Bovio (Spain)

Rapporteur: Mr. Abbas Safarian (Islamic Republic of Iran)

8. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.V/WP.39);

(b) Draft amendments to the UNCITRAL Model Law on Procurement of Goods and Construction to incorporate procurement of services (A/CN.9/WG.V/WP.40);

(c) Report of the Working Group on the New International Economic Order on the work of its sixteenth session (A/CN.9/389);

(d) Procurement of services: Note by the Secretariat (A/CN.9/378/Add.1);

(e) Procurement: draft model legislative provisions on procurement of services: Note by the Secretariat (A/CN.9/WG.V/WP.38);

(f) UNCITRAL Model Law on Procurement of Goods and Construction;¹

(g) Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393).

9. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Model legislative provisions on procurement of services.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

10. The Working Group reviewed the draft amendments to the UNCITRAL Model Law on Procurement of Goods and Construction designed to encompass procurement of services as set forth in the text of document A/CN.9/WG.IV/WP.40. After concluding its deliberations, the Working Group requested the drafting group to prepare a draft revised version of the Model Law reflecting the deliberations and decisions that had taken place. The deliberations and decisions of the Working Group are set forth below in chapter II of the present report. The report of the drafting group containing the text of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services as agreed by the Working Group is set forth in the annex to the present report.

II. CONSIDERATION OF DRAFT AMENDMENTS TO THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION

General remarks

11. The Working Group commenced its work by considering further the question of the form of the model statutory provisions on procurement of services, a matter that had been considered but not finally disposed of at the sixteenth session (A/CN.9/389, para. 11). In that regard, the view was expressed that the mandate of the Working Group, in particular the possible desire of some enacting States to have a free-standing model dealing with procurement of services,² would best be fulfilled by the formulation of a completely free-standing model law dealing exclusively with the procurement of services. It was stated

¹Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), annex I.

²Ibid., para. 262.

that such an approach would have the advantage of underscoring the distinct and more complex character of much of the procurement of services. It was also suggested that a separate treatment would limit any adverse effect on the impact and clarity of the existing Model Law in the spheres of goods and construction. Another possible benefit cited was that completely separate treatment would avoid the added appearance of complexity that might result from an attempt to interpolate provisions on services into the existing Model Law.

12. While recognizing the concerns underlying the above proposal of separate treatment, the Working Group decided, as it had at the sixteenth session, that the consolidated approach reflected in the draft text before it was preferable for a number of reasons. Beyond the concern that the proposed separate approach would not be advisable or feasible in view of the limited time available, a number of other grounds were cited for the decision. Those included that, at the national level, many if not most States traditionally dealt with procurement of goods, construction and services in a consolidated legal text, a practice that was likely to continue and of which the Model Law needed to take account. It was suggested that to do otherwise would leave such States with insufficient guidance and would open a window for perhaps unnecessary and harmful departures from the principles embodied in the Model Law. The decision of the Working Group in favour of a consolidated approach was also grounded in a recognition that most of the provisions of the Model Law were in substance also applicable to the procurement of services, a factor that would render the provisions in a separate model for services largely redundant of the Model Law.

13. With regard to a possible desire by some enacting States for a separate treatment of procurement of goods or construction and of procurement of services, it was understood that the revised text being prepared would leave intact the Model Law as it had been adopted by the Commission and recommended by the General Assembly, with a scope limited to procurement of goods and construction.

14. Notwithstanding its preference for a consolidated model statute dealing with goods, construction and services, the Working Group felt that the concerns that had been raised with regard to such an approach needed to be addressed by a more distinct treatment of procurement of services within the Model Law than was apparent in the draft text before it, which reflected the approach agreed upon at the sixteenth session. It was agreed that such a more distinct, clearer treatment of services could be achieved by including in the Model Law a separate chapter dealing with procurement of services, an approach that had been suggested at earlier stages (see the proposal in A/CN.9/378, and the discussion at the sixteenth session reported in A/CN.9/389, para. 11).

15. The Working Group noted that its decision on the contents of the separate chapter, as well as the identification of the provisions that would be applicable to the procurement of goods or construction as well as to the procurement of services, would have to be considered as part of the article-by-article review of the draft amendments to the Model Law in which the Working Group was about to

engage. There was general agreement, however, that the separate chapter would at the least have to contain the special procedures of request for proposals for the procurement of services, currently set forth in article 39 *bis*. It was noted that it might be helpful to divide that currently lengthy provision into several shorter articles. As had been decided at the sixteenth session (A/CN.9/389, paras. 37-44), the procedure in article 39 *bis* would continue to be the preferred method for procurement of services, except in cases falling within the conditions for use of tendering in the case of services, or in cases subject to procurement by other methods. It was not clear at that stage of the deliberations, however, whether that aspect should be dealt with in articles 16 and 17 of chapter II, or as a part of the separate chapter on services.

Title

16. The Working Group considered further whether the expanded text should be entitled simply "UNCITRAL Model Law on Procurement", or whether it would be preferable to use a more explicit title, "UNCITRAL Model Law on Procurement of Goods, Construction and Services". A concern was raised that the shorter reference, only to "procurement", was unclear and would create uncertainty, since a model statute had already been adopted by the Commission dealing with procurement, albeit with procurement of goods and construction and not of services. The concern was raised in particular that such a general title might compound an impression that the Model Law covered transactions not intended to be covered, an impression that might already be drawn from the open-ended nature of the definition of "services" in article 2 (*d bis*). A countervailing view was that a simple reference would accurately reflect the scope of the Model Law.

17. The suggestion was also made that, in order to avoid confusion with the existing Model Law on Procurement of Goods and Construction, it might be more appropriate to reflect the full contents of the revised Model Law that would contain provisions on services by using the title "UNCITRAL Model Law on Procurement of Goods, Construction and Services". A suggestion to differentiate the revised Model Law by referring to its year of adoption was objected to on the grounds that, in some jurisdictions, legislation was not referred to by year of adoption, unless it was superseding earlier legislation on the same subject-matter.

18. Noting that similar questions of terminology would arise at other points in the Model Law, beginning with the preamble, the Working Group decided to defer a decision on the title. The Working Group also noted the observation that the Guide to Enactment should include an explanation in this context of the drafting history and scope of the Model Law.

Preamble

19. In the light of concerns similar to those raised in the discussion of the title, the Working Group expressed a preference, in both the *chapeau* and subparagraph (c), for the expression "procurement of goods, construction and services", rather than for the shortened reference just to "procurement".

Chapter I. General provisions

Article 1. Scope of application

20. It was pointed out that in the Guide to Enactment, there should be a very clear explanation as to why the Working Group decided that it would not be practicable to indicate the types of procurement that would not be subject to the Model Law and that it should be left to States to specify any such procurement in their law or in the procurement regulations. It was stated that the principal reason behind this decision was that States differed significantly in regard to the types of acquisitions that were not subject to public procurement rules.

21. A suggestion was made to delete the word "all" in paragraph (1). It was explained in support of the proposal that that word might be misleading since the intention was not to make each and every procurement subject to the Model Law. The proposal was referred to the drafting group.

Article 2. Definitions

Subparagraph (a) ("procurement")

22. A view was expressed that the words "for compensation" did not properly reflect the intended limitation in the definition and that it might be preferable to use the words "for reward". It was, however, pointed out that the limitation of the definition of procurement to cases involving payment was not proper; it was suggested instead that the nature of the procurement should determine whether it would be excluded from the Model Law. The Working Group therefore decided to define procurement as "acquisition by any means of goods, construction or services".

Subparagraph (b) ("procuring entity")

23. No changes were suggested with regard to subparagraph (b).

Subparagraph (c) ("goods")

24. It was noted that, in the definition of "goods", the word "including" appeared twice and that the drafting group should consider a formulation that avoided this repetition. A suggestion was made that using such words as "and includes" could solve the problem.

Subparagraph (d) ("construction")

25. It was pointed out that the reference to incidental services in the procurement of construction should be aligned with the reference to incidental services in the procurement of goods. This would make it clear that the value of the incidental services would have to be lower than that of the construction, if the procurement contract was still to be considered as one of construction.

Subparagraph (d bis) ("services")

26. A number of concerns were raised regarding the definition of services as found in subparagraph (d bis). One of the concerns was that the definition was very broad and

probably encompassed more than was intended. The acquisition of real estate, purchase of intellectual property rights and public employment contracts were given as examples in this regard. One remedial suggestion was to specifically exclude the acquisition of real estate and public service contracts from the Model Law, either in article 1 or in the definition of services. In opposition to this suggestion, it was pointed out that the Working Group had already decided that, except for procurement involving national defence or security, no other specific exclusions would be made in the Model Law and that any other exclusions could be made by the enacting State under article 1.

27. Objections were also raised with regard to the use of the word "product" to define services, as it was seen to be overly oriented towards tangible goods. The word "anything" was also not generally acceptable for similar reasons.

28. Various proposals were made as to how to deal with the problems raised. One proposal was to append an annex to the Model Law listing either services to which the Model Law would apply, or perhaps listing instead those to which it would not apply. That proposal did not receive support as it was found to be overly complicated and difficult to implement. It was also stated that the Working Group had already decided not to make references to any specific types of services in the Model Law. A suggestion to delete the definition also did not receive support on the basis that this could leave a gap which might lead to uncertainty as to the scope of application of the Model Law. A proposal that received some support was to define "procurement of services" as opposed to defining "services" themselves. It was suggested that such a definition could read as follows: "procurement of services" means any act of procurement which is not the procurement of goods or construction. That proposal was, however, also not generally acceptable as it might raise a drafting anomaly since there was already a definition of "procurement". It was suggested that that concern might be addressed by including a separate paragraph in article 2 stating that, for the purposes of the Model Law, a reference to procurement of services meant any act of procurement that was not the procurement of goods or construction. That suggestion did not receive sufficient support.

29. Another approach proposed was to provide some examples of what could be considered as services and to leave it to the enacting States to refer to additional categories of services if it so wished. Such an approach, however, was objected to as it involved making reference to specific services, something which the Working Group had decided to avoid. Yet another proposal was to make provision for the enacting State to stipulate in the law the categories of services that would be covered under its law. That proposal also did not receive sufficient support as it did not provide an actual definition and could have the unintended effect of providing enacting States with the possibility of further limiting the scope of application of the Model law.

30. It was observed that the intention of the Working Group should be to provide a simple definition to the effect that any procurement that did not involve the procurement of goods or construction would be a procurement of services. It was therefore proposed that such a definition could

read as follows: "‘services’ means any object of procurement other than goods or construction". This could be coupled with a clarification in the definition of "goods" that goods meant physical objects. It was pointed out, however, that it might not be appropriate to refer to physical objects in the definition of "goods" as this might lead to confusion as to whether some goods, for example electricity, were physical objects. Apart from that concern, the latter proposal was found to be generally acceptable and was referred to the drafting group.

Articles 3-5

31. No comments were made on articles 3-5, entitled: "International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]"; "Procurement regulations"; "Public accessibility of legal texts".

Article 6. Qualifications of suppliers and contractors

Paragraph (1)

32. The Working Group exchanged views on the words "necessary professional qualifications, professional and technical competence". One view was that the expression might be shortened for purposes of economy in drafting by removing the adjectives "professional" and "technical". However, the Working Group affirmed the decision taken at the sixteenth session to include wording along the above lines (A/CN.9/389, paras. 84 and 85). It was further agreed that the expression should be partially modified by replacing the words "necessary professional qualifications" by the words "necessary professional and technical qualifications".

33. The Working Group noted an observation that the Guide to Enactment might usefully explain that the expression "possess . . . personnel" was not intended to indicate the manner in which suppliers and contractors should engage personnel, since in particular it was not meant to suggest that suppliers and contractors could not hire specialized staff in response to the award of a procurement contract in order to carry out that contract.

Paragraphs (2)-(4)

34. No comments were made on paragraphs (2)-(4).

Paragraph (5)

35. A view was expressed that the proviso at the end of the paragraph, prohibiting discriminatory measures that were not objectively justifiable, needed to be strengthened in order to remove obstacles to participation by service providers in procurement proceedings. A specific example cited was the case of "establishment" requirements, which required suppliers and contractors to establish a business entity in the State of the procuring entity or to hold assets there. The concern was expressed that the notion "not objectively justifiable", while not objectionable in itself, would not be universally understood as dealing with obstacles that might be encountered by service providers. For

example, the question was raised whether the mere fact that an obstacle to participation such as an establishment requirement was enshrined in the law would render the requirement "objectively justifiable".

36. The prevailing view was that the Model Law should not venture any further into the matter beyond what was stated in the existing wording and that to do so would exceed the scope of the Model Law. It was pointed out in support of the prevailing view that important questions of public policy and protection of the public interest might underlie requirements imposed on service providers, for example, that insurance or financial companies maintain a requisite amount of assets within the jurisdiction of the enacting State.

37. As to the drafting of the remainder of paragraph (5), a proposal was made to delete the words "with respect to the requirements" as unnecessary. That suggestion was referred to the drafting group.

Article 7. Prequalification proceedings

Paragraphs (1) and (2)

38. No comments were made on paragraphs (1) and (2).

Paragraph (3)

39. The Working Group noted that paragraph (3) had been modified in response to the decision at the sixteenth session to review the paragraph in view of the fact that the provisions on prequalification proceedings were meant to have general applicability, irrespective of the method of procurement (A/CN.9/389, para. 90). It was observed that the modified version referred, in addition to tendering proceedings, to request-for-proposals proceedings and to the special procedures for services under article 39 *bis*, though not to competitive negotiation. Questions were raised as to whether the provisions of paragraph (3) should be assumed to have across-the-board applicability to methods of procurement other than tendering, in particular since some of the information that was required to be included in prequalification documents in the context of tendering proceedings would not necessarily be relevant or available in the context of those other methods of procurement, in particular competitive negotiation. One suggestion for dealing with these considerations was to retain the availability of prequalification proceedings for methods of procurement other than tendering, but to exclude the mandatory application of paragraph (3) to prequalification in the context of those other methods. The Working Group formed a small working party to consider that proposal and deferred a decision on paragraph (3). (The decision of the Working Group on the latter question is reflected in article 7(3) in the annex.)

40. As a matter of drafting, it was pointed out that the reference in paragraph (3)(a)(ii) to article 38(4)(a) should be to article 38(4) as a whole. It was also suggested that in the same provision the reference to "request for proposals" should instead be a reference to "request-for-proposals proceedings".

Article 8. Participation by suppliers or contractors

41. No comments were made on article 8.

Article 9. Form of communications

42. It was noted that the reference in paragraph (2) to article 33(3) should be changed to refer to article 11 *bis* (3). It was also noted that it might be necessary to include mention of certain communications pursuant to article 39 *bis*, depending upon the result of the deliberations concerning that article.

Article 10. Rules concerning documentary evidence provided by suppliers and contractors

43. No comments were made on article 10.

Article 11. Record of procurement proceedings

44. It was suggested that the current formulation failed to meet the concern that had been raised earlier that paragraph (1)(d) seemed to give undue prominence to the price (A/CN.9/389, para. 33), since, for example, in requests for proposals and competitive negotiations some suppliers and contractors would not have the opportunity to present a best and final offer containing a price. It was suggested in response, however, that, since article 11 was essentially a record-keeping provision, in those instances where a tender, proposal or offer did not involve a price, there could be no obligation to record a price. It was suggested that the drafting group consider using words such as "if known," in relation to the price. It was also agreed that the drafting group should replace the words "price-determining formula" with words that better described those instances where the tender, proposal, offer or quotation did not contain a price but contained a mechanism by which the price would be calculated.

45. It was noted that the cross-reference in paragraph (1)(e) to article 39 *bis* (5)(e) should be to article 39 *bis* (4)(c), and that the cross-references in paragraph (1)(f) to article 33 and 33(1) should be to article 11 *bis* and 11 *bis* (1), respectively.

Article 11 bis. Rejection of all tenders, proposals or offers

46. No comments were made on article 11 *bis*.

Article 11 ter. Entry into force of the procurement contract

47. A proposal was made for the deletion of paragraph (2), which provided that the procuring entity should disclose the manner of entry into force of the procurement contract in the documents for solicitation of proposals, offers or quotations. It was pointed out that this proposal would actually entail the deletion of article 11 *ter* in its entirety, since paragraph (1) merely referred to article 35. In support of the proposal, it was stated that, since entry

into force of procurement contracts awarded using methods of procurement other than tendering would be governed by local law, the procuring entity should not be burdened with notifying details of law. It was also suggested that procuring entities would comply with any such requirement by including only a general reference to local law, which would be of little use to suppliers or contractors. In support of the provision, it was recalled that the earlier deliberations of the Working Group had been aimed at an attempt to have rules on entry into force that would apply to all methods of procurement (A/CN.9/389, para. 142). It was observed that, from the perspective of transparency, especially for foreign suppliers and contractors, it would be important for the information on entry into force of the procurement contract to be disclosed and that this did not necessarily entail an undue burden on the procuring entity. After deliberation, the Working Group decided to defer a decision on article 11 *ter* until it had reviewed article 39 *bis*. (For further discussion on article 11 *ter*, see paragraph 118.)

Articles 12 and 13

48. No comments were made on articles 12 and 13 entitled: "Public notice of procurement contract awards", and "Inducements from suppliers or contractors".

Article 14. Rules concerning description of goods or construction

49. It was noted that a reference to services would be added to the title.

Article 15. Language

50. It was noted that the words "goods or construction" in subparagraph (b) would be replaced by the words "goods, construction or services".

Chapter II. Methods of procurement and their conditions for use*Article 16. Methods of procurement*

51. It was suggested that, consequent to the earlier decision of the Working Group to have a chapter dealing exclusively with services, it might be necessary to restructure chapter II in particular in view of the decision to add a special chapter on services, and that such a restructuring should be agreed on prior to the review of article 16. Various proposals were made in that direction.

52. One proposal was to limit chapter II only to goods and construction, and to deal in the special chapter on services with all aspects of procurement of services, reflecting there the changes agreed on at the sixteenth session. A variation of that proposal was to repeat, in the chapter on services, all the provisions on conditions for use, appropriately modified, for the methods of procurement currently available for goods and construction. However, that was objected to as needlessly repetitious, since most of the procedures would be virtually identical.

53. Another proposal was to have a chapter dealing with conditions for use for methods of procurement that would be applicable to goods, construction and services, followed by one chapter dealing with those procurement procedures that would be common to goods, construction and services, and by another chapter dealing with those procedures that would be available only for services. The latter would essentially consist of the procedures currently in article 39 *bis*.

54. In support of yet another approach, the view was expressed that a desirable degree of simplicity might be achieved by not making available for services competitive negotiations or request for proposals, since the essential elements of those two methods were already found in article 39 *bis*. This was objected to, however, on the basis that those methods were substantially different from the procedures in article 39 *bis*. In particular, request for proposals and competitive negotiations dealt with cases in which the procuring entity did not know the nature of the technical solution to its procurement needs, while article 39 *bis* was geared to cases in which the procuring entity attached particular weight to the qualifications and abilities of the service provider. A suggestion to include wording applying to services all the methods of procurement available for goods and construction *mutatis mutandis* was also objected to on the basis that it could lead to uncertainty and disputes.

55. After deliberation, the Working Group decided, rather than to continue at that stage with considerations of the form and content of chapter II, to proceed to a discussion of the contents of the separate chapter on services, in particular article 39 *bis*. (The resumed discussion of article 16 is reported in paragraphs 85-95.)

*Article [39] bis. [Request for proposals for services]
[Special procedures for request for proposals for
services] [Special procedure for procurement
of services]*

56. It was pointed out that the title of the article should be formulated so as to avoid confusion with article 38 on request for proposals for goods and construction. It was also agreed to request the drafting group to divide the article into a number of separate articles, while grouping those articles in one section, a restructuring relevant to the question of titles. No final decision was reached, however, as to whether to use the term "request for proposals for services" or another formulation.

Paragraphs (1), (2) and (3)

57. A proposal was made that, in line with similar provisions on solicitation of tenders, it would be important to provide for the publication of a notice of the intended procurement of services in advance of the distribution of the request for proposals. The essential elements of that proposal were: publication of such a notice "[15] days" before issuance of the request for proposals; requirements as to the contents of such a notice; international publication of the notice; issuance of the request for proposals or the pre-qualification documents and the charges for them, if any; and the possibility of direct issuance of the request for proposals and the prequalification documents to suppliers

or contractors who the procuring entity believed would be interested in such a procurement, for which the procuring entity might wish to employ mailing lists.

58. The Working Group agreed that there would be a need to make provision for the issuance of such a notice. There was, however, a prevailing view that such a provision should not introduce any new elements that were not provided for in the solicitation of tenders and that it should be aligned as closely as possible with similar provisions in the Model Law on tendering proceedings. Doubts were raised in particular with regard to the time-limit for the issuance of the notice and to the requirement that the procuring entity provide its telephone number in the notice and the reference to direct solicitation, especially if it involved the use of lists. After deliberation, the Working Group agreed to delete those elements from the proposal and referred it to the drafting group.

59. The Working Group accepted and referred to the drafting group a suggestion that there should be a cross-reference in paragraph (2) to article 8, as another instance in which the procuring entity might limit publication of the invitation for proposals to domestic suppliers and contractors. It was noted that a similar provision was found for tendering in article 21(a).

60. A suggestion was made that, in paragraph (3), the words "may disregard" were overly strict and that using language such as "need not comply with" might be preferable. The suggestion was accepted and referred to the drafting group.

61. The view was expressed that, also in paragraph (3), there was no need to list in such detail all those instances in which the procuring entity could disregard paragraphs (1) and (2). It was suggested that a provision referring to "reasons of economy and efficiency" would be adequate. In objection to that view, it was stated that the Working Group and the Commission had restricted the usage of that expression in other provisions and that, because of its potential ambiguity, it would therefore not be appropriate in the present case.

Paragraph (4)

62. Differing perspectives were aired as to the adequacy of the treatment afforded by paragraph (4) to the contents of the request for proposals, particularly when compared with the much more comprehensive analogous provision in tendering proceedings (article 25). One view was that, since article 39 *bis* represented the predominant method in the procurement of services, a more comprehensive, rule-based approach would have to be followed that would lead to a certain extent to the expansion of article 39 *bis*. At the same time, the concern was raised that adding to the existing provisions would make the Model Law appear more complex and would have the unintended effect of discouraging use of the procedures in article 39 *bis*. Another factor cited in favour of retaining the existing, more limited approach was that the *chapeau* of paragraph (4) made it clear, by using the words "at least", that there might have to be additional information provided in the request for proposals. A further observation was that some of the other

parts of article 39 *bis* might already allude to matters that would have to be pre-disclosed to suppliers and contractors in the request for proposals.

63. Apart from the concerns that had been raised as to adding to the length of article 39 *bis*, there was broad agreement that much of the information required by article 25 to be included in solicitation documents in the context of tendering should, by analogy, be included in the request for proposals for services. Those elements of article 25 that were said to be probably not relevant included subparagraphs (l), (m), (p), and possibly (v). With regard to the drafting of the current text of paragraph (4), there was considerable sympathy for a suggestion to delete in subparagraph (b) the reference to the location of "delivery" of services, and to refer instead merely to the location of the "performance". It was felt that the current formulation, though intended to address the concern about unnecessary obstacles to participation by foreign service providers (A/CN.9/389, paras. 105-107), was not clear. It was also pointed out for the attention of the drafting group that, whereas article 25(e) spoke of "factors", article 39 *bis* spoke of "criteria".

64. Various types of approaches were considered as to the precise form that the expansion of the scope of paragraph (4) should take, approaches that differed in particular as to the extent to which they would add to the length of the provision. One relatively minimal approach was to include in paragraph (4) merely an indication for the procuring entity that there might be additional elements to be included in the request for proposals for services analogous to the elements of article 25 not currently referred to in paragraph (4). Such an approach, as well as other forms of cross-referencing, were objected to on grounds of style. At the other end of the spectrum of possible approaches was the suggestion that the elements of article 25 that were by analogy relevant to article 39 *bis* should be listed in article 39 *bis*. An approach occupying a more middle ground and designed to avoid a substantial increase in the length of the provision was to include a relatively compressed, summary mention of other relevant elements to be included in the request for proposals for services. As the latter type of approach was considered to be of doubtful adequacy or feasibility, the Working Group considered a proposal for a more detailed version of paragraph (4), based essentially on a recitation of the types of elements to be contained in solicitation documents in tendering proceedings pursuant to article 25.

65. While some hesitation was expressed concerning the length of the proposed text and its ability to distinguish adequately procurement of services, the Working Group generally accepted the proposal and referred it to the drafting group. It was noted that the requirements in the proposal concerned essentially "ministerial" or "housekeeping" types of basic information that would be relevant irrespective of whether goods, construction or services were being procured.

66. The Working Group noted for the attention of the drafting group a number of concerns and questions that had been raised, including: that the term "suppliers or contractors" should be used instead of "proposers"; whether

adequate notice of negotiation was built in for cases in which a negotiation procedure was selected by the procuring entity pursuant to either paragraphs (12) or (13) of article 39 *bis*; the possible inappropriateness of using in article 39 *bis* the word "opening", as well as the concept of "place" of opening of proposals, since those expressions might connote aspects of public opening relevant to tendering proceedings, but not to the procedures in article 39 *bis*; that words such as "where it is required that a price or rate be given" might be added to the beginning of the reference to price, so as to avoid giving undue prominence to price and to avoid suggesting that price always would be a criterion; that, to the extent possible and appropriate, the formulation of the provisions under consideration should be patterned on the analogous provisions for tendering in article 25; the replacement of the term "request for proposals" by the term "solicitation documents", though that suggestion did not appear to attain broad support.

Paragraph (5)

67. Various possible approaches were considered as to whether the use of any or all of the evaluation criteria listed should be mandatory or optional, and as to whether the procuring entity should be permitted to apply criteria other than those listed in paragraph (5). After pausing for some time to consider possible grounds for making at least subparagraphs (a), (b) and (c) mandatory, the Working Group affirmed that the intent of paragraph (5) was to limit the scope of permitted criteria, without requiring the use in all cases of all those criteria. Such an approach was felt to be consistent with the Working Group's understanding of other, similar provisions in the Model Law. It was felt that the words "the criteria shall concern" at the end of the *chapeau* did not adequately portray that understanding and needed to be reviewed by the drafting group. The Working Group was also of the view that it could usefully be made clear already in paragraph (5), rather than waiting for paragraph (9), that the procuring entity was precluded from applying criteria not pre-disclosed to suppliers or contractors in the request for proposals.

68. Turning to the content of paragraph (5), a view was expressed that subparagraph (d), which referred to possible "socio-economic" evaluation criteria, could be deleted. The Working Group was of the view, however, that such a provision, which appropriately might not be found in an international convention dealing with reciprocal trade benefits in procurement, was an inevitable prerogative of States that would invariably be recognized at the level of national law. It was noted that for the same considerations a similar provision had been included for tendering in article 32(4)(c)(iii). A proposal to include a reference to approval by a "designated authority" for the use of criteria listed in subparagraph (d) did not receive sufficient support. The Working Group did agree, however, in particular for purposes of symmetry with article 32(4)(c)(iv), to add as an additional criterion in paragraph (5) national defence and security.

69. Suggestions referred to the drafting group included to combine paragraph (6) with paragraph (5), and to review the formulation of subparagraph (c), since it had been pointed out that, literally speaking, the "price submitted" was not itself the "criterion".

Paragraph (6)

70. The Working Group agreed to refer to the drafting group a suggestion that paragraph (6) should be combined with paragraph (5).

Paragraph (7)

71. It was pointed out that paragraph (7)(a) did not specify the period within which the procuring entity should respond to requests for clarifications or the period of time within which it was to transmit modifications of the request for proposals to suppliers or contractors. It was further pointed out that, in article 26, the issue of clarifications and modifications of solicitation documents in tendering proceedings was dealt with in more detail. A suggestion that it would be preferable to align paragraph (7) with article 26 was accepted and referred to the drafting group.

Paragraph (8)

72. The Working Group accepted and referred to the drafting group a suggestion that paragraphs (8) and (14) should be combined into one paragraph dealing with the issue of confidentiality.

Paragraph (9)

73. Consequent to the decision that the requirement to disclose criteria in the request for proposals should be in paragraph (5), the Working Group was of the view that paragraph (9) could be incorporated in paragraph (10).

Paragraph (10)

74. A proposal was made that paragraph (10) should also provide that the procuring entity may use a jury or panel of outside experts in the selection process. In support of the proposal, it was stated that selection of the successful proposal by a panel of experts was a procedure that was used in practice, particularly in the adjudication of "design contests". It was pointed out that such a procedure was provided for in the European Union Directive relating to the coordination of procedures for the award of public service contracts. It was suggested that such a provision could be incorporated in the existing machinery of selection and would not necessitate another method of selection of the successful proposal. It was also suggested that a provision on the matter in paragraph (10) would be limited to establishing norms governing the composition and impartiality of the selection panels.

75. Various concerns were expressed, however, concerning the proposal. A view was expressed that there was no need to have such a provision since, if the procuring entity wished to use "design contests", it could do so under the existing provisions of the Model Law. Another concern raised was that having such a provision only in article 39 *bis* but not in the procurement methods for goods and construction would appear to limit the use of selection panels to the procurement of services, which would be counter to practice. Furthermore, it was stated, a distinction would have to be made between those panels whose role was merely advisory and those empowered to make a decision that would be binding on the procuring entity, and also

between panels whose role would be limited to the aesthetic and artistic aspects of proposals and those that would have a wider role.

76. After deliberation, the Working Group was of the view that such a provision on selection by an outside panel of experts should be included in paragraph (10), provided it was limited to recognizing that the procuring entity had the right to use impartial panels in the selection of proposals. A draft proposal generally along these lines was presented and referred to the drafting group. Particular interest was expressed in a formulation to the effect that "nothing in the Model Law" prevented the use of impartial panels in the selection process. (For further discussion on the use of selection panels see paragraph 125.)

Paragraphs (11), (12) and (13)

77. The Working Group agreed that the word "shall" in paragraphs (11), (12) and (13) was inappropriate as it created the impression that the use of all three methods of selection was required, when in fact the procuring entity would only employ one of them. It was agreed that the drafting group would craft a formulation that made clear the optional nature of the methods of selection.

78. A concern was raised that, if in accordance with paragraph (13)(b) proposals were ranked only on the basis of their technical and quality merits, some suppliers and contractors would inflate the technical and quality aspects of their proposals beyond what was needed by the procuring entity to meet its needs, so as to obtain a high ranking and thus be in a position to be first to negotiate with the procuring entity. It was pointed out that this would place the procuring entity at a disadvantage, since it would have to negotiate a price for the inflated proposal. The Working Group noted that the rating was intended to involve all aspects of the proposals, including their "effectiveness" in meeting the needs of the procuring entity, so that procuring entities would be able to take into account the possibility of technical overloading of proposals and deny on that ground a high rating for such proposals. It was agreed that paragraph (13)(b) should be redrafted to reflect this understanding.

79. The Working Group also discussed whether the threshold level would be applicable to paragraph (12) so as to make the method more strict. This was objected to on the basis that it might make paragraph (12) so strict as to be of little attraction to procuring entities. A question was raised as to whether paragraph (12) did not already presuppose a threshold, as it provided that negotiations would only be held with those suppliers and contractors whose proposals had not been rejected. It was suggested, however, that the rejection referred to would be on the basis of a failure to satisfy a basic criterion such as a professional qualification and not necessarily on the basis of a full technical review of the proposals. Another suggestion of a drafting nature was that, since the threshold level was applicable to both paragraphs (11) and (13), paragraph (11)(a), which provided for the threshold, could be placed in a separate paragraph.

80. With regard to paragraph (13), a question was raised as to whether a procuring entity could, after negotiating in

sequence with a number of suppliers or contractors, return to conclude the procurement contract with a supplier or contractor higher up the ladder with whom it had terminated negotiations at an earlier stage, if it considered that its needs would be better served by doing so. Concerns were expressed that, by not allowing for such a possibility, paragraph (13) would place procuring entities into the position of selecting suppliers and contractors who did not necessarily represent the best value for the money. It was generally felt, however, that in not providing the procuring entity with the ability to reopen negotiations with suppliers and contractors, paragraph (13) instilled an important discipline in the procurement proceedings and avoided open-ended negotiations, which could lead to abuse and cause needless delay. It was agreed that the Guide to Enactment should make it clear that the intended effect of paragraph (13) was to instil this discipline in the procurement process.

81. Another question that arose in regard to paragraph (13) was whether the negotiations should be limited only to the price or whether they should also cover other aspects of the proposals, as the provision currently stated. Support was expressed for limiting the negotiations under paragraph (13) only to the price on the grounds that the proposals had been rated on the basis of common criteria and that negotiations on aspects other than the price might result in violation of the principle of common criteria. However, it was pointed out that in practice such negotiations in the type of procedure under paragraph (13) were not limited strictly to the price. It was further stated that, since paragraph (13) now represented the main method of selection for those services where the emphasis was the qualifications of the suppliers or contractors, the provision should not be limited in a way that would make it difficult for procuring entities to use. Suggestions were made that negotiations could be limited in a more flexible fashion, for example by limiting negotiations to "price-related" aspects of the proposals. After deliberation, the Working Group deferred a decision on the matter until it had further considered the prevailing practice.

82. In resuming its earlier deliberations on the matter of the scope of negotiations under article 39 *bis* (13)(b) (see discussion above in paragraph 81), the Working Group was again cautioned that negotiation under the special type of procedure provided for in article 39 *bis* (13) should be limited to price. At the same time, the Working Group was urged to recognize that, in practice, negotiations inevitably would have to take place on matters other than price, whether or not a form of a contract had been attached to the request for proposals, if for no other reason than that questions of price would invariably implicate terms of the contract. Suggestions were made to find a middle ground, one that would provide for the needs of practice without opening up the negotiations excessively to the point of rendering the proceedings unfair to other suppliers or contractors. One such proposal was to refer to issues relating to the "resolution of the contract". The prevailing view, however, was that the suggested modifications did not provide added clarity and that, lacking a better expression, it would be preferable to retain the words "or other aspects". (For further discussion on this issue, see paragraph 128.)

83. Various proposals of a drafting nature were also made. In particular it was suggested that, if paragraph (12) was intended to represent the "two envelope" system, it should be more specific. It was also suggested that there should be a clearer reference in paragraph (13) to the procedures for entry into force of the procurement contract as it was this provision that had prompted the Working Group to consider inclusion of article 11 *ter*. It was also agreed that the drafting group would consider whether to use the word "factors" or the word "criteria" throughout article 39 *bis*.

Title of new procurement method for services

84. The Working Group took up the question of the general name to be given to the procurement method set forth in article 39 *bis*. The Working Group recognized that each of the possible formulations presented in the title of article 39 *bis* would have advantages and disadvantages. For example, the term "special procedure for procurement of services" had the advantage of being distinct from "request for proposals", which was a term associated with a procurement method in the existing Model Law (article 38). It was said that the use of a new expression would help to highlight the distinct character of the procurement method being added for services. The term "request for proposals", on the other hand, had the advantage of being a fairly familiar term and in that way might help to make the Model Law more "user-friendly." After deliberations, the Working Group decided to opt for the term "request for proposals for services", and to reflect this in the title of the separate chapter that would contain the provisions set forth in article 39 *bis*.

Article 16. Methods of procurement

85. After having considered article 39 *bis* (see paragraphs 55-84), the Working Group returned to its deliberations on article 16 in particular and on chapter II as a whole, from the standpoint of how best to use those provisions as a steering mechanism to guide procuring entities to the procurement method to be used in any given case of procurement of services.

86. At that point in the discussion, the initial question was one of structure, namely whether chapter II should be such a steering mechanism only for procurement of goods or construction, with a steering mechanism for services (i.e., what was in paragraph (3) of article 16) being located in another part of the Model Law, for example in the separate chapter on services into which it had been decided to place article 39 *bis*. A suggestion was made that went even further in the direction of separate treatment of conditions for use of procurement methods in the context of goods or construction on the one hand, and in the context of services on the other. That suggestion was to recite, also in a separate chapter, the conditions for use under which the procurement methods in articles 18-20 would be available for procurement of services, even though that might be largely repetitious, on the grounds that it might not be fully feasible to draft those conditions in a manner sufficiently general to encompass both goods or construction and services. An example cited in the latter regard was article 19(1). Suggestions for a separate type of approach were motivated in particular by a desire to add clarity in distinguishing

procurement of services and to limit modification of the existing text of the Model Law.

87. Another variation of the proposal on separate treatment also involved providing for the methods of procurement and their conditions for use for goods and construction and for services in different parts of the Model Law, but without providing for the use of two-stage tendering, competitive negotiations and request for proposals for services. In this proposal, the conditions for use of tendering for services would require that the services be of a standardized nature for which the price was the most significant aspect, the conditions for use for restricted tendering and request for quotations would be similar to, while those for single-source procurement would be the same as, conditions for goods and construction.

88. Some interest was expressed in that proposal, in particular since it did not provide for the use of two-stage tendering, competitive negotiations and request for proposals for services. However, objections were raised with regard to the conditions for use that were proposed for tendering for services on the basis that tendering should be made available even in those instances where price was not necessarily the most significant aspect. There was also an objection to combining the conditions for use for restricted tendering and request for quotations since these methods were meant for distinctly different circumstances.

89. In yet another proposal on the structure, all the methods of procurement that were available for goods and construction would have been maintained also for procurement of services. According to that proposal, however, all the provisions dealing exclusively with procurement of services would be placed in a separate part of the Model Law, set apart from those dealing with goods and construction, but still subject to the provisions dealing with methods of procurement common to goods and construction and for services.

90. The prevailing view, however, was that, at least at the current stage, it would be preferable to follow an approach in article 16 and in the rest of chapter II that would aggregate in one section of the Model Law all the rules as to the type of procurement methods to be used, irrespective of whether the procurement was for goods, construction or services. Such an approach, it was said, could be accommodated within the existing structure of the Model Law and would limit the extent to which that structure would be disturbed by the addition of services. It was agreed that the feasibility of such a unified approach would be tested as the Working Group proceeded with its review of the remainder of chapter II, including in particular the manner in which the conditions for use of the various procurement methods were formulated.

91. Turning to the substance of article 16(3), the Working Group focused the discussion on possible ways in which the rules therein governing access to methods of procurement of services other than the special procedures in article 39 *bis* might be made tighter. As regards subparagraph (a), which indicated the conditions in which use of tendering for services would be permitted, it was suggested that the words "and tendering proceedings would be more appropriate taking into account the nature of the services to

be procured" should be deleted, so as to render tendering mandatory when specifications were capable of being drawn up.

92. Similarly, it was suggested that in subparagraph (b), access to the three methods under article 17 needed to be tightened. The text before the Working Group reflected the decision taken at the sixteenth session that use of the methods under article 17 for procurement of services should not be subject to the conditions for use in article 17. It was suggested that, in view of the substantial level of detail added to article 39 *bis* at the current session, it would be appropriate to establish conditions for use of methods under article 17 methods for procurement of services. The main condition, though possibly not the exclusive one, would be the condition in article 17(1)(a), non-feasibility of drawing up detailed specifications. Mention was also made of applying the condition in article 17(1)(c) (national defence and security), as well as the condition in article 17(2) (use of competitive negotiation in cases of urgency).

93. In the discussion, the possibility was raised that the development of article 39 *bis* had eliminated altogether the need for making the methods under article 17 available for procurement of services. It was observed in this regard that procedures in paragraphs (12) and (13) were very much akin to request for proposals and competitive negotiation respectively, thereby rendering subparagraph (3)(b) of article 16 unnecessary. The Working Group was urged in this light to consider carefully that possible confusion and uncertainty might be caused for both legislatures and procuring entities if, for the procurement of services, the Model Law were to offer not only article 39 *bis*, which itself branched out into three different "selection procedures", but also the procurement methods under article 17, all of which the enacting State might conceivably enact into law.

94. After deliberations, there were prevailing views in the Working Group on the points that had been discussed. It was felt that paragraph (3)(a) should remain essentially in its current form, in recognition of possible cases in which it would be feasible to draw up detailed specifications yet in which tendering would nevertheless not be the most appropriate method. As regards paragraph (3)(b), the prevailing view was that the methods of procurement under article 17 should be available for the procurement of services. The Working Group did pause to consider whether it might be possible to forgo reference to request for proposals under article 38 by adding to article 39 *bis* a provision to the effect that the advertisement procedure did not confer the right to have a proposal evaluated. A provision of that type was applied by the Model Law in respect of the advertisement procedure in request for proposals (article 38(2)). Such an approach was criticized, on the one hand, as counter to the intended open character of article 39 *bis* as the main method for procurement of services and, on the other hand, as unnecessary in view of the threshold requirement in article 39 *bis* (11)(a). In the discussion, it was also stated that the need to retain the simple procedure of competitive negotiation for exceptional cases had been compounded by the development of article 39 *bis* into a relatively involved procedure. It was further pointed out that competitive negotiation was recognized under the GATT Agreement on Government Procurement. The

Working Group did agree to modify the existing provision in paragraph (3)(b), however, to the extent that resort to the methods in article 17 would only be available if the conditions for use of those methods were fulfilled.

95. The Working Group considered but decided not to follow a proposal to move paragraph (4) of article 16 to article 11. That proposal was motivated by the desire to make the text more concise in view of the fact that record requirements were dealt with in detail in article 11. It was noted that the provision had been added at this point in the Model Law as adopted by the Commission in order to accord prominence to the record requirement, an intentionally repetitive style used elsewhere in the Model Law.

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

Paragraph (1)

96. A proposal was made to delete the reference in subparagraph (b) to the procurement of a prototype. It was pointed out that the requirement that the research contracts in question should be ones leading to the procurement of a prototype was added in order to bring such research contracts within the scope of the Model Law, which did not deal with services, the field in which research contracts could be said to properly fall. The Working Group agreed that, now that the scope of the Model Law would be expanded to cover services, the reference to procurement of a prototype was no longer necessary, since research contracts could be let under the amended Model Law, either as contracts for the procurement of goods when a prototype was being developed, or otherwise as contracts for services. It was noted that a similar reference to prototypes with respect to research contracts awarded by way of single-source procurement could be deleted from article 20(e).

97. The Working Group noted that the reference in subparagraph (d) to article 33 would be amended to refer to article 11 *bis*.

Paragraph (2)

98. No comments were made on paragraph (2).

Article 18. Conditions for use of restricted tendering

99. No comments were made on article 18.

Article 19. Conditions for use of request for quotations

100. No comments of a substantive nature were made with respect to article 19. The drafting group was requested, however, to review the existing formulation with a view to better fitting it to services.

Article 20. Conditions for use of single-source procurement

Paragraph (1)

101. The Working Group noted that the reference to the "unique nature" of the services had been added to

subparagraphs (a) and (d) in an attempt to respond to the concern that had been raised about the need to convey the exceptional character, in the services context, of resort to single-source procurement on such grounds (A/CN.9/389, paras. 101-104). It was agreed, however, that the additional wording did not achieve the desired degree of clarity and should be deleted. A question was raised as to why the provision should single out services as having a possibly unique character, since a unique character could also be attributed in the case of goods or construction. It was also pointed out that the added words might not provide any additional meaning.

102. The Working Group noted that a reference to services would be added to subparagraphs (b) and (c). A question was raised as to the appropriateness of the notion of "compatibility" referred to in subparagraph (d) as a grounds for repeat procurement of services from a particular supplier or contractor.

Paragraph (2)

103. No comments were made on paragraph (2).

Chapter III. Tendering proceedings

Articles 21-24

104. No comments were made on articles 21-24, entitled: Domestic tendering; Procedures for soliciting tenders or applications to prequalify; Contents of invitation to tender and invitation to prequalify; and Provision of solicitation documents.

Article 25. Contents of solicitation documents

105. It was noted that, in subparagraph (h), the words "goods or construction" would be replaced by the words "goods, construction or services".

Articles 26-35

106. No comments were made on articles 26-35 entitled: Clarifications and modifications of solicitation documents; Language of tenders; Submission of tenders; Period of effectiveness of tenders, modification and withdrawal of tenders; Tender securities; Opening of tenders; Examination, evaluation and comparison of tenders; Prohibition of negotiations with suppliers or contractors; Acceptance of tender and entry into force of procurement contract.

Chapter IV. Procedures for procurement methods other than tendering

Article 36. Two-stage tendering

107. The Working Group agreed with and referred to the drafting group a suggestion that paragraph (2) should provide that, if relevant, the solicitation documents should also seek the professional qualifications of the service providers.

108. With reference to paragraph (3), the Working Group agreed that it would be useful to clarify that the negotiations referred to were part of the first stage of the two-stage tendering.

Article 37. Restricted tendering

109. No comments were made on article 37.

Article 38. Request for proposals

110. The Working Group requested the drafting group, in both paragraphs (2) and (3)(a), to add the word "professional" so as to track the language in similar provisions.

Articles 39-41

111. No comments were made on articles 39-41, entitled: Competitive negotiation; Request for quotations; and Single-source procurement.

Chapter V. Review

Article 42. Right to review

112. The Working Group agreed that, in paragraph (2)(a), it should be made clear that, in procurement of services, the choice of the selection procedure under article 39 *bis*, paragraph (10), would not be subject to review.

113. The Working Group also agreed that paragraph (2)(e) should also refer to article 39 *ter*.

Articles 43-47

114. No comments were made on articles 43-47, entitled: Review by procuring entity (or by approving authority); Administrative review; Certain rules applicable to review proceedings under article 43 [and article 44]; Suspension of procurement proceedings; and Judicial review.

III. REPORT OF THE DRAFTING GROUP

Article 2. Definitions

115. It was agreed that, in subparagraph (d) (definition of "construction"), there should be a reference to the value of the incidental services in line with the analogous provision in the definition of "goods".

Article 9. Form of communications

116. It was agreed that there should be cross-references to those provisions in the chapter on services to which article 9(2) applied.

Article 11. Record of procurement proceedings

117. It was observed that paragraph (1)(d) needed to convey adequately that, as had been raised earlier in the

discussion on article 11 (see paragraph 43), the procuring entity did not know the price in all instances, for example because the "price envelope" in the "two envelope" proposal had not been opened or because a price had not been formulated with respect to a given proposal. It was stated that the procuring entity would not always possess the information required to be recorded in accordance with paragraph (1)(d). After deliberation, the Working Group agreed to add the words along the lines of "if these are in fact known to the procuring entity" at the end of the paragraph.

Article 11 ter. Entry into force of the procurement contract

118. Noting its earlier decision to defer a decision on article 11 *ter* until after consideration of article 39 *bis* (see paragraph 46), the Working Group considered an observation that the reference in article 11 *ter* to "documents for solicitation" might be read as a reference to the term "solicitation documents" in tendering proceedings. Since such types of documents would not be present in all procurement proceedings, in particular in single-source procurement and in request for quotations, it was decided to use a more general term such as "at the time of requesting", so as to take account of those instances when solicitation might be done orally.

Article 39 bis. Solicitation of proposals

119. The Working Group agreed that the terms "invitation for proposals" and "invitation to prequalify" should be replaced with words along the lines of "notice seeking expression of interest in submitting a proposal or in prequalifying".

Article 39 ter. Contents of request for proposals for services

120. It was suggested that subparagraph (d) was unnecessary as there was no need to specify the place, date or time for opening proposals in procurement of services. This was said to be the case since proposals would generally not be opened in the presence of suppliers or contractors. A proposal to require instead predisclosure of the expected time of conclusion of the selection process was not accepted on the ground that, in some of the selection procedures, particularly those that involved negotiations, it would be difficult to specify in advance when the selection process would end. Another suggestion made was to require predisclosure of the expected time of conclusion of the selection process for the procedure under article 39 *sexies* (2) and to require predisclosure of the expected time for opening of negotiations for the procedures under article 39 *sexies* (3) and (4). After deliberation, the Working Group decided to delete subparagraph (d).

121. In subparagraph (h), the Working Group decided to add the words "to the extent known" after the words "to be procured" to reflect the fact that the procuring entity would not in all instances be aware of the exact nature and full characteristics of the services required. Along the same lines, it was agreed that, since in some instances the procuring entity would in fact be seeking proposals as to

possible means of meeting its needs, this possibility needed to be reflected.

122. It was pointed out that, since price was not always a relevant evaluation criterion in procurement of services, it should be made clear that subparagraphs (j) and (k) only applied to the extent that the proposal price was a relevant criterion.

Article 39 quater. Criteria for the evaluation of proposals

123. The Working Group agreed that, in paragraph (1)(a), there should be a reference to the personnel of the procuring entity that would be involved in the provision of the services.

Article 39 sexies. Selection procedure

124. The Working Group agreed that there should be a provision regarding the requirement of recording the grounds and circumstances for the selection of a particular selection procedure in the procurement record.

125. In a further discussion of its earlier decision to include a provision on the use of selection panels (see paragraphs 74-76), the Working Group paused to consider whether paragraph (1)(b) should refer to the role the panel would have in the selection procedure. It was stated in this regard that practice differed from State to State as to whether selection panels only played an advisory role or could also perform a decision-making role in awarding the procurement contract. It was suggested that problems might arise were the Model Law to recommend an approach in contravention of the established procedures in the enacting State and that the matter might be left to the procurement regulations. After deliberations, the prevailing view was that the question of the exact role of selection panels should be left to the procuring entity. The Working Group decided to retain the paragraph with only a change of the word "independent" to the word "impartial".

126. There was a prevailing view that paragraph (2)(a) should be redrafted to make it clear that both the establishment of a threshold level and the rating would be done in accordance with the criteria other than price for evaluating proposals; these criteria would encompass, in accordance with article 39 quater (1)(b), the effectiveness of the proposal in meeting the needs of the procuring entity.

127. In paragraph (2)(b)(ii), the Working Group decided to add words along the lines of "non-price" before the word "criteria".

128. The Working Group, resuming consideration of its earlier deliberations on the scope of negotiations under paragraph (4)(b) (see paragraphs 81 and 82), decided that at the current stage it would be preferable to drop the words "or other aspects". At the same time, it was suggested that it should be indicated to the Commission that the scope of the negotiations under paragraph (4)(b) was an issue that it might wish to consider further.

129. The view was expressed that, as a matter of editorial presentation, the fact that the article under consideration

presented the procuring entity with a choice among several procedures could usefully be highlighted by including editorial headings such as "alternative 1, etc." before each of paragraphs (2), (3) and (4).

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

130. It was agreed that in the *chapeau* of paragraph (1)(a) the test relevant to the procurement of services should be the non-feasibility of identifying the characteristics of the services to be procured in accordance with article 39 ter (h). In the discussion that accompanied this decision, it was observed that the reformulation might still leave open the question of the relationship to the rule in article 16(3), in which one of the tests for the use of tendering for services in a given case was whether it was possible to formulate detailed specifications.

IV. FUTURE WORK

131. Upon concluding its deliberations, the Working Group noted that the text of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services, reflecting the deliberations and decisions of the Working Group at the current session, would be transmitted to the Commission for consideration at its twenty-seventh session (New York, 31 May-17 June 1994). It was noted that that session would present an opportunity to consider further views that had been expressed at the current Working Group session, in particular as to the structure of the amendments to the Model Law, given that no final decision as to form had been made.

132. The Working Group noted the added importance that the Guide to Enactment would have in the light of the inclusion of provisions on procurement of services, since this was an area of rapid development and increasing importance, in which many legislatures and Governments had relatively limited experience. The Working Group noted that the short time available prior to the twenty-seventh session of the Commission might make it difficult for the Secretariat to prepare draft amendments to the Guide to Enactment taking into account the inclusion of services. At the same time, the Working Group expressed the hope that the draft amendments to the Guide to Enactment that would be presented to the Commission would be substantially complete in order to enable the Commission to adopt the amended Model Law and revised Guide to Enactment simultaneously.

ANNEX

[DRAFT UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES]

Preamble

WHEREAS the [Government] [Parliament] of . . . considers it desirable to regulate procurement of goods, construction and services 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, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;
- (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; and
- (f) achieving transparency in the procedures relating to procurement.

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application*

- (1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.
- (2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:
 - (a) procurement involving national defence or national security;
 - (b) ... (the enacting State may specify in this Law additional types of procurement to be excluded); or
 - (c) procurement of a type excluded by the procurement regulations.
- (3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.

Article 2. *Definitions*

For the purposes of this Law:

- (a) "procurement" means the acquisition by any means of goods, construction or services;
- (b) "procuring entity" means:
 - (i) *Option I for subparagraph (i)*
any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)
 - Option II for subparagraph (i)*
any department, agency, organ or other unit, or any subdivision 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");
- (c) "goods" means 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; (the enacting State may include additional categories of goods)

(d) "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 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;

(d bis) "services" means any object of procurement other than goods or construction; (the enacting State may specify certain categories of services)

(e) "supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

(f) "procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

(g) "tender security" means a security provided to the procuring entity to secure the fulfillment of any obligation referred to in article 3 (1)(f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;

(h) "currency" includes monetary unit of account.

Article 3. *International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]*

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 ... (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. *Public accessibility of legal texts*

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

Article 6. *Qualifications of suppliers and contractors*

(1) (a) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(b) In order to participate in procurement proceedings, suppliers or contractors must qualify by meeting such of the

following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

- (i) that they possess the *necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;*
- (ii) that they have legal capacity to enter into the procurement contract;
- (iii) 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;
- (iv) that they have fulfilled their obligations to pay taxes and social security contributions in this State;
- (v) 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 disbarment proceedings.

(2) 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 such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1)(b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, 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 article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations.

(5) Subject to articles 8(1) and 32(4)(d), 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 on the basis of nationality, or that is not objectively justifiable.

(6) (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 be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

Article 7. *Prequalification proceedings*

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III or IV, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The prequalification documents shall include, at a minimum:

- (a) the following information:
 - (i) instructions for preparing and submitting prequalification applications;
 - (ii) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;
 - (iii) any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
 - (iv) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;
 - (v) 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 submission of applications to prequalify and to the prequalification proceedings; and
- (b) (i) in proceedings under chapter III, the information required to be specified in the invitation to tender by article 23(1)(a) to (e), (h) and, if already known, (j);
- (ii) in proceedings under chapter IV bis, the information referred to in article 41 ter (a), (c), if already known, (f), (g), (p) and (s).

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. 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 provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an

application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

Article 8. *Participation by suppliers or contractors*

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

Article 9. *Form of communications*

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(2) Communications between suppliers or contractors and the procuring entity referred to in articles 7(4) and (6), 11 bis (3), 29(2)(a), 30(1)(d), 32(1), 35(1), 37(1), 41 bis (3), and 41 sexies 4(b) to (f) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

Article 10. *Rules concerning documentary evidence provided by suppliers or contractors*

If the procuring entity requires the legalization of documentary evidence provided by suppliers or contractors to demonstrate their qualifications in procurement proceedings, 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.

Article 11. *Record of procurement proceedings*

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) a brief description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) the names and addresses of suppliers or contractors that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;

(c) information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;

(d) the price or the basis for determining the price and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract, if these are known to the procuring entity;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to articles 32(4)(d) and 41 quater (2);

(f) if all tenders were rejected pursuant to article 11 bis, a statement to that effect and the grounds therefor, in accordance with article 11 bis (1);

(g) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) the information required by article 13, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 16(2) and (4) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(i bis) in the procurement of services by means of chapter IV bis, the statement required under article 41 sexies (1)(b) of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;

(j) in procurement proceedings in which the procuring entity, in accordance with article 8(1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;

(k) a summary of any requests for clarification of the prequalification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

(2) Subject to article 3(3), the portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) of this article shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 31(3), the portion of the record referred to in subparagraphs (c) to (g), and (k), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs (c) to (e), and (k), may be ordered at an earlier stage by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1)(e).

(4) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.

Article 11 bis. *Rejection of all tenders, proposals, offers or quotations*

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval), and) if so specified in the solicitation documents or other documents for solicitation of proposals, offers or quotations, the procuring entity may reject all tenders, proposals, offers or quotations at any time prior to the acceptance of a tender, proposal, offer, or quotation. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender, proposal, offer or quotation, the grounds for its rejection of all tenders, proposals, offers or quotations, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have submitted tenders, proposals, offers or quotations.

(3) Notice of the rejection of all tenders, proposals, offers or quotations shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations.

Article 11 ter. *Entry into force of the procurement contract**

(1) In tendering proceedings, acceptance of the tender and entry into force of the procurement contract shall be carried out in accordance with article 35.

(2) In all the other methods of procurement, the manner of entry into force of the procurement contract shall be notified to the suppliers or contractors at the time that proposals, offers or quotations are requested.

Article 12. *Public notice of procurement contract awards*

(1) The procuring entity shall promptly publish notice of procurement contract awards.

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).

(3) Paragraph (1) is not applicable to awards where the contract price is less than [...].

Article 13. *Inducements from suppliers or contractors*

(Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it 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, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

Article 14. *Rules concerning description of goods, construction or services*

(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

(2) To the extent possible, any specifications, plans, drawings, designs and requirements or descriptions of services shall be based on the relevant objective technical and quality characteristics of the goods, construction or services to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction or services to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the prequalification documents, solicitation documents or other documents for solicitation or proposals, offers or quotations;

(b) due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

Article 15. *Language*

The prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations

*Article 11 ter is new text.

shall be formulated in . . . (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where:

(a) the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) 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).

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 16. *Methods of procurement*

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.

(2) In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 17, 18, 19 or 20.

(3) In the procurement of services, a procuring entity shall use the procedures set forth in chapter IV bis, unless the procuring entity determines that:

(a) it is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the services to be procured; or

(b) it would be more appropriate, subject to approval by . . . (the enacting State designates an organ to issue the approval,) to use a method referred to in articles 17 to 20, provided that the conditions for the use of that method are satisfied.

(4) The procuring entity shall include in the record required under article 11, a statement of the grounds and circumstances on which it relied to justify the use of a method of procurement pursuant to paragraphs (2) or (3)(a) or (b).

Article 17. *Conditions for use of two-stage tendering, request for proposals or competitive negotiation*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval,)) a procuring entity may engage in procurement by means of two-stage tendering in accordance with article 36, or request for proposals in accordance with article 38, or competitive negotiation in accordance with article 39, in the following circumstances:

(a) it is not feasible for the procuring entity to formulate detailed specifications for the goods or construction or, in the case of services, to identify their characteristics and, in order to obtain the most satisfactory solution to its procurement needs,

(i) it seeks tenders, proposals or offers as to various possible means of meeting its needs; or,

(ii) because of the technical character of the goods or construction, or because of the nature of the services, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(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 goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) when the procuring entity applies this Law, pursuant to article (3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 11 bis, 13 or 32(3), and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) (Subject to approval by . . . (the enacting State designates an organ to issue the approval,)) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) there is an urgent need for the goods, construction or services, and engaging in tendering proceedings 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; or,

(b) owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods.

Article 18. *Conditions for use of restricted tendering*

(Subject to approval by . . . (the enacting State designates an organ to issue the approval,)) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 37, when:

(a) the goods, construction or services, by reason of their highly complex or specialized nature, are 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 goods, construction or services to be procured.

Article 19. *Conditions for use of request for quotations*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval,)) a procuring entity may engage in procurement by means of a request for quotations in accordance with article 40 for the procurement of readily available goods or services that are not specially produced or provided to the particular specifications of the procuring entity and for which there is an established market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

Article 20. *Conditions for use of single-source procurement*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval,)) a procuring entity may engage in single-source procurement in accordance with article 41 when:

(a) the goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists;

(b) there is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement 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;

(c) owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) 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;

(e) the procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) the procuring entity applies this Law, pursuant to article 1(3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in articles 32(4)(c)(iii) or 41 quater (I)(d), provided that procurement from no other supplier or contractor is capable of promoting that policy.

CHAPTER III. TENDERING PROCEEDINGS

Section I. Solicitation of tenders and of applications to prequalify

Article 21. Domestic tendering

In procurement proceedings in which

(a) participation is limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) 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 submitting tenders, the procuring entity shall not be required to employ the procedures set out in articles 22(2), 23(1)(h) and (i), 23(2)(c) and (d), 25(j), (k) and (s) and 30(1)(c) of this Law.

Article 22. Procedures for soliciting tenders or applications to prequalify

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) The invitation to tender or invitation to prequalify 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.

Article 23. Contents of invitation to tender and invitation to prequalify

(1) The invitation to tender shall contain, at a minimum, the following information:

(a) the name and address of the procuring entity;

(b) 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;

(c) 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;

(d) the criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article 6(1)(b);

(e) a declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8(1), as the case may be;

(f) the means of obtaining the solicitation documents and the place from which they may be obtained;

(g) the price, if any, charged by the procuring entity for the solicitation documents;

(h) the currency and means of payment for the solicitation documents;

(i) the language or languages in which the solicitation documents are available;

(j) the place and deadline for the submission of tenders.

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1)(a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents;

(c) the currency and terms of payment for the prequalification documents;

(d) the language or languages in which the prequalification documents are available;

(e) the place and deadline for the submission of applications to prequalify.

Article 24. Provision of solicitation documents

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified 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 printing them and providing them to suppliers or contractors.

Article 25. Contents of solicitation documents

The solicitation documents shall include, at a minimum, the following information:

(a) instructions for preparing tenders;

(b) the criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 32(6);

(c) the requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) the nature and required technical and quality characteristics, in conformity with article 14, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;

(e) the criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 32(4)(b), (c) or (d) and the relative weight of such criteria;

(f) 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;

(g) if alternatives to the characteristics of the goods, construction, services, contractual terms and conditions or other requirements set forth 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 and compared;

(h) if suppliers or contractors are permitted to submit tenders for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which tenders may be submitted;

(i) 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 goods, construction or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes;

(j) the currency or currencies in which the tender price is to be formulated and expressed;

(k) the language or languages, in conformity with article 27, in which tenders are to be prepared;

(l) 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 submitting tenders, 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 materials bonds;

(m) if a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) the manner, place and deadline for the submission of tenders, in conformity with article 28;

(o) the means by which, pursuant to article 26, 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;

(p) the period of time during which tenders shall be in effect, in conformity with article 29;

(q) the place, date and time for the opening of tenders, in conformity with article 31;

(r) the procedures to be followed for opening and examining tenders;

(s) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 32(5) 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, provided, however, that the omission of any such reference shall not constitute grounds for review under article 42 or give rise to liability on the part of the procuring entity;

(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) any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) notice of the right provided under article 42 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) if the procuring entity reserves the right to reject all tenders pursuant to article 17 bis, a statement to that effect;

(y) any formalities that will be required once a 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 35, 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;

(z) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

Article 26. *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 the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender 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 submission of tenders, 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 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 tenders.

Section II. Submission of tenders

Article 27. *Language of tenders*

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

Article 28. *Submission of tenders*

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article 26, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5) (a) Subject to subparagraph (b), a tender shall be submitted in writing, signed and in a sealed envelope.

(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality.

(c) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

Article 29. *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, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(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 the submission of 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 the submission of tenders.

Article 30. *Tender securities*

(1) When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security:

(a) the requirement shall apply to all such 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;

(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 forth 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 submitting a tender, 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 submitting the tender shall not relate to conduct other than:

- (i) withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline if so stipulated in the solicitation documents;
- (ii) failure to sign the procurement contract if required by the procuring entity to do so;
- (iii) failure to provide a required security for the performance of the contract after the tender 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 tender 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 termination of the tendering proceedings without the entry into force of a procurement contract;
- (d) the withdrawal of the tender prior to the deadline for the submission of tenders, unless the solicitation documents stipulate that no such withdrawal is permitted.

Section III. Evaluation and comparison of tenders

Article 31. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at 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 submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

Article 32. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. 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.

(b) Notwithstanding subparagraph (a) of this paragraph, 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 submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents.

(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 forth 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 and comparison of tenders.

(3) The procuring entity shall not accept a tender:

(a) if the supplier or contractor that submitted the tender is not qualified;

(b) if the supplier or contractor that submitted 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 13.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents.

(b) The successful tender shall be:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of criteria specified in the solicitation documents, which criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.

(c) In determining the lowest evaluated tender in accordance with subparagraph (b)(ii) of this paragraph, the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services;

(iii) the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this 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 enacting State may expand subparagraph (iii) by including additional criteria)]; and

(iv) national defence and security considerations.

(d) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article 25(s), for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4)(b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications 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, subject to the right of the procuring entity, in accordance with article 11 bis (1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11.

Article 33. *Rejection of all tenders* [moved to article 11 bis]

Article 34. *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 submitted by the supplier or contractor.

Article 35. *Acceptance of tender and entry into force of the procurement contract*

(1) Subject to articles 11 bis and 32(7), the tender that has been ascertained to be the successful tender pursuant to article 32(4)(b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

(2) (a) Notwithstanding the provisions of paragraph (4) of this article, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(3) 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 of the tender 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 tenders specified in the solicitation documents pursuant to article 29(1) or the period of effectiveness of tender securities that may be required pursuant to article 30(1).

(4) Except as provided in paragraphs (2)(b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is 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 a mode authorized by article 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 32(4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 11 bis (1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article shall be given to the supplier or contractor that submitted that tender.

(6) 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 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.

CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING

Article 36. *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 submit, 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 goods, construction or services 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 negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 11 bis, 13 or 32(3) concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods, construction or services to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit 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. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 32(4)(b).

Article 37. *Restricted tendering*

(1) (a) When the procuring entity engages in restricted tendering on the grounds referred to in article 18(a), it shall solicit tenders from all suppliers and contractors from whom the goods, construction or services to be procured are available.

(b) When the procuring entity engages in restricted tendering on the grounds referred to in article 18(b), 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.

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in . . . (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) The provisions of chapter III of this Law, except article 22, shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

Article 38. *Request for proposals*

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) the relative managerial and technical competence of the supplier or contractor;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) the price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;

(c) the criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion, and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant *timetables* applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek

or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) the price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

Article 39. *Competitive negotiation*

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(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 shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.

Article 40. *Request for quotations*

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods or services 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 submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation meeting the needs of the procuring entity.

Article 41. *Single-source procurement*

In the circumstances set forth in article 20 the procuring entity may procure the goods, construction or services by soliciting a proposal or price quotation from a single supplier or contractor.

CHAPTER IV BIS. REQUEST FOR PROPOSALS FOR SERVICES*

Article 41 bis. Solicitation of proposals

(1) A procuring entity shall solicit proposals for services or, where applicable, applications to prequalify by causing a notice seeking expression of interest in submitting a proposal or in prequalifying, as the case may be, 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 name and address of the procuring entity, a brief description of the services to be procured, the means of obtaining the request for proposals or prequalification documents and the price, if any, charged for the request for proposals or for the prequalification documents.

(2) The notice shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade or professional publication of wide international circulation except where participation is limited solely to domestic suppliers or contractors pursuant to article 8(1) or where, in view of the low value of the services to be procured, the procuring entity decides that only domestic suppliers or contractors are likely to be interested in submitting proposals.

(3) The procuring entity need not apply the provisions of paragraphs (1) and (2) of this article:

(a) where the services to be procured are available only from a limited number of suppliers or contractors that are known to the procuring entity, provided that it solicits proposals from all those suppliers or contractors; or

(b) where the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) where, because of the nature of the services to be procured, economy and efficiency in procurement can only be promoted by means of direct solicitation, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(4) The procuring entity shall provide the request for proposals, or the prequalification documents, to suppliers or contractors in accordance with the procedures and requirements specified in the notice. The price that the procuring entity may charge for the request for proposals or the prequalification documents shall reflect only the cost of printing and providing them to suppliers or

contractors. If prequalification proceedings have been engaged in, the procuring entity shall provide the request for proposals to each supplier or contractor that has been prequalified and that pays the price charged, if any.

Article 41 ter. Contents of requests for proposals for services

The request for proposals shall include, at a minimum, the following information:

(a) the name and address of the procuring entity;

(b) the language or languages in which proposals are to be prepared;

(c) the manner, place and deadline for the submission of proposals;

(d) if the procuring entity reserves the right to reject all proposals, a statement to that effect;

(e) the criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 7(8);

(f) the requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(g) the nature and required characteristics of the services to be procured to the extent known, including, but not limited to, the location where the services are to be provided and the desired or required time, if any, when the services are to be provided;

(h) whether the procuring entity is seeking proposals as to various possible ways of meeting its needs;

(i) if suppliers or contractors are permitted to submit proposals for only a portion of the services to be procured, a description of the portion or portions for which proposals may be submitted;

(j) if price is a relevant criterion, the currency or currencies in which the proposal price is to be formulated or expressed;

(k) if the price is a relevant criterion, 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 services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(l) the method selected pursuant to paragraph article 41 *sexies* (1)(a) for ascertaining the successful proposal;

(m) the criteria to be used in determining the successful proposal, including any margin of preference to be used pursuant to article 41 *quater* (2), and the relative weight of such criteria;

(n) the currency that will be used for the purpose of evaluating and comparing 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;

(o) if alternatives to the characteristics of the services, contractual terms and conditions or other requirements set forth in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared;

(p) 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;

(q) the means by which, pursuant to article 41 *quinquies*, 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;

*The whole of chapter IV bis is new text.

(r) 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;

(s) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 42 or give rise to liability on the part of the procuring entity;

(t) notice of the right provided under article 42 to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(u) 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;

(v) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of proposals and to other aspects of the procurement proceedings.

Article 41 quater. Criteria for the evaluation of proposals

(1) The procuring entity shall establish criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals. Those criteria shall be notified to suppliers or contractors in the request for proposals and may concern only the following:

(a) the qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of its personnel;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;

(c) the proposal price, subject to any margin of preference applied pursuant to paragraph (2), including any ancillary or related costs;

(d) the effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of (this State), the extent of participation by local suppliers and contractors, the encouragement of employment, the economic development potential offered by the proposal, the development of local expertise, (... (the enacting State may expand subparagraph (d) by including additional criteria));

(e) national defence and security considerations.

(2) If authorized by the procurement regulations (and subject to approval by ... (each State designates an organ to issue the approval).) in evaluating and comparing the proposals, a procuring entity may grant a margin of preference for the benefit of domestic suppliers of services, which shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

Article 41 quinquies. Clarification and modification of requests for proposals

(1) A supplier or contractor may request a clarification of the request for proposals from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the request for proposals that is received by the procuring entity within a reasonable time prior to the deadline for the submission of proposals. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its proposal 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 request for proposals.

(2) At any time prior to the deadline for submission of proposals, 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 request for proposals by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the request for proposals and shall be binding on those suppliers or contractors.

(3) 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 request for proposals, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors participating in the procurement proceedings, so as to enable those suppliers or contractors to take the minutes into account in preparing their proposals.

Article 41 sexies. Selection procedures

(1) (a) The procuring entity, in ascertaining the successful proposal, shall use the procedure provided for in paragraph (2), (3) or (4) of this article that has been notified to suppliers or contractors in the request for proposals.

(b) The procuring entity shall include in the record required under article 11, a statement of the grounds and circumstances on which it relied to justify the use of a selection procedure pursuant to paragraph (1)(a) of this article.

(c) Nothing in this chapter shall prevent the procuring entity from resorting to an impartial panel of experts in the selection procedure.

(2) (a) If the procuring entity uses the procedure provided for in this paragraph, it shall establish a threshold level with respect to quality and technical aspects of the proposals in accordance with the criteria other than price as set out in the request for proposals and rate each proposal in accordance with such criteria and the relative weight and manner of application of that criteria as set forth in the request for proposals. The procuring entity shall then compare the prices of the proposals that have attained a rating at or above the threshold level.

(b) The successful proposal shall then be:

(i) the proposal with the lowest price; or

(ii) the proposal with the best combined evaluation in terms of the criteria other than price referred to in subparagraph (a) of this article and the price.

(3) (a) If the procuring entity uses the procedure provided for in this paragraph, it shall engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(b) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(c) In the evaluation of proposals, the price of a proposal shall be considered separately and only after completion of the technical evaluation.

(d) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for

evaluating the proposals as well as with the relative weight and manner of application of those criteria as set forth in the request for proposals.

(4) If the procuring entity uses the procedure provided for in this paragraph, it shall engage in negotiations with suppliers and contractors in accordance with the following procedure:

(a) establish a threshold level in accordance with paragraph (2)(a) of this article;

(b) invite for negotiations on the price of its proposal the supplier or contractor that has attained the best rating in accordance with paragraph (2)(a) of this article;

(c) inform the suppliers or contractors that attained ratings above the threshold level that they may be considered for negotiation if the negotiations with the suppliers or contractors with better rating do not result in a procurement contract;

(d) inform the other suppliers or contractors that they did not attain the required threshold level;

(e) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (4)(b) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations;

(f) 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 for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

Article 41 septies. Confidentiality

The procuring entity shall treat proposals in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors. Any negotiations pursuant to paragraph article 41 *sexies* (3) or (4) shall be confidential and, subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other information relating to the negotiations without the consent of the other party.

CHAPTER V. REVIEW*

Article 42. Right to review

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 43 to [47].

(2) The following shall not be subject to the review provided for in paragraph (1) of this article:

(a) the selection of a method of procurement pursuant to articles 16 to 20;

(a) bis the selection of the evaluation procedure in a request for proposals for services pursuant to article 41 *sexies*;

(b) the limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

(c) a decision by the procuring entity under article 11 bis to reject all tenders, proposals, offers or quotations;

(d) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 38(2);

(e) an omission referred to in article 25(t) or article 41 ter (s).

Article 43. Review by procuring entity (or by approving authority)

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, as the case may be.)

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days 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, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [44 or 47]. Upon the institution of such proceedings, the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [44 or 47].

Article 44. Administrative review*

(1) A supplier or contractor entitled under article 42 to seek review may submit a complaint to [insert name of administrative body]:

(a) if the complaint cannot be submitted or entertained under article 43 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

*States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

*States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 44 and provide only for judicial review (article 47).

(b) if the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) pursuant to article 43(5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 43(4); or

(d) if the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 43, provided that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]* one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) 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;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) require the payment of compensation for

Option I

any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

Option II

loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings;

(g) order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 47.

Article 45. Certain rules applicable to review proceedings under article 43 [and article 44]

(1) Promptly after the submission of a complaint under article 43 [or article 44], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all suppliers or contractors participating in the procurement proceedings to which the

complaint relates of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

Article 46. Suspension of procurement proceedings

(1) The timely submission of a complaint under article 43 [or article 44] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under article 44 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

Article 47. Judicial review

The [insert name of court or courts] has jurisdiction over actions pursuant to article 42 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 43 [or 44].

*Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

D. Working paper submitted to the Working Group on the New International Economic Order at its seventeenth session: draft amendments to the UNCITRAL Model Law on Procurement of Goods and Construction to incorporate procurement of services

(A/CN.9/WG.V/WP.40) [Original: English]

CONTENTS

	<i>Page</i>
INTRODUCTION	90
DRAFT AMENDMENTS TO UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION	91
Preamble	91
CHAPTER I. GENERAL PROVISIONS	91
Article 1. Scope of application	91
Article 2. Definitions	91
Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	92
Article 4. Procurement regulations	92
Article 5. Public accessibility of legal texts	92
Article 6. Qualifications of suppliers or contractors	92
Article 7. Prequalification proceedings	93
Article 8. Participation by suppliers or contractors	93
Article 9. Form of communications	94
Article 10. Rules concerning documentary evidence provided by suppliers or contractors	94
Article 11. Record of procurement proceedings	94
Article 11 <i>bis</i> . Rejection of all tenders, proposals, offers or quotations	95
Article 11 <i>ter</i> . Entry into force of the procurement contract	95
Article 12. Public notice of procurement contract awards	95
Article 13. Inducements from suppliers or contractors	95
Article 14. Rules concerning description of goods or construction	95
Article 15. Language	96
CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE	96
Article 16. Methods of procurement	96
Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation	96
Article 18. Conditions for use of restricted tendering	96
Article 19. Conditions for use of request for quotations	97
Article 20. Conditions for use of single-source procurement	97
CHAPTER III. TENDERING PROCEEDINGS	97
Section I. Solicitation of tenders and of applications to prequalify	97
Article 21. Domestic tendering	97
Article 22. Procedures for soliciting tenders or applications to prequalify	97
Article 23. Contents of invitation to tender and invitation to prequalify	98
Article 24. Provision of solicitation documents	98
Article 25. Contents of solicitation documents	98
Article 26. Clarifications and modifications of solicitation documents	99
Section II. Submission of tenders	99
Article 27. Language of tenders	99
Article 28. Submission of tenders	100
Article 29. Period of effectiveness of tenders; modification and withdrawal of tenders	100
Article 30. Tender securities	100

	<i>Page</i>
Section III. Evaluation and comparison of tenders	101
Article 31. Opening of tenders	101
Article 32. Examination, evaluation and comparison of tenders	101
Article 33. Rejection of all tenders [moved to article 11 <i>bis</i>]	102
Article 34. Prohibition of negotiations with suppliers or contractors	102
Article 35. Acceptance of tender and entry into force of procurement contract	102
CHAPTER IV. PROCEDURES FOR PROCUREMENT METHODS OTHER THAN TENDERING	103
Article 36. Two-stage tendering	103
Article 37. Restricted tendering	103
Article 38. Request for proposals	103
Article 39. Competitive negotiation	104
Article 39 <i>bis</i> . [Request for proposals for services] [Special procedures for request for proposals for services] [Special procedure for procurement of services]	104
Article 40. Request for quotations	106
Article 41. Single-source procurement	106
CHAPTER V. REVIEW	106
Article 42. Right to review	106
Article 43. Review by procuring entity (or by approving authority)	106
Article 44. Administrative review	107
Article 45. Certain rules applicable to review proceedings under article 43 [and article 44]	107
Article 46. Suspension of procurement proceedings	108
Article 47. Judicial review	108

INTRODUCTION

1. At the twenty-sixth session, following the adoption of the UNCITRAL Model Law on Procurement of Goods and Construction, the Commission requested the Working Group on the New International Economic Order to prepare draft model provisions on the procurement of services. At its sixteenth session, the Working Group identified and discussed changes and additions that could be made to the Model Law so as to encompass procurement of services. After its deliberations, the Working Group requested the Secretariat to prepare a revised version of the Model Law reflecting the deliberations and decisions of the sixteenth session (A/CN.9/389, para. 9).

2. In preparing the present text, the Secretariat has sought to incorporate all deletions, changes and additions agreed on by the Working Group at its sixteenth session including those which the Working Group decided would need further discussion at its seventeenth session. The changes and additions to the Model Law are in italics, except in the case of headings appearing above articles, all of which are in italics as a matter of style. In those few instances where it was felt by the Secretariat that the changes or additions proposed raised issues that would require the attention of the Working Group, such issues are indicated in notes following the articles concerned. However, in keeping with

recent instructions on limitation of United Nations documentation, those notes have been kept to a minimum.

3. The present text enables the Working Group to consider a consolidated version of the Model Law covering procurement of goods and construction, as well as procurement of services. It will be observed, however, that the addition of a fairly lengthy article 39 *bis*, which adds a method of procurement specifically for services while still leaving the existing methods available for services, makes the Model Law apparently more complex. In considering the present text, the Working Group may wish to examine approaches that might have a less complex result. In particular, the Working Group may wish to consider whether it would be preferable to modify articles 16 and 17 so as to exclude services from the generally applicable rule that tendering is the preferred method of procurement. Under such an approach, the essential elements of what is currently in article 39 *bis* would be incorporated into the existing methods of procurement, especially request for proposals (article 38). The modified article 38, which could incorporate special evaluation procedures for services, could then be designated the preferred method for procurement of services. It might be considered that such an approach would permit the retention in the Model Law of special procedures for services without the addition of another method of procurement.

DRAFT AMENDMENTS TO UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION

Preamble

WHEREAS the [Government] [Parliament] of . . . considers it desirable to regulate procurement of goods, construction and services 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, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;
- (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; and
- (f) achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

Chapter I. General provisions

Article 1. Scope of application

(1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.

(2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:

- (a) procurement involving national defence or national security;
- (b) . . . (the enacting State may specify in this Law additional types of procurement to be excluded); or
- (c) procurement of a type excluded by the procurement regulations.

(3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.

* * *

Article 2. Definitions

For the purposes of this Law:

- (a) "procurement" means the acquisition for compensation, of goods, construction or services.

(b) "procuring entity" means:

(i) *Option I for subparagraph (i)*

any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except . . . ; (and)

Option II for subparagraph (i)

any department, agency, organ or other unit, or any subdivision 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");

(c) "goods" means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, including services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves; (the enacting State may include additional categories of goods)

(d) "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 drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract;

(d bis) "services" means [anything] [any product] that is neither goods nor construction; (the enacting State may refer to certain categories of services)¹

(e) "supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;

(f) "procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;

(g) "tender security" means a security provided to the procuring entity to secure the fulfilment of any obligation referred to in article 30(1)(f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;

(h) "currency" includes monetary unit of account.

¹The foregoing definition has been added pursuant to paragraph 25 of A/CN.9/389. However, the Working Group might wish to reconsider the desirability or necessity of retaining the definition of services, as it might raise uncertainty as to the scope of application of the Model Law.

Article 3. *International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]*

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 ... (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. *Public accessibility of legal texts*

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

* * *

Article 6. *Qualifications of suppliers and contractors*

(1) (a) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(b) In order to participate in procurement proceedings, suppliers or contractors must qualify by meeting such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

- (i) that they possess the *necessary professional qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;*
- (ii) that they have legal capacity to enter into the procurement contract;
- (iii) 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;

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

(v) 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 disbarment proceedings.

(2) 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 such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1)(b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, 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 article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations.

(5) Subject to articles 8(1) and 32(4)(d), the procuring entity shall establish no criterion, requirement or procedure with respect to the *requirements to be met by suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof on the basis of nationality, or that is not objectively justifiable.*

(6) (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 be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

* * *

Article 7. *Prequalification proceedings*

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III or IV, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The prequalification documents shall include, at a minimum:

(a) (i) in tendering proceedings, the information required to be specified in the invitation to tender by article 23(1)(a) to (e), (h) and, if already known, (j);

(ii) in request for proposals, the information referred to in article 38(4)(a);

(iii) in (request for proposals for services), the information referred to in article 39 bis (4);

(b) the following information:

(i) instructions for preparing and submitting prequalification applications;

(ii) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(iii) any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(iv) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(v) 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 submission of applications to prequalify and to the prequalification proceedings.¹

(4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. 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 provided the prequalification documents.

(5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.

(6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.

(7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

¹The change in this paragraph is made pursuant to paragraph 90 of A/CN.9/389. In referring only to tendering proceedings, request for proposals and [request for proposals for services] in this paragraph, it is taken that the provisions on prequalifications are not applicable for competitive negotiations, request for quotations and single-source procurement since for these methods, the procuring entity will only engage those suppliers or contractors who are qualified. For two-stage tendering and restricted tendering the rules for tendering proceedings will apply.

* * *

Article 8. *Participation by suppliers or contractors*

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in

the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

* * *

Article 9. *Form of communications*

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(2) Communications between suppliers or contractors and the procuring entity referred to in articles 7(4) and (6), 29(2)(a), 30(1)(d), 32(1), 33(3), 35(1) and 37(1) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

* * *

Article 10. *Rules concerning documentary evidence provided by suppliers or contractors*

If the procuring entity requires the legalization of documentary evidence provided by suppliers or contractors to demonstrate their qualifications in procurement proceedings, 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.

* * *

Article 11. *Record of procurement proceedings*

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) a brief description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) the names and addresses of suppliers or contractors that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;

(c) information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;

(d) the price or price-determining formula and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to articles 32(4)(d) and 39 *bis* (5)(e);

(f) if all tenders were rejected pursuant to article 33, a statement to that effect and the grounds therefor, in accordance with article 33(1);

(g) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) the information required by article 13, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 16(2) and (4) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(j) in procurement proceedings in which the procuring entity, in accordance with article 8(1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;

(k) a summary of any requests for clarification of the prequalification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

(2) Subject to article 31(3), the portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) of this article shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 31(3), the portion of the record referred to in subparagraphs (c) to (g), and (k), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs (c) to (e), and (k), may be ordered at an earlier stage by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1)(e).

(4) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.

* * *

[Article 11 bis. *Rejection of all tenders, proposals, offers or quotations*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval), and) if so specified in the solicitation documents or other documents for solicitation of proposals, offers or quotations, the procuring entity may reject all tenders, proposals, offers or quotations at any time prior to the acceptance of a tender, proposal, offer or quotation. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender, proposal, offer or quotation, the grounds for its rejection of all tenders, proposals, offers or quotations, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have submitted tenders, proposals, offers or quotations.

(3) Notice of the rejection of all tenders, proposals, offers or quotations shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations.]

* * *

[Article 11 ter. *Entry into force of the procurement contract*

(1) In tendering proceedings, acceptance of the tender and entry into force of the procurement contract shall be carried out in accordance with article 35.

(2) In all the other methods of procurement, the manner of entry into force of the procurement contract shall be notified to the suppliers or contractors in the documents for solicitation of proposals, offers or quotations.]¹

¹This article is pursuant to paragraph 142 of A/CN.9/389. In considering the feasibility of including a provision on entry into force of the contract for the other methods of procurement, difficulties became apparent in drafting an appropriate and generally applicable provision. The Working Group may therefore wish to consider whether it is adequate to provide that for all the other methods of procurement the procuring entity should only notify the suppliers or contractors of the manner in which the procurement contract will enter into force.

* * *

Article 12. *Public notice of procurement contract awards*

(1) The procuring entity shall promptly publish notice of procurement contract awards.

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).

(3) Paragraph (1) is not applicable to awards where the contract price is less than [. . .].

* * *

Article 13. *Inducements from suppliers or contractors*

(Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it 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, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

* * *

Article 14. *Rules concerning description of goods or construction*

(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

(2) To the extent possible, any specifications, plans, drawings, designs and requirements or descriptions of services shall be based on the relevant objective technical and quality characteristics of the goods, construction or services to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction or services to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the prequalification documents, solicitation documents or other documents for solicitation or proposals, offers or quotations;

(b) due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating

other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

* * *

Article 15. *Language*

The prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations shall be formulated in... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where:

- (a) the procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article 8(1), or
- (b) the procuring entity decides, in view of the low value of the goods or construction to be procured, that only domestic suppliers or contractors are likely to be interested).

* * *

Chapter II. Methods of procurement and their conditions for use

Article 16. *Methods of procurement*

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.

(2) In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 17, 18, 19 or 20.

(3) In procurement of services, a procuring entity shall use the procedures set forth in article 39 bis, unless the procuring entity determines that:

(a) it is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the services to be procured; or

(b) it would be more appropriate, subject to approval by... (the enacting State designates an organ to issue the approval),) to use a method referred to in article 17, or, in the case of the methods referred to in articles 18 to 20, the method in respect of which the conditions for use are satisfied.

(4) The procuring entity shall include in the record required under article 11, a statement of the grounds and circumstances on which it relied to justify the use of a method of procurement pursuant to paragraphs (2) or (3)(a) or (b).

* * *

Article 17. *Conditions for use of two-stage tendering, request for proposals or competitive negotiation*

(1) (Subject to approval by... (the enacting State designates an organ to issue the approval),) a procuring entity

may engage in procurement by means of two-stage tendering in accordance with article 36, or request for proposals in accordance with article 38, or competitive negotiation in accordance with article 39, in the following circumstances:

(a) it is not feasible for the procuring entity to formulate detailed specifications for the goods, construction or services and, in order to obtain the most satisfactory solution to its procurement needs,

- (i) it seeks tenders, proposals or offers as to various possible means of meeting its needs; or,
- (ii) because of the technical character of the goods or construction, or because of the nature of the services, it is necessary for the procuring entity to negotiate with suppliers or contractors;

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

(c) when the procuring entity applies this Law, pursuant to article 1(3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 13, 32(3) or 33, and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) (Subject to approval by... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) there is an urgent need for the goods, construction or services, and engaging in tendering proceedings 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; or,

(b) owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods.

* * *

Article 18. *Conditions for use of restricted tendering*

(Subject to approval by... (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in procurement by means of restricted tendering in accordance with article 37, when:

(a) the goods, construction or services, by reason of their highly complex or specialized nature, are 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 goods, construction or services to be procured.

* * *

Article 19. *Conditions for use of request for quotations*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of a request for quotations in accordance with article 40 for the procurement of readily available goods or services that are not specially produced or supplied to the particular specifications of the procuring entity and for which there is an established market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

* * *

Article 20. *Conditions for use of single-source procurement*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in accordance with article 41 when:

(a) the goods, construction or, because of their unique nature¹, the services, are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists;

(b) there is an urgent need for the goods or construction, and engaging in tendering proceedings or any other method of procurement 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;

(c) owing to a catastrophic event, there is an urgent need for the goods or construction, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) the procuring entity, having procured goods, equipment or technology 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 of a unique nature¹, 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;

(e) the procuring entity seeks to enter into a contract with the supplier or contractor for the purpose of research,

experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; or

(f) the procuring entity applies this Law, pursuant to article 1(3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by . . . (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 32(4)(c)(iii), provided that procurement from no other supplier or contractor is capable of promoting that policy.

¹The foregoing amendments have been made pursuant to paragraph 101 of A/CN.9/389. The reference to uniqueness of the services may, however, raise some uncertainty because some goods or construction may also only be available from one supplier or contractor by reason of their uniqueness. The Working Group may therefore wish to consider whether a specific reference to uniqueness is warranted in subparagraphs (a) and (d).

* * *

Chapter III. Tendering proceedings

Section I. Solicitation of tenders and of applications to prequalify

Article 21. Domestic tendering

In procurement proceedings in which

(a) participation is limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) 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 submitting tenders, the procuring entity shall not be required to employ the procedures set out in articles 22(2), 23(1)(h) and (i), 23(2)(c) and (d), 25(j), (k) and (s) and 30(1)(c) of this Law.

* * *

Article 22. Procedures for soliciting tenders or applications to prequalify

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in . . . (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) The invitation to tender or invitation to prequalify 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.

* * *

Article 23. *Contents of invitation to tender and invitation to prequalify*

(1) The invitation to tender shall contain, at a minimum, the following information:

- (a) the name and address of the procuring entity;
- (b) the nature and quantity, and place of delivery, of the goods to be supplied or the nature and location of the construction to be effected *or the nature and place of delivery, and, if relevant, place of performance of the services to be procured*;
- (c) the desired or required time for the supply of the goods or for the completion of the construction *or the time schedule requirements for the provision of the services*;
- (d) the criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article 6(1)(b);
- (e) a declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8(1), as the case may be;
- (f) the means of obtaining the solicitation documents and the place from which they may be obtained;
- (g) the price, if any, charged by the procuring entity for the solicitation documents;
- (h) the currency and means of payment for the solicitation documents;
- (i) the language or languages in which the solicitation documents are available;
- (j) the place and deadline for the submission of tenders.

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1)(a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:

- (a) the means of obtaining the prequalification documents and the place from which they may be obtained;
- (b) the price, if any, charged by the procuring entity for the prequalification documents;
- (c) the currency and terms of payment for the prequalification documents;
- (d) the language or languages in which the prequalification documents are available;
- (e) the place and deadline for the submission of applications to prequalify.

* * *

Article 24. *Provision of solicitation documents*

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the

procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified 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 printing them and providing them to suppliers or contractors.

* * *

Article 25. *Contents of solicitation documents*

The solicitation documents shall include, at a minimum, the following information:

- (a) instructions for preparing tenders;
- (b) the criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 32(6);
- (c) the requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (d) the nature and required technical and quality characteristics, in conformity with article 14, of the goods, construction *or services* to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected *or the services are to be delivered and, if relevant, performed*; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;
- (e) the factors to be used by the procuring entity in determining the successful tender, including any margin of preference and any factors other than price to be used pursuant to article 32(4)(b), (c) or (d) and the relative weight of such factors;
- (f) 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;
- (g) if alternatives to the characteristics of the goods, construction, *services*, contractual terms and conditions or other requirements set forth 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 and compared;
- (h) if suppliers or contractors are permitted to submit tenders for only a portion of the goods or construction to be procured, a description of the portion or portions for which tenders may be submitted;
- (i) 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 goods, construction *or services* themselves, such as any applicable transportation and insurance charges, customs duties and taxes;

(j) the currency or currencies in which the tender price is to be formulated and expressed;

(k) the language or languages, in conformity with article 27, in which tenders are to be prepared;

(l) 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 submitting tenders, 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 materials bonds;

(m) if a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) the manner, place and deadline for the submission of tenders, in conformity with article 28;

(o) the means by which, pursuant to article 26, 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;

(p) the period of time during which tenders shall be in effect, in conformity with article 29;

(q) the place, date and time for the opening of tenders, in conformity with article 31;

(r) the procedures to be followed for opening and examining tenders;

(s) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 32(5) 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, provided, however, that the omission of any such reference shall not constitute grounds for review under article 42 or give rise to liability on the part of the procuring entity;

(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) any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) notice of the right provided under article 42 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) if the procuring entity reserves the right to reject all tenders pursuant to article 33, a statement to that effect;

(y) any formalities that will be required once a 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 35, 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;

(z) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

* * *

Article 26. *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 the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender 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 submission of tenders, 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 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 tenders.

* * *

Section II. *Submission of tenders*

Article 27. *Language of tenders*

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

* * *

Article 28. *Submission of tenders*

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article 26, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5) (a) Subject to subparagraph (b), a tender shall be submitted in writing, signed and in a sealed envelope.

(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality.

(c) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

* * *

Article 29. *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, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(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 the submission of 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 the submission of tenders.

* * *

Article 30. *Tender securities*

(1) When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security:

(a) the requirement shall apply to all such 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;

(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 forth 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 submitting a tender, 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 submitting the tender shall not relate to conduct other than:

- (i) withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline if so stipulated in the solicitation documents;
- (ii) failure to sign the procurement contract if required by the procuring entity to do so;
- (iii) failure to provide a required security for the performance of the contract after the tender 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 tender 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 termination of the tendering proceedings without the entry into force of a procurement contract;
- (d) the withdrawal of the tender prior to the deadline for the submission of tenders, unless the solicitation documents stipulate that no such withdrawal is permitted.

* * *

Section III. Evaluation and comparison of tenders

Article 31. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at 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 submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

* * *

Article 32. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. 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.

(b) Notwithstanding subparagraph (a) of this paragraph, 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 submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents.

(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 forth 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 and comparison of tenders.

(3) The procuring entity shall not accept a tender:

- (a) if the supplier or contractor that submitted the tender is not qualified;
- (b) if the supplier or contractor that submitted 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 13.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents.

(b) The successful tender shall be:

- (i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or
- (ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.

(c) In determining the lowest evaluated tender in accordance with subparagraph (b)(ii) of this paragraph, the procuring entity may consider only the following:

- (i) the tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;
- (ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or performance of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services;
- (iii) the effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this 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 enacting State may expand subparagraph (iii) by including additional factors)]; and

(iv) national defence and security considerations.

(d) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article 25(s), for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4)(b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications 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, subject to the right of the procuring entity, in accordance with article 33(1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11.

* * *

Article 33. *Rejection of all tenders (moved to article 11 bis)*

* * *

Article 34. *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 submitted by the supplier or contractor.

* * *

Article 35. *Acceptance of tender and entry into force of procurement contract*

(1) Subject to articles 32(7) and 33, the tender that has been ascertained to be the successful tender pursuant to article 32(4)(b) shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

(2) (a) Notwithstanding the provisions of paragraph (4) of this article, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(3) 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 of the tender 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 tenders specified in the solicitation documents pursuant to article 29(1) or the period of effectiveness of tender securities that may be required pursuant to article 30(1).

(4) Except as provided in paragraphs (2)(b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is 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 a mode authorized by article 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 32(4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 33(1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article shall be given to the supplier or contractor that submitted that tender.

(6) 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 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.

* * *

Chapter IV. Procedures for procurement methods other than tendering

Article 36. 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 submit, 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 goods or construction as well as to contractual terms and conditions of their supply.

(3) The procuring entity may engage in negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 13, 32(3) or 33 concerning any aspect of its tender.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods or construction to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit 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. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 32(4)(b).

* * *

Article 37. Restricted tendering

(1) (a) When the procuring entity engages in restricted tendering on the grounds referred to in article 18(a), it shall solicit tenders from all suppliers and contractors from whom the goods or construction to be procured are available.

(b) When the procuring entity engages in restricted tendering on the grounds referred to in article 18(b), 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.

(2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in . . . (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) The provisions of chapter III of this Law, except article 22, shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

* * *

Article 38. Request for proposals

(1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.

(2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation a notice seeking expression of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.

(3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

(a) the relative managerial and technical competence of the supplier or contractor;

(b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and

(c) the price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(4) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of

construction, the location of any construction to be effected and, in the case of services, the place of delivery and, if relevant, the place of performance;

(c) the criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion, and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) the price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

* * *

Article 39. *Competitive negotiation*

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(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 shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.

* * *

Article [39] (bis). [Request for proposals for services]
[Special procedures for request for proposals for services][Special procedure for procurement of services]

(1) A procuring entity shall solicit proposals for services or, where applicable, applications to prequalify by causing an invitation for proposals or an invitation to prequalify, as the case may be, to be published in . . . (the enacting State specifies the official gazette or other official publication in which the invitation for proposals or to prequalify is to be published).

(2) The invitation for proposals or invitation to prequalify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade or professional publication of wide international circulation [except where, in view of the low value of the services to be procured, the procuring entity decides that only domestic suppliers and contractors are likely to be interested in submitting proposals].

(3) The procuring entity may disregard the provisions of paragraph (1) and (2) of this article:

(a) where the services to be procured are available only from a limited number of suppliers or contractors that are known to the procuring entity, provided that it solicits proposals from all those suppliers or contractors; or

(b) where the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers and contractors to ensure effective competition; or

[(c) where, because of the nature of the services to be procured, economy and efficiency in procurement can only be promoted by means of direct solicitation, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition].

(4) A request for proposals issued by a procuring entity shall include at least the following information:

- (a) the name and address of the procuring entity;
- (b) a description of the services to be procured and the location where the services are to be delivered and, if relevant, performed;
- (c) the criteria to be used by the procuring entity in determining the successful proposal, including any margin of preference and any factors to be used pursuant to paragraph (6) of this article and the relative weight of such factors;
- (d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal;
- (e) any eligibility requirements that have to be met by suppliers or contractors;
- (f) the method selected pursuant to paragraphs (11), (12) or (13) of this article for ascertaining the successful proposal.

(5) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:

- (a) the qualifications, experience, reputation, reliability, professional and managerial competence of the supplier or contractor;
- (b) the effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;
- (c) the price submitted by the supplier or contractor for carrying out its proposal including any ancillary or related costs;
- (d) the effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of (this State), the extent of participation by local suppliers and contractors, the encouragement of employment, the economic development potential offered by the proposal, the development of local experience, (... (the enacting State may expand subparagraph (d) by including additional factors));

(6) If authorized by the procurement regulations (and subject to approval by ... (each State designates an organ to issue the approval),) in evaluating and comparing the proposals, a procuring entity may grant a margin of preference for the benefit of domestic suppliers of services which shall be calculated in accordance with the procurement regulations and included in the record of the procurement proceedings.

(7) (a) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (5) of this

article, shall be communicated to all suppliers or contractors participating in the procurement proceedings;

(b) 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 request for proposals, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors participating in the procurement proceedings, so as to enable those suppliers or contractors to take the minutes into account in preparing their proposals.

(8) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(9) In evaluating the proposals, the procuring entity shall apply only the criteria and method of selection that have been notified to suppliers or contractors in the request for proposals.

(10) The procuring entity, in ascertaining the successful proposal, shall use one of the methods provided for in either paragraph (11), (12) or (13) of this article.

(11) (a) The procuring entity shall establish a threshold level with respect to quality and technical aspects of the proposals and, without considering the price of the proposals, rate each proposal in accordance with the factors for evaluating the proposals and the relative weight and manner of application of those factors as set forth in the request for proposals. The procuring entity shall then compare the prices of the proposals that have attained a rating at or above the threshold level.

(b) The successful proposal shall then be:

- (i) the proposal with the lowest price; or
- (ii) the proposal with the highest combined evaluation of the price, and of technical capacity as rated in accordance with subparagraph (a) of this article.

(12) (a) The procuring entity shall engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(b) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(c) In the evaluation of proposals, the price of a proposal shall be considered separately and only after completion of the technical evaluation.

(d) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals as well as with the relative weight and manner of application of those criteria as set forth in the request for proposals.

(13) The procuring entity shall engage in negotiations with suppliers and contractors in accordance with the following procedure:

(a) establish a threshold level in accordance with paragraph (11)(a) of this article;

(b) invite for negotiations on the price or other aspects of its proposal the supplier or contractor that has attained the highest quality and technical rating in accordance with paragraph (11)(a) of this article;

(c) inform the suppliers or contractors that attained ratings above the threshold level that they may be considered for negotiation if the negotiations with the suppliers or contractors with higher ratings do not result in a procurement contract;

(d) inform the other suppliers or contractors that they did not attain the required threshold level;

(e) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (13)(b) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations;

(f) the procuring entity shall then invite for negotiations the supplier or contractor that attained the second highest 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 for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(14) (a) Any negotiations pursuant to paragraph (12) or (13) of this article shall be confidential and subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or any other information relating to the negotiations without the consent of the other party.¹

¹With reference to the issue raised in paragraph 3 of the introduction to this note, the Working Group might wish to consider the extent to which it would be possible to incorporate paragraph 11 of this article into tendering as it essentially represents a price-based evaluation on the basis of a qualification threshold, a procedure akin to prequalification. Paragraph 12, which is essentially evaluation of the best and final offer (BAFO), is modeled on the procedure already found under article 38. Paragraph 13 of this article could then be incorporated in article 38 as an alternative method for evaluation in the services context.

* * *

Article 40. Request for quotations

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods or services 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 submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation meeting the needs of the procuring entity.

* * *

Article 41. Single-source procurement

In the circumstances set forth in article 20 the procuring entity may procure the goods, construction or services by soliciting a proposal or price quotation from a single supplier or contractor.

* * *

Chapter V. Review*

Article 42. Right to review

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 43 to [47].

(2) The following shall not be subject to the review provided for in paragraph (1) of this article:

(a) the selection of a method of procurement pursuant to articles 16 to 20;

(b) the limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

(c) a decision by the procuring entity under article [11 bis] to reject all tenders, proposals, offers or quotations;

(d) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 38(2);

(e) an omission referred to in article 25(r).

*States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

* * *

Article 43. Review by procuring entity (or by approving authority)

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure.) A reference in this Law to the head of the procuring entity (or the head of the approving authority) includes any person designated by the head of the procuring entity (or by head of the approving authority, as the case may be).

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days 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, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [44 or 47]. Upon the institution of such proceedings, the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [44 or 47].

* * *

Article 44. *Administrative review**

(1) A supplier or contractor entitled under article 42 to seek review may submit a complaint to [insert name of administrative body]:

(a) if the complaint cannot be submitted or entertained under article 43 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

(b) if the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) pursuant to article 43(5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 43(4); or

(d) if the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 43, provided

that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]** one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject-matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) 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;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) require the payment of compensation for

Option I

any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

Option II

loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings

(g) order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 47.

*States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 44 and provide only for judicial review (article 47).

**Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

* * *

Article 45. *Certain rules applicable to review proceedings under article 43 [and article 44]*

(1) Promptly after the submission of a complaint under article 43 [or article 44], the head of the procuring entity (or of the approving authority) [, or the [insert name of

administrative body], as the case may be,] shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

* * *

Article 46. *Suspension of procurement proceedings*

(1) The timely submission of a complaint under article 43 [or article 44] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under article 44 shall suspend performance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

* * *

Article 47. *Judicial review*

The [insert name of court or courts] has jurisdiction over actions pursuant to article 42 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 43 [or 44].

* * *

E. Draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction: note by the Secretariat

(A/CN.9/394) [Original: English]

1. While preparing the UNCITRAL Model Law on Procurement of Goods and Construction, the Commission was of the view that background and explanatory information on the Model Law in the form of a guide to enactment would provide useful assistance to executive branches of Governments, and to legislatures using the Model Law. Accordingly, the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393) was adopted by the Commission at its twenty-sixth session simultaneously with the adoption of the Model Law (A/48/17, para. 258).

2. In reviewing the amendments and additions that should be made to the UNCITRAL Model Law on Procurement of Goods and Construction so as to encompass procurement

of services, the Working Group on the New International Economic Order noted the added importance of the Guide to Enactment in view of inclusion of provisions on procurement of services, in particular since this was an area in which many legislatures and Governments had relatively limited experience. The Working Group expressed the hope that the amended Guide to Enactment would be adopted simultaneously with the amended Model Law (A/CN.9/392, para. 132). In line with that objective, the present note sets forth in the annex the draft amendments to the Guide to Enactment geared to the text of the draft Model Law on Procurement of Goods, Construction and Services as established by the Working Group upon conclusion of its seventeenth session and set forth in the annex to the report of that session (A/CN.9/392).

3. As, in line with applicable directives on limitation of documentation, it was not feasible to reprint the entire Guide, this note only presents the draft amendments and additions that are to be made to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393). In instances where only minor changes are to be made, the words to be added or amended are indicated. In addition, it may be noted that, as appropriate, the final amendments to the Guide will include the replacement of the words "goods or construction" by the words "goods, construction or services". Where the amendments or additions are substantial, the entire new passage is provided. As was the case with the adoption of the Guide at the twenty-sixth session, once the Commission has completed its review and adoption of the Model Law on Goods, Construction and Services at the twenty-seventh session, it might be left to the Secretariat to finalize the Guide to take account of the deliberations and decisions in the Commission.

ANNEX

DRAFT AMENDMENTS TO THE GUIDE TO ENACTMENT OF UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS AND CONSTRUCTION

INTRODUCTION

1. Replace paragraph 1 by the following:

"1. At its nineteenth session, in 1986, the United Nations Commission on International Trade Law (UNCITRAL) decided to undertake work in the area of procurement. The UNCITRAL Model Law on Procurement of Goods and Construction, and its accompanying Guide to Enactment, were adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993). The Model Law is intended 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 presently exists. The text of the Model Law on Procurement of Goods and Construction is set forth in 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)*).

"1 *bis*. On the understanding that certain aspects of the procurement of services were governed by different considerations from those that governed the procurement of goods or construction, a decision had been made to limit the work at the initial stage to the formulation of model legislative provisions on the procurement of goods and construction. At the twenty-sixth session, having completed work on model statutory provisions on procurement of goods and construction, the Commission decided to proceed with the elaboration of model statutory provisions on procurement of services. Accordingly, at the twenty-seventh session (New York, 31 May-17 June 1994), the Commission adopted amendments to the Model Law on Procurement of Goods and Construction so as to encompass procurement of services and adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereinafter referred to as the "Model Law"). The text of the Model Law is set forth 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)*). At the same session, the Commission also adopted the present Guide as a companion to the Model Law."

2. Paragraph 6:

In the penultimate sentence, after the words "for exceptional cases" add the words "in the case of goods or construction, or other than request for proposals for services in the case of services".

1. MAIN FEATURES OF THE MODEL LAW

3. Replace paragraph 10 by the following:

"10. To take account of certain differences between the procurement of goods and construction and the procurement of services, the Model Law sets forth in chapter IV *bis* a set of procedures especially designed for the procurement of services. The main differences referred to above in paragraph 1 *bis* arise from the fact that, unlike the procurement of goods and construction, procurement of services typically involves the supply of an intangible commodity whose quality and exact content may be difficult to quantify. The precise quality of the services provided may be largely dependent on the skill and expertise of the suppliers or contractors. Thus, unlike procurement of goods and construction where price is the predominant criterion in the evaluation process, the price of services is often not considered as important a criterion in the evaluation and selection process as the quality and competence of the suppliers or contractors. Chapter IV *bis* is intended to provide procedures that reflect these differences."

4. Replace paragraph 13 with the following text:

"13. The Model Law presents several procurement methods so as to enable the procuring entity to deal with the varying circumstances that it might encounter. This enables an enacting State to aim for as broad an application of the Model Law as possible. As the rule for normal circumstances in procurement of goods or construction, the Model Law mandates the use of tendering, the method of procurement widely recognized as generally most effective in promoting competition, economy and efficiency in procurement, as well as the other objectives set forth in the Preamble. For normal circumstances in the procurement of services, the Model Law prescribes the use of request for proposals for services so as to give due weight in the evaluation process to the qualifications and expertise of the service providers. For the exceptional circumstances in which tendering is not appropriate or feasible for procurement of goods or construction, the Model Law offers other methods of procurement; and it also does so for the circumstances in which request for proposals for services is not appropriate or feasible for procurement of services."

5. Add a paragraph 14 *bis* as follows:

"Request for proposals for services"

14 *bis*. Since request for proposals for services is the method of procurement to be used in typical circumstances in the procurement of services, chapter IV *bis* contains procedures that promote competition, objectivity and transparency, while taking account of the predominant importance of the qualifications and expertise of the service providers in the evaluation process. The main features of request for proposals for services include, for example, unrestricted solicitation of suppliers and contractors as the general rule, and predisclosure in the request for proposals of the criteria for evaluation of proposals and, of the three optional selection methods, the one that will be used in the selection process. According to the first method, which is set forth in article 41 *sexies* (12) and which is akin to tendering in that there is no negotiation, the procuring entity subjects proposals that obtain a technical rating above a set threshold to a straightforward price competition. The second

option (article 41 *sexies* (13)) provides a method by which the procuring entity negotiates with suppliers and contractors, after which they submit their best and final offers, a process akin to the request for proposals procedure in article 39. Under the third method (article 41 *sexies* (14)), the procuring entity holds negotiations solely on price with the supplier or contractor who obtained the highest technical rating."

6. *Paragraph 15:*

(i) In the first sentence, after the words "for cases", add the words "in the procurement of goods and construction,".

(ii) After the first sentence, add the following: "Those of the three procurement methods provided for in article 17 that have been included by the enacting State in its law might also be used for procurement of services. However, for one of these other methods to be used, the condition for its use would have to be present."

7. *Paragraph 19:*

After the words "standardized goods", add the words "or services".

8. *Paragraph 21:*

After the words "tendering proceedings", add the words "or request for proposals for services".

9. *Paragraph 23:*

(i) In the first sentence, replace the words "in article 32(4)(d)", by the words "in articles 32(4)(d) and 41 quater (2)".

(ii) In the third sentence, where the word "tender" appears, add the words "or proposal".

10. *Paragraph 24:*

In the first sentence, after the words "engaging in tendering", add the words "or request for proposals for services".

11. *Paragraph 25:*

In the first sentence, after the words "other than tendering", add the words "or request for proposals for services".

II. ARTICLE-BY-ARTICLE REMARKS

Chapter 1. General provisions

Article 2. Definitions

12. Replace *paragraph (3)* with the following:

"3. Editorial language has been included at the end of the definitions of "goods" and of "services" in subparagraphs (c) and (d *bis*) indicating that a State may wish to specifically refer in those definitions to categories of items that would be treated as goods or services, as the case may be, and whose status might otherwise be unclear. The intent of this technique is to provide clarity with respect to what is and what is not to be treated as "goods" or "services" and it is therefore not meant to be used to limit the scope of application of the Model Law, which can be done by way of article 1(2)(b). Such an added degree of specificity might be considered desirable by the enacting State, in particular in view of the open-ended definition of services."

Article 4. Procurement regulations

13. *Paragraph 2:*

After the words "method other than tendering", add the words "or request for proposals for services".

14. *Paragraph 3:*

After the reference to article 32(4)(d), add a reference to article 41 *quater* (2).

Article 7. Prequalification proceedings

15. *Paragraph 1:*

In the last sentence, after the word "tender", add the words "or proposal", and after the word "tenders", add the words "or proposals".

Article 11. Record of procurement proceedings

16. *Paragraph 1:*

At the end of the paragraph add the following sentence: "The rationale behind limiting disclosure of information required to be disclosed under article 11(1)(d) to that which is known to the procuring entity is that there may be procurement proceedings in which all proposals would not be fully developed or finalized by the proponents, in particular where all the proposals did not survive to the final stages of the procurement proceedings. The reference in this paragraph to "a basis for determining the price" is meant to reflect the possibility that in some instances, particularly in procurement of services, the tenders, proposals, offers or quotations would contain a formula by which the price could be determined rather than an actual price quotation."

17. Make the following changes after the comments on *article 11*:

(i) Add the title "Article 11 *bis*. Rejection of all tenders, proposals, offers or quotations" and place the comments on article 33 (as amended by (ii) hereunder) below this title.

(ii) In every instance after the word "tenders", add the words "proposals, offers or quotations".

(iii) Add the following text:

"Article 11 *ter*. Entry into force of the procurement contract

Article 11 *ter* is included because, 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. In the context of tendering, article 35 sets forth detailed rules applicable to the entry into force of the procurement contract, which is reflected in paragraph (1). However, no rules on entry into force of the procurement contract are provided for the other methods of procurement in view of the varying circumstances that may surround the use of other procurement methods and the procedurally less detailed treatment of them in the Model Law. It is expected that, in most instances, entry into force of the procurement contract for the other methods of procurement will be determined in accordance with other bodies of law, such as the contract or administrative law of the enacting State. In order to ensure an adequate degree of transparency, however, it is provided for those other methods that the procuring entity predisclose to the suppliers and contractors the rules that will be applicable to the entry into force of the procurement contract."

Chapter II. Methods of procurement and their conditions for use

18. Replace the comments on *article 16* with the following:

"1. Article 16 establishes the rule, already discussed in paragraph 13 of the Introduction to this Guide, that, for the procurement of goods or construction, tendering is the method of procurement to be used normally, while request for proposals for services, as set out in chapter IV *bis*, is the method to be used normally for procurement of services. For those exceptional cases of procurement of goods or construction in which tendering, even if feasible, is not judged by the procuring entity to be the method most apt to provide the best value, the Model Law provides a number of other methods of procurement. In the case of services, the procuring entity may use tendering where it is feasible to formulate detailed specifications and the nature of the services allow for tendering; otherwise it may use one of the other methods of procurement available under the Model Law if the conditions for its use are met."

"2. Article 16(4) sets forth the requirement that a decision to use a method of procurement other than tendering in the case of goods or construction, or, in the case of services, a method of procurement other than request for proposals for services, should be supported in the record by a statement of the grounds and circumstances underlying that decision. That requirement is included because the decision to use an exceptional method of procurement, rather than the method that is normally required (i.e., tendering for goods or construction, or request for proposals for services) should not be made secretly or informally."

Article 17. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

19. Paragraph 1:

In the first sentence, after the words "other than tendering", add the words "or requesting for proposals for services".

20. Paragraph 2:

(i) After the words "to formulate specifications", add the words "for the goods or construction or, as the case may be, identify the characteristics of the services."

(ii) After the words "other than tendering", add the words "or request for proposals for services".

21. Add the following new text consequent to the addition to the Model Law of Chapter IV *bis*:

"Chapter IV *bis*. Request for proposals for services

Articles 41 *bis* to *septies* present the procedures for request for proposals for services, the procurement method normally to be used in procurement of services. Since, as noted in paragraph 10 of section I of this Guide, the main difference between procurement of goods and construction and procurement of services is in the evaluation and selection process, the features of chapter IV *bis* that differ most markedly from tendering are to be found in article 41 *sexies* on the selection procedures. Otherwise, the articles in this chapter, for example on solicitation of proposals and on contents of the request for proposals, generally parallel provisions on analogous points in chapter III, on tendering proceedings. This is because tendering and request for proposals for services are the methods to be used in the bulk of procurement and, as such, are designed to maximize economy and efficiency in procurement and promote the other objectives set forth in the Preamble."

"Article 41 bis. Solicitation of proposals

1. In line with the objective of the Model Law of fostering competition in procurement, and since request for proposals for services is the main method for procurement of services, article 41 *bis* is aimed at ensuring that as many suppliers and contractors as possible get the opportunity to become aware of procurement proceedings and to express their interest in participating in the proceedings. As is the case also in tendering proceedings, this is achieved by providing that the notice seeking expressions to participate should be publicized widely.

2. However, recognizing that in certain instances generally parallel to those reflected in the conditions for use of restricted tendering (article 18), the requirement of open solicitation might be unwarranted or might defeat the objectives of economy and efficiency, paragraph (3) sets out those cases where the procuring entity need not engage in open solicitation. The enacting State may wish to establish in the procurement regulations the value threshold below which procuring entities need not, in accordance with paragraphs (2) and (3) of the article, resort to open solicitation. In this regard, it may be noted that the level at which the threshold would be set for services might be lower than the level at which it would be set for goods and construction."

"Article 41 ter. Contents of request for proposals for services

1. Article 41 *ter* contains a list of the minimum information that should be contained in the request for proposals in order to assist the suppliers and contractors in preparing their proposals and to enable the procuring entity to compare the proposals on an equal basis. In view of the predominance as a procurement method of request for proposals for services, article 41 *ter* is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 25).

2. Paragraphs (h) and (i) reflect the fact that, in many instances of procurement of services, the full nature and characteristics of the services to be procured might not be known to the procuring entity. Since, as discussed in paragraph 10 of section I of this Guide, the proposal price might not always be a relevant criterion in the procurement of services, paragraphs (k) and (l) are only applicable if price is a relevant criterion in the selection process."

"Article 41 quater. Criteria for the evaluation of proposals

1. Article 41 *ter* sets out the permissible range of criteria that the procuring entity may apply in evaluating the proposals. As is the case elsewhere in the Model Law where such types of criteria are listed, the procuring entity is not required necessarily to apply each of the criteria in every instance of procurement. In the interests of transparency, however, the procuring entity is to apply the same criteria to all proposals and it is precluded from applying criteria that have not been disclosed to the suppliers and contractors in the request for proposals.

2. In reflecting the importance of the skill and expertise of the suppliers and contractors in the bulk of the cases of procurement of services, paragraph (1)(a) lists as one of the criteria the qualifications and abilities of the personnel who will be involved in providing the services. This criterion would be particularly relevant in the procurement of those services that

require a high degree of personal skill and knowledge on the part of the service providers, for example, in an engineering consultancy contract. By establishing the effectiveness of the proposal in meeting the needs of the procuring entity as one of the possible criteria, paragraph (1)(b) enables the procuring entity to disregard a proposal that has been inflated with regard to technical and quality aspects beyond what is required by the procuring entity in an attempt to obtain a high ranking in the selection process, thereby artificially attempting to put the procuring entity in the position of having to negotiate with the proponent of the inflated proposal.

3. Paragraphs (1)(d) and (e), and (2), are similar to provisions applicable to tendering by way of article 32(4)(c)(iii), (iv) and (d). The comments in this Guide on those provisions in the context of tendering (see paragraphs 3 to 6 of the comments on article 32) are therefore relevant to article 41 *quater*."

"Article 41 quinquies. Clarifications and modifications of request for proposals"

Article 41 *quinquies* mirrors the provisions of article 26 on the analogous matter in the context of tendering and the comments in this Guide on article 26 are thus relevant to article 41 *quinquies*."

"Article 41 sexies. Selection procedures"

1. Paragraph (1)(b) makes allowance for the use of an impartial panel of experts in the selection process, a procedure that is sometimes used by procuring entities, particularly in the adjudication of design contests or in procurement of services with a high artistic or aesthetic component. Enacting States using such panels may wish to provide further rules in the procurement regulations, with regard, for example, to any distinctions that would have to be drawn between panels whose role was merely advisory, panels whose role was limited to the aesthetic and artistic aspects of the proposals and panels empowered to make decisions that would bind the procuring entity.

2. In paragraphs (2), (3) and (4), three methods of selecting the successful proposal are provided so as to enable the procuring entity, within the context of a request for proposals for services proceeding, to utilize a method that best suits the particular requirements and circumstances of each given case. The choice of a particular method is largely dependent on the type of services being procured and the main factors that will be taken into account in the selection process, in particular, whether the procuring entity wishes to hold negotiations with suppliers and contractors, and if so, at which stage in the selection process. For example, if the services to be procured are of fairly standard nature where no great personal skill and expertise is required, the procuring entity may wish to resort to the method of selection under paragraph (2), which is more price oriented and which, like tendering, does not involve negotiations. On the other hand, for services in which the personal skill and expertise of the supplier or contractor is a crucial consideration, the procuring entity may wish to resort to one of the methods in paragraphs (3) and (4), since they like tendering, permit greater emphasis to be placed on those criteria and provide for negotiation.

3. As mentioned above, the method provided for under paragraph (2) may be more compatible with the procurement of services where the price rather than the personal skill and expertise of the suppliers and contractors is the dominant

consideration and the procuring entity does not wish to negotiate. However, to ensure that the suppliers and contractors possess sufficient competence and expertise, the Model Law provides that the procuring entity should establish a threshold level by which to measure the non-price aspects of the proposals. If this threshold is set at a sufficiently high level, then all the suppliers and contractors whose proposals attain a rating at or above the threshold can in all probability provide the services at a more or less equivalent level of competence. This allows the procuring entity to be more secure in selecting the winning proposal on the basis of price alone in accordance with paragraph (2)(b)(i), or, in accordance with paragraph (2)(b)(ii), on the basis of the best combined evaluation of price and non-price aspects.

4. Paragraph (3) sets forth a method of selection that is akin to the evaluation procedures for the request for proposals method under article 39. It is therefore best suited in those circumstances where the procuring entity seeks various proposals on how best to meet its procurement needs. By allowing for early negotiations with all suppliers and contractors, the procuring entity is able to clarify better what its needs are, which can be taken into account by suppliers and contractors when preparing their "best and final offers". Subparagraph (c) has been included in order to ensure that the price of the proposal is not given undue weight in the evaluation process to the detriment of the evaluation of the technical and other aspects of the proposal, including the evaluation of the competence of those who will be involved in providing the services.

5. A third procedure for selecting the successful proposal, one that also involves negotiations, and which traditionally has been widely used in particular in procurement of intellectual services, is set forth in paragraph (4). In this procedure, 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 above the threshold, ensuring that the suppliers and contractors with whom it will negotiate are capable of providing the services required. The procuring entity then holds negotiations with those suppliers or contractors one at a time, starting with the supplier or contractor that was ranked highest in the procurement proceeding on the basis of their ranking until it concludes a procurement contract with one of them. These negotiations are aimed at ensuring that the procuring entity obtains a fair and reasonable price for the services to be provided. The rationale for not providing the procuring entity with the ability to reopen negotiations with suppliers and contractors with whom it had already terminated negotiations is to avoid open-ended negotiations which could lead to abuse and cause unnecessary delay. However, although this has the benefit of imposing a measure of discipline in the procurement, it denies the procuring entity the opportunity to reconsider a proposal that subsequent negotiations with suppliers or contractors at a later stage would show to have been more favourable. This is an indication that this method of selection is not designed to provide as high a degree of competition as regards to price as the procuring entity may wish to have."

"Article 41 septies. Confidentiality"

Article 41 *septies* is included because, in order to prevent abuse of the selection procedures and to promote confidence in the procurement process, it is important that confidentiality be observed by all parties especially where negotiations are involved. Such confidentiality is important in particular to protect any trade or other information that suppliers or contractors might include in their proposals and that they would not wish to be made known to their competitors."

II. GUARANTEES AND STAND-BY LETTERS OF CREDIT

A. Report of the Working Group on International Contract Practices on the work of its twentieth session

(Vienna, 22 November-3 December 1993) (A/CN.9/388) [Original: English]

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-11
I. DELIBERATIONS AND DECISIONS	12-13
II. CONSIDERATION OF ARTICLES OF A DRAFT CONVENTION ON INTERNATIONAL GUARANTY LETTERS	14-112
CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES (<i>continued</i>) ...	14-37
Article 18. Request for extension or payment in the alternative	14
Article 19. Improper demand	15-30
Article 20. Set-off	31-37
CHAPTER V. PROVISIONAL COURT MEASURES	38-73
Article 21. Preliminary injunction [against issuer or beneficiary]	38-73
CHAPTER VI. JURISDICTION	74-84
Article 24. Choice of court or of arbitration	74-84
Article 25. Determination of court jurisdiction	74-84
CHAPTER VII. CONFLICT OF LAWS	85-89
Article 26. Choice of applicable law	85-89
Article 27. Determination of applicable law	85-89
CHAPTER I. SCOPE OF APPLICATION	90-112
Article 1. Scope of application	90-106
Article 2. Guaranty letter	107-112
III. FUTURE WORK	113

INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session,¹ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce (ICC) and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory level in respect of guarantees and stand-by letters of credit (A/CN.9/316). The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 22.

The Commission, at its twenty-second session, accepted the recommendation of the Working Group that work on a uniform law should be undertaken and entrusted this task to the Working Group.²

2. At its thirteenth session (A/CN.9/330), the Working Group commenced its work by considering possible issues of a uniform law as discussed in a note by the Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit.

²*Ibid.*, Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

3. At its fourteenth session (A/CN.9/342), the Working Group examined draft articles 1 to 7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67). The Working Group also considered the issues discussed in a note by the Secretariat relating to amendment, transfer, expiry, and obligations of the guarantor (A/CN.9/WG.II/WP.68).

4. At its fifteenth session (A/CN.9/345), the Working Group considered certain issues concerning the obligations of the guarantor, presented in the note by the Secretariat relating to amendment, transfer, expiry and obligations of the guarantor (A/CN.9/WG.II/WP.68). The Working Group then considered the issues discussed in a note by the Secretariat relating to fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70) and issues discussed in a note by the Secretariat relating to conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71).

5. At its sixteenth session (A/CN.9/358), the Working Group examined draft articles 1 to 13, and, at its seventeenth session (A/CN.9/361), draft articles 14 to 27 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add.1). At the eighteenth and nineteenth sessions (A/CN.9/372 and 374), the Working Group considered further revisions of the draft articles (contained in A/CN.9/WG.II/WP.76 and Add.1), which, at the sixteenth session, the Working Group provisionally decided should be presented in the form of a draft Convention (A/CN.9/361, para. 147).

6. The Working Group, which was composed of all States members of the Commission, held its twentieth session at Vienna, from 22 November to 3 December 1993. The session was attended by representatives of the following States members of the Working Group: Austria, Canada, China, Costa Rica, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Japan, Mexico, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Slovakia, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

7. The session was attended by observers from the following States: Armenia, Australia, Bolivia, Czech Republic, Finland, Indonesia, Myanmar, Nicaragua, Romania, Sweden, Switzerland, Turkey, Ukraine and the United Arab Emirates.

8. The session was attended by observers from the following international organizations: United Nations Industrial Development Organization (UNIDO) and the Hague Conference on Private International Law.

9. The Working Group elected the following officers:

Chairman: Mr. J. Gauthier (Canada)

Rapporteur: Mr. V. Tuvayanond (Thailand)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.79), a note by the Secretariat containing articles 12 to 27 of the draft Convention (A/CN.9/WG.II/WP.76/Add.1) and a further revision of draft articles 1 to 17 (A/CN.9/WG.II/WP.80), prepared by the Secretariat following the nineteenth session.

11. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft Convention on independent guarantees and stand-by letters of credit.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

12. The Working Group discussed draft articles 18 to 27 as set forth in A/CN.9/WG.II/WP.76 and draft articles 1 and 2(1) as set forth in A/CN.9/WG.II/WP.80, with special attention to the question whether a given rule was appropriate for both independent guarantees and stand-by letters of credit or for only one type of those undertakings.

13. The deliberations and conclusions of the Working Group relating to draft articles 18 to 27, and 1 and 2(1) of the draft Convention are set forth below in chapter II. The Secretariat was requested to prepare, on the basis of those conclusions, a revised draft of articles 18 to 27 and 1 and 2(1).

II. CONSIDERATION OF ARTICLES OF A DRAFT CONVENTION ON INTERNATIONAL GUARANTY LETTERS

Chapter IV. Rights, obligations and defences (continued)

Article 18. Request for extension or payment in the alternative

14. It was recalled that, at the seventeenth session, the suggestion had been made that the extend-or-pay procedure was incompatible with stand-by-letter-of-credit practice and therefore should not apply to guaranty letters issued in that form. The Working Group noted that deletion of article 18 would have the same result, of the extend-or-pay procedure applying only to demand guarantees. This was because stand-by letters of credit were subject to the Uniform Customs and Practice for Documentary Credit (UCP), which did not address the extend-or-pay procedure, and demand guarantees were likely to incorporate the Uniform Rules for Demand Guarantees (URDG), which, in article 26, contained rules that were roughly comparable with those suggested in variant A. Accordingly, the Working Group decided to delete article 18.

Article 19. Improper demand

Chapeau

15. Two variants of the *chapeau* of article 19 were before the Working Group. Variant A duplicated some elements already contained in article 17(2), namely the duty of the issuer to reject a demand as improper and the requirement

that the improper nature of the demand should be known or manifest and clear to the issuer. This duplication was widely considered to be problematic and unnecessary. There was general agreement in the Working Group with the present structure of defining, in article 19, improper demand and indicating, in article 17(2), the legal consequences of a demand being improper. The Working Group expressed its understanding that the reference in article 17(2) to article 19 was only directed to the definition of improper demand, and was not intended to relate to the reference in variant A to the manifestness of the impropriety. Variant B was preferred by the Working Group for its clarity and simplicity, and because it did not duplicate, or overlap with, article 17(2).

16. It was noted that application of article 19 to any obligation of the issuer not to pay was reserved for discussion until the review by the Working Group of article 17(2). It was also stated that, were such a duty imposed, stand-by letters of credit would have to be excepted.

Subparagraph (a)

17. Views were exchanged as to the requirement in square brackets that the beneficiary should have knowledge of any document being forged in order for such a forgery to render a demand improper. One view was that subparagraph (a) should be formulated in more objective terms, which might be done by deleting the reference to the knowledge of the beneficiary. It was stated that, since the forged character of a document should be objectively perceivable, or "clear beyond doubt" to a "reasonable person", and the determination as to whether a document presented in support of a demand for payment was forged would typically be made by the issuer of the guaranty letter, there was no need for any assessment as to what the beneficiary knew or ought to have known. It was therefore suggested that the subparagraph should be redrafted as follows: "It is clear beyond doubt that any document is forged". The Working Group, while it was open to the suggestion to remove the reference to the knowledge of the beneficiary, did not opt to include language relating to the degree of proof required. As noted in the discussion of the *chapeau*, it was agreed that that was a matter that should be dealt with separately, in article 17.

18. With respect to the use of the words "any document is forged", the view was expressed that the notion of forgery might have a rather technical meaning in some jurisdictions, thus resulting in the characterization of a demand as improper even though the falsification concerned was insignificant in that it did not alter the commercial balance of the transaction, and perhaps was even carried out unbeknownst to the beneficiary. It was pointed out that, for example, under existing case law in a number of countries, the presence of a forged date on a bill of lading presented in support of a demand for payment under a guaranty letter, without the beneficiary being aware of the forgery, would not necessarily affect the validity of the demand. It was therefore suggested that wording should be added along the following lines: "or is otherwise fraudulently completed", particularly if the reference to the knowledge of the beneficiary were deleted. It was recalled, however, that the

Working Group had earlier decided that use of terms such as "fraud" or "abuse" should be avoided. An alternate suggestion was to refer to forgery that was "material". The prevailing view, however, was that the current reference to forgery should be maintained, subject to the deletion of the reference to the knowledge of the beneficiary.

Subparagraph (b)

19. A discussion took place as to whether subparagraph (b) should be retained. In support of deletion of the subparagraph, it was noted that the situation dealt with under subparagraph (b) could be described as a subset of the more general situation encompassed by subparagraph (c). In that connection, the view was expressed that the scope of the paragraph was questionable, since the Working Group had already decided that simple demand guarantees should be covered by the draft Convention, thus making the words between square brackets ("on the basis asserted in the demand and the supporting documents") unnecessary. In support of retention of the subparagraph, it was stated that, while subparagraphs (b) and (c) might overlap, subparagraph (b) was needed to deal with the particular situation where the basis of a demand was limited by the text of the guaranty letter itself, for example in the case where non-performance of a given obligation would need to be asserted to obtain payment under a performance bond. Reference was made to the case where there was an internal inconsistency among documents submitted in a demand for payment. In the case where an apparently conforming demand for payment would be made by the beneficiary in such a situation, and the issuer would know that the guaranteed obligation had been satisfactorily performed, it was stated that subparagraph (b) was needed to make it clear that the issuer was under no obligation to investigate beyond the assertions of the beneficiary whether another basis for a demand would be conceivable, as might mistakenly be concluded from reading subparagraph (c). It was stated in response that banks were unable to make some of the determinations called for in subparagraph (b), whereas courts could do so and that accordingly there could be no such duty. The prevailing view was that subparagraph (b) should be retained.

20. As regards the contents of subparagraph (b), it was noted that the knowledge of the beneficiary was a precondition for the applicability of subparagraph (b). It was suggested that, for the same reasons that similar wording had been deleted from subparagraph (a), the opening words ("the beneficiary knows or cannot be unaware") should be deleted. In response, the concern was expressed that the requirement of knowledge on the part of the beneficiary was necessary to protect the beneficiary acting in good faith, who had presented a demand for payment without knowing that no payment was, in fact, due. It was stated that such a protective measure for the beneficiary acting in good faith existed in case law in a number of countries, and was a factor in providing certainty and reliability of the instrument. The prevailing view was that, irrespective of whether the beneficiary was aware or not of the manoeuvres that resulted in a demand being made where payment was not, in fact, due, no payment should be authorized by the draft Convention in such a case.

21. After discussion, the Working Group decided that subparagraph (b) should read as along the following lines: "no payment is due on the basis asserted in the demand and the supporting documents".

Subparagraph (c)

22. The Working Group found the substance of subparagraph (c) to be generally acceptable.

Paragraph (2)

23. It was noted that the purpose of paragraph (2) was to describe some typical cases in which it was evident that a demand had no conceivable basis. Two variants were before the Working Group, reflecting the proposals that had been made at the seventeenth session. Variant X contained a general formula of lack of conceivable basis setting forth a number of cases in which the impropriety of the demand was generally clear and unambiguous. Variant Y contained a non-exhaustive list of particular situations arising under different types of instruments.

24. Differing views were expressed as to whether paragraph (2) should be retained. One general observation was that the definition of improper demand set forth in paragraph (1) was sufficient and that the difficulty in identifying clear cases in which it was evident that a demand had no conceivable basis would weaken the impact of paragraph (2). In that regard, a number of suggestions were made. One suggestion was that the contents of variants X and Y could be reflected in a commentary, thus eliminating paragraph (2). Another suggestion was that variants X and Y could be deleted and the matter of fraud and other problems arising in connection with the underlying transaction could be addressed elsewhere in the Convention, with an orientation towards the role of the courts rather than the duty of the issuer. Yet another suggestion was that variants X and Y could be deleted on the condition that a reference to the underlying transaction would be added to paragraph (1)(c) along the lines of "with due regard to the underlying obligations". In that regard, it was observed that the suggested addition to paragraph (1)(c) might cause uncertainty as to the extent to which the underlying transaction could be taken into consideration in the determination of what was an improper demand.

25. The prevailing view, however, was that paragraph (2) should be retained since it would serve as a useful guide as to when a demand had no conceivable basis.

26. Differing views were expressed as to the two variants of paragraph (2). Some support was expressed for variant Y on the ground that it contained a list of different cases that could arise with regard to different types of guaranty letters, which could serve as a guide. Support was also expressed for combining variants X and Y. In that regard, it was observed that variant X and Y were not mutually exclusive, as variant X contained general rules and variant Y a list of different situations. Another observation was that paragraph (2) should cover only the most evident cases in which a demand had no conceivable basis and should be recast so as to apply in the context of judicial proceedings. The broadest degree of support, however, was expressed

for, variant X on the ground that it was simpler and clearer. It was noted that it gave a non-exhaustive list of general situations in which a demand had no conceivable basis.

27. Regarding the content of variant X, one concern was mentioned that subparagraph (b) raised the spectre of the issuer having to determine matters outside the issuer's area of expertise such as whether the court had jurisdiction and the legal value of an arbitral award. Another concern was that subparagraph (b), which provided that the demand would have no conceivable basis if the underlying obligation had been declared invalid by a court or an arbitral tribunal, was overly broad, since there might be cases in practice in which a guaranty letter was issued to cover precisely such a contingency. It was suggested that the problem might be resolved by making subparagraph (b) subject to the right of the parties to agree otherwise in the guaranty letter. A related suggestion was that the entirety of paragraph (2) should be subject to party autonomy. A concern was expressed that such a modification would allow the parties to exclude even the most serious cases of improper demand, which could run counter to public order. The Working Group therefore agreed on a more limited modification, namely, to include in the next draft language in brackets indicating that the parties could provide in the guaranty letter that a demand would not be improper in case that at least one of the purposes of the guaranty letter was to cover the risk that the underlying transaction had been declared invalid by a court or an arbitral tribunal.

28. Another concern was that variant X did not cover the case in which there was a manifest disproportionality between the damage suffered and the amount claimed under the guaranty letter, a concern which had been expressed at the seventeenth session of the Working Group. In that regard, it was suggested that the manifest disproportionality idea should be covered, either under subparagraph (c) of variant X or under a separate new subparagraph (e), by the addition of language along the lines of "the amount demanded is manifestly disproportionate to the damage suffered". That suggestion failed to attract sufficient support, in particular since that situation was not one of complete lack of a basis for the demand and since it addressed a problem that could be dealt with by including in the guaranty letter a reduction mechanism.

29. The view was expressed that subparagraph (d) was ambiguous, in particular since it might be difficult for the issuer to determine the reasons for which the principal had not fulfilled the underlying obligation. In addition, it was said that there were a number of other acts or omissions of the beneficiary, beyond wilful misconduct, that might prevent fulfilment of the underlying obligation, which would indicate that there might not have been a basis for the demand. However, the suggestion made to delete subparagraph (d) did not meet with the approval of the Working Group.

30. After discussion the Working Group requested the Secretariat to prepare a revised draft of paragraph (2) along the lines of variant X, subject to the amendment agreed upon for subparagraph (b), so as to cover cases in which it was evident that the demand had no conceivable basis.

Article 20. Set-off

31. It was recalled that the wording "by availing itself of a right of set-off" had been chosen in variant A, instead of the wording "by means of a set-off", in view of the understanding of the Working Group that the general law of set-off might impose further restrictions (A/CN.9/361, paras. 97-98). Taking this understanding one step further, variant B merely presented the restriction and prohibited, for claims assigned by the principal, the exercise of any right of set-off available under the general law of set-off. General preference was expressed in favour of the approach taken in variant A, which was said to express more clearly the principle that set-off would be available in the context of guaranty letters.

32. With respect to the opening words ("Unless otherwise agreed by the parties"), it was generally agreed that the principle of party autonomy should be mentioned with respect to set-off. It was generally felt that the principle of party autonomy should apply to the entire article, including the exception set forth at the end of variant A ("excepting any claim assigned to the issuer by the principal"), which the parties should also be allowed to waive. As regards the use of the words "the parties", a concern was expressed that the mere reference to "parties" might not allow, in the case where payment was made by a bank that was not the issuer, that paying bank to avail itself of a right of set-off with a claim it might have against the party demanding payment. It was suggested that the words "the parties" should be replaced by "the party paying under the guaranty letter and the beneficiary". The suggested wording was objected to on the grounds that the relationship between the beneficiary and parties that were neither issuers nor principals was not regulated by other provisions of the draft Convention and, for the sake of consistency, no different solution should be adopted with respect to article 20. It was noted that, as in the rest of the text of the draft Convention, the words "the parties" would be replaced by the words "the guarantor or issuer and the beneficiary", pursuant to a decision made at the nineteenth session. It was noted, however, that article 9(3) referred to the party effecting payment.

33. With respect to the reference to the law of insolvency ("subject to the provisions of the law of insolvency"), the view was expressed that no such reference was needed. It was stated that the reference to the law of insolvency might raise difficulties as to which national law would apply, i.e., the law of the country of the guarantor, of the country of the beneficiary, or of the place of payment. Furthermore, the reference might cause uncertainty where bankruptcy had been adjudicated in several jurisdictions. In that connection, it was suggested that article 20 should establish the rule that only liquid obligations could be set-off under the draft Convention. The view was also expressed that the interplay of the draft Convention with the law of insolvency should be left to national legislation, particularly in view of the complexity of legal mechanisms dealing with priorities in secured transactions in cases of bankruptcy. Furthermore, a question was raised as to the appropriateness of singling out the law of insolvency from among all specific pieces of legislation that might interplay with the text of the draft Convention. While some support was expressed for

the retention in the text of variant A of a reference to the law of insolvency, the Working Group decided, after discussion, that the reference should be deleted.

34. With respect to the substantive rule set forth in variant A ("the issuer may discharge its payment obligation under the guaranty letter by availing itself of a right of set-off with a claim against the person demanding payment"), the view was expressed that the notion of set-off should be defined in the draft Convention. It was recalled that, in the law of certain countries, set-off was restricted to claims of the guarantor arising out of the same transaction as the beneficiary's claim, while the law of other countries contained no such restriction. The Working Group, however, reaffirmed the decision made at its seventeenth session that the matter should be left to the general law of set-off in each country (see A/CN.9/361, para. 98) and noted that the words "avail itself of a right of set-off" were meant to reflect that deferral to national law. In that connection, a concern was expressed that article 20 might be misinterpreted as attempting to create rights of set-off where no such rights already existed in national law. It was thus suggested that the rule contained in article 20 should expressly be established "subject to the general law of set-off". It was recognized, however, that such a reference to the "general" law of set-off did not make it abundantly clear that any prohibition of set-off in matters related to guaranty letters should be displaced by the text of the draft Convention.

35. With respect to the words "with a claim against the person demanding payment", a concern was expressed that, in the case where the right to payment had been transferred by the beneficiary, set-off would not be available with a claim against the previous beneficiary. It was felt, however, that the legal position of the transferee under the draft Convention should not be more favourable than that of the previous beneficiary, i.e. the transferor. After discussion, the Working Group decided that the words "with a claim against the person demanding payment" should be deleted.

Paragraph (3) of article 9 bis

36. Recalling the decision at the nineteenth session to consider the issue of set-off in the context of assignment of proceeds following a further review of article 20, the Working Group engaged in a discussion of paragraph (3) of article 9 bis. Two variants of paragraph (3) were before the Working Group (A/CN.9/WG.II/WP.80). Variant X expressly limited the right of set-off to claims against the beneficiary, thus excluding any possible claims against the assignee. Variant Y was a general provision which did not deal with that question.

37. The Working Group considered whether paragraph (3) should be retained or deleted. Retention of paragraph (3) was urged on the ground that it usefully clarified the circumstances under which the right of set-off could be exercised. The counter-view was that paragraph (3) should be deleted, since it touched upon the general law on set-off, which should be left to national law, as had been agreed in the review of article 20. While there was a general inclination to delete paragraph (3), the Working Group paused to consider the relative merits of variants X and Y. Some

support was expressed for variant X on the ground that it was consistent with paragraph (1) of article 9 *bis*, which dealt with assignment of sums of money and not of claims. At the same time, variant X was criticized for adversely affecting rights of set-off under national laws. Variant Y attracted more support, on the ground that it was a more general provision, without the drawbacks of variant X. However, after deliberation, the Working Group decided to delete paragraph (3).

Chapter V. Provisional court measures

Article 21. Preliminary injunction [against issuer or beneficiary]

General remarks

38. As had been the case at the seventeenth session, various opinions were expressed on the question of preliminary injunctions (see A/CN.9/361, paras. 102-103). There was a degree of hesitation to incorporate article 21 in the draft Convention, in particular to the extent that the article contained procedural rules on matters that were treated differently from State to State and that might better be left to local law. It was suggested that the acceptability of the draft Convention would be adversely affected if it presented legislatures with the prospect of having to revamp, for one particular area of the law, established rules governing injunctions generally. It was also pointed out that for some States the injunctive relief envisaged in the draft article would be unfamiliar. In the light of the above, it was suggested that the article should be deleted, or at least directed only at those States in which injunctions were a recognized measure. As a possible alternative to complete deletion of article 21, it was also suggested that the draft Convention, while it should not attempt to establish any procedural rules, might contain a broad statement of principles, along the lines of the former article 23, deleted by the Working Group at its seventeenth session (see A/CN.9/361, paras. 119-121).

39. In favour of retaining a provision on injunctions, it was stated that such a provision was an integral element of the provisions dealing with fraud and abuse; it was pointed out that one of the main purposes, if not the main purpose, of preparing the draft Convention was to provide some solutions in this area, which was beyond the scope of instruments at the contractual level (e.g., UCP and URDG). It was also suggested that it was not the intent of the draft article to bring about drastic changes in current national procedures, although it was said to be precisely because of the diversity in national approaches that it would be salutary to include the provision in question in the draft Convention. To the extent that injunction procedures did not exist in some States, retention of provisions on injunctions was said to have the benefit of providing guidance to those States in formulating such provisions. Both with respect to such States, as well as to the problem of diversity of national approaches, inclusion of provisions on preliminary injunctions was said to be beneficial for international uniformity and for protection of the integrity of the guaranty letter.

40. After discussion, the Working Group decided to proceed with the consideration of draft article 21; the Working Group agreed to consider further the question of whether to retain article 21 after reviewing the contents of the draft article. Reference was made to the advisability of considering the matter after the Secretariat has had an opportunity to present a revised version of article 19 taking into account the deliberations at the present session (see above, paragraphs 15-30). It was also noted that, in the context of an international convention, the possibility of allowing for reservations to be made by States at the time of ratification or accession with the effect of excluding application of article 21 would need to be discussed at a later stage.

Title

41. The view was expressed that, at least in certain countries, the term "preliminary injunction" might not adequately reflect the procedural techniques through which a court would typically issue a temporary decision aimed at preventing the beneficiary from collecting the benefits stipulated in the guaranty letter. It was generally agreed that a more neutral wording would be preferable. It was suggested, for example, that the article should refer to "court measures against acceptance or payment under a guaranty letter". While no specific wording was adopted by the Working Group, it was agreed that, in addition to being more neutral, the title should also emphasize the "provisional" or "temporary" character of court measures considered under article 21.

42. As regards the terms within square brackets ("against issuer or beneficiary"), it was felt by the Working Group that establishing a limitative list of persons against whom provisional measures might be sought in the context of article 21 might overly restrict the discretion of the courts to order provisional measures that might be relevant in certain countries in the context of an improper demand under a guaranty letter. The Working Group decided to delete those terms.

Paragraph (1)

"Where [, on an application by the principal]"

43. It was generally agreed that provisional court measures should only be ordered on the basis of "an application", rather than also on the initiative of the court. Various concerns were expressed with respect to paragraph (1) being limited in scope to situations where an application for provisional court measures was made by the principal. A first concern was that the current text would result in provisional court measures being unavailable to the guarantor or issuer. It was stated that it was conceivable, although article 17 established an obligation for the guarantor or issuer not to pay when a demand was manifestly and clearly improper, that the guarantor or issuer itself might apply for a court decision enjoining it from paying under a guaranty letter, particularly in situations where an improper demand was expected to be made. Another concern was that reference to an application by the principal might prevent other persons, for example a liquidator, to substitute their application for that of the principal. It was generally felt that, with respect to provisional measures, access to a court should be given to all persons that had an interest in

preventing payment in case of an improper demand. It was realized, however, that it would be difficult to establish an exhaustive list of such persons and that a general rule on access to courts by all persons having a legitimate interest to stop payment might conflict with national laws regarding such issues as standing to sue. After discussion, the Working Group decided to delete the words "by the principal". (The discussion on that issue was reopened in the context of paragraph (5) and the above decision was modified; see below, paragraph 72).

"it is manifestly and clearly shown"

44. A discussion took place as to whether article 21 should establish a standard of proof to be applied by a court in deciding on an application for provisional measures to stop payment. In favour of deleting any reference to a standard of proof, it was stated that issues regarding the level of proof should be left to applicable procedural law and that the text should not limit the discretion of courts. It was thus suggested that, instead of establishing a standard of proof, article 21 should merely refer to cases where "the court is convinced that a demand is improper". In the same vein, another suggestion was to replace the current text of paragraph (1) by the following: "A competent forum, according to the requirements of its procedural law, may issue a preliminary order in case the demand made by the beneficiary is improper in the sense referred to or prescribed by article 19, enjoining the issuer from meeting the demand". It was generally felt that such a text would not contribute to the harmonization of law in the field. In favour of establishing a standard of proof, it was stated that an important feature of the draft Convention would be to establish a "level playing field" i.e., equality of treatment for users of guaranty letters in countries where, currently, the possibility to interfere with the obligation to pay under a guaranty letter was interpreted restrictively by the courts and in countries where courts, particularly in the context of provisional measures, were more open to allowing for exceptions to the payment obligation.

45. As to the substance of a possible standard of proof, a question was raised as to whether the standard of proof set forth for provisional court measures in the context of article 21 should be parallel to the standard of proof set forth for refusal to pay by the guarantor or issuer under article 17. The view was expressed that the highest possible standard of proof should apply equally to both situations, in order not to jeopardize the reliability of the guaranty letter. The following text was suggested: "A court shall not interfere with the obligation to honour a guaranty letter or with presentation of documents to obtain payment under such a guaranty letter unless, in addition to complying with its regular procedures, it finds that the demand is manifestly and clearly improper and will result in serious harm to the applicant". Among the reasons given for applying the same standard of proof in articles 17 and 21, it was said that both articles were geared to protecting the principal. Under article 17, the principal was entitled to have the guarantor refuse payment in case of improper demand. Similarly in the context of court measures, the principal was entitled to seek protection from courts if irreparable harm would result from payment. It was stated that the judge, in making a decision under article 21, would be placed in the shoes of

the guarantor in determining whether the demand was manifestly and clearly improper.

46. It was generally agreed, however, that the respective contexts in which articles 17 and 21 applied were of a different nature and that standards of proof to be applied in the two contexts might differ. The standard of proof under article 17 was to be applied by the guarantor or issuer in determining whether, on the face of a demand, it was sufficiently clear that a demand was improper for the issuer to be obliged not to pay. Among the reasons given for making the standard of proof as high as possible under article 17 were the following: the guarantor or issuer who would make a determination as to the improper character of a demand should not be allowed to escape easily, through such a determination, from its original obligation to make payment upon demand; a high level of proof was also needed to provide a valid excuse for the bank that did not refuse payment on the basis of mere allegations by the principal that the demand was improper. As regards the standard of proof to be applied by a judge under article 21, it was stated that the above considerations should not apply, in particular in view of the provisional nature of the measures being treated.

47. Various views were expressed as to the standard of proof to be applied by the court. One view was that the standard should be the highest possible in order not to jeopardize the reliability of the instrument by allowing courts to dictate various standards. In that connection, it was also stated that the standard of proof should be high in view of the fact that, in many jurisdictions, a preliminary injunction or other provisional court measure would be granted by the court in the context of an *ex parte* procedure, i.e., without the defendant being given an opportunity to be heard. It was stated, however, that providing in the draft Convention that a judge should determine whether a demand was "manifestly and clearly improper" would in many jurisdictions result in no provisional measures being available, since a determination as to the "manifestly and clearly" improper character of a demand could be made only by the court that would make the final decision on the merits of the demand. In favour of adopting a slightly lower standard of proof, it was stated that, in most jurisdictions where provisional court measures were in existence, the standard to be applied referred to notions such as "high probability", or "very high likelihood" that a demand was improper, or "high probability of success on the merits" of the case. It was stated that such slightly lower standards of proof were still considered to be difficult to meet and that a temporary order restraining payment on the basis of such standards would, in many countries, be valid only for a few days. As a possible improvement for such standards, it was suggested that the draft Convention should contain a reference to the notion of "liquid proof". Another view was that, with respect to the standard of proof to be applied by a court, a lower standard should be adopted, for example, "the court is *prima facie* satisfied", "it is seriously arguable", or "the court has reasonable grounds to believe" that the demand is improper. It was widely felt, however, that a low standard along those lines, while not limiting the discretion of the courts, might jeopardize the reliability of the guaranty letter.

48. After discussion, the Working Group decided that a standard of proof relying on the clearly and manifestly improper character of the demand was too high in the context of provisional court measures and that the test to be included in a future draft should be along the lines of a "high probability" that the demand was improper.

"[by documentary and other readily presentable means of evidence]"

49. The view was expressed that the words between square brackets should be deleted in order not to impinge on the discretion of the courts. Another view was that the need for courts to base a decision on documents and other readily presentable means of evidence was linked to the definition of an improper demand under article 19. The view was also expressed, however, that a reference to the "liquid" (i.e., readily available) character of the proof to be taken into account by the court might still need to be added to the current text, which might otherwise be considered to be too vague. After discussion, the Working Group decided to delete the words between square brackets.

"that a demand made [or expected to be made] by the beneficiary is improper according to article 19,"

50. It was generally agreed that there existed a need for allowing anticipatory injunctive relief, which might be particularly relevant in the context of a guaranty letter with successive payments. The Working Group decided to maintain the words "or is expected to be made".

"[the] [a competent] court may issue a preliminary order."

51. It was generally felt that the reference to "a competent" court could be misinterpreted as an attempt to create specific grounds for judicial competence. The Working Group decided to delete the words "a competent".

Subparagraphs (a) and (b)

52. The Working Group considered the merits of subparagraphs (a) and (b). Subparagraph (a) provided for two types of provisional orders directed against the issuer, one order precluding the issuer from paying on demand and another, within brackets, precluding the issuer from debiting the account of the principal. Subparagraph (b) provided for three types of provisional orders directed against the beneficiary, one enjoining the beneficiary from accepting payment, a second ordering the beneficiary, in case a demand was made, to withdraw the demand, and a third ordering the beneficiary, in case a demand was imminent, not to make a demand.

53. The Working Group reviewed the contents of the subparagraphs in order to assess whether it was appropriate to include the type of listing of possible measures envisaged in the present draft. No objections were raised to mentioning, in subparagraph (a), the order enjoining the issuer from meeting the demand for payment. Views differed, however, as to the appropriateness of referring to the order enjoining the issuer from debiting the account of the principal. One view was that making express provision for this type of injunctive relief for the principal was in line

with the general purpose of article 21, which was said to be to protect the interests of the principal. It was pointed out that, as a practical matter, an order enjoining the issuer from debiting the account of the principal would in many cases be more important for the principal than to obtain an injunction, against payment to the beneficiary, since a payment in contravention of article 17 would be at the risk of the issuer.

54. The prevailing view, however, was that providing for such a provisional order was problematic. Views that combined to swing the Working Group in favour of deletion included that such an order could leave the issuer enjoined from debiting the account of the principal, but still obligated to pay the beneficiary; concerned an aspect of the principal-issuer relationship and was therefore not within the main focus of the draft Convention; since the draft Convention in specifying the rights and obligations of the parties made no reference to debiting of accounts, such a reference in article 21 should be avoided. As an alternative to deletion, it was suggested that the two kinds of injunctions could be joined by replacing the word "or" by the word "and", with the effect that the two measures could be treated as a package, thereby eliminating the possibility of the issuer being placed under conflicting obligations. However, that suggestion failed to attract sufficient support.

55. Differing views were expressed as to whether subparagraph (b), which provided for provisional measures to block the beneficiary from taking steps to obtain payment, should be retained or deleted. One view was that subparagraph (b) would in principle not be objectionable, if a number of modifications were made to make it clearer. One observation was that the notion of acceptance of payment was unclear, would not be uniformly understood and could be replaced by a reference to collection of the proceeds. Another suggestion was that the order ordering the beneficiary to withdraw the demand should be deleted. Yet another suggestion was that the words "enjoining the beneficiary . . ." were not appropriate and should be replaced by language along the lines of "declaring that the beneficiary may not accept payment". The prevailing view, however, was that modifications of that type would not overcome the difficulties that they were meant to address and that subparagraph (b) should therefore be deleted. In support of deletion, it was said that the nature of the injunction provided in subparagraph (b) was unclear, that it was unknown in many jurisdictions, and that subparagraph (a) was sufficient. A concern was also expressed that an order ordering the beneficiary not to make or to withdraw a demand might result in his failure to submit a timely demand, if in the meantime the expiry date passes.

56. The discussion of the remedies mentioned in subparagraphs (a) and (b), and the inclination to eliminate mention of some of them, prompted the Working Group to consider whether to use an approach other than one attempting to enumerate, in an exhaustive or indicative way, types of measures that would be available to the parties. It was suggested in this vein that subparagraphs (a) and (b) should be replaced by a general rule along the lines of "the court may take any measure which would protect the interests of the principal and the issuer", with a clear emphasis on the provisional nature of the measures. After discussion,

it was decided that language along the following lines might be added to the end of the *chapeau* of paragraph (1) so as to replace subparagraphs (a) and (b): "a provisional order to the effect that the beneficiary shall not receive payment".

Closing proviso to paragraph (1)

57. A number of concerns were expressed as to the wording of the proviso at the end of paragraph (1). That proviso made the granting of the provisional orders envisioned in paragraph (1) subject to the requirement that the principal would have to suffer "serious harm" or, in an alternative formulation, "irreparable loss" as a result of a refusal by the court to grant the order.

58. One concern was that the words "provided that" were too strong in restricting the court's discretion to consider the risk of damage to the principal, and would contradict national procedural rules providing for such a discretion. It was, therefore, suggested that language along the lines of "taking into account that" would be more appropriate. While the concern was raised that such language might not be sufficiently clear as a guideline for courts, the Secretariat was requested to attempt to incorporate a wording along those lines.

59. Another concern was that the words "the refusal of the court" might suggest that the court could be held responsible for the damage that might be caused to the principal should the provisional measure not be granted, when in point of fact that responsibility lay with the beneficiary submitting an improper demand. Yet another concern was that the words "would cause" might reduce the possibility of the granting of a provisional measure, since it would be very difficult to prove with certainty that serious damage would be caused. Language along the lines of "would be likely to cause" was, therefore, suggested.

60. Various views were presented as to the alternative presented in the proviso within brackets for expressing the degree of the damage that would have to be likely to result from a refusal to grant the provisional measure being sought. One view was that the words "irreparable loss" were preferable since they were clearer and, combined with the word "loss", better reflected the financial character of the damage that would result for the applicant. However, the word "irreparable" was criticized as being vague and potentially too high an across-the-board standard to set, since the principal, if it succeeded on the merits at a later stage, might eventually be able to retrieve funds that it had paid to cover the payment of an improper demand. It was suggested that the word "serious", combined either with the word "loss" or the word "harm", would suffice. Another view was that "irreparable loss" was too high a standard and "serious harm" was too low, and that the words "not easily reparable" should be used instead. Yet another view was that either standard could be accepted. A further view was expressed to the effect that the guarantor or issuer would not be entitled to reimbursement from the principal or applicant if it paid despite an obligation to refuse payment according to article 17(2) and that therefore a proviso requiring the principal or applicant to prove that it would suffer harm would make it necessary for a court to refuse

to order a provisional measure in those cases in which it was shown facts that made the demand manifestly and clearly improper according to article 19. The prevailing view, however, was that the words "serious harm" should be retained.

Paragraph (2)

61. The Working Group considered a proposal to delete paragraph (2), which authorized the court to hear the respondent on the application for a preliminary order. It was said that the significance of a provision referring to a discretionary power would be unclear, and that it anyway concerned an elementary procedural question of due process, which should be left to national procedural law. In addition, it was said that such deletion would not preclude courts from allowing the beneficiary to be heard in appropriate circumstances, which circumstances might not always be present, in particular in *ex parte* type of proceedings encompassed in article 21. Moreover, it was said that paragraph (2) might create a problem in distinguishing between provisional measures, which were covered by article 21, and final procedures, which were not covered. In view of those considerations, the Working Group did not accept a proposal to make the opportunity for the respondent to be heard mandatory, so as to foster due process for the beneficiary and provide the court with the respondent's side of the story as early as possible. The prevailing view, rather, was that paragraph (2) should be deleted.

Paragraph (3)

62. It was agreed that paragraph (3) providing for the possibility that the court may require the applicant to furnish appropriate security before granting a provisional measure was useful and should be retained. It was observed that such a provision was fair and reflected some balance in the consideration of the interests of the applicant and of the respondent. It was also said that paragraph (3) might have a disciplinary effect, precluding applicants from submitting frivolous applications, and as such might have an educational value. As a refinement, it was agreed that the word "security" would be replaced by a broader term, so as not to give the impression that a particular form of security was being referred to. One suggestion was to use the following wording: "undertaking, security or other document".

Paragraph (4)

63. The Working Group considered the three variants contained in paragraph (4). It was noted that variant A contained a broad statement that courts were not precluded from issuing any provisional measures that might be available under applicable procedural law. The only limitation on the discretion of the court in that variant was contained in a sentence between square brackets, included in response to a concern expressed at the seventeenth session that it would be especially disruptive if an injunction were allowed on the ground of non-conformity of documents (A/CN.9/361, para. 109). Variant B stated that the only ground other than improper demand on which a provisional court measure might be obtained was invalidity of the guaranty letter. Variant C was the most restrictive of the three variants, since it did not allow courts to issue a preliminary order on any grounds other than improper demand.

64. Preference for variant A was expressed on the ground that no limitation should be imposed on the discretion of the courts. For the same reason, it was suggested that the restriction contained in the sentence between square brackets should be deleted. Support for variant A was also expressed, based on a concern that, should the draft Convention overly restrict the possibility of judicial intervention in the context of guaranty letters, by means of provisional measures, this might increase the risk that guaranty letters could be used for illicit purposes such as money-laundering or tax evasion. It was noted that such misuse of guaranty letters would not be prevented by the current text of article 19, since the demand for payment in such instance would not suffer from having "no conceivable basis", but would rather be on an illegal basis. In response to that concern, the Working Group generally agreed that, whichever variant were retained, wording to prevent the use of guaranty letters for illegal purposes should be included either in article 19 or in article 21.

65. In support of variant C, it was stated that the possibility of judicial interference with the guaranty letter should be limited to a minimum in order not to jeopardize the reliability of the instrument, the main function of which was to provide assurance of payment, pending resolution of any dispute that might arise. It was stated that, should courts be broadly allowed to interfere with the issuer's obligation to pay in cases other than improper demand as defined in article 19, there would be a risk that courts, at the request of the principal, would intervene in the context of the underlying transaction between the principal and the beneficiary. With a view to further strengthening variant C, it was suggested that injunctions that might be allowed on the ground of non-conformity of documents should be expressly disallowed in the text of variant C.

66. There was wide support for the view that the scope of the procedural rule set forth in paragraph (4) as to the right for the principal to seek injunctive relief should be drafted so as to parallel the substantive rule set forth in article 19 as to the conditions under which payment could be prevented. A question was raised, however, by proponents of variant A as to the reasons for which invalidity of the guaranty letter should be discriminated against as a means of preventing payment under the draft Convention, while improper demand would be regarded as an acceptable ground for seeking injunctive relief. It was stated that payment made upon receipt of an improper demand and payment made where the guaranty letter was manifestly invalid might equally result in irreparable harm being done to the principal. It was also questioned whether the principal would be left with any procedural remedy in circumstances where a demand for payment would be presented despite the guaranty letter being invalid.

67. In response, it was stated that the nature of the instrument was to ensure prompt payment (a feature labelled as "moneyness") and that, typically, it would be beyond the competence of a court ruling on an application for an interim measure to assess the validity of the guaranty letter. It was further stated that the guarantor or issuer was under an obligation to verify the validity of the guaranty letter and that, should it pay under an invalid guaranty letter, it would not be entitled to reimbursement from the principal. It was

suggested that wording should be included in article 21 to make it clear that the article did not deal with the relationship between the principal and the issuer or guarantor (a relationship sometimes referred to as the "account relationship"). The effect of the suggested clarification was to emphasize that the principal would not be precluded access to court by the draft Convention, for example in the context of an application for a provisional court measure enjoining the guarantor or issuer from debiting the principal's account, if the guarantor or issuer had paid upon receipt of a non-conforming demand.

68. After discussion, the Working Group decided that, subject to its above decision on illegality (paragraph 27), matters of non-conformity or invalidity of a guaranty letter should not be considered as subject to provisional court measures under article 21. Variant C was adopted. Furthermore, it was generally agreed that the subject-matter of the draft Convention was the relationship between the guarantor or issuer and the beneficiary. The Secretariat was requested to make it clear in the next draft that article 21(4) does not prevent the principal from seeking provisional court measures in respect of its contract with the guarantor or issuer. It was decided that the wording between square brackets in variant C should be retained to limit the prohibition embodied in variant C to applications based on objections to the payment demanded by the beneficiary. In the same vein, it was decided that the words "any objection to payment" should replace the words "any ground".

Paragraph (5)

69. It was noted that paragraph (5) subjected the attachment and seizure of the assets of the beneficiary or of the issuer, in addition to the requirements of the respective national procedural law, to the conditions contained in paragraph (1), in order to limit judicial interference with the payment of guaranty letters. It was also noted that in some jurisdictions attachment and seizure of assets could take the form of an administrative rather than a judicial procedure.

70. Various doubts were raised as to the necessity and appropriateness of retaining paragraph (5). Those doubts included that: it dealt with procedural law and that it would be too difficult to unify the conditions under which courts could grant any kind of extraordinary relief; the scope of the provision was uncertain, in particular since the Working Group had decided under paragraph (1) not to limit the scope of article 21 only to claims filed by the principal; paragraph (1) was sufficient in achieving a reasonable limitation to judicial interference with the commercial purpose of guaranty letters, namely, certainty of payment; in some jurisdictions the types of measures referred to in paragraph (5) were not considered provisional measures of a judicial nature, but rather were available fairly routinely and simply for a short period of time, without judicial involvement; the provision should not appear to suggest the possibility that all assets of the applicant would be subject to attachment and seizure, but just the proceeds of the guaranty letter.

71. The prevailing view was that a rule along the lines of paragraph (5) should be included in article 21, since such

measures, however they might be characterized or obtained under different legal systems, were an essential element in giving meaning to the measures provided for in paragraph (1); and it was at the same time important to ensure, for the preservation of the commercial viability of guaranty letters, the application of the safeguards against abusive resort applied to provisional measures generally under article 21. However, it was decided to forgo inclusion of paragraph (5), and to implement the substance of the Working Group's decision by further broadening the formulation of paragraph (1) by inserting in paragraph (1), after the word "may", wording along the lines of "effect the blockage of payment of funds or issue a provisional order".

72. The deliberations on paragraph (5) led the Working Group to reconsider its decision to avoid identifying in paragraph (1) the parties that could apply for the provisional measures provided for in article 21. It was generally agreed that, to limit some of the difficulties that had been referred to in the review of paragraph (5), paragraph (1) should limit article 21 to actions brought by the principal and that reference should also be made to the instructing or account party, so as to cover in particular the counter-guarantee context.

73. Upon the completion of the review of article 21, the Working Group returned, as had been agreed, to the general question of whether to retain or delete article 21. The considerations for and against retention of article 21, referred to above in paragraphs 38 and 39, were restated. Particular emphasis was placed, on the one hand, on the difficulties that would be encountered in attempting to craft a uniform rule in this area, and, on the other hand, on the position that a main function, if not the main function, of the draft Convention was to address the matters taken up in article 21. The prevailing view was that it would be premature to take a final decision at this stage and that the Working Group should await the next draft from the Secretariat, at which point it would resume its consideration of article 21.

Chapter VI. Jurisdiction

Article 24. Choice of court or of arbitration and

Article 25. Determination of court jurisdiction

74. In view of the link between the provisions contained in articles 24 and 25, the Working Group considered the two articles together.

75. A variety of questions and views were considered as to the approach taken in the current versions of the two articles. A general question was whether provisions of the type proposed in chapter VI were found in other multilateral instruments. In response to that question, the view was expressed that at this stage the focus of the deliberations should be on the utility of addressing the matters covered in chapter VI in the context of guaranty letters, rather than giving predominant weight to the presence or lack of provisions on jurisdiction in other conventions.

76. The view was expressed that article 24, which recognized the autonomy of the parties to designate a court or to stipulate arbitration for the settlement of disputes arising under the guaranty letter, failed to achieve anything useful since it did not provide for a sanction, in particular exclusivity of jurisdiction, of the designated forum. It was suggested that the resulting uncertainty was compounded further, in the absence of a successful designation under article 24, by the lack of a rule of exclusivity also of the determination of jurisdiction by a court under article 25. It was further observed that the simple affirmation of the principle of party autonomy, without any mention of connecting factors to the designated jurisdiction, might run afoul of policy considerations in States that were concerned with supporting the burden of litigation in cases having little or no connection to the jurisdiction.

77. Those concerns, however, were generally outweighed by the view that article 24 served to provide useful support for the principle of autonomy of the parties with respect to court jurisdiction and might encourage the use of arbitration. It was also noted that article 24, while it still permitted a designated court to decline jurisdiction (e.g., on *forum-non-conveniens* grounds), and while it did not provide for exclusivity, had to be read in conjunction with article 25, which provided a direct rule on jurisdiction in the event that no jurisdiction resulted under article 24 and that some of the questions raised by article 24 could not be resolved until the provisions in article 25 on residual competence had been finalized and were more precise, in particular as to whether they were of a mandatory character. It was also pointed out that articles 24 and 25, since they would be in an instrument of a legislative character, would support the similar approach found at the contractual level in article 28 of the URDG.

78. A concern was expressed as to whether the viability of article 24 might be jeopardized in the event of a selection by the parties of a court that was not competent to resolve the dispute in question. It was suggested in that light to insert the word "competent" before the word "court" in paragraph (1), though it was also noted that article 25 was intended to provide a fall-back rule for cases of this type.

79. The question was raised as to whether the differences in formulation between article 24(1) and article 25(2) were intended to suggest a broader scope for the former provision, in particular as regards the parties to which reference was being made. Similarly, it was questioned whether differences as to formulation and content between article 24(2) and article 25(2) might give rise to the unintended interpretation that the latter provision was somehow intended to limit the jurisdiction of [court not referred to in the provision], which might raise difficulties if it were read to exclude the jurisdiction of courts where assets were located. The suggestion was made to add to article 25(2) a specific reference to article 21 in order to achieve greater clarity. It was also questioned whether the present formulation was intended to exclude the possibility, in the counter-guaranty letter context, of the principal pursuing directly a legal action in the jurisdiction where the guaranty letter supported by the counter-guaranty letter was payable. It was suggested that, if the intention was to permit such an action,

reference could be made in the provision to the instructing party. At the same time, the Working Group was reminded of the question of whether to permit the instructing party to take legal action against the beneficiary of the related guaranty letter would run afoul of the requirement of privity of contract that would be applied in some jurisdictions.

80. Another broad area of concern was the relationship, both from the standpoint of the risk of possible inconsistency as well as possible benefit of positive interaction, between the rules in chapter VI and other multilateral instruments containing general rules on similar matters, in particular the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the 1988 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. It was noted in this regard that while those Conventions were open for accession by all States, they had been formulated on a regional level and that the degree to which those Conventions could support the provisions of chapter VI was thereby limited. A related question was whether, for States that were not parties to such a multilateral recognition and enforcement scheme, implementation of chapter VI would be viable. In response to that concern, it was pointed out that the possibility of recognition and enforcement did not rest solely on participation in such multilateral arrangements. In the first place, arbitral awards were subject to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and enforcement of judicial decisions might be available under bilateral arrangements. It was also pointed out that even States that were parties to the Brussels and Lugano Conventions faced enforcement problems, in particular when the enforcement of a judgment involved other States that were not parties to the Conventions.

81. The Working Group next considered a number of general proposals reflecting the various views and questions that had been expressed. One proposal was simply to delete chapter VI. In support of that proposal it was suggested that in their present form of non-exclusivity of jurisdiction the provisions were unnecessary, and, if they were amended to provide for exclusive jurisdiction, significant difficulties would arise, in particular in the absence of a recognition and enforcement scheme. In support of that proposal, it was pointed out that, at least as regards article 24, deletion would have limited practical effect since, in practice, the matter of jurisdiction was rarely addressed in guaranty letters, in particular since it was a matter that, if raised, might be seen as undermining the undertaking. However, as noted above, the general view was that an attempt should be made to address the matter of jurisdiction in the draft Convention since this was an area of considerable importance.

82. Another approach that was considered was to revise chapter VI so as to make the choice of jurisdiction exclusive. A variant of that approach was to delete article 24, leaving simply an objective rule on jurisdiction in article 25. Objections were raised to any approach that would confer exclusive jurisdiction. Primary among the concerns was that exclusivity was incompatible with an approach that did not ensure recognition and enforcement of decisions, since it would be more likely to give rise to cases in

which, practically speaking, decisions were unenforceable. A related concern was that such an approach might give rise to difficulties if exclusive jurisdiction were conferred on the courts in one jurisdiction, while the assets that were the subject of enforcement were located in another jurisdiction.

83. Yet another type of approach was aimed at combining elements of exclusivity, non-exclusivity and party autonomy. One proposal along those lines was, unless otherwise agreed, to permit the claimant to pursue an action in one of the following jurisdictions: where the guaranty letter was issued; the place of business or residence of the beneficiary; or the place of business or residence of the principal. A suggestion that attracted wider interest was to provide that a designated court would have exclusive jurisdiction, unless it was shown that the decision was not recognized or was unenforceable, in which case another court may exercise jurisdiction.

84. While a doubt was expressed as to whether the latter proposal would work in the absence of a recognition and enforcement scheme, the Working Group decided to request the Secretariat to prepare for the consideration of the Working Group two variants of chapter VI. One variant would in essence retain articles 24 and 25 along their present lines, clearly showing that the choice or determination of jurisdiction was a non-exclusive one. The other variant would make the choice of jurisdiction under article 24 exclusive, while an article 25 determination of jurisdiction would remain non-exclusive. An attempt would be made to add to article 25 a safety valve, the possibility of a court other than the one chosen by the parties under article 24 taking jurisdiction if the decision of the article 24 court would not be capable of recognition and enforcement.

Chapter VII. Conflict of laws

Article 26. Choice of applicable law and

Article 27. Determination of applicable law

85. The Working Group first discussed whether provisions on conflict of laws should be included in the draft Convention. One view was that it was not necessary or appropriate to retain chapter VII since the aim of the draft Convention was to provide a set of uniform substantive rules for guaranty letters. A related concern was raised as to the implications of including chapter VII for States that were parties to the 1980 Rome Convention on the Law Applicable to Contractual Obligations. Another view was that chapter VII should be retained. In support of that view, it was stated that, even with the draft Convention in place, there would be room and need for conflict-of-laws rules, whether they be found in national law or in a convention. Inclusion of such rules in the draft Convention would strengthen the reliability and commercial utility of the instruments being covered by recognizing party autonomy in the choice of law and reducing the extent to which disputes would arise as to determination of the applicable law.

86. The Working Group considered the question whether the scope provisions of article 1 should apply also to the conflict-of-laws provisions in articles 26 and 27, should those articles be retained. It was noted that were articles 26 and 27 to be subject to the same scope rules as the rest of the draft Convention, articles 26 and 27 would apply only if the draft Convention as a whole applied, and thus only to issues not covered by the draft Convention; by contrast, independent applicability of articles 26 and 27 would mean that those articles would apply even when the rest of the Convention was not applicable, thus unifying the conflict-of-laws rules of contracting States in this field. Such an approach would require the express exclusion of articles 26 and 27 from article 1. In view of the relationship between chapter VII and article 1, the Working Group felt that it would be in a better position to decide the question of whether or not to retain chapter VII, and on its content and scope of application, after the further review, in which it was about to engage, of article 1 (see below, paragraphs 90-106).

87. In the context of article 1, doubts were raised relating to the prospect of including in the draft Convention conflict-of-laws rules that would be applicable in the absence of applicability of the Convention pursuant to the scope provisions of article 1. Such an approach was said to be unusual and with very little precedent if any in a multilateral convention. It was stated that conflict-of-laws rules were characteristic features of national legislation, and thus might have to be considered if the Working Group were to decide to use the form of a model law, but they were not appropriate for inclusion in the draft Convention and should be better left to national law. The focus of the draft Convention, it was said, should instead be limited to defining clearly in article 1 the general scope of application of the draft Convention, and that, should conflict-of-laws provisions be included, they should apply only in cases in which the Convention as a whole applied, thus limiting their scope to issues not covered by the draft Convention. A further concern was that a general and fixed rule on conflicts would be of limited utility, as it might not provide the detail and flexibility of a national system of conflicts rules, and it might also stifle progressive development towards more flexible approaches. Yet another concern was that the preparation of viable and sufficiently detailed provisions on conflict of laws that meshed well with various types of legal systems might raise the spectre of further delaying completion of the draft Convention by the Working Group. In this context it was pointed out that, *inter alia*, a more detailed description of the rights, obligations and defences that would be covered or that would not be covered by such rules would be necessary in order to avoid different interpretations in the various legal systems; by way of example, reference was made to the question of prescription.

88. In response to those concerns, it was pointed out that the inclusion of chapter VII on an independent basis should not necessarily be regarded as an intrusion into an inappropriate area, since States would in any case have to have conflicts rules to cover cases in which the Convention did not apply. It was also pointed out that the rules set forth in chapter VII represented the prevailing, widely accepted approach. While this fact was cited by some as a factor for

not including chapter VII, supporters of inclusion pointed out that it meant that a conflict-of-laws convention in this area—the formulation of which was said to be unlikely—would contain essentially the same rules, and that chapter VII should therefore not be regarded as raising matters of controversy or particular difficulty. In that light, it was suggested that there was no reason not to retain chapter VII, with independent applicability, so as to further unify the law applicable to guaranty letters in contracting States, in particular with regard to the important notion of party autonomy in choice of law matters. The Working Group was told that this would help courts to solve practical problems they were encountering in this field and that this practical need should be the predominant consideration, and not whether the procedures involved were categorized as substantive or procedural. It was also pointed out that chapter VII would not be the only portion of the draft Convention addressing matters of procedure, were chapter VI to continue to be retained. A related view was that, even if chapter VII were not made generally applicable independent of the scope provisions in article 1, it might be retained so as to provide a conflicts rule for issues not covered by the convention.

89. After deliberation, the Working Group decided, as a working assumption, that articles 26 and 27 would be retained in the draft Convention, and that their applicability would be independent of whether or not in any given case the draft Convention applied under the general scope rules in article 1. The Working Group requested the Secretariat to prepare, in consultation with the Hague Conference on Private International Law, a revised version of articles 26 and 27 to reflect the working assumption and observations that had been made by the Working Group as to the content and approach of articles 26 and 27. It was noted that this approach would be reviewed on the occasion of the next reading of those articles.

Chapter I. Scope of application

Article 1. Scope of application

90. As the Working Group began its review of the revised provisions of the draft Convention, it was generally agreed that this reading of the text should be considered as the final reading by the Working Group in order that the text could be submitted to the twenty-eighth session of the Commission in 1995, as requested by the Commission at its twenty-sixth session.³

"This Convention"

91. The Working Group engaged in an exchange of views on whether the draft text should eventually be adopted as a convention or in the form of a model law. Some support was expressed for the form of a model law since that form would provide States with a wider latitude for determining which provisions of the text were acceptable and could readily be incorporated into the national law. It was noted, however, that a certain degree of flexibility

³Ibid., *Forty-eighth Session, Supplement No. 17 (A/48/17)*, para. 273.

might also be achieved if the draft text were to be adopted in the form of a convention, since the possibility might be opened for implementing States to make reservations on a limited number of issues.

92. Somewhat wider support was expressed for the form of a convention since that form was more in line with the character of the rules envisaged and since it would better foster uniformity and certainty as to applicable rules, which was said to be essential for the smooth operation of international guaranty-letter transactions and for the creditworthiness of guaranty letters used as financial instruments. It was also stated that a convention, although less flexible in nature than a model law, might be more easily acceptable for implementing States for the reason that, at least in certain countries, a convention regulating international guaranty letters might be incorporated in national legislation through a simplified legislative process that would not necessarily imply elaboration of a national law on guaranty letters.

93. After discussion, the Working Group confirmed the working assumption made at its seventeenth session (A/CN.9/361, para. 147) that the final text would take the form of a convention. It was agreed that the possibility for implementing States to make reservations would need to be discussed by the Working Group as it proceeded with its reading of the provisions of the draft Convention. It was also noted that the decision made by the Working Group as to the form of the instrument did not preclude the possibility that the Commission might revert to the more flexible form of a model law at the final stage of the work, when it would review the draft Convention prepared by the Working Group.

"applies to international guaranty letters"

94. Divergent views were expressed as regards the term "international guaranty letters" used in article 1 to delimit the substantive scope of application of the draft Convention. One view was in favour of retaining that term since it embraced in a suitably short way the two types of undertakings to be covered by the Convention, i.e. demand guarantees and stand-by letters of credit. Moreover, the term was in line with the current approach of having common provisions for both types of undertaking unless in particular cases there was a need for referring to only one of those types. It was noted, however, that in the draft Convention, the common name as a shorthand expression was used only in the provisions of the draft Convention but not in its title, where the naming of both types of undertaking was thought to better signal to the reader what the Convention was intended to cover. It was suggested that the title of the draft Convention might instead read "Draft Convention on guaranty letters (independent guarantees and stand-by letters of credit)". Another suggestion was that, in article 1, a reference to "international guaranty letters as defined in article 2" might make it sufficiently clear that the subject-matter of the convention was limited to independent guarantees and stand-by letters of credit.

95. Another view was that the term "guaranty letter" was inappropriate since it was not reflective of terminology used in practice, especially stand-by-letter-of-credit practice.

Furthermore, it was stated that the reference to "guaranty" might raise regulatory concerns in certain countries, where the draft Convention might be misinterpreted as empowering banks to issue accessory guarantees, a practice that was expressly disallowed by existing banking regulation. It was thus suggested that the expression "guaranty letters" should be replaced by terms such as "independent guarantees and stand-by letters of credit". If, however, there was a need for using a short common name, a truly neutral term such as "undertaking", "independent financial instrument", "international financial assurance" or "demand letter" should be used, which would not raise the concern about leaning towards one of the two types of undertakings. However, a note of caution was struck about the use of any such neutral term, which could generate confusion as to which instrument was being dealt with, particularly in situations involving the issuance of a chain of guarantees and counter-guarantees. With respect to the use of the expression "independent guarantees and stand-by letters of credit", a concern was that such terms might insufficiently cover "equivalent undertakings" referred to in article 2.

96. Another concern was that the use of the term "guaranty letter" in the title and article 1 of the Convention might not be sufficiently neutral, since it might suggest a preference for independent guarantees over accessory guarantees. It was therefore suggested that the qualifier "independent" should be added in the title and article 1 in order not to suggest that bank guarantees and other independent instruments defined under article 2 were the only conceivable "guaranty letters". It was stated in reply that article 2 made it clear that only independent guarantees were covered by the Convention.

97. The prevailing view was that, in view of the practical difficulties raised in certain countries by the use of an artificially created term such as "guaranty letter", no further attempt should be made to adopt terminology that would be descriptive of practice. The draft convention should, instead, refer to a neutral term such as "undertaking" to refer to both types of instruments being covered by the draft Convention. With respect to article 1, it was decided that it should contain a reference to undertakings as defined in article 2, while the expressions "independent guarantees and stand-by letters of credit" would be used in the title of the draft Convention.

"[issued in a contracting State]"

98. The Working Group discussed the wording between square brackets as a possible criterion for the territorial scope of application of the Convention. It was noted that, should the wording be deleted, the determination of the territorial scope of application of the Convention would be left exclusively to applicable conflict-of-laws rules. Should the wording be retained, the territorial scope of application of the draft Convention would be determined by a factor connecting the transaction to a Contracting State autonomously, i.e., without reference to conflict-of-laws rules. It was suggested that another approach that might be taken, which would broaden the scope of application of the draft Convention, along the lines of article 1(1) of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "the United Nations

Sales Convention”), would be to establish a connecting factor such as the one contained in the wording between square brackets and, in addition, provide for the applicability of the draft Convention in cases where conflict-of-laws rules pointed to the law of a Contracting State.

99. In favour of adding a reference to cases where conflict-of-law rules would point to the law of a contracting State, it was stated that such a reference might be necessary for the Convention to deal satisfactorily with the situation where only the counter-guarantor but not the second bank issuing an indirect guarantee was in a Contracting State. It was noted, however, that in practice, the effect of the suggested addition would be limited, since most national conflict-of-laws rules would point to the law of the country where the guaranty letter was issued. A contrary view was that the insertion of a reference to the rules of private international law might raise uncertainties where a court in a contracting State would need to apply the draft Convention as the law of another contracting State and the interpretation of the draft Convention in those two contracting States lead to divergent solutions. It was noted that, for that reason, a number of countries had made a reservation to article 1(1)(b) of the United Nations Sales Convention.

100. After discussion, the Working Group decided that the wording between square brackets should be retained and that, in addition, the draft Convention should provide for the applicability of the Convention in cases where conflict-of-laws rules pointed to the law of a Contracting State.

“[unless otherwise stipulated therein]”

101. There was general agreement that parties should be allowed to agree that the draft Convention would not apply to a guaranty letter transaction (“opting out clause”). It was generally felt that such a decision to opt out of the draft Convention should be expressly mentioned in the text of the undertaking. It was noted, however, that, in most countries, there currently existed no specific legislation with respect to guaranty letters. If parties chose to opt out of the draft Convention, the guaranty letter transaction might be submitted by courts either to general contract law or to the draft Convention, which might be regarded as the only national legislation on the subject. The practical effect of a decision to opt out of the draft Convention might thus be limited. After discussion, the Working Group adopted the wording between square brackets.

102. A question was raised as to whether, in addition to being allowed to opt out of the Convention as a whole, parties should be allowed to derogate from individual provisions of the draft Convention. It was suggested that a provision along the lines of article 6 of the United Nations Sales Convention might be adopted. It was noted, however, that a provision allowing parties to derogate from or vary the effect of specific provisions would only be appropriate if the final text was to be essentially non-mandatory in nature. The prevailing view was that the question of party autonomy with respect to individual provisions of the draft Convention would need to be discussed after review of the articles of the draft Convention, only some of which were currently stated to be non-mandatory.

“, and to any other guaranty letter that provides that it is subject to this Convention.”

103. Various questions were raised in the context of the discussion as to whether the draft Convention should include a provision allowing parties to a guaranty letter to make the guaranty letter subject to the draft Convention (“opt-in clause”).

104. A first question was whether an opting-in clause should allow parties to a domestic guaranty letter transaction to opt for the international regime provided for by the draft Convention. In favour of adopting such a provision, it was stated that it might be particularly desirable to allow parties in the context of domestic transactions to make reference to an international regime that might be expected to express fair solutions to problems that might be insufficiently resolved by domestic legislation. It was also stated that the possibility for parties to opt for the application of the draft Convention might make it more acceptable to adopt a restrictive definition of “internationality” under article 4. The contrary view was that parties should not be allowed to avoid application of the mandatory rules of domestic law by opting for the application of the draft Convention. It was noted that, where no such mandatory rules existed, parties would be able to adopt the draft Convention as a contractual regime even if the draft Convention contained no specific provision to that effect. After discussion, the Working Group agreed that the text of the draft Convention should not be drafted so as to create any specific right for parties to adopt the draft Convention for domestic transactions.

105. A second question was whether an opting-in clause should allow parties to submit to the draft Convention an international guaranty letter that would not otherwise fall within the territorial scope of application of the draft Convention, for example if the guaranty letter was issued in a non-contracting State. The Working Group generally agreed that, while parties should be free to adopt the legal regime set forth in the draft Convention indirectly by means of a reference to the law of a contracting State, no specific provision should allow them to opt directly for the application of the draft Convention in the absence of such a reference to the law of a contracting State that applied the Convention in such cases.

106. A third question was whether an opting-in clause should allow parties to make the draft convention applicable to an instrument that would not otherwise be regarded as a guaranty letter under article 2. The view was expressed that the possibility of opting for the application of the draft Convention should be limited to commercial letters of credit, which were of the same legal nature as stand-by letters of credit and were said in some cases to be apparently indistinguishable from them. It was stated that the application of the draft Convention to commercial letters of credit would be appropriate because they operated on the same principles as stand-by letters of credit. It was further stated that express mention of an opting-in possibility should be made in the draft Convention in view of the possible exclusion of commercial letters of credit from the definition of the guaranty letter under variant C in draft article 2(1). An objection was raised against expressly

mentioning in the draft Convention that the possibility for parties to agree on an opting-in clause would be limited to commercial letters of credit. It was stated that such a provision might produce the unintended effect of excluding any possibility that other instruments could be made subject to the draft Convention, as might otherwise be possible under applicable law. After discussion, the Working Group decided that the general opting-in provision in the current draft should be replaced by a provision allowing parties to commercial letters of credit to opt for the application of the draft Convention to such letters of credit. It was noted, that in its review of the remaining articles of the draft Convention the Working Group would have an opportunity to assess the appropriateness of that decision and to reconsider it if necessary.

Article 2. *Guaranty letter*

Paragraph (1)

Chapeau

107. Various suggestions were made to make it clear that the issuance being referred to in the opening words of the definition was intended essentially to refer to the issuance of the undertaking on a professional basis. To that end, it was suggested to add the word "financial" before the word "institution". The Working Group considered such a modification as not providing additional clarity. Suggestions in generally the same direction were also made with a view to excluding cases in which an undertaking was issued by a consumer. Those suggestions included: permitting a reservation to exclude consumer issuance; including a statement to the effect that the draft Convention did not affect the application of consumer protection law; to add words along the lines of "other than a consumer" to describe the "person" referred to in the definition; to delete the word "person", or at least to refer to a "commercial" person; to refer to the "business or professional" realm. In regard to the latter suggestion, it was pointed out that there were cases in which it was impossible to determine the purpose of the undertaking from the face of the instrument. The Working Group did not find that those proposals achieved their aim of providing additional clarity as to the types of situations intended to be covered. It was also noted that the private-issuance cases in question were relatively infrequent on the international plane. Furthermore, the Working Group generally shared the understanding that issuance of an undertaking by an individual for consumer or other private purposes involved a question which was properly within the sphere of national law, and not affected by the draft Convention.

Variants A, B and C

108. Three variants were presented to the Working Group with respect to the manner of describing the forms or types of undertakings being covered by the draft Convention. Variant A, which referred simply to demand guarantees and to stand-by letters of credit, attracted little support. A view was expressed that the more detailed approach in variant B, which included a description of the typical purpose of the undertaking, was unnecessary. A concern was raised that the definition in variant B did not sufficiently concentrate on the actual characteristics of the

instruments to be covered by the Convention and would cover some instruments not intended to be covered, for example, promissory notes. However, the widely prevailing view was that the variant B approach was preferable. As will be seen below, after the discussion of variant B, the Working Group also decided to incorporate elements of variant C, which expressly excluded certain types of instruments.

109. Within variant B, two options were presented in square brackets as to the precise language to be used to describe the purpose of the undertaking. The Working Group preferred the second option, which included references to the payment upon simple demand or upon the presentation of documents stating that payment was due, and reference to other types of contingencies or purposes, in particular the direct-payment functions often performed by financial stand-by letters of credit.

110. The concern was expressed that the formulation "upon simple demand or upon presentation of documents" might inadvertently suggest that a simple demand undertaking was not of a documentary character, a question that had aroused some controversy among observers of practice. It was suggested that a more appropriate formulation would be "upon simple demand or presentation of other documents". The Working Group agreed to the proposed modification.

111. The suggestion was made that the words "documents stating that payment was due" should be replaced by the words "documents stating or implying that payment is due". The concern was that the existing language was unnecessarily narrow, since there would be cases in which the undertaking required the presentation of certain documents with the demand for payment in the case of default in performance, but that those documents would not necessarily be ones "stating" that payment was due. The concern was voiced that using the word "implying" might give rise to the unintended and undesirable interpretation that the doctrine of strict compliance of the documents with the terms of the undertaking was being watered down or made subject to modification by paragraph (2). In order to address both concerns, the Working Group decided to use wording along the following lines: "documents, in conformity with the terms and conditions of the undertaking, indicating that payment is due ...".

112. As to variant C, which expressly excluded commercial letters of credit, insurance contracts and negotiable instruments, the Working Group was generally of the view that it should be retained, subject to the decision to expressly permit the application of the draft Convention to commercial letters of credit by the agreement of the parties. It had been suggested that variant C could be deleted, in particular since the listing of instruments contained therein could be misinterpreted as exhaustive. It was noted that it would have to be understood that the deletion of variant C should not be an indication of an intent to cover those instruments. However, that approach was not supported, in particular since it was felt that variant C would be useful to dispel doubts that might arise in view of the broad approach decided upon for paragraph (1).

III. FUTURE WORK

113. The Working Group noted that its twenty-first session would take place in New York, from 14 to 25 February 1994, at which time the Working Group would

consider the remainder of the revised articles in A/CN.9/WG.II/WP.80. It was also noted that, subject to the agreement of the Commission, the twenty-second session would take place from 19 to 30 September 1994 at Vienna.

B. Working paper submitted to the Working Group on International Contract Practices at the twentieth session: further revision of draft Convention: articles 1 to 17: note by the Secretariat (A/CN.9/WG.II/WP.80) [Original: English]

CONTENTS

	<i>Page</i>
INTRODUCTION	129
DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT	130
CHAPTER I. SCOPE OF APPLICATION	130
Article 1. Scope of application	130
Article 2. Guaranty letter	130
Article 3. Independence of undertaking	130
Article 4. Internationality of guaranty letter	130
CHAPTER II. INTERPRETATION	130
Article 5. Principles of interpretation	130
Article 6. Rules of interpretation and definitions	130
CHAPTER III. EFFECTIVENESS OF GUARANTY LETTER	131
Article 7. Establishment of guaranty letter	131
Article 8. Amendment	131
Article 9. Transfer of beneficiary's right to demand payment	131
Article 9 <i>bis</i> . Assignment of proceeds	131
Article 10. Cessation of effectiveness of guaranty letter	131
Article 11. Expiry	132
CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES	132
Article 12. Determination of rights and obligations	132
Article 13. Liability of guarantor or issuer	132
Article 14. Demand	132
[Article 15. Notice of demand]	132
Article 16. Examination of demand and accompanying documents	133
Article 17. Payment or rejection of demand	133

INTRODUCTION

1. The Working Group on International Contract Practices examined at its sixteenth session draft articles 1-13 and at its seventeenth session draft articles 14-27 of a uniform law on international guaranty letters prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add. 1). The deliberations and conclusions of the Working Group at those sessions are set forth in the reports of the Working Group on those two

sessions (A/CN.9/358 and 361). On the basis of those conclusions, a revised draft of articles 1-27 was presented to the Working Group at its eighteenth session (A/CN.9/WG.II/WP.76 and Add.1). At that session, the Working Group examined articles 1-8 (A/CN.9/372) and at the nineteenth session articles 9-17 (A/CN.9/374) and requested the Secretariat to prepare a further revised version of articles 1-17 taking into account the deliberations and decisions at the eighteenth and nineteenth sessions.

2. The present note contains that further revision of articles 1-17. Additions and modifications to the text are indicated by italics. It may be noted that, in line with the recent instructions relating to the stricter control and limitation of United Nations documentation, no explanatory remarks have been added to the draft provisions. General reference is therefore made to the relevant portions of the Working Group reports (A/CN.9/372 and 374); additional explanations will be provided orally during the session of the Working Group.

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Chapter I. Scope of application

Article 1. Scope of application

This Convention applies to international guaranty letters [issued in a Contracting State], *[unless otherwise stipulated therein]*, and to any other guaranty letter that provides that it is subject to this Convention.

Article 2. Guaranty letter

(1) A guaranty letter is an independent undertaking given by a bank or other institution or person ("guarantor" or "issuer")

Variant A: , as a demand guarantee or as a stand-by letter of credit,

Variant B: , whether designated as demand guarantee or stand-by letter of credit or an equivalent undertaking [typically given to secure the beneficiary against the non-fulfilment of certain obligations by the principal or applicant or against another contingency] [that provides for payment upon simple demand or upon presentation of documents stating that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal or applicant or another person],

Variant C: , excluding commercial letters of credit, insurance contracts and negotiable instruments,

to pay to the beneficiary a certain or determinable amount in conformity with the terms and any documentary conditions of the undertaking [when so demanded in the manner prescribed in the undertaking].

(2) The undertaking may be given

(a) at the request or on the instruction of the customer ("principal" or "applicant") of the guarantor or issuer ("direct guaranty letter");

(b) on the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal" or "applicant") of that instructing party ("indirect guaranty letter"); or

(c) on behalf of the guarantor or issuer itself ("guaranty letter on guarantor's or issuer's own behalf").

(3) Payment may be stipulated in the guaranty letter to be made in any form, including payment:

(a) in a specified currency or unit of account;

(b) by acceptance of a bill of exchange for a specified amount;

(c) on a deferred basis; or

(d) by supply of a specified item of value.

(4) The guaranty letter may stipulate that the guarantor or issuer itself is the beneficiary when acting in favour of another person.

Article 3. Independence of undertaking

For the purposes of this Convention, an undertaking is independent *where the guarantor's or issuer's [performance] [obligation] to the beneficiary is not subject to the existence or validity of an underlying transaction, or to any term or condition not appearing in the undertaking, or [even if stipulated as a condition of payment in the guaranty letter,] to any future, uncertain act or event other than presentation of stipulated documents.*

Article 4. Internationality of guaranty letter

A guaranty letter is international if the places, as specified in the guaranty letter, of any two of the following [persons] are in different States: guarantor or issuer, beneficiary, principal or applicant, instructing party, adviser, confirmer. If the guaranty letter lists more than one place of a given person, the relevant place is that which has the closest relationship to the guaranty letter.

Chapter II. Interpretation

Article 5. Principles of interpretation

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international guarantee and stand-by letter of credit practice.

Article 6. Rules of interpretation and definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "guaranty letter" includes "counter-guaranty letter" and "confirmation of guaranty letter", and "guarantor or issuer" includes "counter-guarantor" and "confirmer";

[(b) any reference to the guaranty letter or the undertaking of the guarantor or issuer, or to its terms and conditions, is to the text as originally established in accordance with article 7 or, if later amended in accordance with article 8, to the text in its last amended version;]

(c) [deleted]

(d) "counter-guaranty letter" means a guaranty letter given to the *guarantor* or issuer of another guaranty letter by its instructing party or to the *guarantor* of another guarantee or the issuer of another letter of credit and providing for payment upon demand and presentation of any specified document stating that payment under that other guaranty letter or undertaking has been demanded from, or made by, the beneficiary of the "counter-guaranty letter";

(e) "counter-guarantor" means the *guarantor* or issuer of a counter-guaranty letter;

(f) "confirmation" of a guaranty letter means an independent undertaking added to that of the *guarantor* or issuer, and authorized by the *guarantor* or issuer, providing the beneficiary with the option of demanding payment and, unless expressly stipulated otherwise, presenting any required documents to the confirmer instead of to the *guarantor* or issuer;

(g) "confirmer" means the person confirming a guaranty letter;

(h) "document" means a communication made in a form that provides a complete record thereof, and authenticated if so, and in the form, required by the applicable law or by the terms and conditions of the guaranty letter [; where a requirement of authentication does not specify the form, any method of authentication may be used that is commercially reasonable in the circumstances];

(i) "issuance" of a guaranty letter means that the guaranty letter leaves the sphere of control of the *guarantor* or issuer;

(j) ["effectiveness"] ["validity"] of a guaranty letter means that it [entitles] [is open for] the beneficiary to make a conforming demand for payment.

Chapter III. Effectiveness of guaranty letter

Article 7. Establishment of guaranty letter

(1) A guaranty letter may be established in any form which preserves a complete record of the text of the guaranty letter and provides authentication of its source by generally accepted means or by a procedure agreed upon by the *guarantor* or issuer and the beneficiary.

(2) A guaranty letter becomes effective and, unless it expressly states that it is revocable, irrevocable when it is issued, provided that it does not state a different time of effectiveness.

Article 8. Amendment

(1) A guaranty letter may be amended in the form agreed upon by the *guarantor* or issuer and the beneficiary or, failing such agreement, in any form referred to in paragraph (1) of article 7.

(2) Unless otherwise agreed by the *guarantor* or issuer and the beneficiary, an amendment.

Variant A: consented to by the beneficiary [or consisting solely of an extension of the validity period of the guaranty letter] becomes effective when it is issued by the *guarantor* or issuer.

Variant B: becomes effective when it is issued by the *guarantor* or issuer, if previously authorized by the beneficiary [or consisting solely of an extension of the validity period of the guaranty letter]; any other amendment becomes effective when the *guarantor* or issuer receives a notice of acceptance by the beneficiary.

(3) An amendment of a guaranty letter has no effect on the rights and obligations of the principal or applicant (or an instructing party) or of a confirmer of the guaranty letter unless such person consents to the amendment.

Article 9. Transfer of beneficiary's right to demand payment

(1) The beneficiary's right to demand payment under the guaranty letter may be transferred only if so, and to the extent and in the manner, authorized in the guaranty letter.

(2) If a guaranty letter is designated as "transferable" [or contains words of similar import,] without specifying whether or not the consent of the *guarantor* or issuer [or another authorized person] is required for the actual transfer, neither the *guarantor* or issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

Article 9 bis. Assignment of proceeds

(1) Unless otherwise agreed by the *guarantor* or issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the guaranty letter.

(2) If the *guarantor* or issuer, or another person obliged to effect payment, has received a notice of the beneficiary in a form referred to in paragraph (1) of article 7 of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the guaranty letter.

(3) The issuer or other person effecting payment may

Variant X: exercise any right of set-off with a claim against the beneficiary within the limits of article 20.

Variant Y: invoke towards the assignee any right of set-off referred to in article 20.

Article 10. Cessation of effectiveness of guaranty letter

(1) The guaranty letter ceases to be effective when:

(a) the *guarantor* or issuer receives from the beneficiary a statement of release from liability in a form referred to in paragraph (1) of article 7;

(b) the beneficiary and the *guarantor* or issuer agree on the termination of the guaranty letter [in a form referred to in paragraph (1) of article 7];

(c) *the amount available under the guaranty letter is paid, unless the guaranty letter provides for its automatic renewal or for an automatic increase of the amount available or otherwise provides for continuing effectiveness; or*

(d) *the validity period of the guaranty letter expires in accordance with the provisions of article 11.*

[(1 bis) Cessation of the effectiveness of the guaranty letter terminates the right of the beneficiary to demand payment under the guaranty letter, but does not affect other rights or obligations of the beneficiary or other parties created prior to the cessation of effectiveness of the guaranty letter.]

(2) *Variant A:* The provisions of paragraph (1) of this article apply irrespective of whether any document embodying the guaranty letter is returned to the guarantor or issuer, *[or irrespective of whether any procedure functionally equivalent to the return of the document is followed in the case of the issuance of the guaranty letter in non-paper form,]* and the retention of any such document by the beneficiary does not preserve any rights of the beneficiary under the guaranty letter, unless the guaranty letter stipulates, *or the guarantor or issuer and the beneficiary agree elsewhere,* that the guaranty letter does not cease to be effective without the return of the document embodying it.

Variant B: Notwithstanding paragraph (1), the guaranty letter may stipulate, *or the guarantor or issuer and the beneficiary may agree elsewhere,* that the return of the document embodying the guaranty letter to the guarantor or issuer, *[or a procedure functionally equivalent to the return of the document in the case of the issuance of the guaranty letter in non-paper form,]* either alone or in conjunction with one of the events referred to in *[subparagraphs (a) and (b) of]* paragraph (1), is required for the cessation of the effectiveness of the guaranty letter; any such stipulation or agreement has no effect beyond the validity period of the guaranty letter according to article 11.

Article 11. Expiry

The validity period of the guaranty letter expires:

(a) *at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the guaranty letter, provided that, if the expiry date is not a business day at the place of the guarantor or issuer, or of another person or at another place stipulated in the guaranty letter for presentation of the demand for payment, expiry occurs on the first business day which follows;*

(b) *if expiry depends according to the guaranty letter on the occurrence of an event, when the guarantor or issuer receives confirmation that the event has occurred by presentation of the document specified for that purpose in the guaranty letter or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event;*

(c) *Variant A:* if the guaranty letter does not contain a provision on the time of expiry, or if a stated expiry event has not yet been established by presentation of the required document, when five years have elapsed from the date at which the guaranty letter had become effective.

Variant B: if the guaranty letter states neither an expiry date nor an expiry event, or if a stated expiry event has not yet been established by presentation of the required document, five years after the establishment of the guaranty letter, unless the guaranty letter is issued in the form of a demand guarantee and contains an express stipulation of indefinite validity.

Chapter IV. Rights, obligations and defences

Article 12. Determination of rights and obligations

(1) Subject to the provisions of this Convention, the rights and obligations of the *guarantor or issuer and the beneficiary* are determined by the terms and conditions set forth in the guaranty letter, including any rules, general conditions or usages *[specifically]* referred to therein.

(2) In interpreting terms and conditions of the guaranty letter and in settling questions that are not addressed by the terms and conditions of the guaranty letter or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of guarantee or stand-by letter of credit practice.

Article 13. Liability of guarantor or issuer

(1) In discharging its obligations *[under the guaranty letter and this Convention]*, the *guarantor or issuer* shall act in good faith and exercise reasonable care *as determined with due regard to* good guarantee or stand-by letter of credit practice.

(2) A *guarantor or issuer* may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

Article 14. Demand

Any demand for payment under the guaranty letter shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the guaranty letter. In particular, any certification or other document required by the guaranty letter shall be presented, within the time of effectiveness of the guaranty letter, to the *guarantor or issuer* at the place where the guaranty letter was issued, unless another person or another place has been stipulated in the guaranty letter. If no statement or document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that *the demand is not in bad faith or otherwise improper.*

[Article 15. Notice of demand]

Without delaying the fulfilment of its duties under articles 16 and 17, the *guarantor or issuer* shall promptly upon receipt of the demand give notice thereof to the principal or applicant or, where applicable, its instructing party, unless otherwise agreed between the *guarantor or issuer* and the principal or applicant. Failure to give notice does not deprive the *guarantor or issuer* from its right to reimburse-

ment but entitles the principal or applicant to recover from the guarantor or issuer damages for any loss suffered as a consequence of that failure.]

Article 16. Examination of demand and accompanying documents

(1) The guarantor or issuer shall examine [the demand and accompanying] documents in accordance with the standard of conduct referred to in paragraph (1) of article 13. In determining whether documents are in facial conformity with the terms and conditions of the guaranty letter, and are consistent with one another, the guarantor or issuer shall have due regard to the applicable standard of international guarantee or stand-by letter of credit practice.

(2) Unless otherwise stipulated in the guaranty letter, the guarantor or issuer shall have reasonable time, but not more than seven days, in which to examine the demand and accompanying documents and to decide whether or not to pay.

Article 17. Payment or rejection of demand

(1) Subject to paragraph (2) of this article, the guarantor or issuer shall pay against a demand made in accordance with the provisions of article 14. Any payment against a demand that is not in accordance with the provisions of article 14 does not affect the rights and obligations of the principal or applicant.

[(1 bis) Payment shall be made promptly, unless the guaranty letter stipulates payment on a deferred basis, in which case the beneficiary shall promptly acknowledge the conformity of the demand and then make payment at the stipulated time.]

[(1 ter) The guarantor or issuer may not avail itself of the insolvency of the principal or applicant, or of any other circumstance that might affect the ability or obligation of the principal or applicant to reimburse or to otherwise compensate the guarantor or issuer, as a ground for not complying with paragraph (1).]

(2) The guarantor or issuer shall not make payment if it is shown facts that make the demand manifestly and clearly improper according to article 19.

(3) If the guarantor or issuer rejects the demand [on any ground referred to in paragraphs (1) and (2) of this article], it shall promptly give notice thereof to the beneficiary by teletransmission or, if that is not possible, by other expeditious means. Unless otherwise stipulated in the guaranty letter, the notice shall indicate the reason for the rejection.

[(4) Variant A: If the guarantor or issuer fails to comply with the provisions of article 16(2) or of paragraph (3) of this article, it is precluded from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions.

Variant B: The guarantor or issuer may not invoke any discrepancy in the documents not discovered within the time referred to in article 16(2) or not notified to the beneficiary as required by paragraph (3) of this article; if the guarantor or issuer in any other respect fails to comply with those provisions, the beneficiary may recover from the guarantor or issuer damages for loss suffered as a consequence of that failure.

Variant C: Where the guarantor or issuer has failed to discover or notify a certain discrepancy in the documents as required by article 16(2) and paragraph (3) of this article and if compliance with those provisions would have enabled the beneficiary to make a conforming demand before the expiry of the guaranty letter, the guarantor or issuer shall pay the amount of the guaranty letter, plus interest for delay, upon a conforming demand made at the latest [five days] [promptly] after having been notified of that discrepancy.

Variant D: If the guarantor or issuer fails to comply with paragraphs (1) and (1 bis) of this article or to discover or to notify any discrepancy in the documents as required by article 16(2) and paragraph (3) of this article, it is liable to the beneficiary for loss suffered as a direct result of such failure.]

C. Report of the Working Group on International Contract Practices on the work of its twenty-first session

(New York, 14-25 February 1994) (A/CN.9/391) [Original: English]

CONTENTS

	Paragraphs
INTRODUCTION	1-11
I. DELIBERATIONS AND DECISIONS	12-13
II. CONSIDERATION OF ARTICLES OF A DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT	14-129

	<i>Paragraphs</i>
CHAPTER I. SCOPE OF APPLICATION	14-38
Article 2. Guaranty letter (<i>continued</i>)	14-21
Article 3. Independence of undertaking	22-33
Article 4. Internationality of guaranty letter	34-38
CHAPTER II. INTERPRETATION	39-58
Article 5. Principles of interpretation	39
Article 6. Rules of interpretation and definitions	40-58
CHAPTER III. EFFECTIVENESS OF GUARANTY LETTER	59-100
Article 7. Establishment of guaranty letter	60-63
Article 8. Amendment	64-71
Article 9. Transfer of beneficiary's right to demand payment	72-74
Article 9 <i>bis</i> . Assignment of proceeds	75
Article 10. Cessation of effectiveness of guaranty letter	76-89
Article 11. Expiry	90-100
CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES	101-129
Article 12. Determination of rights and obligations	101-104
Article 13. Liability of guarantor or issuer	105-111
Article 14. Demand	112-117
Article 15. Notice of demand	118-119
Article 16. Examination of demand and accompanying documents	120-122
Article 17. Payment or rejection of demand	123-129
III. FUTURE WORK	130-131

INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session,¹ the Working Group on International Contract Practices began its work on independent guarantees and stand-by letters of credit by devoting its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce (ICC) and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit (A/CN.9/316). The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention. The Commission, at its twenty-second session, accepted the recommendation of the Working Group that work on a uniform law should be undertaken and entrusted this task to the Working Group.²

2. At its thirteenth session (A/CN.9/330), the Working Group commenced its work by considering possible issues of a uniform law as discussed in a note by the

Secretariat (A/CN.9/WG.II/WP.65). Those issues related to the substantive scope of the uniform law, party autonomy and its limits, and possible rules of interpretation. The Working Group also engaged in a preliminary exchange of views on issues relating to the form and time of establishment of the guarantee or stand-by letter of credit.

3. At its fourteenth session (A/CN.9/342), the Working Group examined draft articles 1-7 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.67). The Working Group also considered the issues discussed in a note by the Secretariat relating to amendment, transfer, expiry and obligations of the guarantor (A/CN.9/WG.II/WP.68).

4. At its fifteenth session (A/CN.9/345), the Working Group considered certain issues concerning the obligations of the guarantor, presented in the note by the Secretariat relating to amendment, transfer, expiry and obligations of the guarantor (A/CN.9/WG.II/WP.68). The Working Group then considered the issues discussed in a note by the Secretariat relating to fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70) and issues discussed in a note by the Secretariat relating to conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71).

¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 22.

²*Ibid.*, Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

5. At its sixteenth session (A/CN.9/358), the Working Group examined draft articles 1-13, and, at its seventeenth session (A/CN.9/361), draft articles 14-27 of the uniform law prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add.1). At the eighteenth, nineteenth and twentieth sessions (A/CN.9/372, 374 and 388), the Working Group considered further revisions of the draft articles (contained in A/CN.9/WG.II/WP.76 and Add.1 and A/CN.9/WG.II/WP.80), which, at the sixteenth session, the Working Group provisionally decided should be presented in the form of a draft Convention (A/CN.9/361, para. 147).

6. The Working Group, which was composed of all States members of the Commission, held its twenty-first session in New York, from 14 to 25 February 1994. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Bulgaria, Canada, China, Ecuador, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Thailand, Togo, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America.

7. The session was attended by observers from the following States: Algeria, Australia, Bahrain, Cyprus, Czech Republic, Democratic People's Republic of Korea, Finland, Hungary, Jordan, Mongolia, Philippines, Sweden, Switzerland, Turkey and Ukraine.

8. The session was attended by observers from the following international organizations: Banking Federation of the European Community; International Chamber of Commerce (ICC).

9. The Working Group elected the following officers:

Chairman: Mr. J. Gauthier (Canada)

Rapporteur: Mr. V. Tuvayanond (Thailand)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.81); a note by the Secretariat containing a further revision of draft articles 1-17 (A/CN.9/WG.II/WP.80), prepared by the Secretariat following the nineteenth session.

11. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft Convention on independent guarantees and stand-by letters of credit.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

12. The Working Group discussed draft articles 2(2)-17(2) as set forth in A/CN.9/WG.II/WP.80.

13. The deliberations and conclusions of the Working Group relating to draft articles 2(2)-17(2) are set forth below in chapter II. The Secretariat was requested to

prepare, on the basis of those conclusions, a revised draft of articles 2(2)-17(2), as well as the other articles of the Convention, to implement the decisions and conclusions of the Working Group.

II. CONSIDERATION OF ARTICLES OF A DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Chapter I. Scope of application

Article 2. *Guaranty letter* (continued)

General remark

14. In the context of the discussion of article 2, the Working Group reaffirmed the decision made at its previous session that, instead of promoting a new term such as "guaranty letter" as an attempt to describe both bank-guarantee and stand-by-letter-of-credit practice, the draft Convention should rely on a neutral term such as "undertaking" to refer to both types of instruments being covered by the draft Convention (A/CN.9/388, para. 97). The Secretariat was requested to reflect that decision in the next draft.

Paragraph (2)

15. The Working Group, recalling its consideration of the matter at its eighteenth session (A/CN.9/372, paras. 54-55), approved the substance of paragraph (2).

Paragraph (3)

16. The view was expressed that some among the forms of payment listed in subparagraphs (a)-(d) were not commonly used, at least in bank-guarantee practice. It was suggested that paragraph (3) should be limited to the general statement of principle contained in its opening words, establishing that payment could be made in any form stipulated in the undertaking. Other suggestions were to delete various of subparagraphs (a), (b), (c) and (d).

17. The prevailing view was that, while a listing of possible forms of payment might be superfluous with respect to bank guarantees, it might help to delimit appropriately the scope of the draft Convention with respect to stand-by letters of credit. After deliberation, the Working Group found the substance of paragraph (3) to be generally acceptable. It was suggested that the term "draft" might be added in brackets to the term "bill of exchange" for consistency with the terminology used in the Uniform Customs and Practice for Documentary Credits adopted by the International Chamber of Commerce ("UCP 500").

Paragraph (4)

18. The Working Group reaffirmed the decision made at its eighteenth session (A/CN.9/372, paras. 42-43) that the draft Convention should accommodate the practice under which an undertaking could validly stipulate that the guarantor or issuer itself was the beneficiary when acting as a fiduciary or trustee in favour of another person.

19. A question was raised as to whether the draft Convention satisfactorily dealt with the cases where the undertaking might stipulate that the beneficiary was a "branch" of the issuer. It was generally agreed that the draft Convention would readily apply to such an undertaking in those situations where the "branch" as a legal entity was distinct from the issuer.

20. Various views were expressed with respect to those situations where a "branch" issued a guaranty undertaking to another branch of the same legal entity, a practice which was reported to exist with respect to both bank guarantees and stand-by letters of credit. One view was that the text of paragraph (4) needed to be redrafted to make it clear that the draft Convention applied to such undertakings. To that effect, it was suggested that the draft Convention should include a provision, along the lines of both article 1(3) of the UNCITRAL Model Law on International Credit Transfers and article 2 of UCP 500, stating that, for the purposes of the draft Convention, branches and separate offices of a bank in different States were separate banks. A contrary view was that such undertakings should not be brought within the scope of the draft Convention since it was difficult to conceive how the draft Convention would apply in case of a dispute between branches of the same legal entity. It was suggested that, should such a dispute arise, it would in all likelihood be settled by internal procedures that were outside the scope of the draft Convention. The prevailing view was that the draft Convention should not attempt to regulate those situations involving issues of company law. However, it was also agreed that it was not intended to disallow such practice or to invalidate an undertaking whose issuer and beneficiary were branches of the same legal entity. It was also agreed that parties should be free to make the draft Convention applicable to such situations by expressly so stipulating in the undertaking.

21. After deliberation, the Working Group requested the Secretariat to prepare a new draft of article 2 reflecting the above decisions.

Article 3. Independence of undertaking

22. Before entering into the discussion of the substance of article 3, the Working Group expressed a preference for the expression "the guarantor's or issuer's obligation" over the expression "the guarantor's or issuer's performance". A suggestion to refer, in addition to the existence or validity of the underlying transaction, to the "legal effects" or "type" of transaction did not receive support. The Working Group also noted a concern that the current version of article 3 no longer contained a statement to the effect that counter-guarantees under the draft Convention were independent from the underlying guarantee to which they related, a point that could usefully be stated expressly, as had been done in paragraph (3) of the previous version of article 3 (A/CN.9/WG.II/WP.76).

23. As to the substance of article 3, it was generally felt that the provision was not sufficiently clear as to the rule that it attempted to lay down on the effect and fate of non-documentary conditions found in the undertaking. There was uncertainty in particular with regard to the phrase

appearing within square brackets, "even if stipulated as a condition of payment in the guaranty letter". It was noted that the article was intended to reflect the decision at the eighteenth session to exclude undertakings containing non-documentary conditions from the scope of application of the draft Convention, by linking the definition of independence to the documentary character of the undertaking. An alternative approach would have been to include such undertakings in the scope, by providing a "safe-haven" rule under which undertakings denominated in a prescribed manner could be deemed independent irrespective of the presence of non-documentary conditions. Linked to that approach was a "conversion" rule providing for the transformation of non-documentary conditions into documentary ones (articles 3 (1)(b) and (2), in A/CN.9/WG.II/WP.76).

24. Considerable interest was expressed by the Working Group in possibly modifying the above decision as reflected in the current formulation of article 3. Grounds cited for considering further the earlier decision with regard to article 3 included the realization that the strict rule in article 3 would exclude from the scope of the draft Convention a large number of undertakings, of both the bank guarantee and stand-by letter of credit variety, undertakings intended by the parties to be independent despite the presence of non-documentary conditions. The concern was expressed that the exclusion from the scope of a significant number of undertakings would contribute to a diversification of legal regimes and greater uncertainty, rather than to the goal of unification. To that end the Working Group considered a variety of approaches that differed in the extent to which they would permit the draft Convention to take into account non-documentary conditions.

25. There was broad agreement in the Working Group that, as one possible, relatively minimal approach, article 3 could be modified to take cognizance of conditions that, though non-documentary, could be verified within the operational purview of the guarantor or issuer (variant A, under paragraph 28 below). An example cited in this vein was the advance payment guarantee in which receipt of the advance payment by the guarantor, as a requirement for the effectiveness of the guarantee, could be verified by the guarantor's checking its own bank records. It was suggested that such "conditions of effectiveness" were relevant to the current discussion and could be distinguished from "conditions for issuance", for example, a seller's request for issuance of a letter of credit as a condition for the issuance of a performance guarantee.

26. Several possible approaches were considered with respect to the other category of non-documentary conditions, those that fell outside the operational purview of the guarantor or issuer. A number of interventions were directed at the reinstitution of the "safe haven" and conversion rules contained in the earlier draft (and described above, paragraph 23). While support was expressed for such an approach, objections were raised based on a concern that it would subvert party autonomy by bringing into the scope of the draft Convention undertakings not intended to be independent. Similar concerns were raised with respect to using an approach similar to that found in article 13(c) of UCP 500, which provided for ignoring non-documentary conditions. A number of suggestions were made aimed at

injecting more flexibility in determining which type of non-documentary conditions would not cripple independence. They included: assessment of the entire face of the undertaking in order to determine independence; whether conditions could be verified "easily" or "without doubt"; whether the condition was unrelated to the underlying transaction.

27. Two other approaches were proposed, inspired in part by the suggestion that reference could be made to uniform rules of practice in defining independence for the purposes of the scope of application of the draft Convention. Under the first approach (variant B, under paragraph 28), an undertaking would not be deprived of independence by the presence of a non-documentary condition either if the condition was within the purview of the guarantor or issuer or if the undertaking was subject to rules of practice that provided for ignoring the condition or converting it into a documentary condition. It was noted that, under this approach, bank guarantees containing non-documentary conditions would be excluded from the scope of the draft Convention, since the uniform rules in question (URDG) did not contain a rule for disposing of non-documentary conditions. Under the second, broader approach (variant C, under paragraph 28), which would include bank guarantees containing non-documentary conditions, an operational rule would be included for the case of an undertaking not subject to rules of practice that contained a solution to the question of non-documentary conditions. In such cases, the guarantor or issuer would not be obliged to pay unless it was shown *prima facie* evidence that the non-documentary condition had been met. It was suggested that such an approach would reflect a practice followed by most guarantors in such cases. The concern was expressed generally that the reliance on rules of practice for determining the scope of application of a convention was not appropriate.

28. Having engaged in the above survey of possible approaches, the Working Group then considered which of the main approaches that had been identified and that are presented below in textual form would be preferable:

Variant A: For the purposes of this Convention, an undertaking is independent where the guarantor's or issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction, [or to any other undertaking,] or to any term or condition not appearing in the undertaking, or to any future, uncertain act or event other than presentation of stipulated documents or another act or event [whose occurrence lies] within the operational purview of the guarantor or issuer. [A counter-guarantee is separate also from the guarantee to which it relates.] [This rule applies to counter-guarantees also in respect of the guarantees to which they relate.]

Variant B: (1) For the purposes of this Convention, an undertaking is independent where the guarantor's or issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction or to any term or condition not appearing in the undertaking.

(2) An undertaking which provides that the guarantor's or issuer's obligation to the beneficiary is subject to a future, uncertain act or event other than presentation of stipulated documents is independent only if:

(a) the occurrence of that act or event [lies] [can be verified] within the guarantor's or issuer's operational purview, or

(b) that condition is, by virtue of applicable [uniform rules] [rules of practice] or otherwise, to be disregarded or to be converted into a documentary one.

Variant C: (1) For the purposes of this Convention, an undertaking is independent where the guarantor's or issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction or to any term or condition not appearing in the undertaking.

(2) Where an [independent] undertaking subjects the guarantor's or issuer's obligation to a future, uncertain act or event and that condition is neither to be disregarded nor to be converted into a documentary one [by virtue of applicable uniform rules or otherwise], the guarantor or issuer is not obliged to pay unless it is [satisfied] [shown *prima facie* evidence] that the act or event has occurred.

29. As a first step in its review of the above variants, the Working Group considered which of the three approaches should be followed. Broad support was expressed for variant A on the grounds of its simplicity, which made it more apparent how the article would operate. Part of the support for variant A derived from uncertainty concerning the formulation and effect of variant C, the other of the variants to attract significant interest. It was also suggested, and widely supported, that variant A could be interpreted as permitting application of the Convention when non-documentary conditions were "taken out of play" by the ignoring rule in article 13(c) of UCP 500, a result expressly provided for in variant B. The view was expressed that for that reason variant B would be preferable, though variant B raised objections, as noted above, that it would be inappropriate for the draft Convention to rely for its application on rules of practice.

30. Interest in variant C was motivated by the benefit that it would bring of expanding the scope of the Convention to cover a significant additional portion of the market, in particular bank guarantees intended to be independent but containing non-documentary conditions beyond the guarantor's operational purview. It was noted that the wording was intended to be broad enough to encompass the purview notion. However, hesitation was expressed about variant C, in particular because of a view that paragraph (1) of variant C would entangle in the scope of application of the draft Convention a host of independent undertakings not intended to be dealt with, for example, insurance undertakings and bills of exchange. It was pointed out, in response, that paragraph (1) was intended merely to define independence of the undertaking, and that the range of undertakings covered by the draft Convention was subject to limitation by articles 1 and 2. It was also recalled to the Working Group that the formulation used in paragraph (1) to filter out accessory guarantees, in particular the words "not subject to the existence or validity of an underlying transaction", was identical to the formulation used in variant A for the same purpose, and that accessory undertakings would therefore be excluded.

31. The Working Group noted that paragraph (2) of variant C was not intended to be a scope rule, but was currently

being considered because of its relevance, as an operational rule for dealing with non-documentary conditions, to the decision to be taken on scope by the Working Group. Hesitation about the operational rule in paragraph (2) was expressed because of uncertainty as to its effect and a concern for protecting party autonomy. A proposal to replace the *prima-facie*-evidence procedure by a statement from the beneficiary concerning the occurrence of the condition, a procedure reflecting case-law in some jurisdictions, was unable to overcome those concerns.

32. Drafting suggestions aimed at clarifying variant C included: taking into account that a condition could be predicated on a future uncertain event *not* occurring; referring to "readily available evidence" rather than to "*prima facie* evidence"; and referring to "fundamental" future, uncertain acts or events.

33. After deliberation, the Working Group decided that, in accordance with the prevailing view, variant A should be retained. The view was expressed, however, that the matter was likely to be subject to further consideration. As to the precise formulation of variant A, the Working Group decided to retain the words "or to any other undertaking" as a reference to the independence of a counter-guarantee from the other guarantee to which it related. It was felt that such a formulation was preferable to either of the two contained in square brackets at the end of variant A, both of which were therefore deleted. It was also decided to delete the words "whose occurrence lies". Drafting suggestions included: to remove the reference to the operational purview of the guarantor or issuer; to refer to a "fundamental" term and to try to avoid using the expression "uncertain act or event" in a scope context; and to follow the drafting style of variant B, by using paragraphs (1) and (2)(a), the content of which paralleled that of variant A. Only the latter suggestion was accepted by the Working Group.

Article 4. Internationality of guaranty letter

34. The Working Group, recalling the decision made at its eighteenth session (A/CN.9/372, para. 70), found the objective criteria provided in article 4 for determining the internationality of an undertaking to be generally acceptable. A question was raised as to whether, under the current draft, the parties retained the freedom of meeting the internationality requirement merely by calling the undertaking international, through what was referred to as an "opting-in provision". In response, it was recalled that the Working Group at its eighteenth session had decided that the draft Convention should contain a straightforward opting-in provision in article 1 rather than somewhat artificially extend the test of internationality (A/CN.9/372, paras. 71-72).

35. A concern was expressed that a party in a contracting State should not be allowed to impose the application of the draft Convention on a party in a non-contracting State. It was suggested that the draft Convention should make it clear that "different States" mentioned in article 4 should all be contracting States. In response, it was recalled that the issue had been considered by the Working Group at its previous session in the context of the discussion of draft

article 1. It had then been decided that the draft Convention should apply to undertakings issued in a contracting State and when the rules of private international law lead to the application of the law of a contracting State (A/CN.9/388, paras. 98-100).

36. As regards the drafting of article 4, it was noted that the term "place" had been substituted for the expression "place of business" as a result of a decision made by the Working Group at its eighteenth session (A/CN.9/372, para. 76). However, there was general agreement that the mere reference to the "place" of a given party was insufficiently clear and that the text should instead use the notion of "place of business". As a consequence, the Working Group decided that the text of article 4 should contain provisions along the lines of paragraph (2)(a) and (b) of draft article 4 as discussed by the Working Group at its eighteenth session (A/CN.9/372, para. 67). The effect of such provisions would be to establish that, where the undertaking listed more than one place of business, the relevant place of business was that which had the closest relationship to the undertaking and that, where the undertaking did not specify a place of business for a given party but specified its habitual residence, that residence was relevant for determining the international character of the undertaking. As regards the use of the word "person" between square brackets, it was generally agreed that the term should be retained.

37. With respect to the reference to the place of business of the adviser as a possible criterion for determining the international character of the undertaking, it was generally felt that, although an adviser might perform important functions, it would typically act as an agent and that the performance of its functions could not be regarded as characteristic of the stand-by letter of credit or guarantee relationship. It was thus decided that the reference to the place of business of the adviser should be deleted.

38. After deliberation, the Working Group requested the Secretariat to prepare a new draft of article 4 reflecting the above decisions.

Chapter II. Interpretation

Article 5. Principles of interpretation

39. The Working Group found the substance of article 5 to be generally acceptable.

Article 6. Rules of interpretation and definitions

40. The view was expressed that the reference in the title to rules of interpretation should be deleted. The Working Group noted that observation and decided that the exact formulation of the title would be better assessed after a further version of article 6 had been elaborated.

Subparagraph (a) ("guaranty letter")

41. It was recalled that at the twentieth session the Working Group had decided to replace the term "guaranty letter"

throughout the Convention by the term "undertaking" (A/CN.9/388, para. 97). It was further noted that the implementation of that decision in the next revision might have implications not only for subparagraph (a) but also for certain other provisions of article 6, as well as other provisions in the draft Convention. An example of the latter was article 2(1), where the drafting should avoid suggesting that all undertakings were independent.

42. The Working Group revisited briefly its decision to use the term "undertaking", prompted to do so by a question as to whether the term was too broad. Some residual preference was expressed for use of the term "guaranty letter", on the ground that, although currently unknown, it was more precise and would come to be accepted in practice. However, the Working Group again opted for "undertaking", recalling the concerns raised previously regarding "guaranty letter", in particular that that term was unknown in practice and might inadvertently interfere with the use in practice of similar terms to describe accessory guarantees.

43. Some interest was expressed in the possibility of defining the term "undertaking", although the Working Group generally felt that an adequate and properly placed description was to be found in articles 1 and 2. A drafting suggestion of a similar sort was to add a definition of "stand-by letter of credit", in particular to assist legislators in jurisdictions where such instruments were not widely known or used. It was pointed out, however, that defining the stand-by letter of credit would raise the necessity of defining or distinguishing bank guarantees and possibly other forms of undertakings and that such an endeavour had been earlier found to be not feasible in a generally acceptable manner.

Subparagraph (b)

44. The Working Group decided to delete subparagraph (b), as it was generally felt to be self-evident that a reference to the undertaking should be understood as a reference to the latest version of the undertaking.

Subparagraph (d) ("counter-guaranty letter")

45. The view was expressed that the definition as formulated in subparagraph (d) was not clear and that there might not be a need to retain it. It was suggested that the implication might inadvertently arise that counter-guarantees were always issued by the instructing party of the indirect guarantee or that there would always be a counter-guarantee. It was noted that that was not the intended implication. It was pointed out that the need to use such "counter-undertakings" in the context of stand-by letters of credit was minimal because of the reimbursement procedure found in the UCP 500 and the availability of the confirmation procedure.

46. Questions were also raised as to the meaning of the reference to "another guarantee or another letter of credit", which was intended to indicate that the counter-guaranty letter could be given to support a commercial letter of credit or an undertaking of a type not covered by the draft Convention, namely, an accessory guarantee. A view was expressed that including the said wording would blur the

scope of the draft Convention. An alternate formulation might be simply to refer to "another undertaking", which, however, would be narrower in scope.

47. The Working Group requested the Secretariat to review subparagraph (d) with a view, to the extent possible, to addressing the concerns that had been raised.

Subparagraph (e) ("counter-guarantor")

48. The possibility was suggested that subparagraph (e) might be one instance in which it would not be practical to implement the general decision to use the term "guarantor or issuer". It was submitted that the notion of a "guarantor" of a counter-guaranty letter would be confusing and should be avoided. It was suggested that reference might instead be made to the party or person that issued the counter-guaranty letter. It was recalled that the decision of the Working Group with respect to the use of the term "guarantor or issuer" or "guarantor/issuer" reflected the absence of a term familiar in both the guarantee and the stand-by letter of credit environments.

Subparagraph (f) ("confirmation")

49. The question was raised as to whether the scope and effect of subparagraph (f) was clear with respect to a number of issues that might arise in the context of confirmation. Those issues included: when, if ever, did the presentation of a demand for payment to the confirmer free the issuer from its undertaking; was there an order in which the beneficiary was to exercise its right to demand payment from either the confirmer or the issuer; were these possible different considerations applicable to confirmation of stand-by as opposed to commercial letters of credits. In considering those issues, the Working Group noted that confirmation in practice was used in stand-by letter of credit practice, but relatively rarely in the guarantee context.

50. Having considered the above observations, the Working Group affirmed that a definition along the lines of subparagraph (f) should be retained. It did so on the basis of an understanding that the provision was intended to recognize that confirmation established an additional right for the beneficiary, i.e., the right to demand payment at the counters of the confirmer. It was felt that the provision should make it clear that under the draft Convention presentation to the confirmer did not extinguish the right to proceed with a demand against the issuer if the confirmer dishonoured. It was understood that the provision was not intended to deal with issues that might properly be settled in the terms of the undertaking, such as the ones alluded to above, in particular whether there should be a Convention rule on a controllable order for the presentation of the demand to the confirmer or to the issuer.

51. The Working Group noted that it might turn subsequently to the question of whether to include in the draft Convention a provision on "silent confirmation".

Subparagraph (g) ("confirmer")

52. The Working Group found the substance of subparagraph (g) to be generally acceptable.

Subparagraph (h) ("document")

53. The need for a definition of "document" was questioned, but the Working Group decided in favour of retention. Among the reasons cited for that decision was the utility of the provision in facilitating the use of electronic data interchange (EDI) and other emerging communications technologies.

54. Extensive consideration was given by the Working Group to whether to retain the reference to authentication. The concern in that regard was that the mention of authentication might raise a cluster of issues not actually intended to be settled in the Convention, but properly left to the terms of the undertaking and to the applicable law. For example, the question might arise as to whether the draft Convention was intended to regulate discrepancies or inconsistencies between authentication requirements under the terms of the undertaking and under the applicable law. In addition, it was suggested that mention of authentication might perpetuate notions not responsive to the evolution of documentation technology. The concern was further expressed that any definition mentioning authentication in conformity with applicable law would place a burden on the document checker beyond the scope of document checking, i.e., having to verify conformity with applicable law. It was suggested that it would be preferable to avoid the question altogether rather than to risk creating uncertainty by including a limited treatment of the matter.

55. While recognizing that subparagraph (h) was not intended to impose any authentication requirement but merely to "raise the flag" about authentication, the Working Group decided, in view of the concerns that had been raised, to delete the text referring to authentication.

56. As to the precise formulation of subparagraph (h), it was suggested that the word "representation" should be used instead of the word "communication", but that suggestion was not accepted.

Subparagraph (i) ("issuance")

57. The Working Group found the substance of subparagraph (i) to be generally acceptable.

Subparagraph (j) ("effectiveness")

58. Questions were raised as to the necessity of retaining the definition of "effectiveness" of the undertaking, added pursuant to an earlier decision by the Working Group. The re-evaluation was prompted in part by the realization that the draft Convention was no longer using the twin term "binding and effective", as well as by the view that the matter was adequately dealt with in article 10 (1 *bis*). While support was expressed for retention of subparagraph (j) as a useful tool for distinguishing the notions of "effectiveness" and "irrevocability", the Working Group decided to delete the subparagraph.

Chapter III. Effectiveness of guaranty letter

59. The Working Group agreed that it would consider in its review of the substantive provisions of the draft

Convention which provisions should be mandatory and which should be non-mandatory.

*Article 7. Establishment of guaranty letter**Paragraph (1)*

60. The view was expressed that paragraph (1) should be regarded as an element of the scope of the draft Convention and that it might be combined with article 2 or otherwise referred to in chapter I. It was stated that such redrafting was necessary to make it clear that certain undertakings (e.g., an oral promise) that did not meet the form requirement specified in article 7(1) should not be treated as illegal or invalid under the draft Convention but should merely be placed outside its scope of application. Support was expressed in favour of the view that the purpose of the draft Convention was not to invalidate such undertakings, which would, in certain legal systems, be recognized by other applicable rules of law. Examples were given of independent oral undertakings established in the context of individual relationships of a commercial or non-commercial nature, which might be valid under applicable rules of national law. In response, it was stated that the draft Convention should seek to unify the legal regimes applicable to independent undertakings. By placing purely oral undertakings outside its scope, the draft Convention would perpetuate or even create uncertainty and potentially give rise to difficult conflict-of-laws issues. It was stated that the unifying effect of the draft Convention should not be jeopardized merely for the purpose of recognizing the possible use of purely oral undertakings between private individuals in an international context, a situation which was described as marginal in practice. In addition, it was recalled that the same question had been raised at the fourteenth session of the Working Group in a proposal that the draft Convention should not establish any requirement of form or that it should exclude purely oral undertakings from its scope of application. At that session, the Working Group had not accepted that proposal, on the ground that purely oral undertakings created uncertainty and did not conform to sound banking practice (A/CN.9/342, para. 58).

61. After deliberation, the Working Group confirmed its position that the substance of paragraph (1) was generally acceptable.

Paragraph (2)

62. A concern was expressed that the reference in the same paragraph to the two notions of effectiveness and irrevocability might give rise to difficulties in the interpretation of the draft Convention. For example, it was suggested that, should a given undertaking be stipulated to become effective at a time that was different from the time of issuance, the text of paragraph (2) might be misinterpreted as implying that such an undertaking was not irrevocable until the time when it became effective. In response, it was stated that the notions of irrevocability and effectiveness were not linked. While the notion of effectiveness operated as a condition for demanding payment, irrevocability or revocability was a characteristic of the undertaking to be determined at the time of issuance. There was general agreement that any undertaking should be revocable or irrevocable as

of the time when it was issued. Suggestions of a drafting nature were made to clarify that point beyond doubt by indicating that an undertaking was irrevocable unless, when issued, it was stipulated to be revocable, and that such an undertaking became effective at that time, provided that it did not state a different time of effectiveness. The Secretariat was requested to take those suggestions into account in the preparation of the next draft of article 7.

63. A question was raised as to whether an undertaking could become effective under the draft Convention irrespective of the fact that the beneficiary might refuse the benefit of the undertaking. In response, reference was made to article 10(1)(a) and to the related, more general question of whether there was in fact a bilateral agreement between the guarantor or issuer and the beneficiary or whether the undertaking constituted essentially a unilaterally established obligation. It was recalled that that issue had been discussed previously (see A/CN.9/316, para. 120; A/CN.9/330, paras. 16 and 107; A/CN.9/372, para. 115) and that the Working Group had decided not to address it in the draft Convention in view of its controversial nature, given the different types of instruments involved.

Article 8. Amendment

Paragraph (1)

64. Divergent views were expressed with respect to the form requirement established in paragraph (1). One view, for which some support was expressed, was that, whatever the form requirement might be, it should be the same for the amendment of an undertaking as for the establishment of the undertaking itself. The text of article 8(1) should thus parallel article 7(1). In support of that view, it was recalled that among the possible reasons for requiring that the amendment be established in the form in which the corresponding undertaking was established might be the consideration that the amendment modified in part that undertaking. A contrary view was that paragraph (1) should be retained. It was recalled that the Working Group had discussed the same issue at its sixteenth session and that it had agreed that imposing the same form requirement for an amendment and for the establishment of the undertaking would be too restrictive in practice (A/CN.9/358, para. 89). That agreement had been confirmed by the Working Group at its eighteenth session (A/CN.9/372, para. 119) and it was suggested that the debate should not be reopened at the present stage.

65. With regard to the difference in the substance of the form requirements contained in articles 7(1) and 8(1), it was questioned whether it would be appropriate for the draft Convention to authorize an amendment to be made in a form that did not preserve a record of the text of the amendment (i.e., in a purely oral form). It was noted that the current text would allow a purely oral amendment where such a form had been agreed upon by the guarantor or issuer and the beneficiary. The prevailing view was that, while such an agreement might rarely exist in practice, the draft Convention should not limit party autonomy in that respect. It was agreed, however, that the specific form of amendments envisaged by the parties had to be stipulated in the undertaking itself.

66. As a matter of drafting, the view was expressed that, in the context of paragraph (1), it should be made clear that the draft Convention envisaged possible amendments only as exceptions. It was thus suggested that more restrictive wording might be appropriate to indicate, through the use of a negative formulation, that an undertaking could not be amended, except in the form specifically stipulated in the undertaking or, failing such a stipulation, in a form referred to in article 7(1).

67. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (1) to reflect the above decisions.

Paragraph (2)

68. It was noted, at the outset, that both variants A and B established that, except for amendments consisting solely of an extension of the validity period, the consent of the beneficiary was necessary for an amendment to become effective but that the two variants differed as to the point in time at which an amendment became effective. General preference was expressed for variant B.

69. With respect to the words between square brackets ("or consisting solely of an extension of the validity period of the guaranty letter"), it was generally agreed that wording along those lines should be retained since such an amendment often resulted from a request by the beneficiary and, in any event, was beneficial to the beneficiary so that no consent needed to be required.

70. As a matter of drafting, it was generally felt that the opening words ("Unless otherwise agreed by the guarantor or issuer and the beneficiary") should be reconsidered with a view to making it clear that the agreement could be either embodied in the text of the undertaking or reached otherwise. It was also decided by the Working Group that, with respect to the situation where the agreement of the parties would be embodied in the text of the undertaking, the notion of "agreement" should be replaced by more neutral wording such as "stipulation", in order for the draft Convention to remain neutral as to whether the undertaking should be regarded as a bilateral agreement or as a unilaterally established obligation (see paragraph 63 above).

Paragraph (3)

71. The Working Group found the substance of paragraph (3) to be generally acceptable. It was decided that the reference to the rights and obligations of an instructing party should be retained.

Article 9. Transfer of beneficiary's right to demand payment

Paragraph (1)

72. A view was expressed that the scope of the draft Convention would lead to its application to instruments that, under some legal systems, were considered transferable without any specific authorization in the undertaking, and that the application of the rule in paragraph (1) to those instruments would therefore be problematic. In response to

that concern, it was pointed out that the draft Convention was intended to be applied only to the limited range of undertakings referred to in articles 1 and 2. It was also noted that the draft Convention did not deal with transfer by operation of law or succession (e.g., due to the death of the beneficiary), a type of issue not dealt with in other UNCITRAL legal texts either. It was also understood that the provision in paragraph (1) would not bar a subsequent agreement to render a non-transferable undertaking transferable, something that would be accomplished through the amendment procedure under article 8(2).

Paragraph (2)

73. It was noted that the current formulation of paragraph (2) reflected the decision of the Working Group to opt for a rule requiring that, for a transferable undertaking actually to be transferred to a particular transferee, the specific consent to the transfer had to be obtained from the guarantor or issuer. The utility and fairness of such a rule was questioned from the perspective that an undertaking designated as transferable should simply be that, transferable, without the need of the consent of the guarantor or issuer to the specific request to transfer. It was also questioned whether the solution in paragraph (2), based on a similar rule in the UCP, should be applicable to non-UCP instruments.

74. The prevailing view, however, was that the approach in paragraph (2) should be retained. Particular attention was drawn to the complexity of the transfer situation, in which the rule would usefully make it more likely that attention would be paid to concerns such as: ensuring that the documentation requirements were consistent throughout the chain; ensuring that proper account was taken of amendments; taking into account deadlines. It was felt that the specific-consent procedure would protect not only the issuer that had taken the probably inadvisable step of issuing a transferable undertaking without stipulating transfer procedures, but also the other parties to the transaction and the principal or applicant. The Working Group also decided to remove the inverted commas around the word "transferable" and to delete the words "or contains words of similar import", but to retain the words "or another authorized person".

Article 9 bis. Assignment of proceeds

75. A question was raised as to whether the procedure described in paragraph (2) might not be a matter better left to the general law of assignment of claims. Another suggestion was to retain the provision, but to alter the title to read "assignment of claim to proceeds". The view of the Working Group, however, was that article 9 bis was acceptable along its present lines. The provision was intended merely to deal with the right of the beneficiary to give specific payment instructions to the guarantor or issuer for proceeds generated by the payment demand by the beneficiary and with the discharging effect of any payment pursuant to such instructions; it did not otherwise deal with the law of assignment of claims, or with any claim as such, or with issues such as validity of assignment or the rights of creditors of the beneficiary. The Working Group noted that the reference to party autonomy would be patterned on the wording in that respect agreed for article 8(2).

Article 10. Cessation of effectiveness of guaranty letter

Paragraph (1)

Subparagraphs (a) and (b)

76. The view was expressed that subparagraph (b) was redundant with respect to subparagraph (a), since agreement between the guarantor and the beneficiary as to the termination of the undertaking under subparagraph (b) would amount to renunciation by the beneficiary of its rights, a situation already addressed in subparagraph (a). Another view was that subparagraph (b) was redundant with respect to article 8, under which such an agreement would also be allowed. While support was expressed in favour of the deletion of subparagraph (b), the prevailing view was that subparagraphs (a) and (b) might cover somewhat different situations since release from liability under the undertaking and agreement on the termination of the undertaking were notionally different.

77. After deliberation, the Working Group found the substance of subparagraphs (a) and (b) to be generally acceptable. As regards the words between square brackets in subparagraph (b), it was generally felt that a reference to the form requirement of article 7(1) should be retained so as to avoid a purely oral agreement as to the termination of the undertaking.

Subparagraphs (c) and (d)

78. Divergent views were expressed with respect to the words "unless the guaranty letter provides for its automatic renewal or for an automatic increase of the amount available or otherwise provides for continuing effectiveness" at the end of subparagraph (c). One view, which did not receive support, was that similar wording should be included at the end of subparagraph (d). The contrary view was that those words should be deleted from subparagraph (c). In support of deletion, it was said that, where the whole amount available under the undertaking had been paid, the undertaking would cease to be effective. It would not be necessary to refer to the automatic renewal since in that case it should be considered as if the whole amount had not yet been paid. The prevailing view, however, was that the wording should be retained to accommodate the needs of certain instruments of a revolving nature, which might provide for automatic renewal either immediately after payment or after a stipulated period of time had elapsed. It was recalled that several suggestions for the inclusion of a reference to the undertaking as not having been "renewed or renewable" or to include some other specific language to cover the cessation of effectiveness in special cases such as revolving credits had been made at the sixteenth session (A/CN.9/358, para. 129).

79. After deliberation, the Working Group decided to retain the substance of subparagraphs (c) and (d).

Paragraph (1 bis)

80. A view was expressed that the text of the paragraph should indicate more clearly that the reference to "other rights or obligations of the beneficiary" was a reference to the rights and obligations of the beneficiary under the

undertaking, as opposed to the rights and obligations the beneficiary might have under the underlying commercial transaction. In that connection, a question was raised as to what the rights and obligations of the beneficiary might be after the undertaking ceased to be effective. Examples of such rights and obligations that were mentioned in response include: the right to bring a lawsuit or to initiate arbitration proceedings; the right to seek payment from the issuer of the undertaking after expiration of the validity period in the case where a conforming demand for payment made to the confirmer of the undertaking was not honoured; the possible obligation to pay the bank fees where the beneficiary so agreed in the undertaking; and, in general, any rights and obligations of the beneficiary that might accrue after expiry of the undertaking.

81. After deliberation, the Working Group found the substance of the paragraph to be generally acceptable. In terms of drafting, it was agreed that reference should be made to the time when the rights and obligations of the beneficiary "accrued".

Paragraph (2)

82. The Working Group had before it two variants of paragraph (2) dealing with the possible legal significance of the retention or the return by the beneficiary of the instrument embodying the undertaking. Under variant A, paragraph (1) applied irrespective of whether any document embodying the undertaking was returned to the guarantor or issuer. The retention of any such document by the beneficiary would not preserve any rights of the beneficiary under the undertaking unless the parties agreed that the undertaking would not cease to be effective without the return of the document embodying it. Variant B established that, as a general rule, non-return of the undertaking would have no effect. At the same time, it recognized that the parties might wish to agree that return of the instrument, either alone or in addition to the events referred to in paragraph (1)(a) or (b), would be required in order to terminate the undertaking. However, any such agreement would have no effect beyond the expiry date or, if no expiry date was stipulated, beyond the period established in article 11(c).

83. Considerable support was expressed for the retention of variant A and the deletion of the party-autonomy proviso ("unless the guaranty letter stipulates, or the guarantor or issuer and the beneficiary agree elsewhere, that the guaranty letter does not cease to be effective without the return of the document embodying it"). It was stated that such a clause would not reflect sound practice and that there was no role for party 26 autonomy to play in that case. A contrary view, however, was that a party-autonomy proviso was necessary to make the rule non-mandatory, thus taking due account of the fact that, in practice, guaranty undertakings would continue to be issued with clauses linking expiry to return of the instrument in countries that imposed a return requirement.

84. There was general agreement that the retention of the document embodying the undertaking should not preserve any rights of the beneficiary under the undertaking where full payment had occurred or, in any event, beyond the validity period of the undertaking as defined under

article 11. It was decided that a mandatory provision in the draft Convention should reflect that understanding by the Working Group. A suggestion was made that paragraph (2) should be limited to setting forth that mandatory rule.

85. The Working Group, however, proceeded with a discussion of the extent to which return of the instrument before the cessation of effectiveness of the undertaking might carry legal significance. The view was expressed that in no instance should return of the instrument have such significance. It was suggested again that the text of variant A, without the party-autonomy proviso, should be retained and that the draft Convention should provide for no exception to that rule. With respect to a suggestion that release under paragraph (1)(a) could be effected by returning the instrument to the guarantor or issuer, it was said that no exception should be made to the rule that release should be issued in the form referred to in article 7(1). In support of that view, it was stated that there might be difficulties with ascertaining what constituted a procedure functionally equivalent to the return of the instrument in the case of the issuance of the undertaking in non-paper form. It was also stated that return of the instrument, in itself, should not be equated with release since the instrument embodying the undertaking was merely a means of evidencing the undertaking, which was intangible in nature.

86. The prevailing view, however, was that parties should be allowed to stipulate in the undertaking, or otherwise agree, that an undertaking stipulating a date of expiry could cease to be effective prior to that date if the beneficiary released the guarantor or issuer by returning the instrument, either alone or in conjunction with one of the events referred to in paragraph (1)(a) or (b). It was stated that, should variant A be retained without any exception, the return of the instrument embodying the undertaking could never constitute one of the events referred to in paragraph (1)(a) or (b). It was generally agreed that such a consequence would be excessive since there seemed to exist no reason why the return of the instrument should not be allowed as one possible instance of an expiry event under article 11.

87. At the close of the discussion, the Working Group agreed that paragraph (2) should leave parties free to agree that return of the document embodying the undertaking to the guarantor or issuer, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1), would be required for the cessation of effectiveness of the undertaking. It was also agreed that such an agreement should have no effect after payment or beyond the validity period of the undertaking. The Working Group found the substance of variant B to be generally consistent with that decision, although some redrafting may be necessary for purposes of clarity.

88. As a matter of drafting, it was generally felt that the final words of variant B ("any such stipulation or agreement has no effect beyond the validity period of the guaranty letter according to article 11") should be replaced by wording inspired from variant A along the following lines: "retention of any such document by the beneficiary after the undertaking ceases to be effective does not preserve any rights of the beneficiary under the undertaking". It was

also felt that the text should contain wording to the effect that retention of any documents after full payment had been made should have no legal effect.

89. After deliberation, the Secretariat was requested to prepare a revised draft of paragraph (2) reflecting the above-mentioned decisions.

Article 11. Expiry

Subparagraph (a)

90. The Working Group found the substance of subparagraph (a) to be generally acceptable.

Subparagraph (b)

91. The view was expressed that, since the Working Group had decided not to provide for the conversion of non-documentary conditions into documentary conditions under article 3, no such conversion mechanism should be provided under article 11. It was thus suggested that the closing words of subparagraph (b) ("or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event") should be deleted. The prevailing view, however, was that the conversion mechanism should be retained. It was generally felt that such a provision created no inconsistency with article 3, which dealt with the conditions under which payment could be made, while the provision under subparagraph (b) was dealing merely with the time of expiry of the undertaking.

92. A concern was expressed that, by establishing that non-documentary confirmation of an event should be converted into "certification by the beneficiary of the occurrence of the event", subparagraph (b) might create a situation where expiry would depend exclusively on action by the beneficiary, thus recognizing perpetual undertakings in cases where the beneficiary chose not to issue the required certificate. It was stated that, should subparagraph (b) result in the recognition of perpetual undertakings, stand-by letters of credit would need to be excluded from the scope of that subparagraph. In response, it was stated that no risk was created of potentially perpetual undertakings since both variants under subparagraph (c) established a maximum validity period that would apply in cases where occurrence of a stipulated expiry event had not been established by presentation of the required certificate. With respect to stand-by letters of credit, it was noted that such instruments were intended to be excluded from the scope of variant B of subparagraph (c), which dealt with cases where the undertaking contained an express stipulation of indefinite validity. It was also noted that such instruments would in most instances be subject to article 42 of UCP 500 under which an expiry date had to be stipulated.

93. After deliberation, the Working Group found the substance of subparagraph (b) to be generally acceptable, subject to the decision to be made with respect to subparagraph (c).

Subparagraph (c)

94. The Working Group had before it two variants of subparagraph (c), which differed as to the manner in which

they dealt with the question of undertakings of indefinite duration. Both variants provided for a five-year cap on the validity period and referred to the possibility of cessation of effectiveness by way of presentation of a document concerning the occurrence of an expiry event. However, variant B provided for an exception to the five-year cap for demand guarantees containing an express stipulation of indefinite validity. Under variant A, the parties could set a period longer or shorter than the default five-year period, but such an indefinite undertaking was not envisaged.

95. A view was again expressed with respect to the reference to an expiry event, found in both variants, that it would be unfamiliar in stand-by letter of credit practice and thereby lead to uncertainty. However, the Working Group found that aspect of subparagraph (c) to be acceptable, noting that provision had been made for the presentation of a document concerning the occurrence of the expiry event and for a time-limit on the exposure of the issuer. It was also generally agreed that the draft Convention should not deal with the relationship between the five-year cap and national rules on limitation periods for the filing of claims. As it had in the past, the Working Group took the view that the matter was beyond the purview of the draft Convention, in particular in view of differences at the national level as to the effect and operational rules of limitation periods.

96. Competing considerations were raised with respect to the two variants of subparagraph (c). Support was expressed for variant B on the ground that, by providing for undertakings of indefinite duration, it reflected the needs of the market-place. An allusion was made to the fact that in some countries the issuance of such undertakings was required by law or by practice, although the extent to which such requirements were still enshrined in law, or were rather a matter of practice, was questioned. The concern was expressed that, without the recognition of party autonomy contained in variant B, the acceptability of the Convention would be affected, in particular to the extent that guarantors in Convention States might fear losses due to inability to issue indefinite guarantees.

97. The prevailing view, however, was that the approach in variant A was preferable. In support of that preference, it was pointed out that the notion of indefiniteness would raise difficulties in legal systems that considered indefinite or perpetual undertakings to be subject to unilateral dissolution. Another advantage of variant A was that it would not raise the need to differentiate between independent guarantees and stand-by letters of credit. It was also felt that sufficient allowance was made in variant A for party autonomy and the needs of the market-place, since the parties could utilize techniques such as stipulating distant expiry dates or automatic-renewal provisions to accomplish the objectives of indefiniteness without the uncertainty attendant to sheer indefiniteness.

98. As to the drafting of variant A, it was noted that the introductory portion was not intended to suggest that the undertaking could stipulate indefiniteness. It was suggested that the opening phrase of variant B was clearer and might be used instead. It was also suggested that it might be preferable to use the term "termination" to refer to cessation of the effectiveness of the undertaking prior to the

expiry date. It was pointed out in response to the latter suggestion that the term "cessation of effectiveness" was meant to encompass "termination".

99. The Working Group next turned to the question of the point at which the five-year period provided in variant A should commence. The general preference, from the standpoint of clarity and predictability, was that it should commence with the issuance of the undertaking. The view was expressed, however, that the relevant moment should be the effectiveness of the undertaking, since otherwise the full five-year period would not always be available to the beneficiary, where a later time of effectiveness was stipulated on the undertaking. The suggestion was even made that the period should be lengthened to ten years, since it might be judged to override national limitation-period rules. In response to those concerns, the Working Group decided to add an additional year to the five years already provided. It was noted that this would take into account the fact that, as shown by practice, the great majority of undertakings, if not effective upon issuance, would become so within a year of issuance.

100. During the discussion of subparagraph (c), the view was expressed that consideration should be given to dealing in the draft Convention with the effect of embargoes on the expiry of the undertaking, a problem that was said to arise and raise difficulties in practice. It was suggested that the matter might be considered on the basis of a study by the Secretariat or of draft provisions at the next session. Such draft provisions might provide for suspension of the running of the expiry period in the event of circumstances beyond the control of the beneficiary that prevented presentation of a demand for payment, for the period of the inability only. Such a policy orientation did not attract sufficient support. Furthermore, the prevailing view was that the question of embargoes and the wider range of related issues, including restraint-of-trade questions generally, were beyond the scope of the draft Convention, or at least should not be dealt with therein, and therefore did not merit the utilization of already scarce Secretariat resources in this forum. It was also noted that such matters were not addressed in other UNCITRAL legal texts and it was felt that any decision to embark in that direction would be better taken following consideration of the matter by the Commission.

Chapter IV. Rights, obligations and defences

Article 12. Determination of rights and obligations

Paragraph (1)

101. The Working Group found the substance of paragraph (1) to be generally acceptable. It was agreed that the word "specifically" should be retained to make it clear that the paragraph contemplated a reference by the parties to specific usages, not simply a general reference by them to usages.

Paragraph (2)

102. A view was expressed that the draft Convention should support only usages expressly incorporated by the

parties, rather than also providing for the applicability of usages not referred to by the parties. In that connection, a question was raised as to whether paragraph (2) was consistent with paragraph (1), particularly in view of the adoption of a reference to usages "specifically" referred to by the parties in paragraph (1) (see paragraph 1 above). In response, it was stated that there was no inconsistency between the two paragraphs, which served two different purposes: paragraph (1) provided for the incorporation of usages by the parties as part of the undertaking; paragraph (2) was intended to establish a default rule for interpreting the terms and conditions of an undertaking in cases where questions arose, which had not been addressed by the undertaking itself or by the provisions of the draft Convention.

103. Another view was that the text of paragraph (2) should be combined with the provisions of article 5 since both provisions dealt with the interpretation of the draft Convention. It was generally felt, however, that paragraph (2) was not intended to establish merely a rule on the interpretation of the draft Convention but that it established a construction rule for specific rights and obligations under a given undertaking.

104. After deliberation, the Working Group found the substance of paragraph (2) to be generally acceptable, subject to possible drafting improvements to indicate more clearly the purpose served by the provision.

Article 13. Liability of guarantor or issuer

Paragraph (1)

105. With respect to the words between square brackets ("under the guaranty letter and this Convention"), it was generally felt that such wording was needed to make it clear that, under the draft Convention, the ambit of the reference to good faith and to reasonable care was confined to the realm of the issuer's obligations under the undertaking. Such obligations did not include any duties the issuer might have *vis-à-vis* its clients outside the context of the undertaking.

106. Various views and concerns were expressed as regards the use of the words "as determined with due regard to good guarantee or stand-by letter-of-credit practice". A concern was that a reference to "good" practice established a subjective criterion and that it might create uncertainty as to what would constitute "good" practice. In addition, it was stated that, at least in certain jurisdictions, a reference to "good" practice might produce the unintended result that determination of the applicable standards would be treated as a question of fact to be decided upon by a jury. It was thus suggested that those words should be replaced by a reference to "applicable standards of practice" or, possibly, "generally accepted international rules and usages of guarantee or stand-by letter of credit practice", wordings that would provide, in addition to a more ascertainable criterion, consistency with article 12(2). In support of the suggested wording, it was stated that, with respect to independent guarantees and stand-by letters of credit, such standard practice would, to a large extent, be contained in the UCP 500 and in the URDG, which could be regarded as "good" practice.

107. In response, it was stated that, through a reference to "good" practice, paragraph (1) had been intended not to refer merely to existing standards or generally accepted practice, but to suggest a higher standard by providing a normative criterion that would make it possible to distinguish among standards, between those that constituted "good" practice and those that did not. Accordingly, support was expressed for the retention of the reference to "good" practice. The prevailing view, however, was that the term "good practice" could be replaced by a reference to "generally accepted" practice. It was recalled that the focus of paragraph (1) was on "good faith" and "reasonable care", which were not to be determined only by reference to either "good" or "generally accepted" practice but also by reference to the overall circumstances of the case. It was thus agreed that, even after deletion of the reference to "good" practice, the standard of good faith and reasonable care would remain as a higher standard than a mere reference to generally accepted practice.

108. Another concern was that references to practice contained in articles 13(1) and 16 were expressed in different wordings. While the view was expressed that the same wording should be adopted in both articles, it was recalled that the Working Group at its nineteenth session had decided that it was useful to distinguish between standards applicable to two distinct phases of the document examination process: the standard of good faith and reasonable care to be followed by the issuer in examining the demand, i.e., in looking for any discrepancies; and the measure to be used in determining the weight or significance to be attached to certain minor discrepancies that might be found, i.e., whether the discrepancies should result in rejection of the demand (A/CN.9/374, para. 95). It was noted that this type of approach reflected practice, and was incorporated in article 13 of UCP 500.

109. As a matter of drafting, it was suggested that the qualifier "independent" should be added to the words "guarantee practice" to avoid misinterpretation of the draft Convention as addressing also guarantee undertakings of an accessory nature. It was also agreed that reference should be made to the "international" character of practices contemplated under paragraph (1).

110. After deliberation, the Working Group decided to replace the words "as determined with due regard to good guarantee or stand-by letter of credit practice" by the words "having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit".

Paragraph (2)

111. The Working Group found the substance of paragraph (2) to be generally acceptable.

Article 14. Demand

First sentence

112. The Working Group found the substance of the first sentence to be generally acceptable.

Second sentence

113. A proposal was made that, should the undertaking not specify the place where the time of effectiveness of the undertaking was to elapse, the draft Convention should establish that a demand for payment or any other document required by the undertaking was validly presented if it was dispatched by the beneficiary within the time of effectiveness (calculated at the place of business of the beneficiary), irrespective of whether it reached the guarantor or issuer before or after expiry (calculated at the place where the undertaking had been issued). No support was expressed for that proposal. It was generally agreed that the provision that documents had to be presented to the guarantor or issuer at the place where the guaranty letter had been issued should be interpreted as implying that documents had to be received by the guarantor or issuer within the time of effectiveness, that time being calculated at the place where the undertaking had been issued.

114. With respect to those specific cases where an undertaking would stipulate that payment was to be made by a bank other than the guarantor or issuer, it was generally agreed that such a stipulation should be interpreted as implying also that another place was stipulated in the undertaking.

115. After deliberation, the Working Group found the substance of the sentence to be generally acceptable.

Third sentence

116. A suggestion was made that, where a demand for payment was presented and no statement or other document was required under the guaranty letter, the draft Convention should establish an obligation for the beneficiary to issue a statement indicating that payment was due. While some support was expressed for the proposal, the prevailing view was that the suggestion would produce the undesirable result of prohibiting simple demand guarantees and clean stand-by letters of credit. It was recalled that the Working Group, at previous sessions, had discussed extensively the manner in which guaranty letters payable on simple demand should be accommodated by the draft Convention and decided that it would not be appropriate for a legislative text such as the draft Convention to encourage or discourage the use of any specific type of guaranty letter. Instead, the draft Convention should take into account, and provide certainty for, all types of guarantees in use (see A/CN.9/361, paras. 20-21; A/CN.9/374, para. 82). The Working Group reaffirmed its earlier decision.

117. After deliberation, the Working Group found the substance of the sentence to be generally acceptable. As a matter of drafting, it was agreed that the words "statement or document" should be replaced by the words "certification or other document" to ensure consistency with the second sentence of the article.

Article 15. Notice of demand

118. In accordance with what had been agreed previously, the Working Group resumed its consideration of whether to

retain article 15. (For the previous discussion of article 15 at the nineteenth session, see A/CN.9/374, paras. 86 to 92.) While the view was expressed that article 15 should be retained, in particular since it provided for party autonomy, the views were again stressed that article 15 should either be deleted, or, at the least, that the notice procedure provided therein should not be applied to stand-by letters of credit. It was suggested that the relevance of such a procedure to bank guarantees was evidenced by the fact that a similar procedure had been included in the URDG, while its inapplicability to stand-by letter of credit practice was said to be evidenced by the absence of a notice requirement in the UCP 500. Support for the retention of article 15, with its application limited to guarantees, was expressed in particular because of a concern that deletion of the provision might be interpreted as a preference in the draft Convention for the UCP approach, which did not provide for notice. Suggestions were made that, were article 15 to be retained, the second sentence should be deleted or clarified, in particular the words "entitles the principal or applicant".

119. While the above notion of blanket inapplicability of the notice procedure to stand-by letters of credit was questioned by reference to the actual practice, at least in some States, the Working Group concluded that it would be preferable to delete article 15. It was felt that a notice requirement should not be established by the draft Convention, but that the matter could be left to contractual disposition by the parties and to development in practice, a result that would flow from the deletion of article 15. It was also widely felt that, in the light of the views that had been expressed, the question did not merit providing expressly divergent rules for stand-by letters of credit, a divergence that up until that point had been avoided. It was stated that the question essentially concerned the relationship between the principal or applicant and the guarantor or issuer and, as such, was beyond the intended ambit of the draft Convention. The Working Group also felt it important to note that the decision that it had taken was intended to render the Convention neutral on the question of a notice requirement of this type.

Article 16. Examination of demand and accompanying documents

Paragraph (1)

120. The question was raised as to whether it was sufficiently clear that the principal or applicant and the guarantor or issuer could agree to lower the standard of examination of the demand and accompanying documents. It was suggested that additional clarity might be useful, though such a rule could be inferred from the combination of articles 13 and 16. The Working Group, however, was reluctant to alter the basic approach set forth in paragraph (1). It was recalled that the current approach was the result of extensive deliberations at the nineteenth session and was based on the view that the draft Convention should focus on the relationship between the guarantor or issuer and the beneficiary. As had been the case at the nineteenth session, it was stated that the wording of the provision should not be construed as preventing the principal or applicant and the guarantor or issuer from establishing agreed standards.

121. From the standpoint of drafting, the Working Group noted that the upcoming Secretariat redraft would reflect the earlier decision of the Working Group that a demand for payment would be considered a "document" for the purposes of the draft Convention (A/CN.9/388, para. 110). Accordingly, a formulation such as "the demand and any other, accompanying documents" would be used. It was also noted that reference would be made to "independent guarantee", rather than simply to "guarantee", in line with the term used in the title of the draft Convention.

Paragraph (2)

122. The concern was expressed that the seven-day cap on the time allowed for examination of the demand for payment would raise difficulties for States in which clusters of holidays at given points of the year would render the rule in paragraph (2) inadequate. While it was recognized that the current reference to seven calendar days had been included to avoid immersing practitioners in differing understandings of "business" days, it was suggested that paragraph (2) also did not take adequate account of the needs of States in which weekends did not fall on the same days as in other regions. Alternatives proposed included five business days and seven business days at the place where the demand is to be made or at the place where the documents are to be examined. Though some hesitation was expressed that a seven-business-day rule would create uncertainty for beneficiaries, and that use of the word "business" would not take account of private guarantors or issuers, the Working Group settled on the seven-business-day approach. In doing so, the Working Group recognized that a distinction might be drawn between "business days" generally and those days on which guarantors or issuers were open for business ("banking days"). It was understood that paragraph (2) would make it clear that it was referring to the latter category (in line with article 13(b) of UCP 500), so as to reflect the understanding of the Working Group that "business days" meant days when the guarantor or issuer was open for business.

Article 17. Payment or rejection of demand

Paragraph (1)

123. It was agreed that the intended effect of the second sentence should be made clearer, namely, that payment of a non-conforming demand would not deprive the principal or applicant of a right to refuse reimbursement to the guarantor or issuer in such a case. Such additional clarity might be achieved by deleting the words "and obligations" and using the words "does not prejudice" instead of "does not affect". It was also noted that the provision was not meant to override an agreed lower standard. The Working Group suggested that the provision should be redrafted to address the concerns that had been raised.

Paragraph (1 bis)

124. The Working Group noted that the reference to the beneficiary in paragraph (1 bis) was mistaken and should be replaced by a reference to the guarantor or issuer.

125. Differing views were expressed as to the decision to be taken by the Working Group on the retention or deletion of the paragraph. Support was expressed for deletion on the ground that the provision restated a principle (prompt payment of a conforming demand) that was self-evident in paragraph (1). Doubts about paragraph (1 *bis*) were also expressed on the ground that the meaning of the word "promptly" was unclear. Additional misgivings focused on the procedure provided for acknowledgement of conformity of a demand in the deferred-payment context. While some interest was expressed in such a procedure, it was generally felt to be unfamiliar to practice and not relevant as a Convention rule for cases of acceptance of a demand for payment rather than rejection, in which case a communication to the beneficiary was a necessary rule.

126. The prevailing view, which the Working Group adopted, was that paragraph (1 *bis*) served a useful purpose by stating clearly the principle of prompt payment, unless otherwise agreed, in which case payment should be made at the time stipulated. At the same time, it was agreed that no reference would be made in paragraph (1 *bis*) to acknowledgement of conformity of a demand in the deferred-payment context. The Working Group also noted that it would be made clear in the next redraft that the obligation to pay promptly followed the decision to pay, without affecting the time allowed under article 16 (2) for examining the demand and deciding whether to pay.

Paragraph (1 ter)

127. The Working Group decided to delete paragraph (1 *ter*). It was felt that the rule contained therein, that the guarantor or issuer could not avail itself of the financial difficulty of the principal or applicant to the detriment of the obligation to pay, was self-evident. It was also stated that the paragraph might be interpreted as suggesting the applicability of the draft Convention to the relationship between the principal or applicant and the guarantor or issuer.

Paragraph (2)

128. As had been the case previously, the concern was expressed that the rule in paragraph (2) was inappropriate, if not for all the undertakings within the scope of the draft Convention, at the least for stand-by letters of credit. The view was emphasized that, by mandating non-payment when the guarantor or issuer was shown facts that rendered the demand clearly improper, the draft Convention would place the document checker in the position of determining facts, a role that should be left to a court or other trier of fact. In this regard, the attention of the Working Group was drawn to the generally accepted principle of letter-of-credit practice, as reflected in article 15 of UCP 500, that the issuer was not responsible for the authenticity of documents. It was suggested that an acceptable alternative would be to give the guarantor or issuer the discretion not to pay in such cases. In support of such an approach, it was suggested that the obligation to act with reasonable care and in good faith would be sufficient to guide the guarantor or issuer in the event that it was shown evidence of fraud.

129. Having exhausted the time available for deliberations at the current session, the Working Group requested the Secretariat to prepare for the next session alternative formulations reflecting the views that had been expressed so as to facilitate further consideration of paragraph (2), without in any way prejudicing the discussion at the next session.

III. FUTURE WORK

130. The Working Group decided, subject to approval by the Commission, that the next session would be held at Vienna from 19 to 30 September 1994.

131. The Working Group noted that it was the intent of the Secretariat to prepare for the next session a revised version of the draft Convention, implementing the decisions and conclusions of the Working Group.

III. ELECTRONIC DATA INTERCHANGE

A. Report of the Working Group on Electronic Data Interchange (EDI) on the work of its twenty-sixth session

(Vienna, 11-22 October 1993) (A/CN.9/387) [Original: English]

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-13
I. DELIBERATIONS AND DECISIONS	14
II. CONSIDERATION OF DRAFT PROVISIONS FOR UNIFORM RULES ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF TRADE DATA COMMUNICATION	15-176
CHAPTER I. GENERAL PROVISIONS	15-65
Article 1. Sphere of application	15-28
Article 2. Definitions	29-52
Article 3. Interpretation of the Uniform Rules	53-58
Article 4. Rules of interpretation	59-61
Article 5. Variation by agreement	62-65
CHAPTER II. FORM REQUIREMENTS	66-109
Article 6. Functional equivalent of "writing"	66-80
Article 7. Functional equivalent of "signature"	81-90
Article 8. Functional equivalent of "original"	91-97
Article 9. Evidential value of trade data messages	98-109
CHAPTER III. COMMUNICATION OF TRADE DATA MESSAGES	110-176
Article 10. [Binding nature] [Effectiveness] of trade data messages	110-132
Article 11. Obligations subsequent to transmission	133-144
Article 12. Formation of contracts	145-151
Article 13. Receipt of trade data messages	152-163
Article 14. Recording and storage of trade data messages	164-168
[Article 15. Liability]	169-176
III. FURTHER ISSUES TO BE CONSIDERED	177

INTRODUCTION

1. At its twenty-fourth session (1991), the Commission agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field. The Commission agreed that the matter needed detailed consideration by a Working Group.¹

2. Pursuant to that decision, the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of EDI. The report of that session of the Working Group suggested that the review of legal issues arising out of the increased use of EDI had demonstrated that among those issues some would most appropriately be dealt with in the form of statutory provisions (A/CN.9/360, para. 129). As regards the possible preparation of a standard communication agreement for worldwide use in international trade, the Working Group decided that, at least

¹Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 314-317.

currently, it was not necessary for the Commission to develop a standard communication agreement. However, the Working Group noted that, in line with the flexible approach recommended to the Commission concerning the form of the final instrument, situations might arise where the preparation of model contractual clauses would be regarded as an appropriate way of addressing specific issues (A/CN.9/360, para. 132). The Working Group reaffirmed the need for close cooperation between all international organizations active in the field. It was agreed that the Commission, in view of its universal membership and general mandate as the core legal body of the United Nations system in the field of international trade law, should play a particularly active role in that respect (A/CN.9/360, para. 133).

3. At its twenty-fifth session (1992), the Commission considered the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed, along the lines suggested by the Working Group, that, while some issues would most appropriately be dealt with in the form of statutory provisions, other issues might more appropriately be dealt with through model contractual clauses. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (A/CN.9/360, paras. 129-133), reaffirmed the need for active co-operation between all international organizations active in the field, and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.²

4. At its twenty-sixth session (1993), the Commission had before it the report of the Working Group on Electronic Data Interchange on the work of its twenty-fifth session (A/CN.9/373). The Commission expressed its appreciation for the work accomplished by the Working Group. The Commission noted that the Working Group had started discussing the content of a uniform law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text.

5. The view was expressed that, in addition to preparing statutory provisions, the Working Group should engage in the preparation of a model communication agreement for optional use between EDI users. It was explained that most attempts to solve legal problems arising out of the use of EDI currently relied on a contractual approach. That situation created a need for a global model to be used when drafting such contractual arrangements. It was stated in reply that the preparation of a standard communication agreement for universal use had been suggested at the twenty-fourth session of the Commission. The Commission, at that time, had decided that it would be premature to engage immediately in the preparation of a standard communication agreement and that it might be preferable, provisionally, to monitor developments in other organiza-

tions, particularly the European Communities and the Economic Commission for Europe.³

6. After discussion, the Commission reaffirmed its earlier decision to postpone its consideration of the matter until the texts of model interchange agreements currently being prepared within those organizations were available for review by the Commission.

7. It was suggested that, in addition to the work currently under way in the Working Group, there existed a need for considering particular issues that arose out of the use of EDI in some specific commercial contexts. The use of EDI in procurement and the replacement of paper bills of lading or other documents of title by EDI messages were given as examples of topics that merited specific consideration. It was also suggested that the Commission should set a time limit for the completion of its current task by the Working Group. The widely prevailing view, however, was that the Working Group should continue to work within its broad mandate established by the Commission. It was agreed that, only after it had completed its preparation of general rules on EDI, should the Working Group discuss additional areas where more detailed rules might be needed.⁴

8. The Working Group on Electronic Data Interchange, which was composed of all States members of the Commission, held its twenty-sixth session at Vienna, from 11 to 22 October 1993. The session was attended by representatives of the following States members of the Working Group: Austria, Canada, Chile, China, Costa Rica, France, Germany, Hungary, India, Iran (Islamic Republic of), Japan, Mexico, Nigeria, Poland, Russian Federation, Saudi Arabia, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

9. The session was attended by observers from the following States: Armenia, Australia, Belgium, Brazil, Finland, Indonesia, Peru, Philippines, South Africa, Switzerland, Turkey, Ukraine and Yemen.

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

- (a) *United Nations bodies:*
International Trade Centre UNCTAD/GATT (ITC)
United Nations Industrial Development Organization (UNIDO)
- (b) *Intergovernmental organizations:*
Asian-African Legal Consultative Committee (AALCC)
Economic Commission for Europe (ECE)
European Community (EC)
Hague Conference on Private International Law
Intergovernmental Organization for International Carriage by Rail (OTIF)
- (c) *Other international organizations:*
Cairo Regional Centre for International Commercial arbitration
Bank for International Settlements (BIS)

²Ibid., *Forty-sixth Session, Supplement No. 17 (A/46/17)*, para. 316.

³Ibid., *Forty-seventh Session, Supplement No. 17 (A/47/17)*, paras. 140-148.

⁴Ibid., *Forty-eighth Session, Supplement No. 17 (A/48/17)*, paras. 265-268.

European Banking Federation
International Chamber of Commerce (ICC).

11. The Working Group elected the following officers:

Chairman: Mr. José-María Abascal Zamora
(Mexico)

Rapporteur: Mr. Abdolhamid Faridi Araghi
(Islamic Republic of Iran)

12. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.56), a note by the Secretariat containing a first draft of uniform rules on the legal aspects of electronic data interchange (EDI) and related means of trade data communication (A/CN.9/WG.IV/WP.57) and a note reproducing the text of draft rules and explanatory comments proposed by the delegation of the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.58).

13. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Uniform rules on the legal aspects of electronic data interchange (EDI) and related means of trade data communication.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

14. The Working Group considered the issues discussed in the note by the Secretariat (A/CN.9/WG.IV/WP.57) and the proposal made by the delegation of the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.58). The deliberations and conclusions of the Working Group are set forth below in chapter II. The Secretariat was requested to prepare, on the basis of those deliberations and conclusions, a set of revised articles, with possible variants, on the issues discussed.

II. CONSIDERATION OF DRAFT PROVISIONS FOR UNIFORM RULES ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF TRADE DATA COMMUNICATION

Chapter I. General provisions

Article 1. Sphere of application

15. The text of draft article 1 as considered by the Working Group was as follows:

"Sphere of application"

(1) These Rules apply to a trade data message where

Variant A: the sender and the recipient of such a message are in different States [at the time when the message is sent].

Variant B: (a) the sender and the recipient of such a message have, at the time when the message is [prepared or] sent, their places of business in different States; or

(b) any place where a substantial part of the obligations of the commercial relationship to which the message relates or the place with which the subject-matter of the message is most closely connected is situated outside a State in which either of the parties has its place of business.

Variant C: the message affects international trade interests.

(2) These Rules govern only the exchange and storage of trade data messages and the rights and obligations arising from such exchange or storage. Except as otherwise provided in these Rules, they do not apply to the substance of the trade transaction for the purpose of which a trade data message is sent or received.

*These Rules [do not deal with issues] [do not intend to override any law] [are subject to any law] related to the protection of consumers."

Paragraph (1)

16. The Working Group addressed the question whether the uniform rules should apply only to international cases or whether they should cover both international and domestic cases.

17. According to one view, the application of the uniform rules should not be limited to international cases. In support of that view, it was pointed out that legal certainty to be provided by the uniform rules was necessary for both domestic and international trade. Furthermore, a duality of regimes governing the use of electronic means of recording and communication of data might create a serious obstacle to the use of such means. In addition, it was noted that it would be difficult to establish a clear and generally acceptable criterion for distinguishing domestic cases from international ones.

18. According to another view, the uniform rules should apply only to international cases since their purpose was to facilitate international trade. In this context the Working Group held a discussion of the various variants set out under paragraph (1).

19. In favour of variants A and B, it was pointed out that they correctly focused on the message rather than on the underlying transaction, as the purpose of the uniform rules was not to unify national laws on trade transactions. However, variants A and B were criticized for emphasizing the notion of communication, leaving aside the records kept in electronic form but not communicated. In addition, it was noted that variant A was not workable as it might be difficult for a party to know where the party receiving a message was at the time when the message was sent. Variant B was criticized for focusing on the place of business of the parties, which might be difficult to ascertain.

20. Considerable support was expressed in favour of variant C, which was regarded as flexible enough to allow

subsuming under the uniform rules all messages relating to an international transaction, even if some of those messages would be treated as domestic under variants A and B. However, variant C was criticized on the ground that it impliedly referred to the underlying transaction, a reference that was contrary to the principle expressed in paragraph (2).

21. After discussion, the Working Group decided to make the uniform rules applicable in principle to both international and domestic cases, but it also decided to indicate in a footnote a possible test of internationality for use by those States that might desire to limit the applicability of the uniform rules to international cases. It was considered that a provision based on variant C should be incorporated in such a footnote as a possible criterion for distinguishing international cases from domestic ones.

Paragraph (2)

22. The first sentence of the paragraph was criticized for unduly restricting the scope of the uniform rules. It was suggested that, in addition to the exchange and storage of trade data, other operations such as the creation and processing of data also needed to be taken into account if the uniform rules were to apply to the entire range of electronic commerce procedures. It was also stated that the indication contained in the first sentence that the uniform rules governed the rights and obligations arising from the exchange and storage of trade data messages could be read as contradicting the second sentence of the paragraph. As to the second sentence, it was stated that the draft text was insufficiently clear as to the possible interplay between the uniform rules and other legal rules applicable to trade transactions.

23. The Working Group was generally agreed that the provision should define the sphere of application of the uniform rules and also indicate that the uniform rules were not intended to displace other rules of law applicable to trade transactions, such as the general law of contract. However, it should also be indicated in article 1 that, to the extent necessary for the legal recognition of information technology, the uniform rules would prevail over other rules of law. For example, the provisions contained in the uniform rules in respect of a functional equivalent of "writing" would normally prevail over possible definitions of "writing" in national legislation.

Footnote: issues of consumer law

24. It was recalled that, in the context of a preliminary discussion of the issues of consumer law by the Working Group at its twenty-fourth session, it had been agreed that such issues should be expressly excluded from the scope of the uniform rules (see A/CN.9/360, para. 30). The view was expressed that the uniform rules should state that they were not applicable to consumer transactions. It was stated that, should the uniform rules apply to consumer transactions but be made subject only to special rules related to the protection of consumers, difficulties might arise in situations where the uniform rules and consumer-protection legislation could apply concurrently. Such difficulties might arise particularly if a determination had to be made

as to what constituted consumer-protection legislation. Examples were given of possible conflict between the uniform rules and otherwise applicable rules of law which, although not expressly mentioning consumer protection as their purpose, could be interpreted as having a protective effect on consumers. It was also pointed out that the focus of the uniform rules was on trade transactions and that there might exist situations where the uniform rules, if applied in the context of consumer transactions, would adversely affect the position of consumers. As an example of such a situation, it was stated that draft article 10 created a presumption that, under certain circumstances, the purported sender of a message was bound by the content of a message which it had not actually sent. While such a rule might be conceivable in the context of international credit transfers or other trade transactions, it would in all likelihood be inappropriate for consumer transactions.

25. It was also recalled, however, that the decision reached by the Working Group at its previous session was twofold. While it was generally agreed that the uniform rules should not address special issues relating to the protection of consumers, the prevailing view at that session was that the uniform rules should apply to all messages, including messages to or from consumers, but that it should be made clear that the uniform rules were not intended to override any consumer-protection law. It was pointed out that the uniform rules themselves were likely to improve the position of consumers by increasing legal certainty in their transactions, and that, in addition to that improvement, the uniform rules should open the way for the legislators to provide special protection to consumers (see A/CN.9/373, paras. 29-31).

26. A suggestion was made to adopt a provision along the following lines:

"These Rules are not intended to apply to consumer transactions but, if used for that purpose, they should not override any law related to consumer protection".

Support was expressed in favour of the suggested provision. It was stated, however, that the effect of such a provision would be to exclude consumer transactions from the scope of the uniform rules, unless the national statute enacting the uniform rules expressly made the uniform rules applicable to consumer transactions. The suggested provision was objected to on the ground that it ran counter to the wish that the uniform rules be readily applicable to consumer transactions.

27. After discussion, the Working Group was agreed that the uniform rules should contain a clear indication of its intent not to take any special issue of consumer protection into consideration. The Secretariat was requested to prepare, for further consideration by the Working Group, variants reflecting the discussion that had taken place.

28. As to whether the issues of consumer law should be dealt with in the body of the uniform rules or in a footnote, support was expressed for including the relevant provision in the text of the uniform rules. It was realized, however, that the use of such a drafting technique would emphasize the need for a definition of the notion of "consumer". It was generally felt that it would be impractical to attempt to

provide a uniform definition of the notion of "consumer". The Working Group reaffirmed the decision made at its previous session that the issue should be dealt with by means of a footnote (see A/CN.9/373, para. 32).

Article 2. Definitions

29. The text of draft article 2 as considered by the Working Group was as follows:

"For the purposes of these Rules:

(a) 'Trade data message' means a set of trade data exchanged [or stored] by means of electronic data interchange (EDI), telegram, telex, telecopy or other [analogous] means of teletransmission [or storage] of [digitalized] data, [to the exclusion of purely oral communication] which [inherently] provides a complete record of the data;

(b) 'Electronic data interchange (EDI)' means the computer-to-computer transmission of business data in a standard format.

(c) 'Sender' means any person who originates a trade data message covered by these Rules [on its own behalf] [or any person on whose behalf a trade data message covered by these Rules purports to have been sent];

(d) 'Recipient' means a person who ultimately receives a trade data message covered by these Rules or who is ultimately intended to receive such a message;

(e) 'Intermediary' means an entity which, as an ordinary part of its business, engages in receiving trade data messages covered by these Rules and is expected to forward such messages to their recipients. [An intermediary may perform such functions as, *inter alia*, formatting, translating and storing messages.]"

Subparagraph (a) (Definition of "Trade data message")

"Message"

30. It was pointed out, at the outset, that the draft definition was predicated on the concept of communication and that it did not take into account computer records that were simply created or stored but were not communicated. In that respect, it was suggested that reference should be made to "trade data document" or "record" and not to "message". A definition along the following lines was suggested:

"'Trade data [record][document]' means trade information exchanged or stored by electronic, optical or other analogous technological means, including but not limited to information generated or stored by means of electronic data interchange (EDI), telegram, telex or telecopy".

31. Support was expressed in favour of the proposal. As regards the suggested use of the word "document", however, it was pointed out that the uniform rules should avoid referring to a concept that appeared to be intimately linked to the use of paper. Furthermore, it was pointed out that the acceptability of the uniform rules might be enhanced if they clearly departed from the use of terms with a known legal meaning in a paper-based environment. For example,

a new definition of a word such as "message", which seemed to have no such established legal meaning, might be more readily acceptable than an extended definition of a term such as "document". It was agreed that whatever term were used, the text should clearly encompass data created or stored but not communicated.

32. The view was expressed that it was unnecessary and extremely difficult to provide a satisfactory definition of concepts such as "trade data message", "record" or "document". It was suggested that, instead of making the applicability of the uniform rules dependant upon such concepts, the uniform rules should address directly the techniques to which they intended to provide legal recognition. The following text was proposed as a replacement for the definition of "trade data message":

"'Information technology' includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form".

A corresponding amendment to article 1 was proposed as follows:

"These Rules apply in respect of the transmission, creation and storage of any message or other record by means of any telecommunication system or any other information technology".

It was pointed out, however, that such a definition might be too broad and that it might make the uniform rules applicable even to telephone conversations.

33. The Working Group was agreed that the need for defining the notion of "trade data message" or any other such concept on which to base the application of the uniform rules would need to be reassessed after the substantive provisions of the uniform rules had been reviewed. In light of the views expressed, the Working Group agreed that the concept of "trade data message" was useful in that it provided an acceptable working assumption. It was decided, however, that the expression "trade data message" should be placed in square brackets, together with such terms as "record", "communication" and "document".

"Set of trade data"

34. A concern was expressed that the notion of "trade data", as well as any other reference to "trade", might raise difficulties since certain common law countries did not have a discrete body of commercial law, and it was not easy or usual in such countries to distinguish between the legal rules that applied to "trade" transactions and those that applied more generally. Other examples were given of countries where the notion of "trade" was not commonly used and might raise a question as to its definition. On the other hand, examples were also given of countries where the notion of "trade" might be already in use in national legislation and might be interpreted differently according to the country in which the notion was used. It was stated that previous UNCITRAL legal texts had avoided unnecessary references to such notions as "trade" or "commerce", with the exception of the UNCITRAL Model Law on International Commercial Arbitration, which provided a definition of the term "commercial".

35. A concern was also expressed that qualifying data with the attribute of "trade" would unnecessarily exclude from the scope of application of the uniform rules all other kinds of records and messages, such as those required for public administrative purposes. It was recalled that the Working Group, at its previous session, had agreed that, while the uniform rules should not expressly deal with the situations where a form requirement was prescribed by an administration for reasons of public policy, the sphere of relationships between EDI users and public authorities should not be excluded from the scope of the uniform rules (A/CN.9/373, para. 48).

"Telegram, telex, telecopy or other analogous means"

36. The Working Group was generally agreed that the aim of the uniform rules should be to encompass the broadest possible range of techniques, whether readily available or still to be developed. A view was expressed that EDI should be distinguished from other methods of communication such as "telegram, telex or telecopy", for which elements of a definition might also need to be stated in the uniform rules. As a possible criterion for distinguishing "telegram, telex or telecopy" from EDI, it was suggested that at least partial reliance on paper-based communications was a common feature of telegram, telex and telecopy. In that connection, it was stated that, while the notion of "analogous means of telecommunication" might be useful in the context of EDI, it might be more difficult to define what might constitute a technique "analogous" to telegram, telex or telecopy.

"Purely oral communications"

37. While agreement was expressed with the proposition that the uniform rules should not apply to purely oral communications, it was noted that there existed mixed communication techniques that might inherently involve conversion of oral communications into electronic records. It was generally felt that such mixed communication techniques should remain subject to the uniform rules. It was also pointed out that purely paper-based communications should be excluded from the application of the uniform rules.

"Complete record of data"

38. The view was expressed that to require a "trade data message" to provide in all circumstances a complete record of the data might be overly burdensome and that it might create a more stringent requirement than currently existed in a paper-based environment. The concern was expressed that the word "complete" might lead to the exclusion from the scope of application of the uniform rules of messages that provided a partial record of the data stored or exchanged. Furthermore, it was pointed out that the reference to the message providing a record of data was repetitious since the notion of "record" was used earlier in the definition. The Working Group agreed to delete the words "complete record of data" on the understanding that the notion of "record" would be defined in the uniform rules.

39. After discussion, the Working Group requested the Secretariat to prepare a new draft of the definition taking

into account the above discussion in the Working Group. It was suggested that records, communications and acts beyond records or communications, such as preparation of documents for issue or storage, as well as other related acts, should be covered.

Subparagraph (b) (Definition of "EDI")

"Computer-to-computer"

40. It was pointed out that the terms "computerized" or "electronic" transmission were more appropriate, since "computer-to-computer" might give the impression that intermediaries were excluded. It was suggested that it should be expressly stated in the provision that the expression "computer-to-computer transmission of data" did not exclude communications through an intermediary.

"Business data in a standard format"

41. It was generally felt that the word "business" should be deleted, as otherwise non-business data, for example administrative data, would be automatically excluded. The reference to a "standard format" was objected to on the grounds that it might raise questions as to whether such standards referred to "recognized standards" and whether the provision covered only publicly available standards or also "proprietary" or private standards.

42. After discussion, the Working Group agreed that the draft definition of "EDI" should be replaced by a definition inspired by the wording adopted in 1990 by the United Nations Economic Commission for Europe in its definition of UN/EDIFACT, which contains a reference to "the electronic interchange of structured data [...] between independent information systems" (Trade/WP.4/171, para. 15).

Subparagraph (c) (Definition of "Sender")

43. The view was expressed that, in view of the decision by the Working Group that the scope of the uniform rules should cover not only information transmitted, but also information created or stored but not transmitted, the definition of the originator of such information as a "sender" might overly focus on communication of information. It was suggested that a term such as "originator" should be preferred to the term "sender". It was recognized, however, that the draft definition of "sender" encompassed the situation where the information was not communicated. While it was agreed that no decision needed to be made at this stage as to the final term to be used, it was generally felt that, should a definition of "sender" or "originator" be retained, it should clearly indicate that persons acting as intermediaries were not covered by such a definition.

44. With respect to the notion of "person" used in the draft definition, a concern was expressed that the mere reference to "person" might not make it sufficiently clear that any legal person or entity on behalf of which a message was created was to be regarded as a sender. In particular, it was stated that messages that were generated automatically by computers without direct human intervention should be clearly regarded as "sent" by the

legal entity on behalf of which the computer was operated. As regards such situations where messages were automatically generated, it was also stated that they should be expressly covered not only in the definition of a "sender" but also in the rules on effectiveness of messages set forth in article 10, and that a special provision would be needed to deal with the issue of intent to send a message in such cases. It was further stated that the reference to the person who originated a message might be misinterpreted as covering any clerk who processed the data. A suggestion was made to replace the word "person" by the terms "legally responsible entity". That suggestion was criticized, however, on the grounds that it was not clear what responsibility was being referred to. Another suggestion was that the term "natural or legal person" would sufficiently cover the two categories of persons. It was also noted, however, that the notion of "person" had been used in previous UNCITRAL texts, apparently without giving rise to difficulties.

45. The view was expressed that the distinction drawn in the draft definition between a "person who originates a message" and a "person on whose behalf a message purports to have been sent", was unnecessary. It was suggested that the definition should focus on "the person on whose behalf a message is sent", a formulation which might address both the situation of the sender and the purported sender. The view was expressed, however, that this phrase was ambiguous, since it did not clearly cover the case where the actual sender was acting without any authority from the purported sender. Another view was that the notion of a "purported sender" might be useful in the context of article 10 and would need further discussion by the Working Group.

46. After discussion, the Working Group decided that the discussion of a possible definition of "sender" should be resumed at a later stage, once a new draft had been prepared by the Secretariat in light of the above suggestions.

Subparagraph (d) (Definition of "Recipient")

47. The draft provision was criticized on the grounds that it allowed for two different persons to be regarded as the recipient of a single message. It was suggested that the provision should make it clear that the recipient was the person who both received a given message and was the intended addressee of that message. A suggestion was made that this result could be achieved by replacing in the current draft the word "or" by "and". It was also suggested that terms such as "end user" or "addressee" might be more appropriate than the word "recipient".

48. After discussion, the Working Group was agreed that the issue should be left for further consideration until the substantive provisions in the context of which the notion of "recipient" was used had been discussed. It was agreed that, should a definition of "recipient" be finally retained, such a definition should clearly indicate that an intermediary acting in that capacity between a sender and a recipient should not be covered by the definition of a "recipient".

Subparagraph (e) (Definition of "Intermediary")

49. The view was expressed that the definition of an "intermediary" should not be made dependent upon whether an intermediary performed its functions "as an ordinary part of its business". It was stated that the provision might be misinterpreted as leaving out banks or other entities that did not have as their principal activity the performance of services as an intermediary between users of EDI messages. It was noted, however, that no distinction existed in the current draft as to whether the entity performed services as an intermediary in the context of its principal activity or as a side aspect of its business.

50. In that connection, however, it was generally felt that the draft definition of an intermediary was too restrictive in that it only focused on one of the possible functions of an intermediary, namely that of a courier carrying data between a sender and a recipient. It was agreed that the definition should also take into account other possible functions an intermediary might perform, such as recording, storing, preserving or translating data. It was suggested that, instead of focusing on the business activity of the intermediary, the definition should focus on the message and that it should clearly indicate that the intermediary was an entity that performed certain services with respect to the particular trade data message being considered. It was also suggested that an illustrative list of such services should be provided.

51. A view was expressed that the sender and the recipient of a specific message should be expressly excluded from the definition of an intermediary with respect to that message. In response, it was stated that exclusive definitions of sender, recipient and intermediary might be viewed as departing from the definitions adopted for those terms in the UNCITRAL Model Law on International Credit Transfers. However, it was also stated that, while the Model Law focused on payment orders, i.e., segments of the credit transfer operation, the approach taken in the uniform rules should not rely on any such segmentation. Instead, the uniform rules should focus on the validation of the transaction concluded between the end points of the transmission chain. Such an approach might lead to minimizing, in relative terms, the role of intermediaries that were not parties to that transaction.

52. Another view was that it might prove unnecessary to include any definition of an "intermediary", depending on whether it was decided to retain the provisions referring to an intermediary. After discussion, the Working Group decided to take note of the above comments. It was agreed that these issues would be reconsidered once the specific provisions that contained a reference to an "intermediary" had been discussed.

Article 3. Interpretation of the Uniform Rules

53. The text of draft article 3 as considered by the Working Group was as follows:

"(i) In the interpretation of these Rules, regard is to be had to their international character and to the need to

promote uniformity in their application and the observance of good faith in international trade.

(2) Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based or, in the absence of such principles, in conformity with the law applicable by the virtue of the rules of private international law."

Paragraph (1)

54. The Working Group noted, at the outset, that article 3, including paragraph (1), was modelled on article 7 of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as the United Nations Sales Convention). Differing views were expressed as to whether the article should be retained. One view was that, while a provision along those lines might be useful in the context of an international convention, it might be less relevant in the context of a model law that would eventually be enacted as a piece of national legislation. It was stated that paragraph (1) only related to the interpretation of the uniform rules, but it would be the national law enacting the uniform rules, not the uniform rules, which fell for interpretation by the national courts, so paragraph (1) would simply not apply. A concern was expressed that, in certain countries, such a provision might even be found to be unconstitutional. It was recalled that a similar provision had been considered by the Working Group on International Payments in the context of the preparation of the UNCITRAL Model Law on international Credit Transfers and that no consensus had been reached as to the inclusion of the provision in that instrument. It was suggested that the text of article 3 should be placed between square brackets for further consideration by the Working Group once a decision had been made as to the final form that would be taken by the uniform rules.

55. The prevailing view was that paragraph (1) should be retained. It was stated that the paragraph provided useful guidance for interpretation of the uniform rules by courts and other national or local authorities. It was stated that in certain countries, more particularly in federal States, it was not uncommon for model rules to provide such guidance, which was aimed at limiting the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law. Terms such as "commerce" and "trade" were mentioned as examples of notions the interpretation of which would be facilitated by paragraph (1). It was also stated that a provision along the lines of article 3 was being considered for inclusion in the "Principles for International Commercial Contracts" currently being prepared by the International Institute for the Unification of Private Law (UNIDROIT).

Paragraph (2)

56. There was general agreement that the reference to "the law applicable by virtue of the rules of private international law" should be maintained only if the uniform rules were eventually adopted in the form of an international convention. In the case of model legislation, such a

reference would become irrelevant since the only law applicable would be that of the State that enacted the model legislation.

57. It was widely felt that a mere reference to "the general principles on which these Rules are based" was obscure and that the text would need to clarify further what those general principles consisted of. Several suggestions were made in that respect. One suggestion was that the following principles should be listed in paragraph (2): (1) to facilitate electronic commerce among and within nations; (2) to validate transactions entered into by means of new information technologies; (3) to promote and encourage the implementation of new information technologies; (4) to promote the uniformity of law between and within nations; and (5) to support commercial practices. That suggestion was objected to on the ground that, while the suggested principles might constitute acceptable policy statements to be made in the context of a preamble or commentary to the uniform rules, they did not contain legal principles of the nature expected to be referred to under draft paragraph (2). Another suggestion was that paragraph (2) might usefully refer to general principles to be derived from the text of the uniform rules. As to what such principles might be, it was suggested that, for example, a principle of interpretation by analogy might be derived from the listing of techniques in the definition of a "trade data message". The prevailing view, however, was that, in contrast with the law of sales, the general principles of which were commonly known and could be referred to broadly under the United Nations Sales Convention, the international legal practice with respect to EDI was too new for its general principles to be commonly understood.

58. While support was expressed in favour of the deletion of paragraph (2), the Working Group, after discussion, agreed that it might be appropriate for paragraph (2) to provide guidance to courts and other national and local authorities as to the legal principles valued by the uniform rules. It was agreed that further investigation was needed as to how these legal principles should best be expressed.

Article 4. Rules of interpretation

59. The text of draft article 4 as considered by the Working Group was as follows:

"(1) For the purposes of these Rules, statements made by and other conduct of a party are to be interpreted according to that party's intent where the other party knew or could not have been unaware what the intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which

the parties have established between themselves, usages and any subsequent conduct of the parties."

60. The Working Group noted, at the outset, that article 4 was modelled on article 8 of the United Nations Sales Convention. It was also stated that a provision along the lines of draft article 4 was being considered for inclusion in the "Principles for International Commercial Contracts" currently being prepared within UNIDROIT. The view was expressed that a provision along those lines might provide guidance to courts in respect of such issues as the interpretation of messages containing errors or the intent of parties in situations where messages were generated automatically by a computer. The widely prevailing view, however, was that the issues addressed by draft article 4 should be dealt with directly by users of information technologies in the context of their contractual relationships. It was also pointed out that, in some respects, the text of draft article 4 might be difficult to reconcile with that of draft article 10.

61. After discussion, the Working Group decided to delete draft article 4.

Article 5. Variation by agreement

62. The text of draft article 5 as considered by the Working Group was as follows:

"Except as otherwise provided in these Rules, the rights and obligations of the sender and the recipient of a trade data message arising out of these Rules may be varied by their agreement."

63. There was general support for the principle of party autonomy on which draft article 5 was based. Differing views were expressed, however, as to how the principle should be implemented in the uniform rules. Under one view, which supported the wording of the draft article, the emphasis should be placed on the general principle of party autonomy, which should prevail unless otherwise expressly stated by the uniform rules. It was pointed out by the proponents of that view that, in addition to direct agreements between senders and recipients of trade data messages, agreements concluded with intermediaries and, in particular, contractual system rules established by network operators would need to be accommodated.

64. According to another view, certain difficulties might arise if the principle of party autonomy was broadly stated along the lines of draft article 5. It was stated that the uniform rules might, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. It was recalled that such well-established rules were normally of a mandatory nature since they generally reflected decisions of public policy. A concern was thus expressed that an unqualified statement regarding the freedom of parties to derogate from the uniform rules might be misinterpreted as allowing parties, through a derogation to the uniform rules, to derogate from mandatory rules adopted for public policy reasons. It was thus suggested that, at least in respect of the provisions contained in chapter II, the uniform rules should be

regarded as stating the minimum acceptable form requirement and should, for that reason, be regarded as mandatory, unless they expressly stated otherwise.

65. After discussion, the Working Group decided that the current formulation of article 5 should be placed in square brackets and that each article of the uniform rules should be discussed with a view to determining whether parties should be allowed to derogate from its provisions. It was agreed that, once the review of the remaining articles of uniform rules had been completed, the Working Group would revert to article 5 and decide whether it was possible to consolidate in a single article dealing with party autonomy all exceptions to the mandatory nature of the uniform rules.

Chapter II. Form requirements

Article 6. Functional equivalent of "writing"

66. The text of draft article 6 as considered by the Working Group was as follows:⁵

"(1) *Variant A:* "Writing" includes but is not limited to a telegram, telex [, telecopy, EDI message, electronic mail] and any other trade data message which preserves a record of the information contained therein and is capable of being reproduced in [tangible] [human-readable] form [or in any manner that would be prescribed by applicable law].

Variant B: In legal situations where "writing" is required [explicitly or implicitly], that term shall be taken to mean any entry on any medium able to transmit *in toto* the data in the entry, which must be capable of being [intentionally recorded or transmitted and] reproduced in human-readable form.

Variant C: Any form of electronic [or analogous] recording of information is deemed to be functionally equivalent to writing, provided the information can be reproduced in visible and intelligible form and provided the information is preserved as a record.

Variant D: (a) For the purpose of any rule of law which expressly or impliedly requires that certain information be recorded or presented in written form, any form of electronic [or analogous] recording of information is deemed to be equivalent to writing, provided the electronic [or analogous] record fulfils the same functions as a paper document.

(b) In determining whether a record satisfies the functions of a writing, due regard shall be had to any agreement between the parties as to the status of that recording.

(2) For the purposes of this article, "record" means a durable symbolic representation of information in

⁵While the discussion of draft articles 6, 7 and 8 was based on the text of a note by the Secretariat (A/CN.9/WG.IV/WP.57), the Working Group also took into consideration the text of a proposal by the delegation of the United Kingdom of Great Britain and Northern Ireland (see A/CN.9/WG.IV/WP.58). The text of the proposal is reproduced.

objectively perceivable form, or susceptible to reduction to objectively perceivable form.

(3) The provisions of this article do not apply to the following situations: [. . .]"

Paragraph (1)

Variants A and B

67. The view was expressed that both variants, and especially variant A, contained useful elements, which should be considered by the Working Group. For example, it was stated that the list of communication techniques contained in variant A might be retained. It was generally felt, however, that both variants A and B attempted to provide an extended definition of the notion of "writing", an approach which was thought to be less suitable than the "functional equivalent" approach taken in variants C and D. After discussion, the Working Group decided to base its deliberations on variants C and D.

Variants C and D

68. Considerable support was expressed in favour of variant C, which was said to establish clearly the characteristics that needed to be fulfilled for a trade data message to be recognized as the functional equivalent of a "writing". Variant D was criticized on the grounds that it contained a general requirement that trade data messages should "fulfil the same functions" as paper documents, which was vague and could lead to legal uncertainty. It was also recalled that, at previous meetings, numerous possible functions of "writing" had been identified. It was stated that a provision along the lines of variant D might be interpreted as establishing a requirement that, in all instances, trade data messages should fulfil all conceivable functions of a writing. It was generally felt that such an interpretation would result in the imposition of a more stringent requirement in respect of trade data messages than currently existed in respect of paper documents. It was stated that, when establishing a requirement that certain information had to be presented in written form, legislators generally intended to focus on specific functions of a "writing", for example, its evidentiary function in the context of tax law or its warning function in the context of civil law, and that a need to ascertain the very function a given form requirement was focused on could lead to legal uncertainty.

69. The view was expressed that additional criteria should be included in variant C for the purpose of establishing a test of equivalence to "writing" to be met by trade data messages. For example, the following criteria were suggested: integrity of the data; security of the recording method against fraud of alteration of the data; durability or "unalterable" nature of the record. It was stated that, in the absence of safeguards to ensure the integrity of the data, an electronic record (in contrast to a paper document) might be altered inadvertently and that, also in the absence of safeguards, deliberate alterations that were difficult to detect might more easily be made to electronic records; and since no original could exist, it was more difficult to establish that the information had not been altered unless such precautions were taken. It was generally felt, however, that

a requirement that information should be presented in written form in and of itself could be described as a rather low level of form requirement that should not be confused with more stringent requirements regarding, for example, the presentation of "signed" writings or "original" documents. Taking into account with the way in which such issues as integrity of the data and protection against fraud were dealt with in a paper-based environment, it was generally agreed that a fraudulent document would none the less be regarded as a "writing".

70. The Working Group agreed that, in setting out criteria for a functional equivalent of paper, the uniform rules should focus on the basic notion mentioned in the current draft of Variant C, i.e., a "record" that was capable of being reproduced and read. It was generally agreed that the existence of such a record constituted the basic feature from which all other characteristics or functions of "writing" were derived.

71. It was generally felt, however, that the structure of variant C might need to be amended to reflect the purposes for which the requirement of a "writing" was imposed. It was suggested that the opening words of variant D might be combined with variant C. It was felt, however, that the text of variants C and D needed to be further amended to make it clear that the notion of a functional equivalent of "writing" applied not only where an express requirement existed that a document should be presented in written form but also the cases where certain legal consequences would normally flow from the presentation of a written document. Various views were expressed as to how such a result could be obtained. The prevailing view was that the opening words of variant D, to be combined with variant C, should read as follows:

"For the purposes of any rule of law which expressly or impliedly requires that certain information be recorded or presented in written form, or is predicated upon the existence of a writing, . . ."

72. Several improvements to the text of variants C and D were suggested. One suggestion was that a reference to "custom or practice" should be added to the words "For the purpose of any rule of law" at the opening of variant D. Another suggestion was that the words "is deemed to be functionally equivalent to writing" in the text of variant C should be replaced by the words "complies with that requirement". Yet another suggestion concerning variant C was that, in addition to the words "visible and intelligible", the words "legible" and "interpretable" should be included in the draft provision for further discussion by the Working Group at a later session. In that connection, it was suggested that, should the word "legible" be retained, appropriate wording would need to be found to make it clear that the text was intended to address both the situation where a record was "human-readable" and the situation where a record was "machine-readable" only. Yet another suggestion was that functional equivalents of writing should "not require translation or conversion into another medium to express their meaning" or that functional equivalents should "be capable of such translation or conversion. A further suggestion was that the words "upon demand" should be added at the end of variant C. It was pointed out, however,

that, should the suggested amendment be retained, there might be a need to indicate in the provision whose demand was being considered. It was further suggested that the terms "computer-based information" should be substituted for the words "electronic [or analogous] recording of information", which might cause uncertainty since the notion of "analogous" to electronic recording was unclear.

73. After discussion, the Working Group requested the Secretariat to review the formulation of paragraph (1) so as to take into consideration the suggestions and concerns that had been expressed.

Paragraph (2)

74. While the view was expressed that it would not be necessary to define the term "record" as its meaning was subsumed under the term "trade data message" defined in article 2, the prevailing view was that a definition of a "record" was needed. There was strong support in the Working Group for the view that the definition should be included in article 2, so as to make the definition applicable throughout the uniform rules.

75. It was suggested that the word "durable" should be deleted, since the notion of duration was implicit in the term "record", and since express reference to durability raised the question of the length of time a record ought to be kept. The suggestion was made that, if the word "durable" was deleted, the notion of the duration of a record could be expressed by adding the words "at a later time" to the words "susceptible to reduction to objectively perceivable form". Another suggestion was to reconsider the word "symbolic" as it might not adequately cover all information that should be covered, namely textual, numeric and graphic information. Furthermore, the suggestion was made that the word "perceivable" might be unclear as it did not indicate whether information "perceived" should, in addition, be understandable.

76. It was suggested that, in defining the word "record", the Working Group should bear in mind relevant definitions proposed by other international organizations, such as the International Standards Organization. A possible wording offered for consideration was the following: "Record" is data susceptible of accurate reproduction at a later time".

77. After discussion, the Working Group requested the Secretariat to review the formulation of paragraph (2) so as to take into consideration the suggestions and concerns that had been expressed.

Paragraph (3)

78. It was suggested that the essence of paragraph (3) should be placed in a footnote or in brackets, so as not to encourage States to limit the applicability of article 6. In more general terms, it was also suggested that the uniform rules should be so drafted that they would not operate as an invitation to States to limit their applicability. It was generally felt that, in any case, the uniform rules should contain a uniform formulation as to the manner in which States

might limit the applicability of the uniform rules. Documents of title, cheques and documents required by company law were mentioned as possible cases to which a State might wish to refer in a provision along the lines of paragraph (3).

79. The following language was suggested as an alternative to draft paragraph (3): "Nothing in this article prevents a State from enacting further requirements concerning writing, including requirements for the use of a particular medium". It was observed that such a language would be appropriate if the uniform rules were to take the form of a convention, while the current text might be more appropriate for a model law.

80. After discussion, the Working Group requested the Secretariat to review the formulation of paragraph (3) so as to take into consideration the suggestions and concerns that had been expressed.

Article 7. Functional equivalent of "signature"

81. The text of draft article 7 as considered by the Working Group was as follows:⁵

"(1) Where the signature of a person is required by any rule of law, that requirement shall be deemed to be fulfilled in respect of a trade data message if

(a) a method is used to identify the sender of the message and the mode of identification of the sender is in the circumstances a [commercially] reasonable method of security against unauthorized messages; or

(b) a method for the identification of the sender has been agreed between the sender and the recipient of the message and that method has been used.

(2) In determining whether a method of identification of the sender of a message is [commercially] reasonable, factors to be taken into account include the following: the status and relative economic size of the parties; the nature of their trade activity; the frequency at which commercial transactions take place between the parties; the kind and size of the transaction; the function of signature requirements; the capability of communication systems; compliance with authentication procedures set forth by intermediaries; the range of authentication procedures made available by any intermediary; compliance with trade customs and practice; the existence of insurance coverage mechanisms against unauthorized messages; and any other relevant factor.

(3) The provisions of this article do not apply to the following situations: [. . .]".

Paragraph (1)

82. The Working Group agreed that the order of subparagraphs (a) and (b) should be reversed so as to indicate more clearly that the method of identification of the sender primarily depended on the agreement of the parties and that the test specified in paragraph (a) applied only in the absence of such an agreement.

83. It was observed that one function of a signature was to identify the sender and another function was to indicate the sender's approval of the content of the message. There was general agreement that both of those functions should be expressed in article 7(1). The view was expressed that the concept of "authentication" should be built into the definition of a functional equivalent of "signature" so as to make it clear that such a functional equivalent also referred to a method by which the maker of the message or record indicated his or her approval of the information contained therein. It was stated that the concept of "authentication", which was commonly used in the context of EDI, addressed both functions of a signature. It was stated, however, that the word "authentication" might raise difficulties since it might not be understood uniformly. It was generally felt that, should such concepts as "authentication" be used in the uniform rules, a definition would need to be provided. It was also felt that possible relationships between such concepts as "identification", "authentication" and "authorization" might need to be clarified.

84. It was suggested that, in formulating article 7, the Working Group should bear in mind the definition of "signature" contained in article 5(k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes.

85. Various suggestions were made as to the expressions to be used to describe the test for assessing the reasonableness of the method used for identifying the sender and authenticating the content of a given message. According to one view, the expression "commercially reasonable" was suitable since it was readily understandable by business people. It was noted that the same expression was used in article 5 of the UNCITRAL Model Law on International Credit Transfers in an analogous context, and it was stated that the uniform rules should not depart from that precedent. Reservations were expressed, however, as regards the use of the expression "commercially reasonable". It was said that the meaning of the term "reasonable" was unclear and that, in a number of countries, the term was not normally used for purposes of legal interpretation. It was also said that in other countries, while the term "reasonable" might be acceptable since courts were used to interpret it in various contexts, the import of the term "commercial" was unclear, particularly if the reasonableness of a given method was to be assessed by reference to "all the circumstances", which might be expected to be reflective of the business activity of the parties.

86. Further suggestions were made for expressing the test to be set out in subparagraph (a). One suggestion was that the method used for identifying the sender and authenticating the content of a given message should be "appropriate" or "technically appropriate". Another suggestion was to use language along the following lines: "a method of authentication is sufficient if it is as reliable as is appropriate in all the circumstances to the purpose for which a communication was made" and "national law may make provision for determining which kinds of authentication are appropriate for particular purposes". With regard to the second part of that suggestion, a concern was expressed that it would create obstacles to achieving uniformity. Yet another suggestion, which found considerable support, was to require the

method to be in conformity with "commercial usage", a concept that was well understood in national legal systems. It was observed, however, that, if parties decided to use a new method of electronic authentication, such a new method might be regarded as reasonable, while no commercial usage might have been developed in relation to that new method.

87. After discussion, the Working Group decided that the next draft of paragraph (1) should reflect the above suggestions as possible variants.

Paragraph (2)

88. Some support was expressed for paragraph (2), which was said to provide useful guidance in assessing the commercial reasonableness of a method of authentication. In commenting on the substance of the paragraph, suggestions were made to reconsider the factors mentioned therein in particular as to whether they indicated relevant criteria for the assessment. It was said that, for example, that the status and relative economic size of the parties and the existence of insurance coverage should not be listed in the provision.

89. The prevailing view, however, was that the uniform rules were not the proper place for enumerating those factors, in particular since paragraph (2) left a broad latitude as to the influence of the factors on the conclusion to be reached. It was considered to be more appropriate to leave such factors as an element of the *travaux préparatoires* for possible consideration by authorities implementing the uniform rules.

Paragraph (3)

90. The Working Group agreed that the substance of article 7(3) should be presented in the same form as article 6(3) (see above, paragraphs 78-80).

Article 8. Functional equivalent of "original"

91. The text of draft article 8 as considered by the Working Group was as follows:⁵

"(1) *Variant A:* A trade data message sent electronically on any medium shall be considered to be an original with the same evidential value as if it was on paper, provided that the following conditions are met: originality is attributed to the message by the originator of the information; the message is signed and bears the time and date; it is accepted as an original, implicitly or explicitly, through the addressee's acknowledgement of receipt.

Variant B: Trade data messages shall not be denied legal recognition solely as a result of the application of a requirement that a document had to be presented in original form.

Variant C: Where it is required by any rule of law that a document be presented in original form, that requirement shall be fulfilled by the presentation of a

trade data message or in the form of a printout of such a message if

(a) there exists reliable identification of the originator of the message; and

(b) there exists reliable assurance as to the integrity of the content of the message as sent and received; or

(c) the sender and the recipient of the message have expressly agreed that the message should be regarded as equivalent to a paper original document.

(2) The provisions of this article do not apply to the following situations: [. . .]"

Variant A

92. Variant A was criticized on the grounds that it did not sufficiently focus on the functions performed by original documents in a paper-based environment. It was also stated that the text of variant A might result in the application to trade data messages of a more stringent requirement than currently existing requirements with respect to paper originals. After discussion, the Working Group decided to delete variant A.

Variant B

93. Variant B was also found to focus insufficiently on the functions of an original. However, considerable support was given to the approach taken in variant B, which was found to state a useful principle for enhancing the validity of electronic transactions. It was felt that, in a number of countries, a general provision stating that trade data messages should not be denied legal recognition solely as a result of their electronic form was needed. In that connection, the view was expressed that the notion of "legal recognition" might need to be clarified, in particular by comparison with notions such as "validity", "enforceability", "effectiveness" and "admissibility". The view was also expressed, however, that a provision along the lines of variant B might be considered irrelevant if functional equivalents were provided in the uniform rules for form requirements such as the use of "writing", "signature" or "original".

94. After discussion, it was agreed that a provision along the lines of variant B should be included in a separate article and that consideration should be given to broadening the scope of the provision to state that trade data messages should not be denied legal recognition solely as a result of their electronic form.

Variant C

95. The discussion focused on the purposes for which there might exist requirements that information be presented in the form of original documents. The view was expressed that requirements for originals were established in respect of: (1) admissibility of documents as evidence; (2) evidential weight of information adduced as evidence; (3) other purposes, e.g., in the context of specific rules regarding documents of title and other negotiable instruments. As to the functions performed by originals, it was felt that, while in all instances where an original was

required, the notion of integrity of the information contained in the document was essential, the notion of uniqueness of an original also merited consideration in certain contexts, for example the context of negotiable instruments.

96. Based on the above analysis, doubts were expressed as to whether there existed a real need for a provision dealing with the notion of an "original" in the uniform rules, at least at the current stage. It was stated that evidentiary issues, whether related to the admissibility or to the evidential weight of documents, should be dealt with under article 9. With respect to the specific issues of documents of title and negotiable instruments, it was stated that specific provisions might need to be prepared in the future but that such provisions were not currently the main focus of the uniform rules.

97. The Working Group agreed to resume its discussion of the issue of "original" at a later stage. It was decided that a provision along the lines of variant C should be kept in the uniform rules, but that its text should better reflect the range of functions performed by an original. The Working Group also agreed that the order of subparagraphs (a), (b) and (c) should be modified so as to indicate more clearly that the agreement of the parties as to what constituted a functional equivalent of "original" should prevail and that the test specified in subparagraphs (a) and (b) applied only in the absence of such an agreement.

Article 9. Evidential value of trade data messages

98. The text of draft article 9 as considered by the Working Group was as follows:

"(1) *Variant A:* A trade data message shall be admissible as evidence, provided it is reduced to a [tangible] [human readable] form [and provided it is shown that the message has been generated and stored in a reliable manner].

Variant B: In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a trade data message in evidence on the grounds that it was generated [electronically] by a computer or stored in a computer.

(2) A trade data message shall have [evidential value] [the same evidential value as a written document containing the same data] provided it is shown that the message has been generated and stored in a reliable manner.

(3) In assessing the reliability of the manner in which a trade data message was generated and stored, regard shall be had to the following factors: the method of recording data; the adequacy of measures protecting against alteration of data; the adequacy of the maintenance of data carriers; the method used for authentication of the message."

Title

99. It was agreed that the title of article 9 should read "admissibility and evidential value of trade data messages",

since article 9 covered both the admissibility of trade data messages as evidence in legal proceedings and their evidential value.

Paragraph (1)

100. There was general agreement in the Working Group on the principle sought to be stated that trade data messages should not be denied admissibility as evidence in legal proceedings on the sole ground that they were in electronic form. It was stated that the principle was important also for its educational value, even in countries recognizing absolute admissibility of evidence. The Working Group then considered the precise formulation of that principle.

101. Variant A was criticized as being too restrictive, since it established a number of conditions for trade data messages to be admitted as evidence in legal proceedings. It was suggested that variant A could have the unintended effect of facilitating the exclusion of evidence just because it was in electronic form. Furthermore, it was said that such an approach to admissibility would not only unnecessarily discriminate against trade data messages, but would also be inconsistent with those legal systems in which all evidence was freely admissible. It was added that the uniform rules should not introduce restrictions to admissibility of trade data messages that did not exist for paper documents.

102. The prevailing view was that variant B contained a preferable expression of the principle that the form in which a trade data message was created, communicated or stored in and of itself should not be determinative of its admissibility as evidence. Several suggestions of a drafting nature were made with respect to variant B, which the Secretariat was requested to take into consideration in preparing the next draft of article 9. It was suggested that the word "solely" should be added before the words "on the grounds", so as to make it clear that a trade data message could not be dismissed as evidence merely for being in electronic form. A hesitation was expressed that such an addition might raise uncertainty as to whether an objection to a trade data message could be characterized as being made on the grounds that the message was in electronic form and not on other grounds. The suggestion was also made that, after the words "on the grounds that", the following words should be inserted: "that it is a record of a message transmitted by electronic means, or is a record generated by computer or in computerized form". It was stated that the purpose of the first part of the suggested wording was to cover telecopying and the purpose of the second part was to make it clear that a system and not a single computer might be involved.

Paragraphs (2) and (3)

103. The Working Group noted that paragraph (2) was intended to recognize that trade data messages had evidential weight and paragraph (3) was intended to provide guidance as to how that evidential weight was to be assessed. Differing views were expressed as to whether it was necessary or desirable to retain paragraphs (2) and (3). One view was that paragraphs (2) and (3) should be omitted. In line with that view, it was stated that the principle

of admissibility was already covered in paragraph (1) and that the assessment of the evidential value of trade data messages should be left to national courts. Furthermore, it was said that, even though the enumeration in paragraph (3) of factors to be taken into consideration in the assessment of the evidential value of trade data messages was not exhaustive, the misleading impression could be given that those factors were the only or the characteristic factors to be taken into consideration. Another view was that paragraph (2) should be retained as an expression of the principle that trade data messages have evidential value, but that paragraph (3) should be deleted, leaving the assessment of that value to national courts. Yet another view was to introduce a proviso making paragraph (2) "subject to paragraph (3)", so as to make it clear that paragraph (2) was stating the principle while paragraph (3) was providing guidance as to the application of the principle.

104. The prevailing view was that the uniform rules should include provisions containing the essence of the rules set forth in paragraphs (2) and (3), to the effect that trade data messages should not be denied evidential value purely because of their electronic form and that guidance should be given to courts as to the factors to be taken into consideration in assessing such evidential value. It was pointed out that including such guidance would promote the uniform application of the rules.

105. Views were exchanged as to whether the rule in paragraph (2) should refer to a comparability between a trade data message and a written document, as was the case in the present text of paragraph (2), or whether the provision should assign to the trade data message a specific evidential value, to be freely assessed by courts. The view was expressed that one of the main purposes of the uniform rules should be to elevate trade data messages to the same position that written documents enjoyed as regards rules of evidence. It was said that, accordingly, trade data messages should be presumed to have the same evidential value as written documents. The prevailing view, however, was that it was difficult to compare trade data messages with paper documents in the abstract and to assign an automatic, across-the-board equivalence in evidential weight. It was added that there was no merit in assigning to a trade data message the same evidential value as that of a written document which, in a particular case, might not exist. It was also observed that, even if such a written document existed, depending on the circumstances, it could have more or less evidential value than a trade data message, but not necessarily the same value. An alternative wording was proposed, along the following lines: "The weight to be given to a message should be the same regardless of the form in which it was created, stored or communicated". The proposal did not receive support, in particular since it referred to the "same" evidential value without indicating what the word "same" was referring to.

106. The suggestion was made to delete the latter part of paragraph (2), starting with the word "provided", for the same reasons that had led to the rejection of variant A in paragraph (1), which contained similar wording (see above, paragraph 101). That suggestion did not meet with support, since it was found that the remaining portion of paragraph (2) would add nothing new to the principle of

admissibility already expressed in paragraph (1). In addition, it was observed that the text of paragraph (2) might be clearer if specific wording were found to encompass the entire life-cycle of a trade data message. It was felt that the notion of the life-cycle of a message might generally need further consideration in the elaboration of the uniform rules.

107. The Working Group then turned its attention to a proposal that found general support, to combine paragraphs (2) and (3). The new draft, to be prepared by the Secretariat, would indicate that electronic messages should not be rejected because of their form and should provide guidance as to how the evidential value of a trade data message ought to be assessed. The following wording was suggested:

"(2) A trade data message shall be given due evidential weight. In assessing the evidential weight of a trade data message generated by computer or stored in computerized form, regard shall be had to the reliability of the manner in which it was generated and stored, and where relevant, the reliability of the manner in which it was authenticated".

A further suggestion was that, in order to make it abundantly clear that a trade data message should not be discriminated against for reason of its electronic form, the words "notwithstanding its electronic form" should be added after the word "shall" in the first sentence of the above-suggested new wording of paragraph (2). Doubts were expressed as to the proposed additional language since it would lead to a double mention of electronic form.

108. The Working Group took note of a suggestion that article 9 should also refer, along the following lines, to requirements for an electronic message to be admitted as original: "In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a trade data message in evidence solely on the grounds that it is not an original document, if it is the best evidence that the person adducing it could reasonably be expected to obtain".

109. Prior to the close of the discussion on chapter II, the view was expressed that the title of the chapter, "Form requirements", was misleading since the chapter referred to form requirements established regarding written documents and not to form requirements regarding trade data messages. It was suggested that, if it would prove to be impossible to identify and regulate form requirements regarding trade data messages, the title of the chapter would need to be reconsidered.

Chapter III. Communication of trade data messages

Article 10. [Binding nature] [Effectiveness] of trade data messages

110. The text of draft article 10 as considered by the Working Group was as follows:

"(1) A sender [is bound by] [is deemed to have approved] the content of a trade data message [or an

amendment or revocation of a trade data message] if it was issued by the sender [on its own behalf] or by another person who had the authority to bind the sender.

(2) When a trade data message [or an amendment or revocation of a trade data message] is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless [bound] [deemed to have approved the content of the message] if

(a) the purported sender and the recipient have agreed to certain authentication procedures;

(b) the authentication is in the circumstances a commercially reasonable method of security against unauthorized trade data messages; and

(c) the recipient complied with the authentication.

(3) The sender and the recipient of a trade data message [are] [are not] permitted to agree that a purported sender is bound under paragraph (2) if the authentication is not commercially reasonable in the circumstances.

(4) A purported sender is, however, not bound under paragraph (2) if it proves that the message as received by the recipient resulted from the actions of a person other than

(a) a present or former employee of the purported sender, or

(b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.

The preceding sentence does not apply if the recipient proves that the trade data message resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

(5) A sender who is bound by the content of a trade data message is bound by the terms of the message as received by the recipient. However, the sender is not bound by an erroneous duplicate of, or an error or discrepancy in, a trade data message if

(a) the sender and the recipient have agreed upon a procedure for detecting erroneous duplicates, errors or discrepancies in a message, and

(b) use of the procedure by the recipient revealed or would have revealed the erroneous duplicate, error or discrepancy.

[Paragraph (5) applies to an error or discrepancy in an amendment or a revocation message as it applies to an error or discrepancy in a trade data message]."

Paragraph (1)

111. The Working Group noted that article 10, including paragraph (1), was generally patterned on the provisions of article 5 in the UNCITRAL Model Law on International Credit Transfers. The question was raised, however, whether the rule in paragraph (1) had the same relevance to trade

data messages as it did to credit transfers. Differing views were expressed in this regard. One view was that paragraph (1) could be dispensed with because, at most, it was limited to a restatement of applicable basic principles of agency law. It was suggested in this vein that the major substantive contribution of article 10 was rather to be found in paragraph (2), and that including paragraph (1) might suggest distinctions with regard to trade data messages where none actually existed. It was further queried whether the matter addressed in paragraph (1) might not be considered as dealt with in article 7.

112. The prevailing view was that the rule set forth in paragraph (1) was of sufficient importance to trade data messages to merit retention. The Working Group noted that the provision was intended to provide greater certainty and clarity, or even a reminder, in an area that practice had reportedly shown was most often plagued by uncertainty, namely, the question when recipients of trade data messages were entitled to rely on the messages. It was suggested that by addressing this matter the Uniform Rules would facilitate the use of EDI. A further reason for retaining paragraph (1) that the Working Group regarded as important was the question of internal consistency between the Uniform Rules and the UNCITRAL Model Law on International Credit Transfers. The concern in that regard was that failure to retain paragraph (1) might erroneously suggest that some other rule than the obvious one in paragraph (1) was intended for the case of trade data messages.

113. As regards the precise formulation of paragraph (1), the Working Group agreed that it would be preferable to adhere, to the extent appropriate, to the language found in the analogous provisions in the Model Law on Credit Transfers. At the same time, it was recognized that the situations covered by the two instruments were not coterminous and some adjustment in the terminology to be used might therefore have to be considered. In particular, it was decided that the title of article 10 should speak in terms of the "effectiveness" of trade data messages, rather than in terms of their "binding nature", and that paragraph (1) should speak in terms of the sender being "deemed to have approved" the content of a trade data message. This preference for the broader terminology reflected that the context of trade data messages would include documents of non-contractual nature. Subject to these general parameters, the Secretariat was requested to consider a number of drafting suggestions, including: that paragraph (1) should make express reference to the fact that it was subject to paragraph (5); to replace at the end of paragraph (1) the words "to bind the sender" by the words "to act on behalf of the sender"; and to add at the end the specification "in respect of that message".

Paragraph (2)

114. It was observed that paragraph (2) basically dealt with two kinds of situations in which the purported sender who was not bound under paragraph (1), might be deemed to have approved the content of a trade data message. One was the situation where the parties had an agreement on authentication procedures to be followed between them; and another was the situation where no such agreement

existed. Views were exchanged as to how these two kinds of situations should be treated.

115. One view was that, in light of the fact that party autonomy was recognized in article 5, there might be no need to refer to contractual situations in paragraph (2), but that its scope could be limited to cover only non-contractual cases. Another view, broadly supported, was that contractual situations should be clearly distinguished from non-contractual ones and dealt with in separate paragraphs. It was suggested that contractual situations, i.e., cases in which there was an interchange agreement, should be dealt with first, and that the provision should recognize the legal validity of such agreements. This would cover the majority of cases involved.

116. As regards the case where there was no agreement as to the use of authentication procedures, the Working Group engaged in a discussion of how best to treat the question of allocation of the burden of proof which parties would have to bear, with a view to promoting certainty in the application of electronic commerce, but not to the expense of fairness.

117. One view, which received broad support, was that paragraph (2) unnecessarily shifted the burden of proof that would otherwise have to borne by the parties under existing national laws. It was observed that normally the burden of proof lay with the person who would benefit from the fact that the purported sender would be deemed to have approved the message, that is, the recipient. It was added that shifting the burden of proof to the purported sender would make users hesitate about using electronic communications. Furthermore, it was said that paragraph (2) in its present formulation, in particular the word "bound", gave the impression that an irrebuttable presumption existed in favour of the recipient, since it would be impossible for the purported sender to establish the conditions set forth in paragraph (4) in order to rebut the presumption. It was argued that the presumption should be open to challenge by any means and it was agreed that the word "bound" should be deleted.

118. In support of the allocation of the burden of proof outlined in paragraph (2), it was observed that the recipient still had to make out a *prima facie* case that the message originated from the purported sender, by establishing that the recipient had followed agreed or reasonable authentication methods, which he should be expected to be able to meet since he had control over his authentication procedures. The result of the recipient meeting his burden of proof would be that the purported sender would be deemed to have approved the content of the message. The purported sender then would have the opportunity to establish that the sender was not his agent or a person related to him. It was observed that such an approach did not constitute a departure from prevalent rules on burden of necessary proof and that it promoted use of electronic commerce, since users could rely on messages being binding. It was also said that there was no reason to treat the recipient less favourably than he was treated in the UNCITRAL Model Law on International Credit Transfers, where, even though the recipient was typically a bank, that is a party with ample resources, the burden of proof was on the sender.

119. To encourage use of EDI other points were made with regard to paragraph (2). A concern was expressed that paragraph (2) made reference to authentication without that term having been defined. It was observed that reference to amendment or revocation of a trade data message was not necessary. In that regard, it was noted that such a reference was appropriate in the context of article 5 of the UNCTRAL Model Law on International Credit Transfers, on which article 10 was modelled, as the Model Law dealt with payment orders and their revocation or amendment, but was unnecessary in the uniform rules, since they dealt only with trade data messages. It was noted that, in line with the Working Group's decision on article 7, the word "commercially" should appear in brackets.

120. In order to address some of the concerns that had been expressed and to express the prevailing views, wording along the following lines was suggested as an alternative to the existing paragraph (2):

"A purported sender who is not deemed to have approved the message by virtue of paragraph (1) or by virtue of any agreement is deemed to have done so by virtue of this paragraph if:

(a) the message as received by the recipient resulted from the actions of a person whose relationship with the purported sender or with any agent of the purported sender enabled him to gain access to the authentication procedure of the sender; and

(b) the recipient verified the authentication by a method which was reasonable in all the circumstances".

With regard to the above proposal, the concern was expressed that it appeared to be shifting the burden of proof to the purported sender. In response, it was observed, that the burden of proof lay with the recipient, since he had to prove that the message had been sent by an agent of the purported sender and that he followed reasonable procedures of authentication.

121. The Working Group requested the Secretariat to prepare a new draft of paragraph (2), that would continue to be within square brackets, drawing on the proposed new wording.

Paragraph (3)

122. Differing views were expressed as to whether paragraph (3) should be retained. One view was that it should be deleted as unnecessary. In support of that view, it was pointed out that the provision was not relevant in cases in which no agreement existed between the purported sender and the recipient as to the authentication procedures to be followed. As regards cases in which there was such an agreement, the utility of the provision was questioned since such a provision would, if it were permissive, be redundant of provisions recognizing the legal validity of interchange agreements, as envisaged, for example, in article 5 and in the context of the discussion of draft paragraph (2) (see above, paragraph 115), or, if it were restrictive, contradict such provisions. As to the restrictive approach, it was said that it might be necessary with regard to less than reasonable methods of authentication in order to protect the weaker

party from potential abuses of party autonomy by the party with the stronger bargaining power. In that connection, it was suggested that it might not be appropriate to refer to "unreasonable" methods, since the parties usually considered as reasonable whatever they agreed on. After deliberation, the Working Group decided that a provision along the lines of paragraph (3) should be included in the uniform rules, and that no limitation should be imposed by the uniform rules on the contractual freedom of the parties as regards the determination of authentication methods.

123. As to the exact formulation of the principle of freedom of contracts with regard to authentication methods, there was some difference of opinion. One view was that it should be included in a special provision such as article 10; another view was that it should be expressed in a general provision along the lines of article 5. In support of the latter view, it was argued that a general provision applicable throughout the uniform rules would be more appropriate, since it should be made clear that the courts could not second-guess any of the parties' agreements. With regard to the word "commercially", in line with the Working Group's decision on article 7 (see above, paragraphs 85-87), it was decided that it should appear within brackets. The Working Group decided to maintain paragraph (3) in brackets leaving to a later stage the decision as to the exact location or form of the provision in paragraph (3).

124. The Working Group expressed its understanding that the principle of contractual freedom of parties was not intended to override rules of national law preserving in areas such as taxation matters preferential treatment for government authorities and creditors in bankruptcy.

Paragraph (4)

125. The question was raised as to whether paragraph (4) applied to both contractual and non-contractual situations addressed in paragraph (2). The Working Group noted, however, that the thrust of paragraph (4) would be incorporated in the revised version of paragraph (2) as decided above.

Paragraph (5)

126. The Working Group discussed the question whether a rule along the lines of paragraph (5) was necessary. One view was that paragraph (5) should be deleted. In support of that view, it was observed that paragraph (5) might interfere with applicable contract law in several respects; its language, in particular the word "bound", gave the impression that it dealt with the legal effects of a trade data message and legal responsibility for restitution or expectation damages. Furthermore, it was said that paragraph (5) shifted the burden of proof of erroneous messages to the sender and, in the absence of any agreed procedure, might have the unintended effect of altering an existing duty of care imposed on the recipient under applicable law. In addition, it was said that paragraph (5) was not complete to the extent that it did not cover cases where there was no agreement as to the procedures to be followed in case of errors, or cases where senders had an agreement on procedures for detecting errors with third parties, such as intermediaries, and errors were due to such third parties.

127. The countervailing view, which received broad support, was that paragraph (5) should be maintained. In support of that view, it was pointed out that paragraph (5) was not intended to deal with the legal effect of a trade data message, including questions such as liability for restitution or expectation damages or formation of contract; rather, the proposed paragraph (5) was intended to state the general rule that a message, as regards its contents, was effective as received and to identify the exceptions to that rule.

128. In order to address the concerns expressed, several formulations were suggested: "If a message is to be given effect, it is to be given effect as received by the recipient"; another formulation was "Where a sender is deemed to have approved a message under this article, the content of the message as received shall control"; another suggestion was "The fact that a message is deemed to be effective as that of the sender does not impart legal significance to that message. Whether the message is to be given legal significance is to be determined by other law". With regard to that suggestion, it was observed that it might cause confusion to the extent it suggested that there was always an underlying transaction separate from the communication of the message.

129. It was also suggested that exceptions to the general rule could be covered by language along the following lines: "Where a trade data message contains an error or is an erroneous duplicate of an earlier message, a sender is not deemed to have approved the content of the message by virtue of this article in so far as the message was erroneous, if the recipient was aware of the error or the error would have been apparent, had the recipient used reasonable care or any agreed procedure of verification". It was observed that there was no reference in the proposal to discrepancies, since the notion of an error would include discrepancies.

130. The Working Group requested the Secretariat to re-draft paragraph (5), drawing on the suggested language, so as to emphasize that a message should be effective as received and that the recipient should take reasonable steps to ensure that the message had not been altered. It was agreed that the provision should avoid using language that might include the notion of "mistake" or "error" in contract and that might erroneously suggest that the provision dealt with the legal effects of a message.

131. With regard to the wording in square brackets at the end of paragraph (5), the Working Group decided to maintain it in square brackets, since it was recognized that, although the main subject of the uniform rules was the trade data message, there might be a need for correction messages.

132. At the conclusion of the discussion on paragraph (5), the point was raised that the Working Group might wish to consider the security issues arising when there was a change in intermediaries. The Working Group decided that that question might be better dealt with in article 15.

Article 11. Obligations subsequent to transmission

133. The text of draft article 11 as considered by the Working Group was as follows:

"(1) This article applies when:

(a) senders and recipients of trade data messages have agreed on the use of acknowledgements of receipt of messages;

(b) the use of acknowledgements of receipt of messages is requested by an intermediary;

(c) the sender of a trade data message requests an acknowledgement of receipt of the message in the message or otherwise.

(2) Any sender may request an acknowledgement of receipt of the message from the recipient.

(3) *Variant A:* [The recipient of a message requiring an acknowledgement shall not act upon the content of the message until such acknowledgement is sent.] [The recipient of a message requiring an acknowledgement who acts upon the content of the message before such acknowledgement is sent does so at its own risks.]

(4) If the sender does not receive the acknowledgement of receipt within the time-limit [agreed upon, requested or within reasonable time], he may, upon giving prompt notification to the recipient to that effect, treat the message as null and void.

Variant B: An acknowledgement, when received by the originating party, is [conclusive] [presumptive] evidence that the related message has been received [and, where confirmation of syntax has been required, that the message was syntactically correct]. [Whether a functional acknowledgement has other legal effects is outside the purview of these Rules.]".

Title

134. It was recalled that, at previous sessions, the Working Group had decided that the uniform rules should impose no obligation to use functional acknowledgements. It was also recalled that the use of such a procedure might, in certain circumstances, be found to be excessively costly and that, in any event, the decision as to the use of functional acknowledgements was a business decision to be made by users of trade data messages. In that connection, the view was expressed that the whole of article 11 should be deleted. The prevailing view, however, was that the article should be retained in view of the earlier decision made by the Working Group that the uniform rules should encourage the use of functional acknowledgements and also in view of the fact that a default rule might be needed for situations where no previous agreement had been entered into by the parties on the subject of acknowledgement. It was generally agreed that the title of article 11 should contain no indication of an "obligation", but merely refer to "functional acknowledgement".

Definition of "functional acknowledgement"

135. Various views were expressed regarding the content of the notion of "functional acknowledgement". The view was expressed that the possible link between the notion of "functional acknowledgement" and any procedure of "authentication" might need to be clarified. It was also stated that any provision dealing with issues of functional acknowledgements would need to indicate clearly whether any disclosing of the information contained in the trade data message was implied in the context of the acknowledgement procedure. It was generally agreed that the type of procedure envisaged as a "functional acknowledgement" was merely intended to prove the juridical fact that a given message had been received and that such a procedure should imply no disclosure of the content of the message. Rather, "functional acknowledgement" should be regarded as an equivalent of procedures used in the context of registered mail.

136. It was suggested that a definition of the term "functional acknowledgement" should be provided in the uniform rules, possibly in article 2. With respect to the possible content of such a definition, it was generally felt that, in the absence of specific contractual obligations as to the form of an acknowledgement, the recipient of a trade data message who was requested to acknowledge receipt should be allowed to do so by various means, and not necessarily through the issuance of a formal "functional acknowledgement" message. For example, it was stated that the conduct of the recipient of a purchase order who, in response, issued a shipment notice, might be equated to issuance of a functional acknowledgement. It was also suggested that the case where notice of receipt of a message was automatically given by the information system of the recipient should be equated to the issuance of a formal "functional acknowledgement" message. It was generally agreed that, should a definition of "functional acknowledgement" be contained in the uniform rules, it should accommodate the above views and suggestions. As a possible alternative to a formal definition, it was suggested that article 11 might contain indications as to how a functional acknowledgement might be given. The following wording was suggested:

"Acknowledgement of receipt of a trade data message may be provided by:

- (1) issuance of a technical message called a 'functional acknowledgement';
- (2) automatic confirmation of receipt of the trade data message; or
- (3) a response message that would only be generated by receipt of an earlier message."

Paragraph (1)

137. A question was raised as to whether subparagraph (b) encompassed the situation where an acknowledgement was requested by "system rules" that might be established for the operation of a value-added network. It was suggested that express mention should be made in the paragraph that the use of functional acknowledgement could result from such "system rules", which were said to be commonly used in practice. A contrary view was that the uniform

rules should not allow intermediaries to impose acknowledgement requirements on their own behalf. It was suggested that the words "on behalf of recipients of messages" should be added at the end of subparagraph (b). The prevailing view, however, was that the uniform rules should, to the extent possible, avoid dealing with the contractual relationships between value-added networks and their users.

Paragraph (2)

138. The Working Group agreed to delete paragraph (2) since the idea expressed in that paragraph was already implicit in paragraph (1).

*Variant A**Paragraph (3)*

139. The first sentence of paragraph (3) in variant A was criticized on the grounds that it would create an obligation for the recipient of a message not to act until an acknowledgement was sent. In addition, it was stated that the consequences for the failure to fulfil such an obligation were not spelled out. It was generally agreed that the sentence should be deleted.

140. The second sentence of paragraph (3) in variant A was criticized as being too vague and also on the grounds that it did not specify what consequences might flow from the risk taken by the recipient of a message who acted before an acknowledgement was sent. However, support was also expressed in favour of the draft provision. It was stated that other rules of contract law would determine the consequences to be attributed to the conduct of the recipient and that the draft provision was reflective of the current legal situation in many countries. It was generally felt that, should a provision along the lines of the second sentence of paragraph (3) in variant A be retained, it should be combined with draft paragraph (4).

Paragraph (4)

141. Support was expressed in favour of the default rule contained in draft paragraph (4) for the reason that, in the absence of a more specific agreement, it provided certainty as to the allocation of risks between the sender and the recipient in situations where a requested acknowledgement was not received by the sender. However, the provision was objected to on the ground that it might affect the law otherwise applicable to contractual relationship. It was also stated that the draft provision overly simplified a potentially complex range of situations where the consequences of the non-issuance of an acknowledgement might vary according to other applicable rules of law. It was generally agreed that the interpretation of a provision along the lines of draft paragraph (4) should not allow the recipient to deprive a message from legal effectiveness, for example a message notifying the termination of a contract, simply by refusing to issue a functional acknowledgement.

142. It was suggested that the wording of draft paragraph (4) was too broad and that the scope of the provision needed to be restricted to situations where the sender had given prior notice to the recipient that a message might be regarded

as null and void in the absence of an acknowledgement. The following wording was suggested:

"If, on or before transmitting a trade data message, or by means of that trade data message, the sender has requested an acknowledgement and stated that the message is to be of no effect until an acknowledgement is received, the recipient may not rely on the message, for any purpose for which he might otherwise seek to rely on it, until an acknowledgement has been received by the sender.

Where the sender has not requested that the acknowledgement be in a particular form, any request for an acknowledgement may be satisfied by any communication sufficient to indicate to the sender that the message has been received."

It was stated, however, that, should the effect of paragraph (4) be limited to the situation where the sender had given prior notice to the recipient, difficulties might arise, at least in the context of the use of the most advanced EDI techniques, since standard messages contained no field for mentioning such a prior notice.

143. It was suggested that, in the text of paragraph (4), the words "as null and void" should be replaced by the words "as though it had never been received".

Variant B

144. The substance of the provision was found to be generally acceptable. It was decided that, in the preparation of the next draft of article 11, the Secretariat should combine the substance of variant B with elements of variant A, so as to take into consideration the suggestions and concerns reflected above.

Article 12. Formation of contracts

145. The text of draft article 12 as considered by the Working Group was as follows:

"(1) A contract concluded by means of trade data messages shall not be denied legal [validity] [recognition] [and parties to that contract may not contest its validity] on the sole ground that the contract was concluded by such means.

(2) A contract concluded by means of trade data messages is formed at the time [and place] where the message constituting acceptance of an offer is received by the recipient."

Paragraph (1)

146. Differing views were expressed as to whether a rule along the lines of paragraph (1) was necessary. One view was that paragraph (1) should be deleted. In support of that view, it was said that the provision might interfere with the applicable law on matters of formation of contract, an area which should be left to the applicable law. In addition, it was observed that such a provision was unnecessary since the subject was already appropriately covered in articles 6 and 7, to the extent that those articles dealt with fulfilment of requirements for a written and signed document. Furthermore, it was argued that a trade data message was

merely a means of communication, that contracts were concluded by exchange of offer and acceptance, either or both of which might be made by electronic means and that the contract existed regardless of the way by which the offer and the acceptance were communicated. Provided that offer and acceptance might be made electronically, it was stated that it would be redundant to refer to contract. A question was also raised as to the appropriateness of including a provision on formation of contract, while electronic means of communications were used not merely for the conclusion of contracts but also for a variety of other purposes, for example, the implementation of international payments.

147. The prevailing view, however, was that, for a number of reasons, paragraph (1) should be retained. It was pointed out that paragraph (1) was not intended to interfere with rules of applicable law on the formation of contract, but rather was meant to make it clear that a contract should not be denied legal validity merely because it was concluded by electronic means. Furthermore, it was added that the rule contained in paragraph (1) was not recognized in all legal systems, and that its importance might justify some minimal interference with formation of contracts rules of some other countries which had relevant rules to cover the formation of contracts by electronic means. It was noted that such a rule would, therefore, be responsive to the call from the trading community for increased legal certainty or reliability as to the conclusion of contracts by electronic means. The Working Group noted that articles 6 and 7 only dealt with writing and signature and that they did not provide a rule protecting the effectiveness of transactions as a whole against objections relating to electronic form.

148. As to the exact formulation of paragraph (1), several concerns were expressed. One concern was that it was contradictory to state that a contract was "concluded" and that it "should not be denied legal [validity]". The view was expressed that if a contract was concluded, it could not be denied legal validity. Another concern was that the present formulation of paragraph (1) might cause confusion as in most languages "conclusion" was identified with "formation" of contract. In order to address those concerns, it was suggested that such terms as "transaction" or "agreement" should be substituted for the word "contract". A concern was also expressed that the use of the expression "on the sole ground" would not provide sufficient clarity as to whether various possible types of objections could be characterized as objections "on the sole ground" of electronic form. It was suggested that the formulation might also have the unintended effect of disturbing other formal requirements that might apply, such as a requirement that a contract should be sealed. Yet another concern was that the negative formulation of paragraph (1) might give the impression that there was some uncertainty as to whether a contract could be concluded electronically. In order to address that concern, it was suggested that paragraph (1) should be formulated in a positive way. Another suggestion was that paragraph (1) should state that a transaction concluded by electronic means should not be denied legal validity (enforceability) on the sole grounds that it was concluded by electronic means or without human intervention. With regard to that proposal, it was observed that an electronic communication could not ultimately be

described as lacking human intervention, since there still always had to be an intervention of human will, if not with regard to a particular message, at least to extent that the computers were programmed by human beings.

149. The Secretariat was requested to review the formulation of paragraph (1) so as to take into account the concerns that had been expressed concerning the need to avoid crossing into areas governed by contract law.

Paragraph (2)

150. The Working Group considered the question whether paragraph (2) should be retained, in particular since it appeared to deal with matters central to contract law. In support of retention of paragraph (2), at least to the extent that it dealt with the time, but not with the place, of conclusion of contracts, it was said that it was useful to establish the rule that a contract would be concluded by electronic means at the time of receipt of the message constituting acceptance. It was said that such a rule, which would reflect the particular needs of the EDI setting and the fact that receipt was relatively easy to demonstrate in the EDI context, would be useful in particular for those countries which had a different rule about the time of conclusion of contracts, other than a rule geared to the receipt of the acceptance.

151. The prevailing view, however, was that paragraph (2) should be deleted. It was said that paragraph (2) was unnecessary since both international instruments and domestic law dealt sufficiently with the matter of the time and place of conclusion of contracts. Furthermore, paragraph (2) was objected to on the grounds that, to the extent that it adopted the theory of reception of the acceptance with regard to the conclusion of contracts, it was overly general and would interfere with applicable rules on formation of contracts. It was generally felt that the uniform rules should confine themselves to establishing a rule as to the time of receipt of trade data messages, a matter dealt with in article 13. However, so as to facilitate a possible further consideration of the matter dealt with in paragraph (2), the Working Group decided to retain paragraph (2) in square brackets.

Article 13. Receipt of trade data messages

152. The text of draft article 13 as considered by the Working Group was as follows:

"A trade data message is received by its recipient

Variant A: at the time when it [reaches] [enters] [is made available to and is recorded by] the [computer system] [mailbox] [address] of [or designated by] the recipient.

Variant B: (a) at the time when the message is recorded on the computer system directly controlled by the recipient in such a way that it can be retrieved; and

(b) at the place where the recipient has its place of business."

153. A general question was raised as to the necessity of including in the uniform rules a provision along the lines of

article 13 since it might be considered that questions of time and place of receipt were already adequately covered by applicable national law. It was suggested in this vein that, if the intent was to clarify rules of law, it might be sufficient to give direction as to where in systems of applicable law answers might be found to questions of time and place of receipt. The view was expressed that the utility of the present version of article 13 was limited since it risked providing overly general and simplified solutions to complex questions requiring more nuanced solutions. While agreeing that the text before it required further development, the Working Group, however, was generally of the view that, due to the new technological and practical characteristics presented by EDI, and the negative effect on the use of EDI of disparity of national laws, it would be advisable to include some type of provision on the time of receipt of a trade data message so as to ensure the level of legal certainty required to facilitate electronic commerce. For the same reasons, some support was also expressed for the inclusion of a rule on the place of receipt.

Time of receipt

154. As regards the point of time when a trade data message is to be considered received, the Working Group had before it two variants that fixed that point at different stages in the life-cycle of a trade data message. It was generally felt that the existing formulation in article 13, irrespective of which variant were taken, needed to be considered further taking into account the peculiar features of exchange of messages in the EDI environment. In particular, the attention of the Working Group was drawn to the possibility that the concept of "reaching" or "entering" the computer system of the recipient, a notion found in variant A, and the notion of "recording" on the recipient's computer system, as described in variant B, were insufficient to take into account the various stages and possible difficulties that might occur in the transmission and receipt of trade data messages. Those stages included dispatch, receipt, entry, recording, possibly translation, retrieval by the recipient and "reading" or taking note of the content of the message by the recipient. It was noted that at various of those stages, the possibility of problems existed and that possibility had to be taken into account in formulating the rule. Such problems included, for example, that the memory of the recipient's computer might be full, thus preventing entry or recording of the message, that the recipient's system might be inoperative due to power failure, or as simple a problem as a lack of paper in the recipient's telecopy machine. The question was also raised as to whether it might not be necessary to consider fixing different points of time, depending upon the type of technology being used for the transmission of the trade data message. A final observation of a more general character was that it would be useful to make it clear in the *chapeau* of article 13 that the provision was intended to serve as a default rule and was therefore subject to contractual autonomy.

155. The Working Group then exchanged views as to which particular point in time or stage in the above-described life-cycle of the trade data message should be used to fix the time of receipt. One view, based on variant A, was that the point of time should be when the message reached the information system of the recipient. It was

suggested that such a rule would appropriately reflect the different spheres of control of the sender and recipient and would thus establish an appropriate allocation of risk. Further observations were made directed at the possible need to include in the rule additional precision, in particular to reflect that the risk of the recipient's system not functioning properly should be within the sphere of the recipient. One suggestion in this direction was drawn along the following lines, combining elements of both variants A and B:

"A trade data message is received by its recipient at the time when the message entered the information system controlled by the recipient in such a way that it can be retrieved by the recipient, or could be retrieved if the recipient's information system were functioning properly."

156. Another suggested reformulation read as follows:

"A trade data message is received by its recipient at the time when the message enters the information system controlled [or chosen] by the recipient in such a way that it can be retrieved by the recipient or when the message could have entered the information system and been retrieved if the recipient's information system had been functioning properly."

157. As regards the problem that may arise when a transmission cannot be completed due to the inability of the recipient's system to receive messages, the question was raised whether for such cases the uniform rules should establish a procedure for a minimum number of attempts. It was further questioned whether in such cases, in particular the case where the storage capacity of the recipient's computer was full, the message might be deemed received.

158. It was pointed out that the words "controlled by the recipient" found in the reference in variant B to the recipient's computer system might be too narrow, since it might very well be that the recipient received messages in a system that was not under its control, but was merely nominated by the recipient. It was suggested in that light that a preferable expression might involve a word such as "designated". It was also suggested that, rather than referring to the recipient's computer system, it might be preferable to use a more general expression such as "facility".

159. Another possible complexity that was highlighted concerned the various ramifications that might be raised by the fact that in the EDI context the "reading" or legibility of a message was not as straightforward a matter as in the traditional paper-based environment. It was generally agreed that the rule should be framed so as to exclude the possibility that the recipient could defeat the transmission of the message by ignoring it or refusing to read it. At the same time, however, it was recognized that there might be circumstances that might require additional steps to be taken after arrival of the message in order to achieve legibility. For example, the message might have to be translated, decoded or deciphered. The concern was expressed that in such a case the time of receipt should not be subject to the whim of or delay caused by the recipient in taking those additional steps. It was suggested that a proper balance taking such circumstances into account might be a twin formulation based on the message reaching the system of

the recipient and being accessible or retrievable. The view was expressed that such a formulation would also take into account the possibility that a message would have to be reformatted, translated or processed in some other way by an intermediary, prior to becoming accessible to the recipient. Another proposal to deal with such cases was to provide that, if the message was not accessible in a manner visible or intelligible to the recipient, the time of receipt would be deemed to be the earliest reasonable point of time that it would be so accessible.

Place of receipt

160. Reservations were expressed as to the necessity and advisability of including a rule on place of receipt, as suggested in subparagraph (b) of variant B. Those reservations were based on the view that a default rule was unnecessary on the question of place, since it was a matter that could be readily resolved either by contract or in accordance with the applicable law, pursuant to which courts would be likely to focus on a variety of relevant factors rather than being guided solely by the location of the recipient's computer. It was pointed out in this regard that the question of place of receipt was generally governed by national law as well as by international instruments, in particular the United Nations Sales Convention. It was also stressed that the general rule set forth in the draft text could not be assumed to be appropriate for all cases.

161. In response to those reservations and concerns, it was stated that a principal reason for including a rule on place would be to address a circumstance characteristic of electronic commerce that might not necessarily be treated adequately under existing domestic or international law, namely, that very often the information system of the recipient where the message was received or from which the message was retrieved was located in a jurisdiction other than that in which the recipient was located. The rationale behind the provision therefore was to ensure that the location of an information system would not be the dispositive element, but rather that there should be some reasonable connection between the recipient and what was deemed to be the place of receipt, and that that place could be readily ascertained by the sender. It was also noted that the rule on place of receipt, as in the case of the rule on time of receipt, was intended to be a default rule subject to contrary contractual agreement, and that it was meant to cover also the wide range of transactions falling under domestic and international laws governing sales transactions.

162. As to the precise formulation of a rule on place, a question was raised as to the extent to which it would actually be possible to separate, as was apparently attempted in the existing text, the question of time from the question of place. It was pointed out in this regard that the notion of a particular point of time of receipt would necessarily have to be linked to a particular place. It was suggested that this problem might be solved by replacing in the *chapeau* the words "a trade data message is received" by the words "a trade data message is deemed to be received". As regards the case where the recipient had more than one place of business, it was suggested that the rule might refer to the place with the closest relationship to the transaction concerned. To address the concern that the rule on place

should not be overly general, it was suggested that the uniform rules might simply provide that the place of receipt was not necessarily the place where the recipient's computer was located, or where the message was stored or recorded.

163. After deliberation, the Working Group, without finally deciding on the content of article 13, requested the Secretariat to revise the provision, taking into account the comments and observations that had been made, and including a default rule concerning place of receipt.

Article 14. Recording and storage of trade data messages

164. The text of draft article 14 as considered by the Working Group was as follows:

"(1) *Variant A:* This article applies where records are required to be kept by applicable legislation or regulation or by any contractual provisions.

Variant B: Subject to any contrary requirement in legislation, where a requirement exists with respect to the retention of records, that requirement [shall] [may] be satisfied if the records are kept in the form of trade data messages provided that the requirements contained in paragraphs (2) and (3) of this article are satisfied.

(2) Trade data messages shall be stored by the sender in the transmitted format and by the recipient in the format in which they are received.

(3) Electronic or computer records of the messages shall be kept readily accessible and shall be capable of being reproduced in a human readable form and, if required, of being printed. Any operational equipment required in this connection shall be retained."

Paragraph (1)

165. While there was no strong feeling in the Working Group for either variant A or B, variant A was criticized for appearing to introduce requirements additional to those existing under the applicable law or by virtue of contractual arrangements. Variant B was preferred, since, although it raised a number of questions, it was more descriptive of the operational context. Several suggestions of a drafting nature were made with regard to variant B. The view was expressed that the expression "subject to any contrary requirement" was inappropriate, since the purpose of the paragraph was precisely to overcome requirements that records be kept in a paper form. Another view was that the expression "subject to any contrary requirement" was unclear, since legislation could be unfriendly to EDI without necessarily being "contrary". Preference was expressed for the word "shall" within square brackets. As to the words "in the form of trade data messages", it was observed that they might give the mistaken impression that trade data messages were a form in which information might be kept, and not the information itself.

Paragraph (2)

166. The concern was expressed that, to the extent paragraph (2) established a duty to store trade data messages, it

introduced an unjustified departure from normal practice. Furthermore, it was said that paragraph (2) raised a number of questions. One question was how messages should be stored. Another question was who would have access to the stored messages, i.e., the sender, the recipient, some other third party or the public in general. That question was said to raise issues of confidentiality and data protection, issues of public law that implicated questions of constitutional, administrative and penal law. In that regard, it was said that the uniform rules should confine themselves to private law issues and should make it clear that, as regards matters of private concern, there should be confidentiality. In light of those observations, it was suggested that paragraph (2) should not introduce a duty to store messages, but that the matter should rather be left to the discretion of the parties. It was suggested that that result could be achieved by replacing the word "shall" with the word "may". Another concern was that the present formulation of paragraph (2) was not sufficient, in order to ensure the integrity of the message. In order to address that concern, it was suggested that the words "unaltered and securely" should be added after the word "stored". Yet another concern was that paragraph (2) might not be workable in relation to certain existing telecopy systems.

Paragraph (3)

167. It was suggested that the notion of accessibility and intelligibility of the message should be emphasized in paragraph (3). Differing views were expressed as to the duty to preserve the equipment needed for the retrieval and reproduction of messages. One view was that such a duty should be established, since the maintenance of the equipment was an important condition for the possibility to retrieve and reproduce messages. Another view was that such a duty was too onerous and should not be established.

168. While no decision was taken as to whether the duty envisaged in the last sentence of draft paragraph (3) was one that the uniform rules should establish, it was generally felt that the words "Any operational equipment [...] shall be retained" were inappropriate, since they created the impression that the user of a given equipment was under an obligation to immobilize and physically retain all equipment. It was suggested that the notion of "availability" was preferable to that of "retention" of any operational equipment. The Working Group requested the Secretariat to revise article 14 taking into account the comments and observations that had been made.

[Article 15. Liability]

169. The text of draft article 15 as considered by the Working Group was as follows:

"[(1) Each party shall be liable for damage arising directly from failure to observe any of the provisions of the uniform rules except in the event where the party is prevented from so doing by any circumstances which constitute an impediment beyond that party's control and which could not reasonably be expected to be taken into account at the time when that party engaged in sending and receiving EDI messages or the consequences of which could not be avoided or overcome.

(2) In no event shall either party be liable for special, indirect, or consequential damage.

(3) If a party engages any intermediary to perform such services as the transmission, logging or processing of a message, the party who engages such intermediary shall be liable for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.

(4) If a party requires another party to use the services of an intermediary to perform the transmission, logging or processing of an EDI message, the party who requires such use shall be liable to the other party for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.]”

Article 15 as a whole

170. The view was expressed that article 15 as a whole should be deleted, since the uniform rules did not seem, at least at this stage, to introduce duties additional to those existing under the applicable law and the contractual arrangements of the parties. Some support was expressed for the retention of article 15. It was suggested that at this stage it would be premature to answer in a definitive manner the question whether the uniform rules would establish new duties for the parties. In that regard, it was said that articles 10, 11 and 14 might introduce such duties, a possibility which it was too early to fully assess.

Paragraph (1)

171. The view was expressed that paragraph (1) of article 15 should be deleted. It was noted that in principle two types of liability would be possible, i.e., no-fault liability and liability for fault. In that regard, it was questioned why a non-fault liability regime of the type in paragraph (1) should be adopted. It was added that a liability regime based on fault was not necessary either, since, as already mentioned, the uniform rules did not create any statutory duties for the parties. As to contractual duties, it was observed that they raised problems relating to the underlying transaction, which should be left to the applicable law and the contractual arrangements of the parties.

172. Some support was expressed for the retention of paragraph (1) of article 15. It was stated that such a rule was necessary so as to avoid application of disparate national laws, a situation that might be an obstacle to legal certainty and, therefore, to the use of EDI. Furthermore, it was observed that a rule on liability might prove to be useful in view of the risk that courts might award damages disproportionate to the amounts involved in trade data messages, a risk that was said to be a serious source of concern and an obstacle to electronic commerce.

Paragraph (2)

173. One concern was that paragraph (2) might cause confusion since it used terms such as “special, indirect, or consequential damages”, terms that had little if any meaning in a number of legal systems. Another concern was that paragraph (2), to the extent it appeared to exclude liability even for intentional acts and gross negligence, was departing without reason from what was considered to be the

normal rule in most legal systems. In light of the concerns expressed, it was suggested that, even if paragraph (1) of article 15 were retained, paragraph (2) should be deleted.

Paragraph (3)

174. It was pointed out that paragraph (3) raised a number of questions. One question was what was the basis of liability of a party which has engaged a intermediary for damage caused by the intermediary, breach of duty of care or warranty. Another question was to whom was the party which engaged an intermediary liable; it could be inferred that it was the other party, but, it was said that such a rule might be unreasonable in cases where the same intermediary was engaged by both parties or where the decision as to which party would engage an intermediary was fortuitous. Yet another question was whether the obligation of the party which engaged an intermediary was primary or secondary to the liability of the intermediary, that is, whether the other party could claim directly from the party which engaged the intermediary, or only after such a claim had been made, without success, against the intermediary.

Paragraph (4)

175. The view was expressed that paragraph (4) was unnecessary. It was said that the fact that it applied to cases in which one party required the other party to engage an intermediary indicated that a contract had been concluded between the parties, which would normally deal with the question of liability.

176. At the conclusion of the discussion, a concern was expressed that continued retention of article 15, despite the fact that at present the uniform rules did not seem to establish new duties the violation of which could trigger liability, might give the mistaken impression that new duties were being established. Attention was drawn to the risk that this might discourage consideration of the uniform rules. However, the Working Group decided to retain article 15, in square brackets, so as to facilitate consideration at a later stage of the matter whether a provision along the lines of article 15 was finally justified. The Secretariat was requested to prepare a revised draft of article 15, taking into account the various suggestions and concerns that had been expressed.

III. FURTHER ISSUES TO BE CONSIDERED

177. The Working Group discussed whether further issues should be dealt with in the uniform rules. With respect to a suggestion contained in the note by the Secretariat (A/CN.9/WG.IV/WP.57) that the question of liability of third-party service providers might need to be discussed, it was generally felt that, while the question might need to be taken up at a later stage in the light of future developments of EDI practice, it would be premature at this stage. With respect to the question of documents of title and securities, the Working Group noted that the Commission, at its twenty-sixth session, had considered a suggestion that there existed a need for rules dealing with such specific issues. It was generally felt that only after completion of the uniform rules currently being prepared, which were intended

to be a discrete set of rules, would the Working Group be in a position to undertake work in specific areas where more detailed rules might be needed. With respect to the possible interplay of the uniform rules with legal rules on personal data protection that might exist in certain countries, it was generally felt that, where such legal rules ex-

isted, they were intended for a purpose of privacy protection that went far beyond the purview of any instrument that might be prepared by the Commission. It was agreed, however, that issues of personal data protection might need to be taken into consideration in the preparation of the uniform rules.

B. Working papers submitted to the Working Group on Electronic Data Interchange at its twenty-sixth session

1. Draft uniform rules on the legal aspects of electronic data interchange (EDI) and related means of trade data communication: note by the Secretariat

(A/CN.9/WG.IV/WP.57) [Original: English]

CONTENTS

	<i>Page</i>
INTRODUCTION	173
I. DRAFT PROVISIONS FOR UNIFORM RULES ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF TRADE DATA COMMUNICATION	174
CHAPTER I. GENERAL PROVISIONS	174
Article 1. Sphere of application	174
Article 2. Definitions	175
Article 3. Interpretation of the uniform rules	176
Article 4. Rules of interpretation	176
Article 5. Variation by agreement	177
CHAPTER II. FORM REQUIREMENTS	177
Article 6. Functional equivalent of "writing"	177
Article 7. Functional equivalent of "signature"	178
Article 8. Functional equivalent of "original"	179
Article 9. Evidential value of trade data messages	180
CHAPTER III. COMMUNICATION OF TRADE DATA MESSAGES	180
Article 10. [Binding nature] [Effectiveness] of trade data messages	180
Article 11. Obligations subsequent to transmission	181
Article 12. Formation of contracts	181
Article 13. Receipt of trade data messages	181
Article 14. Recording and storage of trade data messages	182
[Article 15. Liability]	182
II. FURTHER ISSUES TO BE CONSIDERED	183

INTRODUCTION

1. At its twenty-fourth session, in 1991, the Commission agreed to undertake work on the legal issues of electronic data interchange (EDI) in recognition of the fact that those legal aspects would become increasingly important as the

use of EDI developed. The Commission was agreed that, given the number of issues involved, the matter needed detailed consideration by a working group.¹ Pursuant to that

¹Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 306-317.

decision, the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of EDI.

2. At its twenty-fifth session, in 1992, the Commission had before it the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed that, while no decision should be made at that early stage as to the final form or the final content of the legal rules to be prepared, the Commission should aim at providing the greatest possible degree of certainty and harmonization.

3. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (A/CN.9/360, paras. 129-133) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.²

4. The Working Group on Electronic Data Interchange undertook this task at its twenty-fifth session held in New York from 4 to 15 January 1993. At that session, the Working Group reviewed a number of legal issues set forth in a note prepared by the Secretariat (A/CN.9/WG.IV/WP.55). The Working Group agreed that it should proceed with its work on the assumption that the uniform rules should be prepared in the form of statutory rules. The Working Group deferred, however, a final decision as to the specific form that those statutory rules should take (A/CN.9/373, para. 34). At the conclusion of the session, the Working Group requested the Secretariat to prepare draft provisions, with possible variants based on the deliberations and decisions of the Working Group during the session, for its consideration at its next meeting (A/CN.9/373, para. 10).

5. This note contains the draft provisions requested by the Working Group together with a commentary.

6. At its twenty-sixth session, held at Vienna from 5 to 23 July 1993, the Commission had before it the report of the Working Group on Electronic Data Interchange on the work of its twenty-fifth session (A/CN.9/373). The Commission expressed its appreciation for the work accomplished by the Working Group. The Commission noted that the Working Group had started discussing the content of a uniform law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text.

7. The view was expressed that, in addition to preparing statutory provisions, the Working Group should engage in the preparation of a model communication agreement for optional use between EDI users. It was explained that most attempts to solve legal problems arising out of the use of EDI currently relied on a contractual approach. That situation created a need for a global model to be used when drafting such contractual arrangements. It was stated in

reply that the preparation of a standard communication agreement for universal use had been suggested at the twenty-fourth session of the Commission. The Commission, at that time, had decided that it would be premature to engage immediately in the preparation of a standard communication agreement and that it might be preferable, provisionally, to monitor developments in other organizations, particularly the European Communities and the Economic Commission for Europe.³

8. After discussion, the Commission reaffirmed its earlier decision to postpone its consideration of the matter until the texts of model interchange agreements currently being prepared within those organizations were available for review by the Commission.

9. It was suggested that, in addition to the work currently under way in the Working Group, there existed a need for considering particular issues that arose out of the use of EDI in some specific commercial contexts. The use of EDI in procurement and the replacement of paper bills of lading or other documents of title by EDI messages were given as examples of topics that merited specific consideration. It was also suggested that the Commission should set a time-limit for the completion of its current task by the Working Group. The widely prevailing view, however, was that the Working Group should continue to work within its broad mandate established by the Commission. It was agreed that, only after it had completed its preparation of general rules on EDI, should the Working Group discuss additional areas where more detailed rules might be needed.

DRAFT PROVISIONS FOR UNIFORM RULES ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF TRADE DATA COMMUNICATION

Chapter I. General provisions

Article 1. *Sphere of application**

(1) These Rules apply to a trade data message where

Variant A: the sender and the recipient of such a message are in different States [at the time when the message is sent].

Variant B: (a) the sender and the recipient of such a message have, at the time when the message is [prepared or] sent, their places of business in different States; or

(b) any place where a substantial part of the obligations of the commercial relationship to which the message relates or the place with which the subject-matter of the message is most closely connected is situated outside a State in which either of the parties has its place of business.

Variant C: the message affects international trade interests.

²Ibid., *Forty-seventh Session, Supplement No. 17 (A/47/17)*, paras. 140-148.

³Ibid., *Forty-sixth Session, Supplement No. 17 (A/46/17)*, para. 316.

(2) These Rules govern only the exchange and storage of trade data messages and the rights and obligations arising from such exchange or storage. Except as otherwise provided in these Rules, they do not apply to the substance of the trade transaction for the purpose of which a trade data message is sent or received.

*These Rules [do not deal with issues] [do not intend to override any law] [are subject to any law] related to the protection of consumers.

References

A/CN.9/373, paras. 21-26, and 29-33 (twenty-fifth session, 1993)

A/CN.9/WG.IV/WP.55, paras. 7-20

A/CN.9/360, paras. 29-31 (twenty-fourth session, 1992)

A/CN.9/WG.IV/WP.53, paras. 25-33

Remarks

Internationality of trade data message

1. At its twenty-fifth session, the Working Group considered the question whether the uniform rules should be limited in scope to international uses of EDI or whether they should cover both international and domestic uses of EDI. The variants contained in paragraph (1) reflect various approaches in favour of which support was expressed at the twenty-fifth session of the Working Group by those delegations whose general view was that the scope of the uniform rules should be limited to international situations (see A/CN.9/373, para. 25). The test of internationality set forth in variant A was drawn from article 1(1) of the UNCITRAL Model Law on International Credit Transfers. The wording of variant B was inspired from article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration. Variant C makes use of a test of internationality adopted in some States for distinguishing between international and domestic arbitration (e.g., Article 1492 of the French *nouveau code de procédure civile*).

2. It may be noted that the wordings of variants A and B could apply to a trade data message actually transmitted between a sender and a recipient and also to a trade data message stored by a recipient. Depending upon the definition of a "trade data message", they could also be made applicable to a computer record created as a result of the computerization of trade data transmitted by means of a paper document. However, both of those variants imply a transmission of data and would not cover computer records created outside the context of such a transmission. Variant C does not imply a transmission of data and would cover at the same time messages transmitted between a sender and a recipient and computer records stored without any assumption that the data would be transmitted.

3. It may be extremely difficult to distinguish, in practice, between international and domestic uses of EDI. For example, the issuer of an offer to contract, whose offer is circulated by means of an open network, would typically not know in advance where the acceptance will come from. Furthermore, even for those situations where a test of internationality could be used to produce such a distinction

between international and domestic transactions, the situation of EDI users might be adversely affected if two different legal regimes applied to international and to domestic transactions. It may be recalled that an important purpose of the uniform rules is to facilitate the use of EDI by establishing the legal effectiveness of communications effected by electronic means. The Working Group may wish to discuss whether it is conceivable and desirable to produce a situation where, for example, the evidential value of an invoice transmitted as an EDI message or its admissibility for regulatory purposes would be treated differently according to whether the transmission had taken place in an international or in a domestic context, while the commercial nature of the underlying transaction (e.g., a sale of goods) was the same in both cases.

4. In order for a State to apply the uniform rules to both domestic and international messages, article 1 might be modified as follows:

"These Rules apply to trade data messages as defined in article 2."

Messages as focus of the uniform rules

5. Draft paragraph (2) is intended to reflect the decision made by the Working Group at its twenty-fifth session that the initial focus of the uniform rules should be trade data messages and not transactions or contracts that resulted from the exchange of such messages, except as necessary (see A/CN.9/373, para. 26).

Consumer transactions

6. At its twenty-fifth session, the Working Group was agreed that, while the uniform rules should not address special issues relating to the protection of consumer, they should apply to all messages, including messages to or from consumers. It was pointed out that the uniform rules were likely to improve the position of consumers by increasing legal certainty in their transactions. However, in line with its decision that the uniform rules should focus on messages and not on the underlying contracts or obligations for the purposes of which messages were sent, the Working group generally felt, however, that the uniform rules should not provide a definition of consumer transactions. A preference was thus expressed for dealing with the issue of consumer protection in a footnote, a drafting technique that could circumvent the need to provide a definition of consumer.

7. The draft text of the footnote would allow States, when implementing the uniform rules, to include a definition of "consumers", which might include certain kinds of businesses for which it might be felt appropriate to establish particularly protective rules.

Article 2. Definitions

For the purposes of these Rules:

(a) "Trade data message" means a set of trade data exchanged [or stored] by means of electronic data interchange (EDI), telegram, telex, telecopy or other [analogous] means of teletransmission [or storage] of

[digitalized] data, [to the exclusion of purely oral communication] which [inherently] provides a complete record of the data;

(b) "Electronic data interchange (EDI)" means the computer-to-computer transmission of business data in a standard format.

(c) "Sender" means any person who originates a trade data message covered by these Rules [on its own behalf [or any person on whose behalf a trade data message covered by these Rules purports to have been sent];

(d) "Recipient" means a person who ultimately receives a trade data message covered by these Rules or who is ultimately intended to receive such a message;

(e) "Intermediary" means an entity which, as an ordinary part of its business, engages in receiving trade data messages covered by these Rules and is expected to forward such messages to their recipients. [An intermediary may perform such functions as, *inter alia*, formatting, translating and storing messages.]

References

A/CN.9/373, paras. 11-20, 26-28, and 35-36 (twenty-fifth session, 1993)

A/CN.9/WG.IV/WP.55, paras. 23-26

Remarks

Trade data message

1. The reference to "trade data message", as well as the suggested title of the uniform rules, is intended to reflect the approach taken by the Working Group at its twenty-fourth and twenty-fifth sessions according to which, in preparing the uniform rules, the Working Group would have in mind a broad notion of EDI, covering a variety of trade-related uses of EDI that might be referred to broadly under the rubric of "electronic commerce". Considering that the notion of EDI tends to be interpreted narrowly as the computer-to-computer exchange of standardized data, it is submitted that "messages", which are to constitute the focus of the uniform rules should not be designated for all purposes as "EDI messages".

2. The notion of a "trade data message" was used in the text of the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (UNCID Rules) published by the International Chamber of Commerce (ICC) in 1987. The text of the UNCID Rules is reproduced as an annex to document A/CN.9/WG.IV/WP.53. The UNCID Rules define a "trade data message" as trade data exchanged between parties concerned with the conclusion or performance of a trade transaction. It is submitted that the draft definition contained in this note is not incompatible with the UNCID Rules.

3. The broad definition of a "trade data message" is intended to accommodate the concerns expressed at the twenty-fifth session that the uniform rules should be applicable not only to narrowly defined EDI messages but also to such techniques as telex and telecopy (see A/CN.9/373, para. 12) and not only to messages that were communicated between the parties but also to computer records (see

A/CN.9/373, para. 81). In the preparation of the draft uniform rules, it was assumed that all elements of that broad definition would be retained.

Electronic data interchange (EDI)

4. While the Working Group, at its twenty-fourth and twenty-fifth sessions, decided to postpone its final decision as to the definition of EDI, it is submitted that, if EDI is to be listed among other means of data transmission and storage covered by the uniform rules, a definition is needed and that definition should be the narrow definition used, for example, for the purposes of UN/EDIFACT messages, a definition along the lines of those also used in many existing model communication agreements.

Sender, recipient and intermediary

5. Under the draft definition in subparagraph (c) the person who stores trade data in a computer would be the sender of a message. The wording between square brackets would include the purported sender in the definition of a sender.

Article 3. *Interpretation of the uniform rules*

(1) In the interpretation of these Rules, regard is to be had to their international character and to the need to promote uniformity in their application and the observance of good faith in international trade.

(2) Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based or, in the absence of such principles, in conformity with the law applicable by the virtue of the rules of private international law.

References

A/CN.9/373, paras. 38-42 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 30-31

Remarks

1. The draft article is modelled on article 7 of the United Nations Sales Convention.

Article 4. *Rules of interpretation*

(1) For the purposes of these Rules, statements made by and other conduct of a party are to be interpreted according to that party's intent where the other party knew or could not have been unaware what the intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of

the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

References

A/CN.9/373, paras. 38-42 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 30-31

Remarks

1. The draft article is modelled on article 8 of the United Nations Sales Convention.

Article 5. Variation by agreement

Except as otherwise provided in these Rules, the rights and obligations of the sender and the recipient of a trade data message arising out of these Rules may be varied by their agreement.

References

A/CN.9/373, para. 37 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 27-29

Remarks

1. The wording of draft article 5 is modelled on article 4 of the UNCITRAL Model Law on International Credit Transfers.

Chapter II. Form requirements

Article 6. Functional equivalent of "writing"

(1) *Variant A:* "Writing" includes but is not limited to a telegram, telex [, telecopy, EDI message, electronic mail] and any other trade data message which preserves a record of the information contained therein and is capable of being reproduced in [tangible] [human-readable] form [or in any manner that would be prescribed by applicable law].

Variant B: In legal situations where "writing" is required [explicitly or implicitly], that term shall be taken to mean any entry on any medium able to transmit *in toto* the data in the entry, which must be capable of being [intentionally recorded or transmitted and] reproduced in human-readable form.

Variant C: Any form of electronic [or analogous] recording of information is deemed to be functionally equivalent to writing, provided the information can be reproduced in visible and intelligible form and provided the information is preserved as a record.

Variant D: (a) For the purpose of any rule of law which expressly or impliedly requires that certain information be recorded or presented in written form, any form of electronic [or analogous] recording of information is deemed to be equivalent to writing, provided the electronic [or analogous] record fulfils the same functions as a paper document.

(b) In determining whether a record satisfies the functions of a writing, due regard shall be had to any agreement between the parties as to the status of that recording.

(2) For the purposes of this article, "record" means a durable symbolic representation of information in objectively perceivable form, or susceptible to reduction to objectively perceivable form.

(3) The provisions of this article do not apply to the following situations: [...].

References

A/CN.9/373, paras. 45-61 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 39-49
A/CN.9/360, paras. 32-43 (twenty-fourth session, 1992)
A/CN.9/WG.IV/WP.53, paras. 37-45
A/CN.9/350, paras. 68-78
A/CN.9/333, paras. 20-28

Remarks

Extended definition of "writing"

1. At the twenty-fifth session of the Working Group, support was expressed by some delegations in favour of an extended definition of "writing". That approach is reflected in the text of variants A and B, which were proposed at the twenty-fifth session. It is submitted that an extended definition of "writing" such as the one contained in article 13 of the United Nations Sales Convention is useful in the context of a legal text which expressly provides for certain legal consequences by reference to whether certain data are presented in writing. However, such an extended definition may be insufficient to cover all situations where legislation in a given country, while not expressly requiring the presentation of paper documents, is drafted in such a manner that it can only apply in a paper-based environment. Such a situation is not uncommon, as a consequence of the fact that rights and obligations were generally established on the assumption that data was normally presented in paper form.

2. If any of those two variants were retained, the text might need to be supplemented by a paragraph along the following lines: "the above paragraph applies where the context or use of such words as 'document' implies that a writing is required".

3. It may be noted that in certain standard interchange agreements such as the European Model EDI Agreement a different approach is taken, under which no attempt is made to create an equivalent to written documents. Instead, the conditions under which computer data would carry legal significance are directly established.

Functional equivalent to "writing"

4. Variants C and D do not rely on an extended definition of "writing". Rather, they attempt to create a presumption that the same legal consequences will derive from the presentation of data on paper and in other form, provided that the functions fulfilled by both types of media are equivalent. Variant D, for which support was expressed at the

twenty-fifth session of the Working Group, expressly refers to some of the functions performed by paper. It may be recalled that other functions of paper were also identified by the Working Group at its previous sessions. However, it was also noted by the Working Group that not all paper documents performed the same functions and that all express or implied requirements that data be presented in written form were not always based on the assumption that the medium on which the information was to be presented performed all the conceivable functions of paper. It might be excessively burdensome for EDI users to require all electronic or analogous recordings of data to perform all the functions of paper. Variant D only states a general principle and would leave it to courts or to other legal rules to establish in each case what a functional equivalent to paper would be.

5. It may be recalled that functional equivalence to "writing" is not to be confused with other levels or elements, such as authentication. The mere fact that a requirement of "writing" is fulfilled does not mean that other requirements are fulfilled. As an illustration of that distinction, it may be noted that article 28 of the UNCITRAL Model Law on Procurement of Goods and Construction provides that "a tender shall be submitted in writing, signed and in a sealed envelope" and that "a tender may alternatively be submitted in any other form specified in the solicitation documents that provided a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality". While the notion of a "record" has already been used as an equivalent for "writing" in previous UNCITRAL texts such as article 1 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, additional requirements of authenticity, security and confidentiality are treated separately.

Notion of "record"

6. The definition of a "record" is derived from a concept under study within the Subcommittee on Electronic Commercial Practices of the American Bar Association (see A/CN.9/WG.IV/WP.55, para. 47).

Possibility of derogation

7. At its previous session, the Working Group discussed the relationships between EDI users and public authorities and considered transactions involving special form requirements (A/CN.9/373, paras. 45-49). A general concern was expressed by certain delegations that the Uniform Rules should not attempt to override mandatory form requirements imposed for reasons of regulatory policy or *ordre public* (see A/CN.9/373, paras. 48-49). A related concern was that an extended definition of "writing" might lead to the undesirable result of validating the dematerialization of instruments for which States might wish to maintain the paper-based form, for example in the area of cheques and securities (see A/CN.9/373, para. 56). It is submitted that, should an extended definition of "writing" be adopted, a general provision should allow States to make exceptions to the definition in the instrument by which they implement the uniform rules at the national level.

8. Draft paragraph (2) would allow States to list specific transactions or areas of law where the use of trade data

messages as a replacement for paper would not be permitted. Such a provision would underscore the fact that, under the uniform rules, trade data messages would normally be acceptable in replacement for paper while the obligation to produce paper documents would result from an exception to that general rule.

Article 7. Functional equivalent of "signature"

(1) Where the signature of a person is required by any rule of law, that requirement shall be deemed to be fulfilled in respect of a trade data message if

(a) a method is used to identify the sender of the message and the mode of identification of the sender is in the circumstances a [commercially] reasonable method of security against unauthorized messages; or

(b) a method for the identification of the sender has been agreed between the sender and the recipient of the message and that method has been used.

(2) In determining whether a method of identification of the sender of a message is [commercially] reasonable, factors to be taken into account include the following: the status and relative economic size of the parties; the nature of their trade activity; the frequency at which commercial transactions take place between the parties; the kind and size of the transaction; the function of signature requirements; the capability of communication systems; compliance with authentication procedures set forth by intermediaries; the range of authentication procedures made available by any intermediary; compliance with trade customs and practice; the existence of insurance coverage mechanisms against unauthorized messages; and any other relevant factor.

(3) The provisions of this article do not apply to the following situations: [...].

References

- A/CN.9/373, paras. 63-76 (twenty-fifth session, 1993)
- A/CN.9/WG.IV/WP.55, paras. 50-63
- A/CN.9/360, paras. 71-75 (twenty-fourth session, 1992)
- A/CN.9/WG.IV/WP.53, paras. 61-66
- A/CN.9/350, paras. 86-89
- A/CN.9/333, paras. 50-59
- A/CN.9/265, paras. 49-58

Remarks

Notions of "signature" and "authentication"

1. While the term "authentication" is commonly used by EDI users, designers of EDI messages and EDI security experts, it may be noted that the question of whether the content of a document is authentic is not to be confused with the question of whether a document is signed, i.e., whether its author is identified. The purpose of draft paragraph (1) is to establish the equivalence of a handwritten signature on the one hand and the use of a method which performs the function of identifying the author of the message on the other hand. Additional rules on "authentication" of the content of the message may be contained in

agreements concluded between EDI users or in other applicable rules of law regarding, for example, testimony by witnesses. In the draft uniform rules, the notion of "authentication" is used in article 10 as an element to be considered in determining the binding nature of the content of a trade data message.

2. An effect of the draft provision is that, where certain data should be signed, the purported sender of such data by means of a trade data message is deemed to be the actual sender of the data and to have fulfilled the signature requirement if a method has been used to identify the sender of the message.

Notion of "commercial reasonableness"

3. The Working Group did not decide whether a "commercially reasonable" method of authentication should be required in all cases or whether parties should be allowed to agree on a less than reasonable method of authentication (see A/CN.9/373, paras. 67-68).

4. Draft paragraph (1) establishes a distinction with a view to protecting third parties or EDI users communicating in the absence of a prior agreement by saying that no unreasonable method of identification of the sender should have weight against them. However, EDI users would be free to agree, as among themselves, on the use of an unreasonable method.

Possibility of derogation

5. As for the equivalent of "writing", States would be free to list specific transactions or areas of law where the use of a method other than signature for identifying the sender of a message would not be permitted (see above, comments 7 and 8 under draft article 6).

Article 8. Functional equivalent of "original"

(1) *Variant A:* A trade data message sent electronically on any medium shall be considered to be an original with the same evidential value as if it was on paper, provided that the following conditions are met: originality is attributed to the message by the originator of the information; the message is signed and bears the time and date; it is accepted as an original, implicitly or explicitly, through the addressee's acknowledgement of receipt.

Variant B: Trade data messages shall not be denied legal recognition solely as a result of the application of a requirement that a document had to be presented in original form.

Variant C: Where it is required by any rule of law that a document be presented in original form, that requirement shall be fulfilled by the presentation of a trade data message or in the form of a printout of such a message if

(a) there exists reliable identification of the originator of the message; and

(b) there exists reliable assurance as to the integrity of the content of the message as sent and received; or

(c) the sender and the recipient of the message have expressly agreed that the message should be regarded as equivalent to a paper original document.

(2) The provisions of this article do not apply to the following situations: [...].

References

- A/CN.9/373, paras. 77-91 (twenty-fifth session, 1993)
- A/CN.9/WG.IV/WP.55, paras. 64-70
- A/CN.9/360, paras. 60-70 (twenty-fourth session, 1992)
- A/CN.9/WG.IV/WP.53, paras. 56-60
- A/CN.9/350, paras. 84-85
- A/CN.9/265, paras. 43-48

Remarks

1. The text of variant A was already used as a basis for discussion by the Working Group at its twenty-fifth session (see A/CN.9/373, paras. 80-86).

2. An original document may be required for evidential or for other purposes. Where an original document is required for evidential purposes, in certain legal systems, the originality of the message determines its admissibility as evidence. This is, for example, the case of the "best evidence rule" in the common law system. In other legal systems, while admissibility might not be an issue and original documents and copies would be equally admissible, the weight carried by the evidence might differ depending upon whether the document is regarded as an original or as a copy. Variant B, the substance of which received support at the twenty-fifth session of the Working Group, would mainly address the question of admissibility of trade data messages as evidence where the presentation of an original document is normally required (see A/CN.9/373, para. 87).

3. An original document may be required for other purposes, for example to incorporate a right of property over the goods described in a negotiable bill of lading. The original nature of the document may thus have an impact on the transferability of rights incorporated in a document of title. A bill of lading, for example, would give title to ownership of the goods only if it is an original. At this stage, the draft uniform rules do not deal with the issue of transferability of rights in an electronic environment. It is expected that the Working Group will examine the issue at a later stage (see below, "Further issues to be considered").

4. Variant C embodies a third approach in favour of which support was expressed at the previous session of the Working Group (see A/CN.9/373, para. 88). It states the conditions under which, where legal consequences flow from the presentation of an original document, similar consequences flow from the presentation of a trade data message.

Notion of presentation

5. Nothing in the draft uniform rules should be interpreted as precluding regulatory authorities from determining what presentation is and what software is to be maintained by EDI users.

Possibility of derogation

6. As for the equivalent to "writing" and "signature" in draft articles 6 and 7, States would be free to list specific transactions or areas of law where the obligation to present a paper original would be maintained (see remarks 7 and 8 above under draft article 6, and remark 5 under article 7).

Article 9. *Evidential value of trade data messages*

(1) *Variant A:* A trade data message shall be admissible as evidence, provided it is reduced to a [tangible] [human readable] form [and provided it is shown that the message has been generated and stored in a reliable manner].

Variant B: In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a trade data message in evidence on the grounds that it was generated [electronically] by a computer or stored in a computer.

(2) A trade data message shall have [evidential value] [the same evidential value as a written document containing the same data] provided it is shown that the message has been generated and stored in a reliable manner.

(3) In assessing the reliability of the manner in which a trade data message was generated and stored, regard shall be had to the following factors: the method of recording data; the adequacy of measures protecting against alteration of data; the adequacy of the maintenance of data carriers; the method used for authentication of the message.

References

- A/CN.9/373, paras. 97-102 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 71-81
 A/CN.9/360, paras. 44-59 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 46-55
 A/CN.9/350, paras. 79-83
 A/CN.9/333, paras. 29-41
 A/CN.9/265, paras. 27-48

Remarks

1. Draft paragraph (1) deals with the question of admissibility of evidence, which may be of particular importance in common law countries. The aim of the provision is to eliminate the need for EDI users to demonstrate by testimony the integrity and reliability of all processing units in the network in order to establish the admissibility of messages before the Courts.

2. Draft paragraph (2) deals with the question of the evidential weight to be carried by data presented in the form of an electronic message. The Working Group was agreed, at its twenty-fifth session that it was neither possible nor desirable to establish detailed statutory rules for weighing the probative value of EDI messages. The aim of the provision is limited to establishing the conditions under which an equivalence is to be recognized to computer data and to data produced in traditional paper form.

Chapter III. Communication of trade data messages

Article 10. *[Binding nature] [Effectiveness] of trade data messages*

(1) A sender [is bound by] [is deemed to have approved] the content of a trade data message [or an amendment or revocation of a trade data message] if it was issued by the sender [on its own behalf] or by another person who had the authority to bind the sender.

(2) When a trade data message [or an amendment or revocation of a trade data message] is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless [bound] [deemed to have approved the content of the message] if

(a) the purported sender and the recipient have agreed to certain authentication procedures;

(b) the authentication is in the circumstances a commercially reasonable method of security against unauthorized trade data messages; and

(c) the recipient complied with the authentication.

(3) The sender and the recipient of a trade data message [are] [are not] permitted to agree that a purported sender is bound under paragraph (2) if the authentication is not commercially reasonable in the circumstances.

(4) A purported sender is, however, not bound under paragraph (2) if it proves that the message as received by the recipient resulted from the actions of a person other than

(a) a present or former employee of the purported sender, or

(b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.

The preceding sentence does not apply if the recipient proves that the trade data message resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

(5) A sender who is bound by the content of a trade data message is bound by the terms of the message as received by the recipient. However, the sender is not bound by an erroneous duplicate of, or an error or discrepancy in, a trade data message if

(a) the sender and the recipient have agreed upon a procedure for detecting erroneous duplicates, errors or discrepancies in a message, and

(b) use of the procedure by the recipient revealed or would have revealed the erroneous duplicate, error or discrepancy.

[Paragraph (5) applies to an error or discrepancy in an amendment or a revocation message as it applies to an error or discrepancy in a trade data message].

References

- A/CN.9/373, paras. 109-115 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 82-86

*Remarks**Chapter III*

1. Draft chapter III contains a number of rules that are intended to apply to communication of trade data messages between commercial parties in the absence of a prior agreement between them. These rules are of a kind generally found in communication agreements. The Working Group may wish to decide to what extent rules in that area could be deviated from by contract.

Article 10

2. The text of draft article 10 is based on article 5 of the UNCITRAL Model Law on International Credit Transfers. The effect of the provision is that the purported sender is taken to have approved the content of the message as received if an authentication procedure has been used.

3. The Working Group may wish to discuss whether the issues of revocation or amendment of the content of trade data messages should be dealt with under the uniform rules.

Article 11. Obligations subsequent to transmission

(1) This article applies when:

(a) senders and recipients of trade data messages have agreed on the use of acknowledgements of receipt of messages;

(b) the use of acknowledgements of receipt of messages is requested by an intermediary;

(c) the sender of a trade data message requests an acknowledgement of receipt of the message in the message or otherwise.

(2) Any sender may request an acknowledgement of receipt of the message from the recipient.

(3) *Variant A:* [The recipient of a message requiring an acknowledgement shall not act upon the content of the message until such acknowledgement is sent.] [The recipient of a message requiring an acknowledgement who acts upon the content of the message before such acknowledgement is sent does so at its own risks.]

(6) If the sender does not receive the acknowledgement of receipt within the time limit [agreed upon, requested or within reasonable time], he may, upon giving prompt notification to the recipient to that effect, treat the message as null and void.

Variant B: An acknowledgement, when received by the originating party, is [conclusive] [presumptive] evidence that the related message has been received [and, where confirmation of syntax has been required, that the message was syntactically correct]. [Whether a functional acknowledgement has other legal effects is outside the purview of these Rules.]

References

A/CN.9/373, paras. 116-122 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 87-93

A/CN.9/360, para. 125 (twenty-fourth session, 1992)

A/CN.9/WG.IV/WP.53, paras. 80-81

A/CN.9/350, para. 92

A/CN.9/333, paras. 48-49

*Remarks**Notion of "functional acknowledgement"*

1. The draft article contains no definition of an acknowledgement of receipt. It is submitted that the concept of acknowledgement is self-explanatory. However, as an example of a possible definition of "acknowledgement", it may be noted that the following is being considered in the preparation of the European Model EDI Agreement:

"The acknowledgement of receipt of a message is the procedure by which, on receipt of the message, the syntax and semantics are checked, and a corresponding acknowledgement is sent."

However, while such a definition may be suitable for EDI technique, it might not be applicable to less advanced communication techniques.

Article 12. Formation of contracts

(1) A contract concluded by means of trade data messages shall not be denied legal [validity] [recognition] [and parties to that contract may not contest its validity] on the sole ground that the contract was concluded by such means.

(2) A contract concluded by means of trade data messages is formed at the time [and place] where the message constituting acceptance of an offer is received by the recipient.

References

A/CN.9/373, paras. 126-133 (twenty-fifth session, 1993)

A/CN.9/WG.IV/WP.55, paras. 95-108

A/CN.9/360, paras. 76-95 (twenty-fourth session, 1992)

A/CN.9/WG.IV/WP.53, paras. 67-78

A/CN.9/350, paras. 93-108

A/CN.9/333, paras. 60-75

Remarks

1. It may be noted that the draft provision may affect the substance of the underlying commercial transaction in that it deals with the existence and validity of a contract concluded by means of trade data messages. The Working Group may wish to decide whether, in the area of contract formation, the uniform rules should deviate from the principle set forth in article (1) according to which the uniform rules should focus on the exchange and storage of data (see above, comment 5 under draft article (1)).

Article 13. Receipt of trade data messages

A trade data message is received by its recipient

Variant A: at the time when it [reaches] [enters] [is made available to and is recorded by] the [computer system] [mailbox] [address] of [or designated by] the recipient.

Variant B: (a) at the time when the message is recorded on the computer system directly controlled by the recipient in such a way that it can be retrieved; and

(b) at the place where the recipient has its place of business.

References

- A/CN.9/373, paras. 134-146 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 95-108
 A/CN.9/360, paras. 76-95 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 67-78
 A/CN.9/350, paras. 93-108
 A/CN.9/333, paras. 60-75

Remarks

1. While the question of the time and place of receipt of a message has been previously discussed by the Working Group in the context of formation of contracts, it is submitted that a general provision should deal with the time of receipt of all messages, irrespective of the purpose for which they are sent.
2. As to the place where messages are received, a suggestion was made at the twenty-fifth session of the Working Group that the relevant place was the place where the recipient kept its computer facilities. However, it was generally felt that, in many instances, that place would be irrelevant since the country in which the recipient kept its computer facilities might have no other connecting factor to the transaction or to the parties.
3. The draft provision provides a rule for determining the time and place of receipt of a message. It is not intended to deal with the question of whether a message received has legal effects.
4. The draft provision does not affect the possible application of other rules of law to demonstrate receipt of a message.

Article 14. *Recording and storage of trade data messages*

(1) *Variant A:* This article applies where records are required to be kept by applicable legislation or regulation or by any contractual provisions.

Variant B: Subject to any contrary requirement in legislation, where a requirement exists with respect to the retention of records, that requirement [shall] [may] be satisfied if the records are kept in the form of trade data messages provided that the requirements contained in paragraphs (2) and (3) of this article are satisfied.

(2) Trade data messages shall be stored by the sender in the transmitted format and by the recipient in the format in which they are received.

(3) Electronic or computer records of the messages shall be kept readily accessible and shall be capable of being reproduced in a human readable form and, if required, of being printed. Any operational equipment required in this connection shall be retained.

References

- A/CN.9/373, paras. 123-125 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, para. 94

Remarks

1. At its twenty-fifth session, the Working Group generally felt that it would be desirable to have a rule validating storage of records in electronic or similar form, since the rule would increase opportunities for reducing the cost of storage of records (see A/CN.9/373, para. 124).
2. However, the draft provision is intended to make it clear that States should not be obliged to modify specific national requirements on the keeping of records. In particular, supervisory authorities should not bear the cost of maintaining the equipment needed to make the data stored readable in a human language.

[Article 15. *Liability*

(1) Each party shall be liable for damage arising directly from failure to observe any of the provisions of the uniform rules except in the event where the party is prevented from so doing by any circumstances which constitute an impediment beyond that party's control and which could not reasonably be expected to be taken into account at the time when that party engaged in sending and receiving EDI messages or the consequences of which could not be avoided or overcome.

(2) In no event shall either party be liable for special, indirect, or consequential damage.

(3) If a party engages any intermediary to perform such services as the transmission, logging or processing of a message, the party who engages such intermediary shall be liable for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.

(4) If a party requires another party to use the services of an intermediary to perform the transmission, logging or processing of an EDI message, the party who requires such use shall be liable to the other party for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.]

References

- A/CN.9/373, paras. 148-152 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 114-123
 A/CN.9/360, paras. 97-103 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 82-83
 A/CN.9/350, paras. 101-103
 A/CN.9/333, para. 76

Remarks

1. The question of including a possible rule on liability in the uniform rules was only touched upon briefly by the Working Group at the end of its twenty-fifth session. The text of draft article 15 was drawn from the European Model

EDI Agreement prepared in the context of the TEDIS programme carried out within the Commission of the European Communities (see A/CN.9/350, paras. 11-26). This text has been included in the draft uniform rules as an illustration of a provision prepared against the background of a variety of legal systems and reflecting a possible approach to the issue of liability. The Working Group may wish to use this text as a basis for discussion.

2. It may be noted, however, that the text of the draft article was prepared in the form of a model contractual clause and, as such, may not be suitable for direct inclusion in a text of a statutory nature such as the uniform rules.

2. *Proposal by the United Kingdom of Great Britain and Northern Ireland: note by the Secretariat* (A/CN.9/WG.IV/WP.58) [Original: English]

1. At the twenty-fifth session of the Working Group, the delegation of the United Kingdom made a number of proposals for the drafting of the uniform rules on the legal aspects of electronic data interchange being prepared by the Working Group. Those suggestions dealt with the conditions in which alternative means might be deemed to satisfy legal requirements for: (1) an instrument in writing; (2) signature; and (3) the production of an original document (see A/CN.9/373, paras. 60, 76 and 91).

2. Following the twenty-fifth session of the Working Group, the Secretariat received from the delegation of the United Kingdom a revised set of proposals, with explanatory notes. The draft rules proposed by the United Kingdom together with the explanatory notes are reproduced in the annex to this note as they were received by the Secretariat.

ANNEX

A. *Writing*

(1) Where, by virtue of any enactment or rule of law, certain legal consequences of any matter are determined by reference to whether information is recorded in writing or in legible form, it shall be sufficient for the purpose of that enactment or rule if the information is recorded in such a manner as to be capable of being produced in the form of [textual or other] visual images which:

- (i) precisely correspond to that information; and
- (ii) are no less satisfactory for any relevant purpose that would be served if the information had been recorded in writing or in legible form.

(2) Where it is necessary for the purpose of any enactment or rule of law or any question of evidence that a record be produced in writing or in legible form, it shall be sufficient for that purpose if a record of information recorded in the manner described in paragraph (1) above is produced in the form of [textual or other] visual images which satisfy subparagraphs (i) and (ii) of that paragraph.

B. *Authentication*

(1) This article applies where the signature of any person is of significance for the purpose of any enactment or rule of law, any question of evidence, any contract or any other matter.

III. FURTHER ISSUES TO BE CONSIDERED

The Working Group may wish to discuss whether further issues should be dealt with in the uniform rules. Among such issues, the Working Group agreed, at its twenty-fifth session, to consider the question of liability of third-party service providers and the question of documents of title and securities. The Working Group may wish to consider what steps should be taken to address those issues. In addition, the Working Group may also wish to discuss the question of the possible interplay of the uniform rules with legal rules on personal data protection that might exist in certain countries.

(2) In this article, an "authentication" means any device which purports to indicate by whom a communication or record was made or issued and that person's approval of the information contained therein.

(3) An authentication which purports to have been applied by or on behalf of the person whose signature is relevant shall be sufficient for the purpose in question in place of signature if:

- (i) it is evidence that it was applied by that person or its agent (whether or not authorized for the purpose); and
- (ii) as such evidence, is no less reliable than signature, or (except where signature would otherwise be required by law) is as reliable as was appropriate in all the circumstances to the purpose for which the record or communication was made.

(4) In so far as it applies in relation to any enactment or rule of law, paragraphs (1) to (3) above may not be excluded or modified by any legally enforceable undertaking or agreement.

C. *Transactions effected by signed writing*

(1) This article applies where, by virtue of any enactment or rule of law, the legal effect of any transaction is determined by reference to whether it is effected by writing and signature.

(2) A record, which by virtue of articles A and B above is to be treated as sufficient for the purpose of any condition as to writing and signature which applies to a transaction referred to in paragraph (1) above, shall be taken to confer on the transaction such legal effect as would be conferred by writing and signature only as from the time when the record is in a form which complies with subparagraphs (i) and (ii) of articles A(1) and B(3).

D. *Requirement of an original*

(1) This article applies where:

- (i) it is necessary for the purpose of evidence or of any enactment or rule of law that an original record be produced; and
- (ii) information has been recorded other than in the form of visual images.

(2) In any legal proceedings it shall be sufficient for the purpose of the application of any rule of evidence referred to in paragraph (1)(i) above that the record sought to be adduced in evidence is the best evidence that the person adducing it could reasonably be

expected to obtain; but nothing in this paragraph shall affect any question as to the weight to be accorded to that evidence.

(3) Subject to paragraph (2) above, it shall be sufficient for any purpose referred to in paragraph (1)(i) above if a record is produced in a form:

- (i) the information in which precisely corresponds to the information originally recorded; and
- (ii) which is no less satisfactory for any relevant purpose that would be served by the production of an original record.

E. Information corresponding to the original recording

(1) For the purpose of articles A and D above, a record shall be taken to be in a form the images or information in which correspond precisely to the information as it was recorded if, notwithstanding any alternation in the form of the record, the content of the information originally recorded has been precisely replicated.

(2) For the purpose of paragraph (1) above, unless the contrary is shown, the content of the information shall be presumed to have been precisely replicated if the ultimate record derives from the original recording by an unbroken chain or reproduction, and at all material times the following remained unaltered:

- (i) the original recording;
- (ii) the ultimate record in question; and
- (iii) any intermediate reproduction of the original recording, from which the ultimate record was directly or indirectly reproduced.

[F. Exclusions

Articles A to E above do not apply for the purpose of any enactment or rule of law or any question of evidence in so far as those articles relate to a negotiable instrument or a share certificate.]

G. Burden of proof

Where an issue arises as to whether any condition in articles A, B, D or E above is satisfied, it is (subject to paragraph (2) of article E) for the person who claims that the paragraph is satisfied to show that it is.

Notes on UK Draft

Generally

The rules under consideration by the Working Group fall into two distinct categories.

One set of rules deals with the conditions in which legal requirements for writing, signature and an original document may be taken to be satisfied by alternative means. The UK draft only covers rules of this kind. In this category also (but not addressed by the UK version) would fall provisions about the evidential admissibility and weight of records generated by or stored in a computer.

For the purpose of this category of rules, no definition of EDI or electronic transmission is necessary. Neither is any internationality test necessary. The matters dealt with by the rules are necessarily more general in scope: they are concerned with the legal formalities which apply to records and communications generally. They are not merely concerned with regulating the relationship between sender and recipient, but rather with independent statutory and other legal requirements. It is for consideration whether this category of rules might be treated separately as "Part I" of any Model Law.

The second category (which would then become "Part II") might consist of rules governing the relationship between sender and recipient: e.g. the extent to which a sender of an electronic communication is to be taken to have approved the content of that message if it purports to be authenticated by him, the time when a message is to be taken to be received, the consequences of failing to acknowledge receipt when requested to do so etc. If any definition of EDI or internationality is necessary, it is only relevant to this part of the Model Law.

Writing: Article A

Paragraph (1) deals with requirements that information be recorded in writing; paragraph (2) deals with requirements that written records be produced (e.g. in court or to administrative authorities). In the first case, it is sufficient if the information is recorded in such a manner as to be *capable* of being produced in the form of visual images which satisfy conditions (i) and (ii). In the second case the record produced must satisfy conditions (i) and (ii), and not merely be "capable" of doing so. Article G puts the burden of showing that these conditions are satisfied on the person who claims that they are.

Condition (i) requires an assurance as to the integrity of the record from the time that the information was recorded. This is necessary, because, in contrast to the case where the information is originally recorded in writing, a computer print-out is unlikely to have been made at the time that the information was recorded. Furthermore, it is likely to be more difficult to detect (from a computer print-out) that the electronic recording has been altered in the interval between the time that the information was recorded and the time that the record (the computer print-out) was produced. Article E applies for the purpose of interpreting condition (i).

Condition (ii) of article A(1) is a condition as to "functional equivalence". It is essentially directed at excluding the operation of paragraph (1) in circumstances where a paper document has certain functions which could not be fulfilled by an electronic record. It is true that many of these may be capable of specific exclusion: for example, cheques and other negotiable instruments. There may, however, be other cases where a paper document is required because what is needed is a record that is capable of delivery. In some cases it may be that what is required is something capable of endorsement (in the sense of signature on the reverse side of the written document); and there may be requirements for sealing or other formalities which presuppose a paper document. Condition (ii) would also require the visual images produced to be legible to the same extent as the written document would have been. It is a question of fact in each case whether the alternative (electronic) record serves all the functions which the requisite paper document was intended to serve.

Authentication: Article B

This article precludes any objection (whether by the recipient of a message, the authorities enforcing a requirement of public law or a third party) that the message was not signed, if it was authenticated in a manner no less reliable than signature. It applies in relation to requirements for signature which are imposed by law or by any contract, and to the need for signature for the purpose of any question of evidence or any other matter.

The article distinguishes in one respect between (i) requirements of law, and (ii) any other need for signature. In relation to requirements of law, the condition specified in subparagraph (ii) is that the authentication is "no less reliable than signature". For any other purpose, however, it will be sufficient, where it cannot be shown that the authentication was no less reliable than signature, if it can instead be shown that the authentication is as reliable as was appropriate in all the circumstances to the purpose for which the record or communication was made. This distinction

is necessary, because in relation to requirements of law neither party should be free to substitute its own criteria of reliability in place of the standard required by the law, whereas in other contexts the appropriate standard of reliability may depend on the circumstances.

The words in condition (i) "(whether or not authorized for the purpose)" refer to the possibility that an officer, employee or other appointed agent of a company may not be authorized to sign or authenticate a particular manager on behalf of the company; the rule does not affect any issue as to whether he is authorized for that purpose.

Article G puts the onus of showing that the authentication was no less reliable than signature on the person who claims that it was, if the issue is disputed.

(Note that putting the burden of proof on the person claiming that the authentication was no less reliable than signature does not affect the operation of any principle of estoppel as against a sender who seeks to escape from a contract or other obligation on the grounds that he never actually signed the message (although it was authenticated by him). Where the recipient is unable to show that the sender's authentication was no less reliable than signature, or that it was as reliable as was appropriate for the relevant purpose, it would still be possible for the recipient to rely upon any estoppel that would otherwise apply against a sender who has authenticated the message).

Paragraph (4) is drafted on the assumption that the Model Law will include a general provision to the effect that, *except as otherwise provided*, the rights and obligations of a sender or recipient under the rules contained in the Model Law may be varied by their agreement.

Transactions effected by signed writing: article C

This deals with the case where a legal transaction *can only be validly effected* by signed writing. It ensures that a condition as to signed writing is only satisfied by virtue of articles A and B as from the time when the information is in a form which satisfies the conditions in those articles. The situation contemplated is where (i) the existing law states that a transaction is only valid if it is in writing and the written document is signed, and (ii) a particular transaction is effected informally and only subsequently recorded by an authenticated computer record. In such a case, article C prevents articles A and B having the effect that the computer record could *retrospectively* (as from the date of the transaction) have the same legal effect as would have been conferred by signed writing at that date. It should only have that legal effect as from the time when the authenticated electronic record exists.

Requirement of an original: article D

Paragraph (2) applies for the purpose of the rules of evidence which apply to proceedings in court. It makes it clear that evidence will not be excluded on the grounds that it does not consist of an original document, provided that the best evidence rule is satisfied. The weight of any document admitted in this manner is left to the court to assess, and this article does not affect that assessment.

Paragraph (3) applies for the purpose of (i) requirements of law generally (as distinct from rules of evidence applicable to

proceedings in court) and (ii) any question of evidence outside court. It is subject to the rule in paragraph (2) about the rules of evidence which apply in court.

Condition (i) provides an assurance as to the integrity of the record as from the time that the information was recorded. This condition is interpreted by article E.

Condition (ii) is a condition as to the "functional equivalence" of the record sought to be produced. Condition (ii) is necessary because the purpose of the requirement for an original may not be merely as an assurance of the authenticity or integrity of the information. It may also be required for some other purpose, for example as a protection against the fraudulent re-use of a document which entitles the bearer to claim payment, or as an assurance that title has not previously been transferred to another person. Again, it is a question of fact whether the electronic document serves all the functions which the requisite paper document was intended to serve.

Assurance as to the integrity of the record: article E

This article applies for the purpose of interpreting articles A and D. It provides a test as to the integrity of a record since the time that the information was recorded. It distinguishes between an alteration to the *form* of the record and an alteration to the *content* of the information recorded. Only the latter should be regarded as detracting from the integrity of the information.

Article G puts the onus of showing that these conditions are satisfied on the person who claims that they are, but if it can be shown that the conditions in paragraph (2) are satisfied, a rebuttable presumption arises that the condition in paragraph (1) is satisfied. The process of reproduction referred to in paragraph (2) may be the production of a computer print-out, or it may be the photographic copying of this print-out.

(Note that any altered record may also satisfy the requirement for an original, but it will only be an authentic record of the original information *as amended*. This reflects the ordinary position with documents in writing. For example, where an agreement in writing has been varied, the record of the variation may be as much as "original" as the record of the initial agreement; but it will only be an original record of the variation, not of the initial agreement).

Exclusions: article F

This article excludes negotiable instruments and share certificates from the application of these rules. In the context of negotiable instruments, requirements for writing, signature and an original document serve an additional purpose. Signature may be a method of transferring title by means of endorsement. The requirement for an original provides an assurance that title has not previously been transferred to a third party.

It is considered that this article is not strictly necessary in view of condition (ii) of articles A(1) and D(1), and for that reason it appears in square brackets. The Working Group will wish to consider (a) whether it is desirable to make specific exclusions of this kind or whether it is preferable to rely on condition (ii); and (b) if there are to be specific exclusions, whether the list should be extended.

C. Report of the Working Group on Electronic Data Interchange (EDI) on the work of its twenty-seventh session

(New York, 28 February-11 March 1994) (A/CN.9/390) [Original: English]

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-12
I. DELIBERATIONS AND DECISIONS	13-14
II. CONSIDERATION OF DRAFT PROVISIONS FOR UNIFORM RULES ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF DATA COMMUNICATION	15-153
General remarks	15
Title	16-20
CHAPTER I. GENERAL PROVISIONS	21-78
Article 1. Sphere of application	21-33
Footnote to chapter I	34-40
Footnote to article 1	41-43
Article 2. Definitions	44-65
Article 3. Interpretation of the Uniform Rules	66-73
Article 4. [Deleted]	
[Article 5. Variation by agreement]	74-78
CHAPTER II. FORM REQUIREMENTS	79-143
Article 5 <i>bis</i>	79-87
Article 6. Functional equivalent of "writing"	88-96
Article 7. Functional equivalent of "signature"	97-109
Article 8. Functional equivalent of "original"	110-138
Article 9. Admissibility and evidential value of trade data messages	139-143
CHAPTER III. COMMUNICATION OF DATA [RECORDS] [MESSAGES] ..	144-153
Article 10. Effectiveness of data [records] [messages]	144-153
III. FUTURE WORK	154-161

INTRODUCTION

1. At its twenty-fourth session (1991), the Commission agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field. The Commission agreed that the matter needed detailed consideration by a Working Group.¹

2. Pursuant to that decision, the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of EDI. The report of that session of the Working Group suggested that the review of legal issues arising out of the increased use of EDI had demonstrated

that among those issues some would most appropriately be dealt with in the form of statutory provisions (A/CN.9/360, para. 129). As regards the possible preparation of a standard communication agreement for worldwide use in international trade, the Working Group decided that, at least currently, it was not necessary for the Commission to develop a standard communication agreement. However, the Working Group noted that, in line with the flexible approach recommended to the Commission concerning the form of the final instrument, situations might arise where the preparation of model contractual clauses would be regarded as an appropriate way of addressing specific issues (A/CN.9/360, para. 132). The Working Group reaffirmed the need for close cooperation between all international organizations active in the field. It was agreed that the Commission, in view of its universal membership and general mandate as the core legal body of the United Nations system in the field of international trade law, should play a particularly active role in that respect (A/CN.9/360, para. 133).

¹Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 314-317.

3. At its twenty-fifth session (1992), the Commission considered the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed, along the lines suggested by the Working Group, that, while some issues would most appropriately be dealt with in the form of statutory provisions, other issues might more appropriately be dealt with through model contractual clauses. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (A/CN.9/360, paras. 129-133), reaffirmed the need for active cooperation between all international organizations active in the field and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.²

4. At its twenty-sixth session (1993), the Commission had before it the report of the Working Group on Electronic Data Interchange on the work of its twenty-fifth session (A/CN.9/373). The Commission expressed its appreciation for the work accomplished by the Working Group. The Commission noted that the Working Group had started discussing the content of a uniform law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text.

5. It was suggested that, in addition to the work currently under way in the Working Group, there existed a need for considering particular issues that arose out of the use of EDI in some specific commercial contexts. The use of EDI in procurement and the replacement of paper bills of lading or other documents of title by EDI messages were given as examples of topics that merited specific consideration. It was also suggested that the Commission should set a time-limit for the completion of its current task by the Working Group. The widely prevailing view, however, was that the Working Group should continue to work within its broad mandate established by the Commission. It was agreed that, only after it had completed its preparation of general rules on EDI, the Working Group should discuss additional areas where more detailed rules might be needed.³

6. The Working Group on Electronic Data Interchange held its twenty-sixth session at Vienna, from 11 to 22 October 1993. At that session, the Working Group considered the issues discussed in a note by the Secretariat (A/CN.9/WG.IV/WP.57) and a proposal made by the delegation of the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.58). The Secretariat was requested to prepare, on the basis of the deliberations of the Working Group, a set of revised articles, with possible variants, on the issues discussed.

7. The Working Group on Electronic Data Interchange, which was composed of all States members of the Commission, held its twenty-seventh session in New York,

from 28 February to 11 March 1994. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Bulgaria, Cameroon, Canada, Chile, China, Denmark, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

8. The session was attended by observers from the following States: Algeria, Australia, Bahrain, Bolivia, Czech Republic, Côte d'Ivoire, Finland, Indonesia, Myanmar, Pakistan, Panama, Philippines, Republic of Korea, Senegal, Sierra Leone, Sweden, Switzerland, Turkey, Ukraine and Zambia.

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

- (a) *United Nations bodies*
United Nations Conference on Trade and Development (UNCTAD)
- (b) *Intergovernmental organizations*
Asian-African Legal Consultative Committee (AALCC)
Economic Commission for Europe (ECE)
European Community (EC)
Hague Conference on Private International Law
- (c) *Other international organizations*
Cairo Regional Centre for International Commercial Arbitration
Federación Latinoamericana de Bancos (FELABAN)
International Chamber of Commerce (ICC)
Organization of Islamic Capitals and Cities (OICC)
Society for Worldwide Interbank Financial Telecommunication (SWIFT)

10. The Working Group elected the following officers:

- Chairman:* Mr. José-María Abascal Zamora (Mexico)
- Rapporteur:* Mr. Abdolhamid Faridi Araghi (Islamic Republic of Iran)

11. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.59) and a note by the Secretariat containing a revised draft of uniform rules on the legal aspects of electronic data interchange (EDI) and related means of data communication (A/CN.9/WG.IV/WP.60).

12. The Working Group adopted the following agenda:

- 1. Election of officers.
- 2. Adoption of the agenda.
- 3. Uniform rules on the legal aspects of electronic data interchange (EDI) and related means of data communication.
- 4. Other business.
- 5. Adoption of the report.

²Ibid., *Forty-seventh Session, Supplement No. 17 (A/47/17)*, paras. 140-148.

³Ibid., *Forty-eighth Session, Supplement No. 17 (A/48/17)*, paras. 265-267.

I. DELIBERATIONS AND DECISIONS

13. The Working Group discussed draft articles 1 to 10 as set forth in the note by the Secretariat (A/CN.9/WG.IV/WP.60).

14. The deliberations and conclusions of the Working Group are set forth below in chapter II. The Secretariat was requested to prepare, on the basis of those deliberations and conclusions, a set of revised articles, to implement the decisions and conclusions of the Working Group.

II. CONSIDERATION OF DRAFT PROVISIONS FOR UNIFORM RULES ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF DATA COMMUNICATION

General remarks

15. The Working Group noted with interest an observation that was made concerning the appearance of common, EDI-related issues in a number of areas of possible future work by the Commission. A specific example cited was the mechanism of a "registry", which might come to be a technique used to support international-trade-law-based solutions in diverse areas such as assignment of claims, securities transactions and paperless negotiable instruments, including documents of title. It was suggested that one response to this phenomenon by the Commission might be to formulate a general legal framework for registries. It was noted that the Working Group might wish to consider this question in the context of further deliberations on possible other issues to be dealt with upon the completion of its current work (see below, paragraphs 154-160). Such other issues might also include the preparation of a model communication agreement and questions related to the liability of third-party service providers.

Title

16. The reference in the title to "uniform rules" gave rise to a review by the Working Group of its earlier decision to formulate a legal text in the form of statutory rules (A/CN.9/387, para. 2). It was widely agreed that the term "uniform rules" was inappropriate as it suggested a legal instrument in the nature of contractual rules of practice, when what was needed was statutory support of the practice of EDI. As to the exact form of the statutory rules, a decision that had previously been deferred, the Working Group expressed a preference for the form of a model law. It did so in view in particular of the complexity and time involved in formulating and implementing an international convention, difficulties that were disadvantageous in view of the urgent need for statutory rules in this area.

17. While it was agreed that the form of the text should be that of a model law, and that this needed to be indicated clearly in the title, it was widely felt that, owing to the special nature of the legal text being prepared, a more flexible term than "model law" needed to be found. It was observed that a more flexible term was needed in order to reflect that the text contained a variety of provisions relating to existing rules scattered throughout various parts of different national laws in a typical enacting State. It was

thus a possibility that enacting States would not necessarily incorporate the text as a whole and that the provisions of the model law would not necessarily appear together in any one particular place in the national law. The text could be described, in the parlance of one legal system, as a "miscellaneous statute amendment act". The Working Group agreed that this special nature of the text would be better reflected by the use of the term "model statutory provisions". The view was also expressed that the nature and purpose of the model statutory provisions could be explained in an introduction or guidelines accompanying the text.

18. A number of misgivings were expressed as to the remainder of the title. They included: discomfort with the words "the legal aspects", which were described as being too vague for the title of a legislative text and, alternatively, were said to create the mistaken impression that the text dealt with all the legal issues that might be related to the use of EDI; the use of the word "data", which might be suitable for the informal discussions of the Working Group, but was said to be too narrow and unclear to be included in a legal text (see below, paragraph 46); the use of the word "communication", which was felt to be too narrow and appeared to prejudge decisions still to be made by the Working Group as to the scope of the model statutory provisions; the possible inadequacy of the reference at the end of the title to "related means of data communication"; and the potentially broad scope of transactions and activities to which the words "data communication" could be understood to refer.

19. Various proposals were made aimed at addressing those concerns, while reflecting the common understanding that the title should take into account various possible technologies and combinations of technologies, along with the essential element of durable recording. Those proposals included the use of expressions such as: "data recording"; "computer-based records in commerce"; "electronic commerce"; "exchange of electronic documents"; "using non-paper-based technologies"; "paperless recording and communication of information".

20. Following deliberations, the Working Group was of the view that it would not be possible to fix a final formulation of the title until the content of the model statutory provisions, in particular the provisions relating to scope, had been considered and developed further. It was noted that, for the purposes of a working title, the term "electronic commerce" might be used, though it was observed that the use of the term "commerce" in the title raised questions relating to the scope of application of the model statutory provisions (see below, paragraphs 22-27).

Chapter I. General provisions

Article 1. Sphere of application

First sentence

21. The Working Group discussed whether the words between square brackets ("commercial and administrative") should be retained. With respect to the reference to

"administrative information", it was generally felt that the model statutory provisions should not expressly deal with the situations where a form requirement was prescribed by an administration for reasons of public policy. It was thus decided that the reference to "administrative information" should be deleted. A view was expressed that the text should contain express wording excluding administrative information from the scope of the model statutory provisions. The Working Group, however, reaffirmed the decision made at its previous sessions that the sphere of relationships between EDI users and public authorities should not be excluded from the scope of the model statutory provisions (A/CN.9/373, para. 48 and A/CN.9/387, para. 35).

22. Divergent views were expressed with respect to the use of the notion of "commercial information". One view was that the model statutory provisions should somehow be limited in scope to data created, stored or exchanged for the purposes of commercial transactions. It was stated that such a limitation would appropriately reflect the general mandate of the Commission with respect to international trade law. It was considered, however, that the reference to the notion of "commercial information" might make it necessary to define that notion in the model statutory provisions. Suggestions were made to provide such a definition either by listing certain types of transactions as "commercial transactions" or by listing certain types of parties as "merchants". It was widely felt that either of those two approaches might raise difficulties in the context of an international instrument since existing national laws might differ as to which types of transactions would be regarded as "commercial" and which types of parties would be regarded as conducting a "commercial" activity. In that connection, it was suggested that, even if the model statutory provisions were generally limited in scope to "commercial information", a provision might be needed to make them applicable to certain data and transactions that might not be regarded as commercial, for example medical data, and to certain categories of professionals that might not be regarded, in many legal systems, as merchants.

23. The contrary view was that any reference to "commerce" or "trade" should be avoided. In support of that view, it was stated that such a reference might raise difficulties, since certain common-law countries, as well as certain civil-law countries, did not have a discrete body of commercial law, and it was not easy or usual in such countries to distinguish between the legal rules that applied to "trade" transactions and those that applied more generally. Other examples were given of countries where the notion of "trade" was not commonly used and might raise a question as to its definition. On the other hand, examples were also given of countries where the notion of "trade" might be already in use in national legislation and might be interpreted differently according to the country in which the notion was used. It was stated that previous UNCITRAL legal texts had avoided unnecessary references to such notions as "trade" or "commerce", while the UNCITRAL Model Law on International Commercial Arbitration, which contained such references, also provided a definition of the term "commercial". It was recalled that the same concern had been expressed at the previous session of the Working Group (A/CN.9/387, para. 34).

24. In favour of deletion of any reference to "commercial information", it was also stated that the focus of the model statutory provisions should not be on any specific category of transactions, e.g., commercial transactions in the context of which various computer-based techniques might be used, but rather that it should be on those techniques themselves, whose common feature was that they were not paper-based. It was thus suggested that the text should contain a reference to "paperless creation, recording and communication of information".

25. It was further stated that, should the model statutory provisions apply only to commercial transactions, such a limitation in scope would be inconsistent with the broad formulation of draft articles 6-9, which were intended to provide alternative ways of complying with existing requirements of national law. It was suggested that the scope of the model statutory provisions should cover the full scope of such national requirements, not all of which were intended to apply in a commercial context. For example, it was stated that, in certain jurisdictions, there existed mandatory requirements that all guarantees be established in writing. It was stated that a distinction between "commercial" and "non-commercial" guarantees, cutting across such a legal regime, would establish an unnecessary dichotomy. Another suggestion was made that the scope of the model statutory provisions should cover all kinds of relationships under which parties were free to determine their contractual rights and obligations, to the exclusion of relationships where such rights and obligations were determined by mandatory rules of law.

26. The view was expressed that, should the reference to "commercial information" be deleted, the text might need to be reworked so as not to result in a mere reference to the notion of "data [record] [message]" as defined under draft article 2(a). Several alternative wordings were proposed for the first sentence. Such proposed wordings included: "These Rules apply to electronic information in the form of data or messages"; "These Rules apply to information related to transactions"; and "These rules apply to computer-based transactions intended to have legal effect". With respect to the proposed reference to the notion of "transaction", it was recalled that the Working Group had agreed at previous sessions that the focus of the model statutory provisions was on data messages or records and not on the underlying transaction.

27. While considerable support was expressed in favour of deletion of any reference to "commercial information", the Working Group decided that the reference should be maintained in square brackets and that the discussion should be reopened at a later meeting, after the substantive model statutory provisions had been reviewed.

Second sentence

28. The Working Group discussed whether the second sentence of draft article 1, stating that the model statutory provisions "do not apply to purely oral or purely [documentary] [written] information" should be retained.

29. It was stated that the meaning of both the terms "written" and "documentary" was not sufficiently clear. The term "paper-based information" was suggested as an

alternative. It was pointed out, however, that that term might not encompass certain forms in which information might appear, which should be excluded from the scope of application of the model statutory provisions, such as microfiche. It was therefore suggested that a reference to "digitalized information", i.e., information that could be processed by means of a computer, would be preferable.

30. The prevailing view, however, was that the second sentence of draft article 1 should be deleted. Reasons given in support of deletion of the sentence included: that the model statutory provisions should specify the cases in which they would apply, and for that purpose draft article 2(a), defining "data record" or "data message", should be sufficient; that a negative definition of the scope of application of the model statutory provisions, such as the exclusion of written or documentary information, might be confusing, since it would not be clear whether only written or documentary information, or other information as well, would be excluded; that such a negative definition of the scope of application might be inappropriate, since it might have the adverse effect of excluding certain kinds of information in written or documentary form, such as telegrams and teletypes, which should not be excluded.

Third sentence

31. Differing views were expressed as to whether the third sentence of draft article 1 ("Except as otherwise provided in these Rules, they do not apply to the substance of the information") should be retained.

32. One view was that the sentence should be retained since it provided a useful rule of interpretation under which the burden of proof that the rules applied to the substance of a given information would be on the person raising such an argument. Another view was that the sentence should be retained, but slightly modified by replacing the word "substance", which was not sufficiently clear, by "contents" or by "rights and obligations arising from the underlying transaction". Yet another view was that the sentence should be rephrased to define the sphere of application in a positive manner.

33. The prevailing view, however, was that the sentence should be deleted. In support of deletion, it was stated that the sentence was superfluous, since the principle that the model statutory provisions would not apply to the rights and obligations arising from the underlying transaction was self-evident. However, it was also stated by proponents of deletion that there were cases in which the model statutory provisions would apply to matters of substance of the information (e.g., draft article 12 dealing with the formation of contracts) and that the matter should be dealt with in each relevant article rather than in a general article defining the sphere of application of the model statutory provisions. It was also stated that whether the model statutory provisions applied to the substance of the underlying transaction was a matter to be determined by other applicable rules of national law, since there might be cases in which the trier of fact would have to consider the substance of the information in order to determine whether the model statutory provisions would apply.

Footnote to chapter I

34. The Working Group considered the question whether the issue of the relationship of the model statutory provisions to consumer protection law should be dealt with in a footnote or in the text of the model uniform provisions.

35. The view was expressed that dealing with the matter in a footnote was not appropriate. It was stated that, in a number of countries, footnotes to statutory texts were not used and the legal effect of such a footnote would be uncertain. It was thus suggested that the matter should be dealt with in the text of draft article 1 proper. It was also stated that the need to define the notion of "consumer" could be circumvented through the use of wording based on article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods, which provided that the Convention did not apply to "sales of goods bought for personal, family or household use". In this context, a rule along the following lines was suggested: "Personal or household matters are out of the scope of application of the model statutory rules."

36. In response, it was recalled that, at its previous sessions, the Working Group had decided that the issue should be dealt with in a footnote, in particular since it would be impractical to attempt to provide a uniform definition of the notion of "consumer" (see A/CN.9/387, para. 28 and A/CN.9/373, para. 32). In support of that approach, it was stated that issues of consumer protection should, to the widest possible extent, be left to national legislators. Moreover, it was pointed out that if the matter were to be dealt with in the text of the model statutory provisions, a rule setting the priority between the model statutory provisions and consumer protection law would have to be added. After discussion, the Working Group reaffirmed its previous decision that the issue of consumer protection law should be dealt with in a footnote.

37. As to the precise approach to be followed with regard to consumer matters, four variants were before the Working Group. Variant A stated that the model statutory provisions did not deal with issues related to consumer protection. Variant B stated the principle that the model statutory provisions did not override law intended for the protection of consumers. Variant C was based on a twofold approach, i.e., the model statutory provisions would not apply to consumer transactions and they would be subject to consumer protection law. Variant D was based on the principle that the model statutory provisions would not apply to consumer transactions.

38. The view was expressed that the matter of consumer protection should be dealt with along the lines of variant D so as to exclude the application of the model statutory provisions to consumer transactions. In support of that view, it was stated that the term "consumer transactions" was a clear and objective criterion, while the notion of "consumer protection" might be unclear and raise difficulties. Such difficulties might arise particularly if a determination had to be made as to what constituted consumer protection legislation. Examples were given of possible conflict between the model statutory provisions and otherwise applicable rules of law which, although not expressly

mentioning consumer protection as their purpose, could be interpreted as having a protective effect on consumers. For example, it was stated that protection-of-data-privacy law was, in a sense, consumer protection law, and yet should not be covered by the model statutory provisions.

39. The prevailing view, however, was that variant D should be rejected. The Working Group reaffirmed the decision made at its nineteenth session that the model statutory provisions should apply to all messages, including messages to or from consumers, but that it should be made clear that the model statutory provisions were not intended to override any consumer protection law (see A/CN.9/373, paras. 29-31).

40. The Working Group then focused its attention on variant B. Variant B was criticized on the ground that it might necessitate a determination as to whether a particular law was intended for the protection of consumers, which might be a difficult matter of interpretation of the law. In addition, it was stated that variant B might be misinterpreted as subjecting commercial law to consumer law. It was thus suggested that, should the variant be retained, it should be placed within brackets. The prevailing view, however, was in favour of the adoption of variant B, which was said to establish appropriate recognition of the principle that consumers could benefit from the application of the model statutory provisions, while it left open the possibility for legislators to provide special protection to consumers.

Footnote to article 1

41. The view was expressed that the model statutory provisions should apply only to international cases since their purpose was to facilitate international trade. It was stated that such a limitation in scope would be consistent with the general mandate of the Commission with respect to international trade. The contrary view was that the application of the model statutory provisions should not be limited to international cases. In support of that view, it was pointed out that legal certainty to be provided by the model statutory provisions was necessary for both domestic and international trade. Furthermore, a duality of regimes governing the use of electronic means of recording and communication of data might create a serious obstacle to the use of such means.

42. After discussion, the Working Group reaffirmed the decision made at its previous session, that the model statutory provisions should be applicable in principle to both international and domestic cases, but that a footnote should indicate a possible test of internationality for use by those States that might desire to limit the applicability of the uniform rules to international cases (A/CN.9/387, para. 21).

43. With respect to the text of the footnote, a number of improvements of a drafting nature were suggested. It was stated that the notion of "international trade interests" was too broad and potentially confusing since it might be interpreted as dealing indifferently with the interests of Governments and with the interests of commercial partners in the field of international trade. It was thus suggested that the text should refer to "international trade" or to "international trading interests". There was general agreement that the

matter would need to be discussed by a drafting group, to be established by the Working Group at a future session.

Article 2. Definitions

44. The Working Group decided that its method of working with regard to draft article 2 at the current session would be to engage in an exchange of views on the definitions contained therein, but to generally reserve final decisions until it had completed its review of the draft model statutory provisions as a whole.

Subparagraph (a) (Definition of "Data [record] [message]")

45. The Working Group noted that the text of the subparagraph reflected the decisions that had been made at the previous session (A/CN.9/387, paras. 30-39). It then proceeded to consider further various elements of the definition, largely from the standpoint of drafting.

46. The view was expressed that the word "data", irrespective of whether it was paired with "record" or "message", was not clear, since it might be interpreted in either of two ways: as a reference to any information in a computer, or as a reference to information fields in EDI messages. As an alternative, an expression along the following lines was suggested: "electronic record" means information as data or messages . . .". The use of the word "electronic", it was said, would not necessarily be interpreted as barring future, non-electronic media. It was stated in response that the word "data" and the term "data record" had a specific, commonly understood connotation in practice. In response to a suggestion to use the term "electronic document", it was recalled that the Working Group had previously shied away from using the word "document" because it might connote a link to paper. Yet another suggestion was to forgo in the term selected words such as "electronic", in which there might appear to be an inherent reference to the media, and to include as an essential element in the definition the notion of digital creation, storage and communication of information.

47. Another portion of the definition focused on by the Working Group was the reference to creation, storage and communication of information. A suggestion was made that communication or transmission should be a required element, a view that, as in the past, did not attract support. As regards the reference to creation of information, the concern was expressed that that wording, in particular if read in conjunction with draft article 12(2), could be read as suggesting the possibility that contracts could be concluded in the total absence of human intervention. Another concern with the word "created" was that it might suggest the possibility of purely oral communications. An amendment proposed in line with those views was the use of the word "recorded" in place of the word "created".

48. While recognizing the concern that had been raised with respect to such a possible interpretation of the word "created", there was broad agreement that the definition needed to take into account the fact that industry was increasingly relying on interactive, computer-to-computer communications with little or no human intervention, in

which software programs permitted computers to make decisions within limited parameters (e.g., computerized inventory control triggering computer-generated re-ordering when inventory stocks diminished). It was understood that, standing at the back of such purely computer-generated communications, there were persons, either physical or juridical, that remained ultimately responsible for the legal consequences of the communications. Another drafting suggestion was to replace "created" by "generated".

49. Differing views were exchanged as to the choice to be made by the Working Group between the terms "data record" and "data message". Related concerns were raised with respect to both terms. On the one hand, the concern was expressed that the word "message" might suggest the exclusion of data that was merely stored, while on the other hand the word "record" might be read as excluding data that was communicated. It was suggested that the term "data statement" might be a collective term that would encompass both stored and communicated data. The concern raised in turn by that proposal was that the word "statement" might connote a link to paper and might also suggest the exclusion of computer-generated data interchange. After deliberation, the Working Group decided, at least for the time being, to retain the term "data record", which was understood to encompass the case of computer-generated messages.

50. Differing views were also expressed as to whether to retain the reference to telegram, telex and telecopy. One view was that those forms of communication should be deleted from the definition. Reasons cited in support of deletion centred on the differences between those forms of communication and EDI, which included, aside from technological factors, the fact that established legal approaches existed for dealing with communications by telegram and telex, if not by telecopy, which might, however, be understood legally as a combination of mail and photocopying.

51. The prevailing view was to affirm the earlier decision in favour of a broad approach to media of communication and to retain in the definition a reference to telegram, telex and telecopy. The Working Group as well did not accept a suggestion to refer only to telex and telegram, and to delete mention of telecopy. It was noted in the discussion that the technological distinction between EDI and those media of communication was blurring as they themselves increasingly relied on technologies that provided a recording capability. To that it might be added that a data transaction might involve several types of media. A view was also expressed that, were the definition to contain a requirement of digitalization, uncertainty as to the inclusion of telegram, telex and telecopy could be met. Other suggestions directed at the media of communication included: to include a reference to electronic mail; to avoid excluding the practice of issuance of a telegram on the basis of oral transmission by telephone to the intermediary of the contents of the telegram; and to forgo the use of the word "analogous", since that word might inadvertently suggest a link to analog technology.

Subparagraph (b) (Definition of "Electronic data interchange (EDI)")

52. The Working Group found the substance of the subparagraph to be generally acceptable. It was noted that, in

the preparation of a revised draft, it might be useful to consider any definition of "EDI" that might be adopted by the Economic Commission for Europe (ECE) in the context of UN/EDIFACT.

Subparagraph (c) (Definition of "[Sender] [Originator]")

53. The Working Group noted that the text of the subparagraph reflected decisions that had been made at the previous session (A/CN.9/387, paras. 43-46). It then proceeded to consider further various elements of the definition, largely from the standpoint of drafting.

54. As regards the choice between the words "sender" and "originator", support was expressed in favour of each of these words. It was widely felt, however, that the word "originator" would be more in line with the decision to use the word "record" in subparagraph (a). It was stated that the word "originator" was commonly used in practice in the context of communication or transmission of information.

55. It was widely felt that, since a definition of "intermediary" was contained in subparagraph (e), the words "other than one performing the function of an intermediary" should be replaced by the words "other than an intermediary".

56. Several concerns were expressed with respect to the words "any person on whose behalf a data [record] [message] covered by these Rules purports to have been created, stored or communicated". One concern was that the expression "any person" was too broad and should be replaced by "a person" to avoid covering persons other than originators. Another concern was that the words "on whose behalf" might be interpreted as excluding the originator itself. While it was suggested that the text should be redrafted to cover expressly the originator and any other person acting on its behalf, it was widely felt that the text was sufficiently clear to avoid misinterpretation. It was further suggested that the words "covered by these Rules" were redundant, since a definition of "data record" was contained in subparagraph (a). There was general agreement for the deletion of those words.

57. With respect to the notion of "person" used in the draft definition, a concern was expressed that the mere reference to "person" might not make it sufficiently clear that any legal person or entity on behalf of which a message was created was to be regarded as a sender. In particular, it was stated that messages that were generated automatically by computers without direct human intervention should be clearly regarded as "sent" by the legal entity on behalf of which the computer was operated. As regards such situations where messages were automatically generated, it was also stated that a special provision would be needed to deal with the issue of intent to send a message in such cases. It was further stated that the reference to the person who originated a message might be misinterpreted as covering any clerk who processed the data. Suggestions that were made to replace the words "any person" or "a person" included "a natural or legal person"; "a person or entity"; "a party"; and "anyone". A further suggestion was

to introduce, either in the text of the model statutory provisions or in a footnote, a definition of the notion of "person".

58. In response to those suggestions and concerns, it was recalled that the same discussion had taken place at the previous session of the Working Group (A/CN.9/387, para. 44). It was noted that the notion of "person" had been used in previous UNCITRAL texts, apparently without giving rise to difficulties. It was also noted that, should the model statutory provisions deviate from the use of the notion of "person" or introduce a definition of the notion of "person", difficulties might arise with respect to the interpretation of other UNCITRAL texts. The view was expressed that, in most legal systems, the notion of "person" was used to designate the subjects of rights and obligations and was consistently interpreted as covering both natural persons and corporate bodies. The view was also expressed that, should the notion of "entity" be used, the text should make it clear that it was not intended to establish any computer as the subject of rights and obligations. While support was expressed in favour of using the notion of "party", which was said to be sufficiently neutral, that notion was also objected to on the ground that it pertained to the contractual sphere.

Subparagraph (d) (Definition of "Addressee")

59. Doubts were raised as to the need for including the subparagraph on the grounds that "addressee" was a "natural" term, i.e., a term with a meaning that would be obvious from the context in which it was used, rather than a special term of art that required definition in the model statutory provisions. It was suggested that the only function apparently served by the definition was to exclude intermediaries from the notion of "addressee". That blanket exclusion was questioned on the ground that there might be instances in which an intermediary would be an addressee, for example, when it was acting in a representational capacity with respect to an end-user. In support of retaining subparagraph (d), it was pointed out that "addressee" was an important term, as evidenced by its repeated use throughout the model statutory provisions.

60. Various observations and views were expressed aimed at modification or refinement of subparagraph (d), were it to be retained. Those observations included the following: the words "other than one performing the function of an intermediary" were not clear and might lend themselves to circumvention; those words might therefore be deleted, in particular if, in subparagraph (e), wording were used along the lines of "any person that provides the service"; the expression "any person" was too broad, since persons other than addressees might be involved, a concern that might be met by saying instead "the person" or "a person"; the term "end-user" might be too narrow, since it would not be the concern of the law whether the addressee actually made use of a data record; the word "ultimately" should be deleted since it might exclude the possibility of addressees in the middle of the message-transmission chain; this provision might be one instance in which the term "data message" would have been a term preferable to "data record", in view of the focus on data transmission in the current provision; the words "covered by these rules"

were unnecessary since all "data records", as a defined term, were covered.

Subparagraph (e) (Definition of "Intermediary")

61. The view was expressed that it might not be necessary to retain a definition of "intermediary". However, the focus of most interventions was on modification of the provision. A concern with the first sentence, in connection with a concern raised with regard to subparagraph (d) (see above, paragraph 60), was that the expression "as an ordinary part of its business" might lend itself to circumvention. It was suggested that the expression should be deleted, or, in the alternative, replaced by the expression "on behalf of a person". Another suggestion to ease this concern in subparagraph (e), as well as in (c) and (d), was to focus in those provisions on the rights and obligations with regard to a particular message.

62. Views were also exchanged as to the second sentence of subparagraph (e), which set forth a non-exhaustive list of value-added services that might be provided by an intermediary. A number of interventions questioned the need for that sentence on the ground that the value-added services referred to therein were outside the message-transmission chain and therefore did not involve rights and obligations of concern to the model statutory provisions. The proper scope of the text, it was stated, should be the rights and obligations related to the transmission function of the intermediary. It was also suggested that the sentence contained what appeared to be a substantive rule and as such did not belong in a definition. Support was expressed, however, for the retention of the second sentence, on the ground that such value-added services performed an increasingly important commercial function and should be recognized. The view was also expressed that in such a case the nature of the intermediary as a service provider should be made clearer, in addition to making it clearer that the list of possible services in the definition was non-exhaustive.

Subparagraph (f) (Definition of "Record")

63. Doubts were expressed as to the necessity or advisability of including a definition of "record" in view of the definition in subparagraph (a) of the term "data record". In addition to the concern over possible overlap and confusion with subparagraph (a), the concern was raised that the reference to a form requirement in the definition would overlap and possibly conflict with draft article 6.

64. Concerning the two variants of subparagraph (f) before the Working Group, a view was expressed that variant A appeared to be more complicated than variant B, and that therefore the latter was preferable. As to the formulation of variant B, concerns included the applicability of the word "representation" to what was in effect a collection of electronic impulses and the clarity of the reference to "reproduction" of the record. An alternative formulation for the definition, focusing on the elements of durability and form, was proposed: "... a durable representation of information either in or capable of being converted into a perceivable form". The concern was again expressed, however, that such a definition might overlap with draft article 6.

65. The Working Group concluded its deliberations on draft article 2 by noting that, in addition to the decisions that had been taken, a number of drafting suggestions that had been made could be taken into consideration in the preparation of a revised draft of the model statutory provisions.

Article 3. Interpretation of the Uniform Rules

Paragraph (1)

66. It was noted that paragraph (1) contained an interpretation rule, modelled on article 7(1) of the United Nations Sales Convention, emphasizing the importance of the international character of the model statutory provisions and the need to promote uniformity in their application and the observance of good faith. Differing views were expressed as to whether the provision should be retained. One view was that, while such a provision might be useful in the context of an international convention, it might be irrelevant in the context of statutory provisions that would eventually be enacted as pieces of national legislation. It was stated that paragraph (1) only related to the interpretation of the model statutory provisions, but it would be the national law enacting the model statutory provisions, not the model statutory provisions themselves, which would be interpreted by the national courts, so paragraph (1) would simply not apply. It was pointed out that for this reason no such interpretation rule had been included in the model laws prepared thus far by UNCITRAL.

67. The prevailing view, however, was that paragraph (1) should be retained. It was stated that a provision along the lines of paragraph (1) would enhance unification and harmonization of law, since it could provide useful guidance to national courts and other authorities. It was stated that in certain countries, more particularly in federal States, it was not uncommon for model rules to provide such guidance, which was aimed at limiting the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law. It was also stated that in some jurisdictions, it was recognized that national laws could be subject to a different set of interpretation rules, depending on whether they were of domestic or of international origin, for example if they originated from organs of regional economic integration organizations. It was added that it was consistent with the practice followed in contemporary international legal instruments to include such a rule aimed at the harmonization or uniform interpretation of national laws.

68. A number of drafting changes were suggested. As the model statutory provisions applied to both national and international cases, there was a need to limit the application of this provision in the case of purely domestic transactions. The suggestion was therefore made that the words "where appropriate" should be inserted before the words "to their international character". Another suggestion was that the reference to international trade should be deleted, since good faith had the same meaning both in domestic and in international trade. Yet another suggestion was that the notion of the international character and the need to promote uniformity were two different goals that should be expressed in separate paragraphs, so as to avoid confusion.

69. The view was expressed that one of the purposes of the model statutory provisions would be seen as encouraging the use of new communication technologies. The suggestion was thus made that a new paragraph should be inserted between the current paragraphs (1) and (2) along the following lines: "Regard is also to be had to the purpose of these rules to enhance trade through transactions utilizing modern commercial methods." That suggestion was objected to on the ground that it could be seen as mandating the use of electronic communications, while the intention of the Working Group was merely to remove obstacles in the use of such communications. The objection was also raised that the word "modern" was not appropriate, since today's "modern" technologies would eventually become outdated.

Paragraph (2)

70. It was noted that paragraph (2), which was modelled on article 7(2) of the United Nations Sales Convention, provided that lacunae left by the model statutory provisions were to be covered by application of the general principles enshrined in the statutory provisions or, in the absence of such principles, of the law applicable by virtue of the rules of private international law.

71. Differing views were expressed as to whether the paragraph should be deleted, or retained and possibly modified. In favour of deletion of the paragraph, it was stated that it was inappropriate to include a reference to "the general principles on which these Rules are based" in the model statutory provisions, since it was not clear what principles were being referred to. It was also stated that a reference to the law applicable by virtue of the rules of private international law was irrelevant, since the only law applicable would be that of the State enacting the model statutory provisions.

72. However, there was general agreement in the Working Group that, although paragraph (2) needed to be modified, a rule along those lines was useful and should be included in the model statutory provisions. As regards that modification, it was recalled that, at its previous session, the Working Group was agreed that the reference to "the law applicable by virtue of the rules of private international law" should be maintained only if the model statutory provisions were eventually adopted in the form of an international convention (see A/CN.9/387, para. 56). Accordingly, in view of its decision to use the form of a model law, the Working Group decided that the reference to the rules of private international law should be deleted.

73. Several suggestions were made to improve the formulation of paragraph (2), including the following: to place the paragraph in a separate article, since it did not establish a rule of interpretation of the model statutory provisions, or to amend the title of draft article 3 so as to correspond with its contents; to clarify the term "settled", since it was not clear whether the general principles or the applicable law would govern a matter that was not "settled" at all in the model statutory provisions or was "settled" only partially; to recast paragraph (2) so as to incorporate some of the ideas contained in the new paragraph proposed for insertion between the current paragraphs (1) and (2) (see above,

paragraph 69), along the following lines: "In the interpretation of the model statutory provisions regard is to be had to their purpose of giving effect to principles formulated internationally intended to facilitate the use of modern methods of communicating and holding information and the need to promote uniformity in the application of these principles." The Working Group noted the above suggestions as possible items to be considered in the preparation of a revised draft of the model statutory provisions.

Article 4. [Deleted]

[Article 5. Variation by agreement]

74. There was general support for the principle of party autonomy, on which draft article 5 was based. Differing views were expressed, however, as to how the principle should be implemented in the model statutory provisions. Under one view, which supported the wording of the draft article, the emphasis should be placed on the general principle of party autonomy, which should prevail unless otherwise expressly stated by the model statutory provisions. In the same vein, it was suggested that, with a view to simplifying and clarifying the expression of the general principle, the text should be replaced by a provision along the following lines: "These Rules may be varied by agreement."

75. According to another view, certain difficulties might arise if the principle of party autonomy was broadly stated along the lines of draft article 5. It was stated that, as had already been pointed out at the previous session of the Working Group (A/CN.9/387, para. 64), the model statutory provisions might, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. It was recalled that such well-established rules were normally of a mandatory nature since they generally reflected decisions of public policy. A concern was thus expressed that an unqualified statement regarding the freedom of parties to derogate from the model statutory provisions might be misinterpreted as allowing parties, through a derogation to the model statutory provisions, to derogate from mandatory rules adopted for public policy reasons. It was thus suggested that, at least in respect of the provisions contained in chapter II and in draft article 14, the model statutory provisions should be regarded as stating the minimum acceptable form requirement and should, for that reason, be regarded as mandatory, unless they expressly stated otherwise.

76. Another suggestion, which received considerable support, was that draft article 5 should be moved to chapter III. There was general agreement that chapter III dealt mostly with rights and obligations that should be maintained within the sphere of party autonomy. With respect to chapter II, it was stated that a general reference to party autonomy might not be needed, since draft articles 6, 7 and 8 expressly dealt with situations where agreements were concluded between parties. However, the view was expressed that, in the context of draft article 9, a provision on party autonomy might be needed to validate agreements by parties on the means of evidence that they would use for the purposes of their contractual relationships.

77. Several suggestions were made with respect to the formulation of draft article 5. It was suggested that party autonomy should apply not only in the context of relationships between originators and addressees of data records but also in the context of relationships involving intermediaries. Another suggestion was that the text should expressly limit party autonomy to rights and obligations arising "as between the contracting parties" so as not to suggest any implication as to the rights and obligations of third parties.

78. After discussion, the Working Group decided that the current text of draft article 5 should be retained, subject to drafting improvements, and that each article of the model statutory provisions should be discussed with a view to determining whether parties should be allowed to derogate from its provisions. It was agreed that, once the review of the remaining articles of the model statutory provisions had been completed, the Working Group would revert to draft article 5 and decide whether it was possible to consolidate in a single article dealing with party autonomy all exceptions to the mandatory nature of the model statutory provisions. The Working Group also postponed its final decision as to whether draft article 5 should be moved to chapter III.

Chapter II. Form requirements

Article 5 bis

79. It was recalled that the Working Group, at its previous session, had agreed that the model statutory rules should contain a broad provision stating that trade data records should not be denied legal recognition solely as a result of their electronic form (A/CN.9/387, para. 94). It was noted that, in the current text of draft article 5 *bis*, the word "solely" had been omitted in view of concerns that had been expressed at the previous session of the Working Group that the use of such words as "solely" or "on the sole grounds" might raise uncertainty as to whether an objection to a trade data message could be characterized as being made on the grounds that the message was in electronic form and not on other grounds (see A/CN.9/387, paras. 102 and 148).

80. Various concerns were expressed with regard to draft article 5 *bis*. One concern was that the draft article was too broadly worded and that it might produce the unintended effect that information in the form of a data record would have to be recognized as having legal validity irrespective of whether a contract stipulated that written documents should be used. Another such unintended effect might be to validate the use of electronic means of recording information in cases where a statutory regime prescribed the use of a writing, for example, in the case of cheques, bills of exchange and various kinds of documents that would embody title to goods or other proprietary rights.

81. Another concern was that draft article 5 *bis* might contradict draft articles 6, 7 and 8. It was stated that, while the purpose of those draft articles was to allow for certain existing requirements to be removed under strictly controlled conditions, draft article 5 *bis* might be interpreted as doing away with such requirements without establishing any condition regarding the use of data records.

82. Various suggestions were made to narrow the scope of draft article 5 *bis*. One suggestion was to limit the scope of the draft article to the contractual sphere and to provide expressly that parties could deviate from its provisions. Another suggestion was to limit the scope of draft article 5 *bis* to the areas covered by draft articles 6, 7 and 8 and to provide express reference to the conditions set forth in those articles. In that connection, several changes in drafting or structure were proposed. One proposal was that draft article 5 *bis* should be drafted in the form of a positive rule as an introduction to draft articles 6, 7 and 8. Another proposal was that draft article 5 *bis* should be combined with draft articles 6 and 8 in a single provision establishing the legal validity of data records if certain conditions were met regarding the quality and security of the recording process. Yet another proposal was that article 5 *bis* should be redrafted along the following lines: "A data record may only be denied legal effectiveness, validity or enforceability on the grounds that the information it contains is required to be recorded in writing or presented in its original form if the conditions in article 6 or article 8 (as the case may be) are not satisfied."

83. Further suggestions were made regarding the scope of draft article 5 *bis*. One suggestion was to exclude expressly certain instruments, such as cheques and documents of title. Another suggestion was that the scope of the draft article should be limited to the sphere of admissibility of evidence. In that connection, it was proposed that draft article 5 *bis* should be combined with draft article 9 to indicate that, for evidence purposes, the reliability of a data record should not be in question unless the party that objected to the admissibility of a data record established that there were reasonable grounds to consider that the data record might not be reliable.

84. In response to the above-mentioned concerns and suggestions, it was recalled that the purpose of the draft article was only to reflect the general principle agreed upon by the Working Group at its previous session (see above, paragraph 79). It was stated that the effect of the draft article should not be to solve any evidentiary issue or to establish the legal validity of any data record but merely to ensure that such validity could not be denied for the only reason that the data record was in electronic form. It was also stated that the effect of draft article 5 *bis* should not be to allow the substitution of a data record for any formal element that might be required under a specific legal regime. There was general agreement that, for example, cheques in an electronic form could not be validly presented for payment.

85. After discussion, the Working Group reaffirmed its decision that the model statutory provisions should establish as a principle that data records should not be rejected simply because of their form. It was widely felt that such a principle should apply generally. The scope of the draft article should therefore not be limited to the area of evidence or to other issues dealt with under draft articles 6-9.

86. It was generally felt, however, that article 5 *bis* needed to be redrafted to express more clearly the principle on which it was based. In that connection, it was suggested that the draft article should contain the opening words "For the

purpose of any rule of law" and that a reference to the "sole grounds" should be introduced in the current text. Another suggestion was that the draft article should read as follows: "A data record shall not be denied legal effectiveness, validity or enforceability on the sole grounds that it is recorded in electronic form." Further suggestions were made to replace the words "on the grounds that the information it contains must be recorded in [written] [documentary] form or presented in its original form" by the words "on the sole grounds that it is in a form covered by these Rules" or "on the sole ground that it was not stored or communicated in paper form". Yet another suggestion was that the draft article should read as follows: "Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is recorded as a data record."

87. After discussion, the Working Group decided that draft article 5 *bis* should read along the following lines: "Information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is recorded as a data record."

Article 6. Functional equivalent of "writing"

Title

88. The view was expressed that the meaning of the term "functional equivalent" was not clear, in particular since the term was used only in the title, and that a different formulation should be sought. Suggestions for reformulation of the title included "form", "functional requirement of writing", and "concept of writing", none of which attracted sufficient support. At the same time, the Working Group was urged, in formulating the title and content of draft article 6, not to shy away from the use of terms that were widely known and understood in the EDI field.

Paragraph (1)

89. As to the choice between variants A and B, the Working Group was generally of the view that variant A was preferable. A view had been expressed, however, that variant B was preferable because the expressions used in variant B, in particular "displayed" and "immediately accessible" were more objective and ascertainable than the corresponding terms in variant A, "visible and intelligible". A concern had also been expressed as to the appropriateness of the expression "predicated upon the existence of a writing" in variant A, since the crux of the matter was the case in which a statute would have consequences if information was not in writing.

90. Having settled on variant A, the Working Group engaged in a discussion of various suggestions for developing its content and formulation. As had been the case in the discussion of draft article 6 at the previous session (A/CN.9/387, paras. 66-80), the view was expressed that the conditions for the acceptability of a data record as a replacement for a writing should include a reference to the integrity or reliability of the data record, apart from or instead of the evidential rules set forth in draft article 9. It was stated that a data record could not be considered a true "equivalent" of writing and that the additional conditions were therefore needed to provide security. It was also stated

that, in a number of countries, where existing legislation required the presentation of a writing, a data record could only be regarded as satisfying such a requirement if: the data record constituted a "record" under the definition suggested in article 2(f); there existed assurance as to the integrity of that record; and the data record was intelligible and accessible. It was suggested that such an added layer of conditions of acceptability, beyond those contained in paragraphs (1)(a) and (b) of variant A, were needed to take account of constraints in the infrastructure and technology of EDI and related means, illustrated in particular by cases ranging from telecopies to instruments such as securities, cheques, negotiable documents of title, property deeds and even simple deposit tickets. A concern was also expressed as to opposability of data records to third parties.

91. Formulations that were suggested for use as additional conditions, in addition to "integrity" or "reliability", included: faithfulness of the data record in reflecting what was actually exchanged; authenticity and security against falsification; and durability. A structural suggestion in line with this approach was to combine article 6 with article 8, in which variant A of paragraph (1)(b) referred to the integrity of information presented in the form of a data record. Suggestions designed to soften the impact of the additional conditions on the use of EDI included: to establish a rebuttable presumption of the reliability of data records; the application of standards such as "commercial reasonableness" or "as appropriate in the circumstances"; a reference to "minimal security"; and consistency in tests for reliability in articles 6, 7 and 8.

92. In response to the view that reference should be made to the integrity or reliability of the data record, it was recalled that the Working Group had discussed the matter extensively at the previous session and that it had been recognized that the question of integrity or reliability was a matter that went mainly to the evidential value or weight of the data record, a matter dealt with in draft article 9 and beyond the scope of draft article 6, which was limited to defining what might be considered the equivalent of a writing. The view was stressed that the determination of evidential value was a matter that should be left to the trier of fact so as to ensure that evidence that might be necessary would not be prevented from being presented. It was also pointed out that the concerns that had been raised with respect to integrity and reliability of information in an EDI environment were relevant also to writings but that such additional conditions being suggested were not applied to paper-based writing, except in the context of evaluating evidential weight. Such an approach, it was warned, would impede rather than facilitate use of EDI and other emerging technologies in the conduct of international trade. In particular, it was pointed out that additional requirements such as those suggested above (see paragraphs 90-91) would impede EDI by imposing a greater burden on data records than on routine paper writings, which were accepted as presented.

93. As regards the instances of potential difficulty cited above (see paragraph 90), it was explained that there too questions were being raised that were intended to be dealt with elsewhere in the model statutory provisions: telecopies could be considered as copies, which would meet a test for

writing, but beyond that, would have to meet the requirements for functional equivalency with an original, a matter dealt with in draft article 8; the questions raised with respect to securities, cheques and other instruments mentioned would also fall under that rule since they were instruments that traditionally had to be presented not only in written form, but also as originals. It was also pointed out that enacting States would have the option under paragraph (2) to make exclusions from the application of draft article 6. It was further noted that an express limitation on the opposability of data records to third parties was not merited, since non-opposability to third parties was a general principle of law that applied to writings as well.

94. Differing views were expressed as to whether to retain the reference in the *chapeau* of variant A to "custom or practice". The Working Group was urged to delete that reference so as to exclude from the scope of the rule in draft article 6 writing requirements derived from rules of custom or practice. It was stated that such requirements would, in most instances, be regarded as contractual in nature and be subject to contrary agreement of the parties. It was also stated that exclusion of such requirements would not preclude enacting States from taking account of the particular needs of practice, as well as of differences in circumstances and understanding in different countries. Support for retention of the reference was expressed on the ground that the application of draft article 6 to statutory writing requirements rules indicated that it would be appropriate to apply the draft article also to writing requirements derived from rules of custom or practice. After deliberation, it was decided to delete the reference to rules of custom or practice. Concerns were also expressed as to the words "any rule of law", which might, for example, have the effect of application of draft article 6 to administrative requirements. Suggestions to meet that concern included to use an expression along the lines of "the law requires", or to limit the reference to rules of trade law.

95. Upon concluding its deliberations on draft article 6, and pending possible further deliberations at a later stage, following the review in particular of draft article 9, the Working Group agreed that the next draft of paragraph (1) would be based on variant A, subject to the deletion of the reference to rules of custom or practice. It was also agreed that, to address concerns that had been raised, the words "visible and intelligible" would be replaced by the word "durable", in square brackets.

Paragraph (2)

96. The Working Group decided to postpone its consideration of paragraph (2) of draft articles 6, 7 and 8 until it had completed its review of the other provisions of those articles (see below, paragraphs 128-133).

Article 7. Functional equivalent of "signature"

Paragraph (1)

Chapeau

97. There was general agreement with the thrust of the *chapeau*. A proposal was made to delete the words "custom or practice". In support of deletion, it was stated that

the reference to "custom or practice" was superfluous since custom and practice were sources of law and, as such, were implicit in the words "any rule of law". It was added that to the extent that "custom or practice" were not recognized as sources of law, they would be beyond the scope of application of the model statutory rules. After discussion, the Working Group decided that the reference to "custom or practice" in the *chapeau* should be deleted.

98. With respect to the use of the words "expressly or impliedly", it was stated that, while requirements for signatures would most often be express, there existed a need to cover more explicitly the situation where a rule of law, while not expressly requiring a signature, provided for certain consequences if a signature was not presented. There was general agreement that the text should be made clearer in that respect.

99. As a matter of drafting, a few suggestions were made. One suggestion was to replace the words "requires information to be signed" by words such as "requires a signature" or "requires a document to be signed". Another suggestion was to insert after the word "satisfied" the words "in relation to a data record".

Subparagraph (a)

100. Differing views were expressed as to whether subparagraph (a) should be retained or deleted. In support of deletion, it was stated that requirements for signature, which were usually set by national mandatory rules of law, should not be made subject to alteration by agreement of the parties. In accordance with that view, draft article 5, recognizing party autonomy should be moved from chapter I to chapter III, so that it would not apply to chapter II (see above, paragraphs 76 and 78).

101. In support of subparagraph (a), it was stated that, from the standpoint of practice in high-speed, high-volume transactions, it would be important to recognize the freedom of parties to agree on the level and type of authentication method. In addition, it was pointed out that subparagraph (a) was not intended to alter requirements set by mandatory rules of law but merely to permit parties to agree on a particular authentication method in cases in which the law required a "signature" without mandating a specific authentication method. In that regard, it was stated that, even if subparagraph (a) had the unintended effect of altering statutory requirements for signature, it could not affect third parties. Moreover, it was said that, in cases where the rule contained in subparagraph (a) might conflict with a national mandatory rule of law, its application could be excluded by virtue of paragraph (2). Apart from retention of subparagraph (a), proposed methods of implementing in the model statutory provisions a rule recognizing party autonomy with respect to signature included: keeping draft article 5 in chapter I or recognizing party autonomy in subparagraphs (b) or (c), or devising a default rule that would cover cases where there was no rule of law and no agreement of the parties requiring signature. After discussion, the Working Group decided to retain subparagraph (a) within brackets.

102. A related question was raised that subparagraph (a) in its current formulation might not sufficiently cover

system rules, i.e., rules that were implemented in third-party service agreements. In that regard it was suggested that system rules should be dealt with in the context of draft article 5 dealing with party autonomy in general. Another suggestion was that the issues of system rules as well as trading partner agreements might be usefully explained in a guide to enactment of the model statutory provisions.

Subparagraphs (b) and (c)

103. There was general agreement in the Working Group on the principles embodied in subparagraphs (b) and (c). It was noted that subparagraphs (b) and (c) recognized the dual function of a signature to identify the originator and to confirm that the originator approved the content of a data record. The Working Group then turned to the question of the formulation of subparagraphs (b) and (c).

"method [of authentication]"

104. The Working Group discussed whether the words "of authentication" that appeared within brackets in subparagraph (b) should be retained or deleted. In support of deletion, it was stated that the term "authentication" was inappropriate, since it might be misinterpreted as suggesting a reference to notarization of documents. Another objection to the notion of authentication was that, while it might be a term of art in the context of certain EDI techniques, it might be meaningless or unclear in the context of other techniques. Moreover, it was stated that "authentication" meant nothing more than a method of identifying the originator of a data record and of establishing the originator's approval of the contents of the data record. For that reason, it was stated that use of the term would add nothing to the existing language of subparagraph (b). It was suggested that the words "method of authentication" should be replaced by the word "procedure".

105. In support of retention of the words "method of authentication", it was stated that the notion of "authentication" was used in EDI as well as in non-EDI communications and that its meaning was well established in both types of situations. It was recognized, however, that it might be useful to include in the model statutory provisions a definition of authentication. In that regard, a definition along the following lines was suggested: "authentication means a process providing certainty on the identity of the originator of a data record". Another suggestion was to use the following wording: "authentication is proof of identification or the process by which claimed identity is verified". With respect to the suggested wording, it was stated that, at least in the context of EDI, the notion of authentication might be used to refer both to the identification of the sender and to the integrity of the content of a data record. After discussion, the Working Group decided to retain the reference to authentication within brackets.

"created or communicated"

106. The suggestion was made that, in view of the decision that the model statutory provisions should apply to "data records", irrespective of whether such "records" were intended or not to be communicated, the formulation of

subparagraph (b) might need to be reconsidered. A suggestion was made to replace the words "the data [record] was created or communicated" by the words "a data statement is made". Another suggestion was to refer to the identity of the originator and its intention that the data record be transmitted". In addition, the concern was expressed that the word "person", following the words "created or communicated", was not clear. The Working Group requested the Secretariat to redraft that part of subparagraph (b) taking into account the suggestions made.

"technically appropriate"

107. The Working Group considered the question whether the term "technically" that appeared within brackets in subparagraph (c) should be deleted or whether the term "technically appropriate" should be replaced by the term "commercially reasonable". In support of deletion, it was stated that the term was unnecessary, in the light of the reference to a method as reliable as appropriate in view of all circumstances. In addition, it was pointed out that use of that term had the effect of overemphasizing technical considerations at the expense of other substantive considerations, such as the economic value of the transaction involved. On the other hand, it was stated that it might be more appropriate to require that the method of authentication should be "commercially reasonable". It was added that the words "commercially reasonable", used also in the context of the UNCITRAL Model Law on International Credit Transfers, introduced a well-known objective criterion on the basis of which the reliability of an authentication method could be assessed. While interest was expressed in the addition of the term "commercially reasonable", the use of the term was objected to on the ground of considerations raised at the previous session of the Working Group (see A/CN.9/387, para. 85). After discussion, the Working Group decided to delete the term "technically", without reaching a final resolution of whether to include a reference to commercial reasonableness.

*"including [any agreement between the [sender]
[originator] and the addressee of the data [record]
[message] and any relevant commercial usage]"*

108. It was stated that it was inappropriate to list factors on the basis of which the reliability of a method of authentication could be assessed. In support of deletion of the corresponding wording at the end of subparagraph (b), it was pointed out that such listing of factors might appear to be exhaustive, while other factors might be relevant in assessing the reliability of an authentication method, e.g., availability of alternative methods of authentication, or the value and the importance of the transaction involved. The view was expressed, however, that the reference to any agreement between the parties should be retained in draft article 7 or, if that reference were deleted from draft article 7, that draft article 5 should remain in chapter I so that the model statutory provisions would recognize the freedom of the parties to choose an authentication method (see above, paragraphs 76 and 78). After discussion, the Working Group decided that the reference to agreement of the parties should be maintained within brackets for further consideration at a later stage and that the words "and any relevant commercial usage" should be deleted.

Paragraph (2)

109. The Working Group decided to postpone its consideration of paragraph (2) of draft articles 6, 7 and 8 until it had completed its review of the other provisions of those articles (see below, paragraphs 128-133).

Article 8. Functional equivalent of "original"

General remarks

110. Differing views were expressed as to whether draft article 8 should be retained. In support of deletion, it was stated that it was impossible to speak of "original" data records, since if "original" were defined as a medium on which information was fixed for the first time, the addressee of a data record would always receive a copy thereof. Another view was that a rule along the lines of draft article 8 was useful but that it should be put in a different context. In support of that view, it was pointed out that the notion of "original" should be dealt with in draft article 6, since usually an "original" was meant whenever the law required a writing (see above, paragraph 90). Moreover, it was stated that the notion of "original" could be dealt with in draft article 9, since it was useful for purposes of admissibility of evidence and evidential weight, which were dealt with in that draft article.

111. The prevailing view, however, was that draft article 8 should be retained. A number of reasons were given in support of its retention. One reason was that the draft article was essential since in practice many disputes related to the question of originality of documents and in electronic commerce the requirement for presentation of originals constituted one of the main obstacles that the model statutory rules should try to remove. Another reason was that a rule along the lines of draft article 8 could be useful in granting the legal recognition of original documents to certain data records, such as invoices which were in the form of printouts and could not have the appearance of originality that, for example, bills of lading had. Yet another reason was that draft article 8 was necessary since, although in some jurisdictions an "original" was meant whenever a "writing" was required, the model statutory provisions dealt with "writing", "signature" and "original" in draft articles 6, 7 and 8 respectively as separate concepts. Yet another reason was that draft article 8 was useful in clarifying the notions of "writing" and "original", in particular in view of their importance for purposes of evidence.

112. The Working Group recalled that, at its previous session, it had been felt that draft article 8 might be pertinent to documents of title and negotiable instruments, in which the notion of uniqueness of an original was particularly relevant (see A/CN.9/387, paras. 91-97). In line with the decision taken by the Working Group in the consideration of draft article 1, it was clarified that the model statutory provisions were not intended to apply to documents of title and negotiable instruments, or to such areas of law where special requirements existed with respect to registration or notarization of writings, e.g., family matters or the sale of real estate. In that regard, a note of caution was struck that draft article 8 could provide guidance as to the

meaning of "original" in the context of party autonomy but should avoid defining "original" for the purposes of national mandatory law, in the context of which an original could be required for a number of considerations that went beyond the scope of application of the model statutory rules.

Paragraph (1)

Opening words

"any rule of law"

113. At the outset, the Working Group recalled that the focus of the draft article should be on providing a substitute for requirements that stemmed from existing rules of law regarding the use of originals. The focus of the draft article should not be on contractual requirements or on requirements that were rooted in custom or practice.

114. A concern was expressed that the words "any rule of law" might be interpreted as making draft article 8 applicable to administrative requirements. Suggestions to meet that concern included: to use an expression such as "the law requires", or to limit the scope of the draft article to the area of trade law. It was recalled, however, that the Working Group, under draft article 1, had decided that administrative requirements, while not constituting the focus of the model statutory provisions, should not be excluded from their scope. After discussion, the Working Group adopted the words "a rule of law".

"custom or practice"

115. The view was expressed that, in line with the decision made in the context of draft articles 6 and 7, the reference to custom or practice should be deleted. It was stated that, in many countries, requirements of custom or practice would be considered either as contractual in nature, e.g., where rules of custom or practice were incorporated expressly or impliedly by parties in their trading terms and conditions, or as a rule of law, e.g., where certain usages would be recognized as sources of law by regulatory authorities or by case-law.

116. In response, it was pointed out that often it was not only rules of law but also practice or custom that required information to be presented in original form. For example, it was stated that, in certain countries, customs and practices of port authorities would have a legal value of their own, in the absence of contractual or statutory rules, and that such rules of custom might constitute considerable obstacles to the use of EDI, which the model statutory provisions should attempt to overcome.

117. After discussion, the Working Group decided, in line with its decision to focus on statutory requirements in the context of draft article 8, to delete the reference to custom or practice from the paragraph. However, it was felt that the situations where obstacles to EDI arose from rules of custom or practice regarding the use of originals might need to be reconsidered after the entire draft article had been reviewed. The Working Group took note of a suggestion that a separate rule might need to be devised in the context of a separate article or in the context of article 9 (see below, paragraphs 134-138).

"expressly or impliedly"

118. It was stated that, while requirements for originals would most often be express, there existed a need to cover more explicitly the situation where a rule of law, while not expressly requiring the use of an original, provided for certain consequences if an original was not presented. There was general agreement that the text should be made clearer in that respect.

"in its original form"

119. It was suggested that the words "in its original form" should be replaced by the words "with its original contents". That suggestion was objected to on the ground that, in practice, disputes arose with regard to both the form and the content of information.

Subparagraph (a)

120. The view was expressed that subparagraph (a) was needed to establish the principle of party autonomy with respect to original requirements. The prevailing view, however, was that there existed no need for an express provision validating private agreements in the absence of mandatory requirements of law, i.e., in the absence of legal obstacles to the use of EDI. It was also recalled that the appropriate focus for draft article 8, and for chapter II in general, was on mandatory requirements of law, not on contractual matters, which should be dealt with separately, under draft article 5 or in the context of chapter III (see above, paragraphs 76 and 78).

121. Divergent views were expressed as to how the statutory rule established in draft article 8 would interplay with the principle of party autonomy. Under one view, draft article 8 should be regarded as stating the minimum acceptable form requirement to be met by a data record for it to be regarded as the functional equivalent of an original. It was stated that parties should not be free to derogate from the provisions of draft article 8, for the same reasons that they would not be free to derogate from existing mandatory rules which would be replaced by draft article 8 (see above, paragraph 75). It was thus suggested that subparagraph (a) should be deleted. Another view was that the statutory provisions contained in draft article 8, and in chapter II in general, should be used to promote the use of agreed procedures between parties. It was thus suggested that the agreement of the parties should be the foremost element in the definition of a functional equivalent of "original" and that subparagraph (a) should be maintained. It was generally recognized, however, that, even if contractual stipulations were to be regarded under subparagraph (a) as an element of the statutory definition of the functional equivalent of "original", the principle of privity of contract would limit the ambit of such stipulations, which could not affect the rights and obligations of third parties. It was thus recognized that, in all likelihood, retention or deletion of subparagraph (a) would not result in significantly different situations in practice. After discussion, the Working Group decided to delete subparagraph (a).

Variants A and B

122. Support was expressed in favour of both variants. In favour of variant A, it was said that it established a

clearer and simpler test. It was stated that variant A had the advantage of emphasizing the importance of the integrity of the information for its originality. However, it was suggested that the notion of "integrity" might need to be further clarified in the provision. It was suggested that the following references should be built into the text of variant A as elements to be considered when assessing integrity: systematic recording of the information, assurance that the information was recorded without lacunae and protection of the data against alteration. Another suggestion was that the notion of integrity should be clarified by including a reference to the notion of "record", which had been considered under draft article 1.

123. In favour of variant B, it was said that it had the advantage of linking the concept of originality to a method of authentication and that it appropriately put the focus on the method of authentication to be followed in order to meet the requirement. It also was said to provide appropriate flexibility by establishing that, in each given case, the reliability of the method of authentication would be assessed with regard to circumstances. It was stated that a reference to non-alteration might be more explicit than the notion of integrity, which was said to be unclear, in particular as to whether it related to integrity of the data or integrity of the support on which the data were affixed. However, the reference to the notion of "authentication" in variant B was objected to for reasons already expressed in the context of the discussion on draft article 7 (see above, paragraphs 104-105).

124. It was widely felt that variants A and B should be combined and that the resulting text should contain the following elements: a simple criterion such as integrity; a description of the elements to be taken into account in assessing the integrity; and an element of flexibility, e.g., a reference to circumstances.

125. A suggestion was made that, rather than trying to define originality of data records on the basis of paper-based considerations, draft article 8 should focus on how to satisfy requirements for originals, since data records in fact would never be the equivalent of paper documents. In that connection, the suggestion was made that language along the following lines could be used:

"Where a rule of law requires an original, a data record shall be considered as satisfying that requirement when:

"(a) the data record constitutes a 'record' under article 2(f); and

"(b) the integrity of the record has been preserved."

It was stated that consideration might be given to adding two other optional requirements to the notion of originality of data records, i.e., uniqueness of the data record, and authentication along the lines of variant B.

126. Another suggestion was that the notion of originality should be linked with the possibility for the data record to be displayed. It was also suggested that the provision should contain a reference to the notion that original information should have remained unaltered between the

time of its original recording and the time when it was displayed. A wording along the following lines was suggested:

"Where law requires information to be presented in the form of an original record or provides for certain consequences if it is not, that requirement shall be satisfied in relation to information contained in a data record if:

"(a) that information is displayed to the person to whom it is to be presented; and

"(b) there exists a reliable assurance as to the integrity of the information between the time it was recorded and the time it is displayed."

The reference to the information being "displayed" was objected to on the ground that it might establish a subjective criterion, which might be met or not, depending upon the will of the addressee. In response to that concern, it was suggested that the word "displayed" could be replaced by the following: "displayed in a form which enables it to be accessible for the purpose of reference as it would have been if it had been recorded in an original record".

127. After discussion, the Working Group agreed that paragraph (1) should be revised along the following lines:

"(1) Where a rule of law requires information to be presented in the form of an original record, or provides for certain consequences if it is not, that requirement shall be satisfied in relation to a data [record] containing the requisite information if:

"(a) that information is displayed to the person to whom it is to be presented; and

"(b) there exists a reliable assurance as to the integrity of the information between the time the originator first composed the information in its final form, as a data [record] or as a record of any other kind, and the time that the information is displayed.

"(2) Where any question is raised as to whether paragraph (1)(b) is satisfied:

"(a) the criteria for assessing integrity are whether the information has remained complete and, apart from the addition of any endorsement, unaltered; and

"(b) the standard of reliability required is to be assessed in the light of the purpose for which the relevant record was made and all the circumstances."

Paragraph (2)

128. Various views were expressed as to paragraph (2), which provided that an enacting State might wish to exclude the application of draft article 8 from situations to be specified by it. Many remarks were made in the discussion directed not only at draft article 8(2), but also at the analogous provisions found in draft articles 6(2) and 7(2) (see above, paragraphs 96 and 109).

129. One category of views was that paragraph (2) should specifically exclude certain types of situations, depending in particular on the purpose of the formal requirement in question. One such type of situation was said to be

the case of writing requirements intended to provide notice or warning of specific factual or legal risks, for example, requirements for warnings to be placed on certain types of products. A formulation along the following lines was proposed to embody that approach: "The provisions of this article do not apply if 'writing' is required by law in order to give notice to the sender or the addressee in regard to factual or legal risks."

130. Other cases suggested for specific exclusion were negotiable instruments, documents of title and formalities required pursuant to international treaty obligations of the enacting State (e.g., the requirement that a cheque be in writing pursuant to the Convention providing a Uniform Law for Cheques, Geneva, 1931). It was suggested in the light of those cases that the current formulation was unclear since it might suggest a choice for the enacting State with respect to requirements that in fact had to be applied pursuant to existing international obligations of the enacting State.

131. A differing view was that, on a variety of grounds and notwithstanding the concerns that had been raised, it was not necessary or appropriate to provide for exclusions as in paragraph (2) and its sister provisions in draft articles 6 and 7. As to the proposal to specifically exclude requirements with a warning purpose, it was suggested that the purpose of statutory requirements would often be unclear, thereby enhancing the possibility that a purpose-related test could be used to circumvent the model statutory provisions. It was also suggested that the provisions dealing with matters such as warning requirements were a distinct area of the law not likely to be confused with the limited purpose and subject-matter of the model statutory provisions.

132. Opposition was also expressed to exclusion in paragraph (2) of negotiable instruments and documents of title. It was said that this would raise needless obstacles to the development of EDI, since what the model statutory provisions contained were very fundamental principles and approaches that were likely, to one degree or another, to find application in those cases. It was suggested that the concern with negotiable instruments, securities and the like should not be exaggerated since it would be obvious that the model statutory provisions were not meant to be a full set of structured, operational rules of the type required for such instruments. The concern was also raised that a blanket exclusion would not only needlessly prejudice questions that the Working Group was likely to take up in the near future, but also fail to take account of developments in practice. In that connection, it was reported that EDI was being used, for example, for certain types of negotiable warehouse receipts. It was stated that, should the Working Group wish to exclude any kind of situation or any area of law from the scope of draft articles 6, 7 and 8, it should focus on those kinds of situations and areas of law that were beyond the power of the enacting State to change by means of a statute.

133. The prevailing view was that paragraph (2), as its sister provisions in draft articles 6 and 7, should remain essentially in its current form, which did not recommend any specific exclusions, but merely indicated that there was a choice for enacting States to make. Such an approach, it

was said, would recognize that the matter of specifying exclusions should be left to enacting States, an approach that would take better account of differences in national circumstances. It would also avoid the risk that a listing of exclusions in the model statutory provisions might err, on the side either of inclusion or exclusion. In response to a suggestion that it might be appropriate to introduce a footnote drawing the attention of legislators to certain areas of the law or certain types of situations that might be excluded from the scope of the model statutory provisions, it was widely felt that the matter would more appropriately be dealt with in a guide to enactment of the model statutory provisions, which might be prepared at a later stage.

Suggested "default rule"

134. At the close of the discussion on draft article 8, it was suggested that a rule might be considered for inclusion in the model statutory provisions establishing the functional equivalent of "original" in the case where no requirement of either contract or statutory law was applicable in that respect. It was stated that, in addition to dealing with custom and practice (see above, paragraphs 115-117), such a rule would have the advantage of providing a default rule to supplement the terms of agreements in cases of gaps or omissions in contractual stipulations, e.g., interchange agreements or "system rules". Doubts were expressed as to whether it would be appropriate to attempt to regulate custom or practice by way of a statutory instrument. However, considerable interest was expressed in the possibility of preparing a default rule to supplement contracts.

135. The following formulation was suggested for possible inclusion as a separate paragraph of draft article 8 or as a separate article:

"In the absence of any express or implied agreement and any rule of law requiring the information to be in the form of an original document, information in the form of a data [record] shall be accorded equal weight to information of article 8(1)(b)."

136. Another formulation was proposed, based on a negative wording, which was proposed for inclusion in draft article 9:

"In the absence of any express or implied agreement and any rule of law requiring the information to be in the form of an original document, in any legal proceedings, information in the form of a data [record] shall not be accorded any less weight [solely] on the grounds that it is not contained in an original document if article 8(1)(b) is satisfied."

137. Both proposals were objected to on the grounds that they provided rules to assess the evidential weight of data records. It was stated that nothing in the model statutory provisions should limit the authority of courts to decide on the evidential weight to be given to information presented in paperless form. In response, it was stated that one of the purposes of the model statutory provisions was to enhance certainty, which might include providing guidance to the trier of facts. It was noted that the effect of the suggested wordings would not be to modify the principle embodied in draft article 9(2) that information provided in the form of a data [record] would be given "due evidential weight".

138. After discussion, the Working Group agreed that the possible preparation of a "default rule" needed further consideration. The Secretariat was requested to consider the preparation of a draft provision reflecting the above discussion.

Article 9. Admissibility and evidential value of data records

139. There was general agreement in the Working Group on the principles stated in draft article 9. However, differing opinions were expressed as to the best manner in which those principles could be formulated.

140. One view was that the draft article should be deleted and the basic criteria for the admissibility of data records should instead be included in draft article 6. It was stated that draft articles 9 and 6 dealt with the same issue, i.e., the basic criteria to be met for data records to be treated in the same manner as writings. As to other elements of draft article 9, the suggestion was made that they should be deleted: subparagraph (a) of paragraph (1) because it duplicated the principle expressed in draft article 5 *bis* that data records should not be denied legal value on the sole ground that they were in electronic form; the term "best evidence" in subparagraph (b) of paragraph (1) because it was, in some jurisdictions, meaningless; paragraph (2) because stating that data records would be given due evidential weight would be stating the obvious. It was suggested that the various factors listed in the second sentence of paragraph (2) would be more appropriate in a commentary than in the text of the model statutory provisions.

141. The prevailing view, however, was that draft article 9 should be retained. It was stated that paragraph (1), establishing that data records should not be denied admissibility as evidence in legal proceedings on the sole ground that they were in electronic form, put appropriate emphasis on the general principle stated in draft article 5 *bis* and was needed to make it expressly applicable to admissibility of evidence, an area in which particularly complex issues might arise in certain jurisdictions. In addition, it was generally felt that paragraph (2), which provided useful guidance as to how the evidential value of data records should be assessed (e.g., depending on whether they were created, stored or communicated in a reliable manner) might be seen as introducing an appropriate qualification of the principle enshrined in paragraph (1).

142. As to the precise formulation of draft article 9, a number of suggestions were made. One suggestion was that paragraph (1) should be recast in a positive way. It was stated that the purpose of that paragraph was to eliminate barriers to the admissibility of data records in legal proceedings and that that purpose might be better served if the principle were expressed through a positive formulation. Another suggestion was that the term "solely" in subparagraphs (a) and (b) should be deleted, since in the case of an objection to admission of data records it might be difficult to determine whether the objection was on the ground that the record was in electronic form or whether other grounds were involved. Yet another suggestion was that appropriate language should be added at the end of the second sentence of paragraph (2) so as to make it clearer

that the assessment of the evidential weight of data records could be based on any other factor not listed in paragraph (2). As to the suggestion to delete the reference to the "best evidence" rule, the Working Group agreed that the reference should be maintained. It was recognized that the term "best evidence" was a term understood in and necessary for common law jurisdictions. In addition, it was pointed out that States in which the term was meaningless could adopt the model statutory rules without the reference to the "best evidence" rule.

143. After discussion, the Working Group adopted the text of draft article 9, subject to drafting improvements. It was agreed that words along the lines of "and any other relevant factor" should be added at the end of paragraph (2). It was also agreed that the word "solely" should be deleted from subparagraphs (a) and (b) of paragraph (1).

**Chapter III. Communication of data
[records] [messages]**

Article 10. Effectiveness of data [records] [messages]

144. In view of the fact that only a limited time remained at the current session, the Working Group engaged only in a general review of the draft of article 10, which implemented the decisions taken at the twenty-seventh session (A/CN.9/387, paras. 110-132).

145. It was noted that draft article 10, in line with the intended scope of chapter III, dealt with the effects of the communication of data records and that it did not focus on the creation or maintenance of data records. It was suggested that the title of draft article 10 should reflect this by referring to communication of data records. Other suggestions that were made with respect to the title of draft article 10 included: "obligations binding on the originator of a trade data record" and "right to repudiate data records".

146. With regard to paragraph (1), a number of suggestions were made. One suggestion was that the word "issued" should be replaced by the word "transmitted" since it was not clear whether a data record was "issued" at the time it was created or at the time it was communicated. Another suggestion was that the opening words of paragraph (2), "As between the [sender] [originator] and the addressee," should be inserted at the beginning of paragraph (1), since the communication of a data record should produce effects only between the sender and the recipient and not against third parties. Yet another suggestion was that the reference to amendment or revocation should be deleted. In support of that suggestion, it was stated that, while such reference was meaningful in article 5 of the UNCITRAL Model Law on International Credit Transfers dealing with payment orders and their revocation or amendment, on which draft article 10 had been modelled, it was unnecessary in draft article 10. It was explained that a revocation or amendment of a data record made by electronic means would be a data record covered by the model statutory provisions, while a revocation or amendment of a data record made by other means should fall outside the scope of the model statutory provisions.

147. A concern was expressed that the words "is deemed to have approved the content" in paragraphs (1), (3) and (5) might overly burden the originator. It was stated that, if a data record was issued by the originator, or on its behalf, those words created an irrebuttable presumption that the originator approved the content of the record as received. In order to avoid that unfair result, the suggestion was made that the words "is deemed to have approved" should be replaced by the words "is presumed to have approved". Moreover, it was felt that the presumption should not refer to approval of the "content" of a data record but to approval of its "sending" by the originator.

148. The suggestion was objected to on the ground that such an irrebuttable presumption was consistent with the purpose of the model statutory rules, since trading partners could be discouraged from using electronic means of communications if the recipient could not rely on the data record as received. In addition, the suggestion was objected to on the ground that an irrebuttable presumption would cause no problems since, if there was an error in the data record as received, it would be covered by paragraph (5) or the national applicable law of mistake. Moreover, it was recalled that the words "is deemed to have approved" originated from the UNCITRAL Model Law on International Credit Transfers and that at its previous session the Working Group agreed that the model statutory provisions should use, to the extent appropriate, language that was consistent with the language of the Model Law. However, a view was that the words "is deemed to have approved" should not be interpreted as establishing an irrebuttable presumption, since paragraph (5) provided that the presumption would not apply in case of error.

149. With a view to addressing the various views and concerns that had been expressed, a proposal was made that paragraph (1) should be reformulated so as to create an irrebuttable presumption as to whether the sender who had signed the data record would be deemed as having approved the sending of the data record, and a rebuttable presumption as to whether the sender would be deemed as having approved the content of the data record. Some support was expressed in favour of that proposal.

150. Although it was generally agreed that paragraphs (1), (2) and (3) were useful, it was suggested that they needed to be simplified. It was stated that those paragraphs should focus on the attribution of a data record to the originator, in the case where the data record was actually transmitted by the originator itself, or through an agent, or in the case where the addressee properly applied a reasonable method of authentication that had previously been agreed upon with the originator. With regard to paragraphs (2) and (3)(b), the concern was expressed that the meaning of the "verification" referred to therein was not clear. With regard to paragraph (3)(b), the concern was expressed that, in the current formulation, the originator could be bound merely because the addressee verified the authentication by a reasonable method, even in the absence of any previous relationship with the addressee. As to paragraph (4), a concern was expressed that it might allow the party with the stronger bargaining power to impose on the weaker party an unreasonable authentication method. It was suggested that paragraph (4) should be deleted.

151. Differing views were expressed as to whether paragraph (5) should be retained. In support of retention, it was stated that the paragraph was useful in providing some protection to the originator in case of errors in the transmission of a data record. In support of deletion, it was suggested that paragraph (5) was unnecessary since it essentially dealt with the issue of mistake, which should be dealt with under other applicable law. It was also suggested that paragraph (5) should be redrafted in terms of a presumption.

152. As to paragraph (6), a number of concerns were raised. One concern was that paragraph (6) could give the mistaken impression that data records might have no legal effect in themselves. Another concern was that paragraph (6) did not make it clear whether the legal effects related to the creation or the communication of a data record. It was suggested that paragraph (6) should be deleted, or if retained, that it should be modified.

153. After discussion, the Working Group requested the Secretariat to prepare a revised draft of article 10, taking into account the various views and concerns that had been expressed.

III. FUTURE WORK

154. The Working Group engaged in a preliminary exchange of views as to whether further legal issues relevant to the increased use of EDI and related means of data communication should be drawn to the attention of the Commission and considered for future work upon completion of the model statutory provisions.

155. The view was expressed that the legal aspects of negotiability or transferability of rights in goods in a computer-based environment were important issues to be considered in developing rules to facilitate the growth of world trade through electronic commerce. It was stated that such rules should focus on the following topics: the means to achieve legal recognition of agreements involving negotiability or transferability; the need for default standards for allocation of risks among the parties; the need for designated registries to maintain the integrity of the transfers. It was suggested that this project could focus on the preparation of a functional equivalent to a negotiable bill of lading or that it might explore the establishment of a new kind of document of title. Wide support was expressed in favour of that proposal.

156. Another view was expressed that it would be particularly appropriate to adopt a broader approach to the issues of transferability, with a view to involving not only transfer of rights in goods but also transfer of rights in securities such as stocks and shares. Some support was expressed in favour of that proposal. It was stated that many of the legal issues arising in the area of transferability of rights would in all likelihood be identical, irrespective of whether the rights transferred were in goods or in securities. It was pointed out, however, that securities markets were highly regulated at the national level. Moreover, it was stated that national systems for the exchange of dematerialized securities had been recently developed in many countries, or were currently being developed. It was

stated that, for those reasons, it might be particularly difficult to achieve uniformity in that area.

157. The prevailing view was that it would be appropriate for the Commission to undertake the preparation of uniform law on the issue of negotiability in a computer-based environment. It was generally felt that such uniform law should not be limited in scope to transfer of rights in goods and that certain issues relevant to dematerialized securities might need to be taken into account. It was also felt that no attempt should be made, at the current stage, to develop a uniform regime for the exchange of securities at an international level. There was general agreement that the future project should give particular consideration to the use of registries and to the possibility of performing such functions as registration and transfer of rights at an international level.

158. After discussion, the Working Group adopted a recommendation to the Commission that it should authorize the Working Group to undertake preliminary work on this project as soon as it had completed the preparation of the model statutory provisions.

159. Another suggestion was that the Commission should consider the issue of liability of networks and, more generally, the legal issues arising in the context of the relationships between EDI users and service providers as possible work items. While some support was expressed in favour of the suggestion, it was felt that it might be premature to engage in work on such a topic at this stage.

160. Yet another suggestion was that the Commission should engage in the preparation of a model communication agreement for optional use between EDI users. It was recalled, however, that such standard communication agreements were currently being prepared by other organizations, particularly the European Communities and the Economic Commission for Europe. It was also recalled that the Commission, at its twenty-sixth session, had reaffirmed its earlier decision to postpone its consideration of the matter until the texts of model interchange agreements currently being prepared within those organizations were available for review by the Commission.

161. The Working Group decided, subject to approval by the Commission, that its twenty-eighth session would be held at Vienna, from 3 to 14 October 1994.

**D. Working paper submitted to the Working Group on Electronic Data Interchange
at its twenty-seventh session: revised articles of draft uniform rules on the legal aspects of
electronic data interchange (EDI) and related means of data communication: note by the Secretariat:
(A/CN.9/WG.IV/WP.60)**

CONTENTS

	<i>Page</i>
INTRODUCTION	206
DRAFT UNIFORM RULES ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF DATA COMMUNICATION	206
CHAPTER I. GENERAL PROVISIONS	206
Article 1. Sphere of application	206
Article 2. Definitions	206
Article 3. Interpretation of the Uniform Rules	207
Article 4. [Deleted]	207
[Article 5. Variation by agreement]	207
CHAPTER II. FORM REQUIREMENTS	207
[Article 5 bis]	207
Article 6. Functional equivalent of "writing"	207
Article 7. Functional equivalent of "signature"	208
Article 8. Functional equivalent of "original"	208
Article 9. Admissibility and evidential value of data [records] [messages] ...	208
CHAPTER III. COMMUNICATION OF DATA [RECORDS] [MESSAGES]	208
Article 10. Effectiveness of data [records] [messages]	208
Article 11. Acknowledgement of receipt	209
Article 12. Formation of contracts	209
Article 13. Time and place of receipt of a data [record] [message]	210
Article 14. Storage of data [records] [messages]	210
[Article 15. Liability]	210

INTRODUCTION

1. At its twenty-fifth session, in 1992, the Commission discussed the legal issues of electronic data interchange (EDI) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic data Interchange.¹

2. The Working Group commenced this task at its twenty-fifth session by reviewing a number of legal issues set forth in a note prepared by the Secretariat (A/CN.9/WG.IV/WP.55). The Working Group agreed that it should proceed with its work on the assumption that the uniform rules should be prepared in the form of statutory rules. The Working Group deferred, however, a final decision as to the specific form that those statutory rules should take (A/CN.9/373, para. 34). At the conclusion of the session, the Working Group requested the Secretariat to prepare draft provisions, with possible variants based on the deliberations and decisions of the Working Group during the session, for its consideration at its next meeting (A/CN.9/373, para. 10).

3. At its twenty-sixth session, in 1993, the Commission considered the report of the Working Group on the work of its twenty-fifth session (A/CN.9/373). The Commission noted that the Working Group had started discussing the content of a uniform law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text.²

4. At its twenty-sixth session, the Working Group considered a first draft of uniform rules on the legal aspects of electronic data interchange and related means of trade data communication prepared by the Secretariat (A/CN.9/WG.IV/WP.57) and a proposal made by the delegation of the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.58). The Secretariat was requested to prepare a revised draft of the uniform rules on the basis of the deliberations and decisions of the Working Group (A/CN.9/387, para. 14).

5. The present note contains revised articles of the uniform rules. Additions and modifications to the text are indicated by italics. It may be noted that, in line with the recent instructions relating to the stricter control and limitation of United Nations documentation, no explanatory remarks have been added to the draft provisions. General reference is therefore made to the relevant portions of the Working Group report (A/CN.9/387); additional explanations will be provided orally during the session of the Working Group.

¹Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

²Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 263-268.

DRAFT UNIFORM RULES ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF DATA COMMUNICATION

Chapter I. General Provisions*

Article 1. Sphere of application**

These Rules apply to [commercial and administrative] information in the form of a data [record] [message]. They do not apply to information in purely oral or purely [documentary] [written] form. Except as otherwise provided in these Rules, they do not apply to the substance of the information.

Footnote to Chapter I

*Variant A: These Rules do not deal with issues related to the protection of consumers.

Variant B: These Rules do not override any rule of law intended for the protection of consumers.

Variant C: These Rules are not intended to apply to consumer transactions. They are subject to any rule of law intended for the protection of consumers.

Variant D: These Rules do not apply to consumer transactions.

Footnote to article 1

**The Commission suggests the following text for States that might wish to limit the applicability of these Rules to international [data [records] [messages]]:

These Rules apply to a data [record] [message] as defined in article 2 where the [record] [message] relates to international trade interests.

References

- A/CN.9/387, paras. 15-28 (twenty-sixth session, 1993)
- A/CN.9/WG.IV/WP.57, article 1
- A/CN.9/373, paras. 21-26 and 29-33 (twenty-fifth session, 1993)
- A/CN.9/WG.IV/WP.55, paras. 7-20
- A/CN.9/360, paras. 29-31 (twenty-fourth session, 1992)
- A/CN.9/WG.IV/WP.53, paras. 25-33

Article 2. Definitions

For the purposes of these Rules:

(a) "Data [record] [message]" means information created, stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange (EDI), telegram, telex or telecopy;

(b) "Electronic data interchange (EDI)" means the computerized transmission of structured data between independent computer systems;

(c) "[Sender] [originator]" means any person other than one performing the function of an intermediary, on whose behalf a data [record] [message] covered by these Rules purports to have been created, stored or communicated;

(d) "Addressee" means any person other than one performing the function of an intermediary, who is intended ultimately to [receive] [be the end user of] a data [record] [message] covered by these Rules;

(e) "Intermediary" means any person who, as an ordinary part of its business, engages in receiving data [records] [messages] covered by these Rules and forwarding such data [records] [messages] to their addressees or to other intermediaries. [An intermediary may, in addition, perform such functions as, *inter alia*, formatting, translating, recording, preserving and storing data [records] [messages].]

[(f) "Record"

Variant A: in relation to any means by which information is preserved for subsequent reference, means the form in which such information is preserved.

Variant B: means a representation of data that is susceptible of accurate reproduction at a later time.]

References

- A/CN.9/387, paras. 29-52 (twenty-sixth session, 1993)
A/CN.9/WG.IV/WP.57, article 2
A/CN.9/373, paras. 11-20, 26-28, and 35-36 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 23-26

Article 3. Interpretation of the Uniform Rules

(1) In the interpretation of these Rules, regard is to be had to their international character and to the need to promote uniformity in their application and the observance of good faith [in international trade].

[(2) Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.]

References

- A/CN.9/387, paras. 53-58 (twenty-sixth session, 1993)
A/CN.9/WG.IV/WP.57, article 3
A/CN.9/373, paras. 38-42 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 30-31

Article 4.

[Deleted]

References

- A/CN.9/387, paras. 59-61 (twenty-sixth session, 1993)
A/CN.9/WG.IV/WP.57, article 4
A/CN.9/373, paras. 38-42 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 30-31

[Article 5. Variation by agreement

Except as otherwise provided in these Rules, the rights and obligations of the [sender] [originator] and the addressee of a data [record] [message] arising out of these Rules may be varied by their agreement.]

References

- A/CN.9/387, paras. 62-65 (twenty-sixth session, 1993)
A/CN.9/WG.IV/WP.57, article 5
A/CN.9/373, para. 37 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 27-29

Chapter II. Form requirements

[Article 5 bis.

A data [record] [message] shall not be denied legal effectiveness, validity or enforceability on the grounds that the information it contains must be recorded in [written] [documentary] form or presented in its original form.]

Reference

- A/CN.9/387, paras. 93-94 (twenty-sixth session, 1993)

Article 6. Functional equivalent of "writing"

(1) Variant A: For the purpose of any rule of law, custom or practice which expressly or impliedly requires that certain information be recorded or presented in written form, or is predicated upon the existence of a writing, information in the form of a data [record] [message] complies with that requirement if

(a) the information can be reproduced in visible and intelligible [legible, interpretable] form; and

(b) the information is preserved as a record.

Variant B: Where any rule of law, custom or practice expressly or impliedly requires information to be recorded or presented in writing, or provides for certain consequences if information is or is not recorded or presented in writing,

(a) any such requirement or condition as to recording in writing shall be satisfied if a record is created which enables the information in question to be subsequently displayed in a form which permits such reference as could have been made had the information been recorded in writing; and

(b) any such requirement or condition as to the presentation of information in writing shall be satisfied if the information in question is recorded in accordance with paragraph (a) above, and presented in a form in which it is displayed to the person to whom it is required to be presented, or immediately accessible to that person for the purpose of reference.

[(2) The provisions of this article do not apply to the following situations: [. . .]]

References

- A/CN.9/387, paras. 66-80 (twenty-sixth session, 1993)
A/CN.9/WG.IV/WP.57, article 6
A/CN.9/WG.IV/WP.58, annex
A/CN.9/373, paras. 45-61 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 39-49

A/CN.9/360, paras. 32-43 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 37-45
 A/CN.9/350, paras. 68-78
 A/CN.9/333, paras. 20-28

Article 7. Functional equivalent of "signature"

(1) Where any rule of law, custom or practice expressly or impliedly requires information to be signed, any such requirement shall be satisfied if

[(a) a method [of authentication] indicating by whom the data [record] [message] was created and that that person approved the information contained therein has been agreed between the [sender] [originator] and the addressee of the data [record] [message] and that method has been used; or]

(b) a method [of authentication] is used to indicate by whom the data [record] [message] was created or communicated and that that person approved the information contained therein; and

(c) that method was as reliable as was [technically] appropriate to the purpose for which the data [record] [message] was created or communicated, in the light of all circumstances, including [any agreement between the [sender] [originator] and the addressee of the data [record] [message] and] any relevant commercial usage.

[(2) The provisions of this article do not apply to the following situations: [. . .].]

References

A/CN.9/387, paras. 81-90 (twenty-sixth session, 1993)
 A/CN.9/WG.IV/WP.57, article 7
 A/CN.9/WG.IV/WP.58, annex
 A/CN.9/373, paras. 63-76 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 50-63
 A/CN.9/360, paras. 71-75 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 61-66
 A/CN.9/350, paras. 86-89
 A/CN.9/333, paras. 50-59
 A/CN.9/265, paras. 49-58

Article 8. Functional equivalent of "original"

(1) Where any rule of law, custom or practice expressly or impliedly requires that certain information be presented in its original form, that requirement shall be fulfilled by the presentation of a data [record] [message] or in the form of a printout of such a data [record] [message] if

[(a) the [sender] [originator] and the addressee of the data [record] [message] have expressly agreed that the data [record] [message] should be regarded as equivalent to a paper original document; or]

Variant A: (b) there exists reliable assurance as to the integrity of the information presented in the form of a data [record] [message].

Variant B: (b) a method [of authentication] is used to ensure that the information presented has not been altered; and

(c) that method was as reliable as was [technically] appropriate to the purpose for which the data [record] [message] was created or communicated, in the light of all the circumstances, including [any agreement between the [sender] [originator] and the addressee of the data [record] [message] and] any relevant commercial usage.

[(2) The provisions of this article do not apply to the following situations: [. . .].]

References

A/CN.9/387, paras. 91-97 (twenty-sixth session, 1993)
 A/CN.9/WG.IV/WP.57, article 8
 A/CN.9/WG.IV/WP.58, annex
 A/CN.9/373, paras. 77-91 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 64-70
 A/CN.9/360, paras. 60-70 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 56-60
 A/CN.9/350, paras. 84-85
 A/CN.9/265, paras. 43-48

Article 9. Admissibility and evidential value of data [records] [messages]

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a data [record] [message] in evidence

(a) solely on the grounds that it is a data [record] [message]; or,

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, solely on the grounds that it is not an original document.

(2) Information presented in the form of a data [record] [message] shall be given due evidential weight. In assessing the evidential weight of a data [record] [message], regard shall be had to the reliability of the manner in which the data [record] [message] was created, stored or communicated and, where relevant, the reliability of the manner in which the information was authenticated.

References

A/CN.9/387, paras. 98-109 (twenty-sixth session, 1993)
 A/CN.9/WG.IV/WP.57, article 9
 A/CN.9/WG.IV/WP.58, annex
 A/CN.9/373, paras. 97-102 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 71-81
 A/CN.9/360, paras. 44-59 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 46-55
 A/CN.9/350, paras. 79-83
 A/CN.9/333, paras. 29-41
 A/CN.9/265, paras. 27-48

Chapter III. Communication of data [records] [messages]

Article 10. Effectiveness of data [records] [messages]

(1) A [sender] [originator] is deemed to have approved the content of a data [record] [message] [or an

amendment or revocation of a data [record] [message]] if it was issued by the [sender] [originator] or by another person who had the authority to act on behalf of the [sender] [originator] in respect of that data [record] [message].

[(2) As between the [sender] [originator] and the addressee, a data [record] [message] is deemed to be that of the [sender] [originator] if the addressee properly applied a procedure previously agreed with the [sender] [originator] for verifying that the data [record] [message] was the data [record] [message] of the latter.]

[(3) A [sender] [originator] who is not deemed to have approved the data [record] [message] by virtue of paragraph (1) or (2) is deemed to have done so by virtue of this paragraph if:

(a) the data [record] [message] as received by the addressee resulted from the actions of a person whose relationship with the [sender] [originator] or with any agent of the [sender] [originator] enabled that person to gain access to the authentication procedure of the [sender] [originator]; or

(b) the addressee verified the authentication by a method which was reasonable in all the circumstances.]

[(4) The [sender] [originator] and the addressee of a data [record] [message] are permitted to agree that an addressee may be deemed to have approved the data [record] [message] although the authentication is not [commercially] reasonable in the circumstances.]

(5) Where a [sender] [originator] is deemed to have approved the content of a data [record] [message] under this article, it is deemed to have approved the content of the message as received by the addressee. However, where a data [record] [message] contains an error, or duplicates in error a previous [record] [message], the [sender] [originator] is not deemed to have approved the content of the data [record] [message] by virtue of this article in so far as the data [record] [message] was erroneous, if the addressee knew of the error or the error would have been apparent, had the addressee exercised reasonable care or used any agreed procedure of verification.

[Paragraph (5) applies to an error or discrepancy in an amendment or a revocation message as it applies to an error or discrepancy in a data [record] [message]].

[(6) The fact that a data [record] [message] is deemed to be effective as that of the [sender] [originator] does not impart legal significance to that data [record] [message].]

References

- A/CN.9/387, paras. 110-132 (twenty-sixth session, 1993)
A/CN.9/WG.IV/WP.57, article 10
A/CN.9/373, paras. 109-115 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 82-86

Article 11. Acknowledgement of receipt

(1) Where, on or before sending a data [message], or by means of that data [message], the [sender] [originator] has requested an acknowledgement of receipt, but the [sender] [originator] has not requested that the acknowledgement be in a particular form, any request for an acknowledgement may be satisfied by any communication or conduct of the addressee sufficient to indicate to the [sender] [originator] that the message has been received.

(2) If, on or before transmitting a data message, or by means of that data message, the [sender] [originator] has requested an acknowledgement of receipt [and stated that the data message is to be of no effect until an acknowledgement is received], the addressee may not rely on the message, for any purpose for which it might otherwise seek to rely on it, until an acknowledgement has been received by the [sender] [originator].

(3) If the [sender] [originator] does not receive the acknowledgement of receipt within the time-limit [agreed upon, requested or within reasonable time], it may, upon giving prompt notification to the addressee to that effect, treat the data message as though it had never been received.

(4) An acknowledgement of receipt, when received by the [sender] [originator], is [conclusive] [presumptive] evidence that the related data message has been received and, where confirmation of syntax has been required, that the data message was syntactically correct. Whether a functional acknowledgement has other legal effects is outside the purview of these Rules.

References

- A/CN.9/387, paras. 133-144 (twenty-sixth session, 1993)
A/CN.9/WG.IV/WP.57, article 11
A/CN.9/373, paras. 116-122 (twenty-fifth session, 1993)
A/CN.9/WG.IV/WP.55, paras. 87-93
A/CN.9/360, para. 125 (twenty-fourth session, 1992)
A/CN.9/WG.IV/WP.53, paras. 80-81
A/CN.9/350, para. 92
A/CN.9/333, paras. 48-49

Article 12. Formation of contracts

(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data [records] [messages]. Where a contract is formed by means of data [records] [messages], it shall not be denied validity or enforceability on the sole ground that the contract was concluded by such means.

[(2) A contract concluded by means of data [records] [messages] is formed at the time when [, and at the place where] the data [record] [message] constituting acceptance of an offer is received by its addressee or deemed to be received under article 13.]

References

- A/CN.9/387, paras. 145-151 (twenty-sixth session, 1993)
 A/CN.9/WG.IV/WP.57, article 12
 A/CN.9/373, paras. 126-133 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 95-108
 A/CN.9/360, paras. 76-95 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 67-78
 A/CN.9/350, paras. 93-108
 A/CN.9/333, paras. 60-75

Article 13. Time and place of receipt of a data [record] [message]

(1) Unless otherwise agreed between the [sender] [originator] and the addressee of a data [record] [message] and [unless otherwise provided by other applicable law], a data [record] [message] is deemed to be received by its addressee

(a) [subject to subparagraph (b) of this article,] at the time when the data [record] [message] enters the information system of, or designated by, the addressee in such a way that it can be retrieved by the addressee or when the data [record] [message] would have entered the information system and been capable of being retrieved if the information system of the addressee had been functioning properly.

[(b) if the data [record] [message] is in such a form that it requires translation, decoding or other processing in order to become intelligible by the addressee, at the time when such processing is completed or at the time when such processing could reasonably be expected to be completed.]

(2) Unless otherwise agreed between the [sender] [originator] and the addressee of a data [record] [message] and [unless otherwise provided by other applicable law], a data [record] [message] is deemed to be received by its addressee at the place where the addressee has its place of business; where the addressee has more than one place of business, the data [record] [message] is deemed to be received at the place of business with the closest relationship to the content of the data [record] [message].

References

- A/CN.9/387, paras. 152-163 (twenty-sixth session, 1993)
 A/CN.9/WG.IV/WP.57, article 13
 A/CN.9/373, paras. 134-146 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 95-108
 A/CN.9/360, paras. 76-95 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 67-78
 A/CN.9/350, paras. 93-108
 A/CN.9/333, paras. 60-75

Article 14. Storage of data [records] [messages]

(1) Where it is required by law that certain information be retained as a record, that requirement shall be

satisfied if the information is kept in the form of data [records] [messages] provided that the requirements contained in paragraphs (2) and (3) of this article are satisfied.

[(2) Data [records] [messages] shall be stored unaltered by the [sender] [originator] in the transmitted format and by the addressee in the format in which they are received.]

[(3) Data [records] [messages] shall be kept readily accessible and shall be capable of being reproduced in a human readable form and, if required, of being printed. Any operational equipment required in this connection shall be made available by the person storing information in the form of data [records] [messages].

References

- A/CN.9/387, paras. 164-168 (twenty-sixth session, 1993)
 A/CN.9/WG.IV/WP.57, article 14
 A/CN.9/373, para. 123-125 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, para. 94

[Article 15. Liability]

(1) Each party shall be liable for damage arising directly from failure to observe any of the provisions of the uniform rules except in the event where the party is prevented from so doing by any circumstances which constitute an impediment beyond that party's control and which could not reasonably be expected to be taken into account at the time when that party engaged in sending and receiving data [records] [messages] or the consequences of which could not be avoided or overcome.

(2) If a party engages any intermediary to perform such services as the transmission, logging or processing of a data [record] [message], the party who engages such intermediary shall be liable for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.

(3) If a party requires another party to use the services of an intermediary to perform the transmission, logging or processing of a data [record] [message], the party who requires such use shall be liable to the other party for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.]

References

- A/CN.9/387, paras. 169-176 (twenty-sixth session, 1993)
 A/CN.9/WG.IV/WP.57, article 15
 A/CN.9/373, paras. 148-152 (twenty-fifth session, 1993)
 A/CN.9/WG.IV/WP.55, paras. 114-123
 A/CN.9/360, paras. 97-103 (twenty-fourth session, 1992)
 A/CN.9/WG.IV/WP.53, paras. 82-83
 A/CN.9/350, paras. 101-103
 A/CN.9/333, para. 76

IV. INTERNATIONAL COMMERCIAL ARBITRATION

Draft guidelines for preparatory conferences in arbitral proceedings: report of the Secretary-General

(A/CN.9/396 and A/CN.9/396/Add.1) [Original: English]

[A/CN.9/396]

1. The Commission, at its twenty-sixth session in 1993, considered a note by the Secretariat entitled "Guidelines for pre-hearing conferences in arbitral proceedings" (A/CN.9/378/Add.2).¹ The note was prepared as a result of a suggestion made at the UNCITRAL Congress on International Trade Law on the theme "Uniform commercial law in the twenty-first century", held in New York from 18 to 22 May 1992, in the context of the twenty-fifth session of the Commission.

2. The note, observing the useful application of the principle of discretion and flexibility in the conduct of arbitral proceedings, pointed out that in some circumstances that principle may make it difficult for the participants in an arbitration to prepare for the various stages of the arbitral

proceedings. In addition, the note described how those difficulties could be avoided by holding at an early stage of arbitral proceedings a "pre-hearing conference" in order to discuss and plan the proceedings. Furthermore, the note suggested that the Commission should prepare guidelines for pre-hearing conferences and gave a tentative outline of topics that might be addressed in such guidelines.

3. The Commission requested the Secretariat to prepare a draft of such guidelines with a view to being considered and adopted at the Commission's twenty-seventh session in 1994 or twenty-eighth session in 1995.²

4. Addendum 1 to the present document contains the first draft of Guidelines for Preparatory Conferences in Arbitral Proceedings, prepared pursuant to the request by the Commission.

¹Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 293-296.

²Ibid., paras. 293 and 296.

[A/CN.9/396/Add.1]

CONTENTS

	Page
INTRODUCTION	212
I. GENERAL CONSIDERATIONS	212
A. Background	212
B. Term "preparatory conference"	213
C. Purpose and nature of the Guidelines	213
D. Relationship between the Guidelines and arbitration rules	213
II. CONVENING AND CONDUCTING A PREPARATORY CONFERENCE	214
A. Cases in which preparatory conference may be useful	214
B. Stage at which preparatory conference may be held	215
C. Decisions taken at preparatory conference	215
III. ANNOTATED CHECK-LIST OF POSSIBLE TOPICS FOR PREPARATORY CONFERENCE	215
[A. Rules governing arbitral procedure]	216
[B. Jurisdiction and composition of arbitral tribunal]	216
C. Possibility of settlement	216
D. Defining issues and order of deciding them	217
E. Undisputed facts or issues	218
F. Arrangements concerning documentary evidence	218
G. Arrangements concerning physical evidence	219

	<i>Page</i>
H. Arrangements concerning evidence of witnesses	220
I. Arrangements concerning evidence of experts	221
J. Arrangements concerning written submissions	222
K. Practical details concerning exhibits and writings	223
L. Hearings	223
M. Language of proceedings	225
N. Administrative support	225
O. Secretary or registrar of arbitral tribunal	225
P. Place of arbitration	226
Q. Mandatory provisions governing arbitral proceedings	226
R. Multi-party arbitration	227
S. Deposits for costs	228
T. Any other procedural matter	228

INTRODUCTION*

[...]

1. GENERAL CONSIDERATIONS

A. Background

1. Arbitration rules agreed upon by parties typically allow the arbitral tribunal quite broad discretion and flexibility in the conduct of arbitral proceedings. This is true in particular for the proceedings after the constitution of the arbitral tribunal and before the making of the award, that is when various documents are exchanged, hearings held and evidence taken. A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1):

"1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

2. The principle of flexibility and discretion has two kinds of limits. First, the arbitral tribunal does not have discretion to the extent the rules themselves restrict it by providing a specific solution. In the case of the UNCITRAL Rules, this is indicated in the introductory phrase of article 15(1) "Subject to these Rules". Second, the arbitral tribunal must observe the provisions of the procedural law applicable to the arbitration that are mandatory for the arbitral tribunal.

3. It is generally considered that the principle of discretion and flexibility is useful and that it constitutes one of the reasons for the attractiveness of arbitration as a method of settling commercial disputes. The principle is useful because it allows the arbitral tribunal to adapt the manner of proceeding to the circumstances of the dispute, to conduct the case in the procedural style preferred by the parties and the arbitrators, and to plan the proceedings.

4. If the arbitral tribunal does not plan the proceedings or if planning is too limited, it is possible, in particular in international arbitration, that a party, a legal counsel or a member of the arbitral tribunal will find the proceedings unpredictable, surprising and difficult to prepare for. This is likely to lead to misunderstandings, delays and increased costs of proceedings.

5. Planning of arbitral proceedings is particularly useful in international arbitration, in which arbitrators or parties may have differing expectations as to the manner of proceeding. Differences in procedural traditions to which the arbitrators, parties or counsel are accustomed are typical reasons for such differing expectations. Differing expectations may be anticipated also when the legal backgrounds of the participants in the arbitration do not appear dissimilar. This is because arbitrators and other arbitration practitioners in international trade are increasingly exposed to diverse procedural practices and because many practitioners have developed individual and eclectic procedural methods.

6. In order to plan the conduct of arbitral proceedings, some arbitrators consider it useful to hold, at an early stage of proceedings, a conference among the participants in the arbitration. At such a conference, referred to herein as "preparatory conference", appropriate procedural decisions are considered and details of procedure clarified so as to make the subsequent proceedings more predictable as well as more time efficient and less costly.

7. Many widely used sets of international arbitration rules make no reference to such preparatory conferences, and those conferences are in practice convened irrespective of

*It is suggested that the Introduction to the Guidelines contain a short history of the work on the Guidelines and a resolution which the Commission may wish to adopt in finalizing the Guidelines. A draft Introduction will be before the twenty-seventh session in 1994 in the form of a conference-room paper.

Portions of the draft Guidelines have been placed between square brackets; this has been done to indicate that the purpose of the Guidelines may also be fulfilled without the bracketed portions.

whether there is provision for that in the agreed set of arbitration rules. This indicates that arbitral tribunals consider the decision to convene such a conference to be within the general procedural authority of the arbitral tribunal to conduct arbitral proceedings in the manner it considers appropriate.

8. The confidential nature of arbitration makes it difficult to assess the extent of the practice of holding preparatory conferences. According to reports of practitioners, it seems that in a good number of international arbitrations such conferences are held. It appears that the practice of preparatory conferences is particularly widespread in procedural traditions that tend to see the role of the arbitral tribunal more as one of a moderator of the proceedings as opposed to an active investigator, and which, in accordance with this procedural tendency, expect the parties to assume a considerable degree of procedural initiative. Nevertheless, in view of the potential benefits resulting from planning arbitral proceedings, in particular when the expectations of the parties or the arbitrators as to the manner of conducting the proceedings are likely to differ, a preparatory conference might be useful in any arbitral setting.

9. It may be concluded that, since there appear to be no reports of objections in principle to the practice of holding preparatory conferences, and since many commentators praise the usefulness of the practice, it may be expected that preparatory conferences in arbitration are likely to become more frequent even where they have not been customary.

B. Term "preparatory conference"

10. A single term for preparatory meetings in arbitration has not developed. Meetings of this kind are referred to in practice by expressions such as "pre-hearing conference", "preliminary meeting", "pre-trial review", "administrative conference" or terms of similar import. Which of those terms will be used may partly depend upon the stage of the proceedings at which the meeting is to take place. For example, a meeting referred to as "preliminary" meeting usually takes place shortly after the initial request for arbitration has been presented, at which time not all elements of the claim and defence may have been stated to the arbitral tribunal; the term "administrative" meeting is used in arbitrations under the auspices of some arbitral institutions. Expressions such as "pre-hearing" conference, on the other hand, may be used more frequently for a preparatory meeting taking place at a time when the claims and defences have been fully stated and the main focus of the meeting is to prepare hearings. A "pre-hearing review" might have as its main focus the review of the preparations by the parties for the hearings pursuant to procedural decisions taken earlier.

11. The Guidelines use the expression "preparatory conference" as a general term intended to reflect the purpose of the conference, irrespective of the stage at which it is held or whether or not it is administered by an arbitral institution. Expressions usual in the practice of some arbitral institutions or at traditional arbitration venues are not employed, since they are not in universal use and could be understood as giving undue emphasis to particular practice.

C. Purpose and nature of the Guidelines

12. The preparation of the Guidelines was motivated by the consideration that, in appropriate circumstances, a preparatory conference in arbitration is a useful exercise and that internationally harmonized guidelines would assist practitioners in deciding whether to hold a preparatory conference and, if one is to be held, to help them prepare it and carry it out.

13. The Guidelines explain the objectives of a preparatory conference and serve as a reminder of topics that could usefully be considered at such a conference. The Guidelines are not a comprehensive guide on the substance of the decisions that could be taken as a result of a preparatory conference. While with respect to some types of decisions some of the possible options have been mentioned for illustrative purposes, the Guidelines do not have the ambition to present the whole spectrum of possible solutions. The practice in international arbitration is too varied for the Guidelines to be able to reflect the possible solutions and all aspects of arbitral practice. Thus, for the proper conduct of an arbitration, the arbitrators and the parties will require knowledge of the law and practice of arbitration beyond the information contained in these Guidelines.

14. As preparatory conferences are not used with equal frequency in all regions and arbitration venues, the Guidelines would contribute to the dissemination of practical knowledge about arbitration. By doing so, the Guidelines may gradually foster improvement, better understanding and harmonization of international arbitration procedures.

D. Relationship between the Guidelines and arbitration rules

15. The Guidelines are not rules suitable to be agreed upon. A decision to refer to the Guidelines in connection with a preparatory conference does not establish any obligation for the arbitral tribunal or the parties as to the selection of topics to be considered or as to decisions to be taken as a result of the conference. Thus, a preparatory conference is to be carried out within the limits of the arbitration rules that the parties may have agreed upon.

16. The decision to use the Guidelines does not imply any modification of the arbitration rules that the parties may have agreed upon. Nevertheless, at a preparatory conference decisions may be taken that add more detail or new requirements to the arbitration rules agreed upon by the parties. Decisions may also be taken to modify the agreed arbitration rules.

17. Since the arbitral process is based on the freedom of parties to agree on rules of procedure or to empower the arbitrators to determine those rules, nothing is in principle to be held against adding to or modifying the agreed upon rules. Nevertheless, two reservations should be expressed. Firstly, when the arbitration is administered by an arbitral institution, the institution may reserve the right not to approve a modification of the rules. In fact, some institutions are reluctant to agree to modifications of their rules. Secondly, it is advisable that a modification of a standard

set of arbitration rules be well considered. The parties should be mindful that standard sets of rules are designed to function as a system of rules, and that a modification of a rule may affect the system in an unintended or inappropriate manner. Moreover, as arbitration rules determine the duties and prerogatives of the arbitral tribunal, the arbitrators have an interest in any modification of those rules. It is therefore recommendable that a modification of arbitration rules be made in consultation with the arbitral tribunal.]

18. It should be borne in mind that, whatever decisions are taken as a result of the preparatory conference, they should not violate provisions of the law applicable to the arbitration that cannot be derogated from.

II. CONVENING AND CONDUCTING PREPARATORY CONFERENCE

19. It is stressed at the outset that, if a preparatory conference is to be held, its organization, agenda and the manner in which it is conducted should be adapted to the needs of the case, in line with the principle of flexibility and discretion generally governing arbitration. Furthermore, it is for the arbitral tribunal to take care that the holding of a preparatory conference does not add unnecessarily to the costs of the proceedings or prove to be an administrative burden.

20. A preparatory conference is often convened on the initiative of the arbitral tribunal or the presiding arbitrator, frequently after consulting the parties. The question of whether the arbitral tribunal has the right to convene a preparatory conference depends on the procedural prerogatives of the arbitral tribunal as specified in the governing procedural law and any agreed upon rules. Arbitration rules and laws typically give the arbitral tribunal such procedural latitude that the right to convene a preparatory conference falls within the tribunal's authority. Some arbitration rules contain specific provisions concerning the preparatory meetings of the type discussed in these Guidelines.

21. It is possible that a party has doubts about the usefulness of, or objects to, holding a preparatory conference. Such an attitude will be taken into account by the arbitral tribunal in considering whether it is worthwhile to convene the conference. A negative attitude might indicate that a preparatory conference should not be held since it may not fully meet its objectives.

22. There might, however, be cases where the arbitral tribunal would conclude that a preparatory conference should be held despite reservations or objections of a party. Such may be the conclusion when the tribunal procedural wishes to take certain procedural decisions only after giving the parties the opportunity to express their views. If a party should fail to participate in the preparatory conference, the arbitral tribunal may consider it appropriate to hold the conference and take the procedural decisions without having heard the views of that party. For a preparatory conference to be held in the absence of a party, it is necessary, in accordance with general principles of arbitral procedure, that the party was given due notice and has not shown sufficient cause for its failure to appear. What is

sufficient cause is a matter to be judged in the light of the circumstances of the case and the standards of fairness and equality. If a party who was duly notified fails to appear without having indicated its intention not to appear, it is normally wise not to proceed until after first inquiring about the reasons for the party's absence.

[23. Usually, the participants in the preparatory conference will be the parties themselves, their legal counsel and any other representatives of the parties. Sometimes, however, the arbitral tribunal may indicate in the invitation to the conference that, in view of the types of questions to be discussed, it would satisfy the objectives of the conference if only the legal counsel are present. For example, when the matters to be discussed are limited to the rules governing the arbitral procedure, practical arrangements concerning written statements or administrative support, the presence of the legal counsel may be sufficient.]

24. Often, a decision to plan arbitral proceedings means that the participants will hold a meeting at the place of arbitration or at some other appropriate place. Sometimes, however, in particular if a limited number of procedural issues is to be considered, it may be sufficient if under the coordination of the presiding arbitrator consultations are carried out by telecommunications.

A. Cases in which preparatory conference may be useful

25. While planning of the proceedings is a necessary and usual activity in any arbitration, convening a preparatory conference for that purpose is not a necessity. Indeed, in many arbitrations, planning is carried out by procedural decisions of the arbitral tribunal without calling a special meeting. It may be decided not to convene a preparatory conference in particular when the participants have a good idea as to how the proceedings will be conducted, when the participants are not likely to have disparate expectations as to the arbitral procedure, or when the case is relatively simple. In such cases, the Guidelines may be of assistance by reminding the arbitral tribunal about the issues on which early decisions might be worthwhile.

26. The usefulness of convening a preparatory conference depends on whether the time and expense needed for it are justified by the expected benefits, such as increased predictability of the subsequent proceedings, better understanding by the participants of the procedures, increased efficiency of hearings and an improved procedural atmosphere. In addition to the time and expenses, two types of considerations are likely to be important in deciding whether a preparatory conference should be held.

27. One consideration may be a belief that the parties do not have a sufficiently clear idea as to the manner of proceeding and that a personal exchange of views is needed to provide early guidance to the parties. A related consideration is the likelihood that the arbitrators, parties, and legal counsel are not used to the same procedural style, and therefore have divergent expectations as to the manner in which arbitral proceedings will be carried out (see also above, paragraph 5).

28. Another consideration is the degree of procedural complexity of the case in terms of, for example, the expected length of hearings, the number of witnesses to be heard, the extent and kind of expert evidence that may be needed, the probability that hearings will have to be held outside the venue of arbitration, the number of items of evidence to be assessed, the volume of documentation to be managed, or linguistic problems to be overcome. The more complex the case, the more useful it may be to convene a preparatory conference in order to coordinate and plan procedural actions, and to tailor the procedures to the circumstances of the case.

B. Stage at which preparatory conference may be held

29. No generally applicable guidelines can be expressed as to the stage of arbitral proceedings at which it is most appropriate to hold a preparatory conference. When the claimant's initial request for arbitration does not cover all factual and legal aspects of the claim, the question is whether the arbitral tribunal should schedule the preparatory conference to follow that initial request or whether the conference should be held later, most likely shortly after the parties have stated their claims and defences. In some cases, it is considered useful to hold the conference before the claims and defences have been fully stated. In other cases, it is considered appropriate to convene a preparatory conference shortly after the submission of the statements of claim and defence.

30. The stage at which the preparatory conference is held influences the scope of the agenda of the preparatory conference. When the conference is held before the claims and defences have been fully stated, the agenda will typically be more limited and will probably not cover, or will cover to a limited extent, questions such as defining points at issue, various arrangements concerning evidence, statements of undisputed facts or undisputed issues, or preparations for hearings. One likely topic of such an early preparatory conference will be the preparation of documents completing the statements of claim and defence.

31. In exceptional cases, which appear to be limited to most complex arbitrations, more than one preparatory conference might be held. As the expenditures and time needed for a preparatory conference are major limitations, the opportuneness of more than one conference may be increased if the participants reside near the place of arbitration. More than one conference may be planned at the outset of the proceedings, or the development of the proceedings may prompt the arbitral tribunal to convene an additional conference. In some of those cases, the main purpose of a subsequent conference may be to review how the parties were able to implement procedural decisions taken earlier and to take corrective measures if necessary.

32. Often the decisions taken as a result of a preparatory conference imply that there should be an interval between the conference and the next stage of the arbitral proceedings. During the interval, the parties are to implement the decisions and prepare for the proceedings. Nevertheless, it

is often acceptable to plan and prepare procedural actions at a conference held shortly or immediately before hearings on the substance of the dispute. It should be noted, however, that such preparatory activities carried out close to the hearings would have a limited scope in that they cannot address procedural questions that imply time for preparations.

C. Decisions taken at preparatory conference

[33. The purpose of a preparatory conference is to facilitate making decisions as to the manner of proceeding during the subsequent arbitral proceedings. Most of those decisions will be of a procedural nature. Some decisions, however, may concern or touch upon the substance of the dispute (e.g., determination of points at issue, or agreement of the parties that certain facts or issues are undisputed).]

34. Different approaches are possible concerning the way in which decisions are arrived at and recorded. Under one approach, the arbitral tribunal takes decisions after consulting with the parties and issues the decisions in the form of a procedural order. Another approach, which may be taken when the parties are ready to agree on one or more issues, is to record the substance of the agreement. When this approach is used, the parties' agreement may be incorporated into a document signed by the parties or into a document drawn up and issued by the arbitral tribunal reflecting the agreement of the parties.

35. One difference between the two approaches is that it is usually more expeditious for the arbitral tribunal to take decisions itself instead of engaging in discussions with the parties in order to reach agreement on the wording of the decisions. Another difference is in the manner in which a decision emanating from the preparatory conference can later be modified: while a procedural decision by the arbitral tribunal can be modified by the tribunal itself, a procedural agreement by the parties can only be modified if the parties so agree.

36. The degree of detail in formulating procedural decisions varies. Some practitioners tend to formulate a detailed and comprehensive set of decisions, while others prefer more general decisions, leaving details to be decided upon by the arbitral tribunal as appropriate during the subsequent arbitral proceedings. In deciding on the level of detail of a decision, it is advisable to take into account that, with a detailed and specific decision, the possibility is greater that the decision would have to be modified as a result of a change in circumstances.

III. ANNOTATED CHECK-LIST OF POSSIBLE TOPICS FOR PREPARATORY CONFERENCE

37. In order to enable the parties to prepare for and efficiently participate in a preparatory conference, it is useful that they be given advance notice of the agenda for the conference. Usually, the agenda is prepared by the arbitral tribunal or the presiding arbitrator. Sometimes, views of the parties are sought as to the topics to be included in the agenda.

38. It is generally useful for the arbitral tribunal in conducting the preparatory conference to adhere to the agenda announced in advance. By avoiding matters that participants may not have prepared for, expeditiousness will be fostered. Nevertheless, it is also useful to maintain a degree of flexibility and allow, if the arbitral tribunal considers it appropriate, that an unannounced topic be considered.

39. The following sections A to T are a check-list of topics that an arbitral tribunal might include in the agenda for a preparatory conference. The list is intended to be quite complete so as to provide a reminder for as many different circumstances as possible. It is emphasized, however, that in drawing up the agenda the individual circumstances of the case should be borne in mind, and that, indeed, in many arbitrations only a limited number of the matters mentioned in the check-list will need to be considered. On the other hand, the check-list is not presented as exhaustive. There may be other issues that the participants may wish to address at a conference of the type covered by these Guidelines.

[A. Rules governing arbitral procedure]

Agenda: If the parties have not agreed on arbitration rules, inquire whether they now wish to do so.

Remarks

1. Sometimes parties forgo including in the arbitration agreement a stipulation as to a set of arbitration rules that is to govern the arbitral proceedings. Reasons may be, for example, that at the time of the conclusion of the arbitration agreement the parties did not pay attention to that aspect of the arbitration agreement, did not want to prolong the negotiations, or intended to leave the manner of conducting the proceedings to the arbitral tribunal and the applicable procedural law.

2. It is advisable to ascertain whether both parties wish to consider the possibility of agreeing on a set of arbitration rules. Otherwise, an initiative of the arbitral tribunal for the parties to adopt a set of arbitration rules might give rise to unnecessary discussions, to an undesirable impression that the arbitral tribunal is unsatisfied with the substance of the arbitration agreement or that the arbitrators have a difficulty with their task. If after bringing up the question it emerges that agreement is not easily attainable, the arbitral tribunal may wish to discontinue the discussion on the matter and proceed on the basis of the arbitration agreement and the applicable procedural law.]

[B. Jurisdiction and composition of arbitral tribunal]

Agenda: Inquire whether a party has an objection as to the jurisdiction or the composition of the arbitral tribunal.

Remarks

1. Raising the matter of jurisdiction or the composition of the arbitral tribunal may not always be desirable. A possible disadvantage might be that thereby the arbitral tribunal

creates a possibly incorrect impression that the jurisdiction or the composition of the arbitral tribunal is in doubt, which a party might try to use to stall the proceedings. An advantage, however, may be that any question, doubt or objection that a party may have can be addressed and dispelled at an early stage of the proceedings. Furthermore, by putting on record that an issue concerning jurisdiction or composition of the tribunal has been settled or that no such issue has been raised, a party may rely on that record should the other party have an objection at a later time.]

C. Possibility of settlement

Agenda: Inquire whether the parties are willing to inform the arbitral tribunal about the status of any settlement discussions and whether those discussions should affect the scheduling of the arbitral proceedings.

Remarks

[1. Parties may have different attitudes as to whether the arbitral tribunal should be aware of any settlement discussions that might have taken place or are intended to take place. Often, a party or both parties wish to keep any settlement discussions completely separate from the arbitration and may also wish that the arbitral tribunal should not be informed about the fact that such discussions have taken place or about the substance of the discussions. In other cases, the parties may wish the arbitral tribunal to be aware of the fact that settlement discussions are taking place or will take place. A reason for informing the arbitral tribunal may be for it to take that into account in scheduling the arbitral proceedings. Sometimes, the parties might even wish the arbitrators to be involved in an appropriate manner in settlement discussions in order to facilitate reaching a settlement.]

[2. When an arbitrator is involved in an attempt to settle a dispute, views differ as to whether such an involvement in an unsuccessful attempt to settle the dispute affects the arbitrator's ability to continue performing its function. Under one view, the roles of a conciliator and an arbitrator are not incompatible, provided that the manner in which the person participated in settlement negotiations does not compromise the person's ability to act in an impartial manner. According to another view, the fact that a person has acted as a conciliator calls into question its ability to act as an impartial arbitrator in the same dispute and, according to some, such a person is automatically disqualified from acting as an arbitrator.]

3. If the parties wish to inform the arbitral tribunal of the status of settlement discussions, they may wish to limit the consultations, in the interest of brevity and effectiveness of the preparatory conference, to the following:

(a) whether settlement discussions have taken place or are likely to take place, without entering into a discussion of possible terms of a settlement, and whether the possibility of settlement discussions should affect the scheduling of the arbitral proceedings; and

(b) if it appears appropriate, whether the parties have considered, or are willing to consider, engaging in conciliation, a procedure in which an independent and impartial conciliator assists the parties in their attempt to settle the dispute. Should the parties so wish, it may be useful to discuss available conciliation methods (for example, the method provided by the UNCITRAL Conciliation Rules).

D. Defining issues and order of deciding them

- Agenda:*
- (i) Define the points that are at issue between the parties;
 - (ii) define more precisely, if necessary, the relief or remedy sought;
 - (iii) consider the order in which the issues should be decided.

Remarks

Item (i)

1. It is useful for the points at issue to be identified as early as practicable in the proceedings. This will help the parties and their advisers to identify undisputed facts, concentrate on the essential matters and possibly settle some of the claims. Moreover, this will assist the participants in determining the best procedures for resolving the issues. For example, if the most difficult issues are ones of fact, a party might take steps to secure relevant evidence and engage expert witnesses; if, however, the facts are largely undisputed and the issues concern law, it might be possible to request that the proceedings be conducted on the basis of documents only.

2. One approach to identifying the points at issue may be for the arbitral tribunal to do so on the basis of the written statements of the parties. However, whether the arbitral tribunal will be able to do so with reasonable dispatch depends on how the parties have stated their cases. Practices differ as to the matters that parties include in their statements, the style and length of presentation, and the stage of proceedings at which the parties are expected to present the facts, evidence and legal arguments supporting their claims. Under some procedural traditions, the initial statements are largely limited to facts, whereas legal arguments and even evidence are brought up later, sometimes as late as during the hearings. Under other traditions, a more comprehensive approach is expected already at the initial stage of the arbitration in that a statement of claim should include facts, references to evidence and legal arguments. Differences exist also as regards the level of detail at which facts, evidence and arguments are set forth in writing. In order to facilitate the identification of the issues by the arbitral tribunal, it is worthwhile sufficiently early to give to the parties guidance and suggestions for preparing the submissions, indicating, for example, the desired structure, scope and the level of detail of the submissions (see below, J, "Arrangements concerning written submissions", item (iv)).

3. Another approach to identifying the points at issue may be for the arbitral tribunal to request the parties to draw up a list of those points. If it appears unlikely that the

parties are in a position to prepare a joint list, each party may be requested to prepare a list of points that in its view are at issue.

4. For ease of reference, it is often helpful if the issues, with short indications as to opposing positions, are systematically summarized in a list or a schedule. In a complex dispute, different lists may be prepared, for example, one concerning issues of liability, and another one, which might be drawn up later, concerning various items of the claim for damages.

5. When the case is particularly complex, and the statements of claim and defence have not yet been submitted, the advisability of early consultations as to a common approach to preparing the statements of claim and defence and identifying the issues may make it worthwhile to convene a preparatory conference promptly after the arbitral tribunal has been formed. (As to the time of convening a preparatory conference, see above, II, "Convening and conducting a preparatory conference", paragraphs 29-32.)

Item (ii)

[6. The relief or remedy sought by a claimant or counter-claimant must be sufficiently definite for the arbitral tribunal to be able to decide on it. Criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy. A possible reason for an insufficiently precise formulation may be the fact that the claimant is uncertain as to the extent of its rights under the applicable law and a resulting desire to leave to the arbitral tribunal the decision on the extent or even the type of the relief or remedy due to the claimant.]

[7. It is advisable that the claimant assure itself that, should its arguments be accepted, the formulation of the claim will not be an obstacle to granting the full relief or remedy. If the claim is not formulated according to the criteria of the arbitral tribunal, it is possible that the claim will be decided on only in so far as it is definite.]

8. If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, the preparatory conference may be an appropriate time to explain to the parties the degree of definiteness with which their claims are to be formulated.

Item (iii)

9. Having clarified the points at issue, the arbitral tribunal may wish to determine the order in which the issues are to be taken up. The order may be determined by the fact that one of the issues is preliminary with respect to another issue. For example, a decision on the disputed jurisdiction of the arbitral tribunal is preliminary to the other issues, or the resolution of questions concerning the existence of the contract and the responsibility for its non-performance is preliminary to the question of damages arising from the non-performance. When various items of damages are claimed or if the breach of different contracts is in dispute, the order of considering and deciding the issues may depend on considerations such as the time thought to be needed for each item, the amounts in question, prospect of success of the claim, and the interests of the parties.

[10. After deciding on the order of deciding the issues, the arbitral tribunal might consider it appropriate to incorporate the decision on one of the issues into an award and leave the award on the other issues to be issued subsequently. "Partial", "interim", or "interlocutory" award are terms used in contractual and statutory rules for such awards addressing one of the several issues submitted to the arbitral tribunal. The use of one or the other term depends on the type of issue dealt with in the award and on whether the award is final with respect to the issue it resolves.]

[11. The arbitral tribunal may, for example, decide to limit the award to an issue such as its jurisdiction, interim measures of protection, existence of the contract out of which the claim arises, liability of the defendant, or a segment of the damages claimed. Such awards addressing only some issues might be used, for example, when it is considered fair to advance deciding on a discrete part of a claim; if it is expected that after certain issues have been decided the parties might be more inclined to settle the remaining ones; or in order to give a party an early opportunity to raise a recourse against the decision on a preliminary issue.]

E. Undisputed facts or issues

Agenda: Inquire whether the parties are willing to agree that certain facts and issues are undisputed.

Remarks

1. If facts or issues relevant in the dispute are agreed by the parties to be undisputed, there is no need to prove those facts or to argue those issues. Thus, by such agreement the parties will reduce the time and expense for taking evidence and for arguments.

2. Different approaches may be used for arriving at a statement of undisputed facts and issues. One may be that the arbitral tribunal gives the parties a period of time for preparing a joint statement of undisputed facts and issues. Another approach may be for the presiding arbitrator or the arbitral tribunal to draw up, on the basis of written submissions and consultations with the parties, a statement of facts and issues, which is to be presented to the parties for agreement.

[3. The arbitral tribunal may clarify at the preparatory conference that, should a party refuse to admit a fact advanced by the opponent and it becomes clear that the party had no reason to doubt the fact, the tribunal may take that into account, together with other circumstances, in apportioning the costs of the arbitration. This may be an effective stimulus to reduce the time and costs for the taking of evidence.]

F. Arrangements concerning documentary evidence

Agenda: The following may be considered regarding documentary evidence:

- (i) a time schedule for submitting documentary evidence;

- (ii) whether, unless a party contests a document within a specified period of time: (a) the document is accepted as having originated from the source indicated in the document, (b) a copy of a communication (e.g., letter, telex, telefax) is accepted without further proof as having been received by the addressee and (c) a photocopy is accepted as correct;
- (iii) whether the parties agree to submit jointly a single set of documentary evidence whose authenticity is not disputed;
- (iv) whether voluminous or complicated documentary evidence should be presented by reports by qualified persons which may contain summaries, tabulations, charts, extracts or samples;
- (v) whether a party intends to seek, or request the arbitral tribunal to seek, production of documentary evidence from the other party.

Remarks

Item (i)

1. Many arbitration rules empower the arbitral tribunal to fix periods of time for submitting documentary and other evidence. A discussion of those periods at the preparatory conference will be conducive to deciding realistic and fair time-limits.

2. In some cases it may not be possible or advisable to establish at an early stage of the proceedings a final and comprehensive time schedule. For such cases it may be decided that the established time schedule will be reviewed and supplemented as appropriate.

3. The arbitral tribunal may clarify to the parties that the tribunal will not admit late submissions of evidence. In the interest of fairness of the proceedings, exceptions may have to be made, in particular when new evidence is submitted in order to rebut other evidence, when a piece of evidence has been discovered after the deadline, or when the arbitral tribunal for another reason considers that a late submission should be allowed.

Item (ii)

4. It may be decided that the presumption as to the origin and receipt of a document and as to correctness of a copy applies to all documents or only to specified categories of documents. Such a decision may be useful to simplify the introduction of documentary evidence or to discourage making unfounded and dilatory objections at a late stage of the proceedings concerning the probative value of documents.

5. In order to allow each party to review the documents before the presumption would apply, it should be provided that the presumption applies unless the document is contested within a specified time period. It may be added that, even if a document is contested late, the presumption does not apply if the arbitral tribunal considers the delay justified.

Item (iii)

6. The parties may wish to agree to submit jointly a single set of documents whose authenticity is not disputed. It should be made clear to the parties that the purpose of this procedure is to avoid duplicate submissions and discussions concerning the authenticity of documents, and that the procedure does not prejudice the position of the parties concerning the significance of the content of the documents. When in large cases the single set of documents is too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents.

Item (iv)

7. When documentary evidence is technical or voluminous, examination of all underlying data may be disproportionately time consuming. In such cases, savings may be achieved if a source such as a public accountant or consulting engineer is appointed to analyse the documentation and present a report. The report may present findings in the form of summaries, tabulations, charts, extracts or samples. It is advisable to discuss the terms of reference to be observed in preparing the report and a time schedule.

8. Such a decision should be combined with arrangements that give the parties the opportunity to review the underlying data and the methodology of preparing the report based on that data.

Item (v)

9. Many arbitration rules expressly empower the arbitral tribunal to require the parties to produce documentary and other evidence. In addition to that power, at some arbitration venues specific procedures are in use on various forms of "discovery" of evidence, whereby a party has a right to obtain from the other party pieces of evidence. Those procedures, as specified in arbitration rules and national laws and as applied by arbitrators, vary widely.

10. Unless the agreed arbitration rules provide specific solutions, the arbitral tribunal might consider it appropriate to discuss at the preparatory conference to what extent a party should have a right to seek production of documents from the other party. Such a discussion may be useful in particular where, due to different legal backgrounds, the arbitrators and the parties have different notions as to how that right is to be exercised.

11. One possible set of conditions for requesting a document from the opponent may be formulated along the following lines: the document must be described with reasonable particularity; the document must be such that it would likely contribute to the clarification of the case; the document must be within the control of the party from whom production is sought; and the seeking party must have made reasonable but unsuccessful efforts to obtain the document. A further condition that might be included, either unqualified or subject to discretion by the arbitral tribunal, is that the document must have passed between the requested party and a third party who is not a party to the arbitration, a condition that would exclude requests for purely internal documents. It might be appropriate to clarify

that, if the requested party refuses to comply with a proper request, the question as to whether the refusal was justified is to be decided by the arbitral tribunal.

12. As an alternative to setting out specific conditions such as the ones mentioned in the preceding paragraph, the parties might make a generally worded stipulation to the effect that they will make available to each other documents relevant to the dispute and that the arbitral tribunal should exercise discretion in deciding whether a request for documents should be complied with.

13. In deciding disagreements as to whether a request for a document should be complied with, the arbitral tribunal will take into account, among other circumstances, the principles in national laws concerning situations in which the party is entitled to refuse to surrender a document. Grounds for refusal may concern, for instance, national defence, diplomatic relations between countries, certain governmental actions, certain communications between a client and its legal counsel, or the right of a person to refuse to take a self-incriminating action.

14. It may be useful to establish a time-frame for submission of a request for documents, for production of documents or other response to the request. The parties should be reminded that the arbitral tribunal would be free to draw its conclusions from the failure of a party to produce a properly requested document.

G. Arrangements concerning physical evidence

- Agenda:*
- (i) Consider whether physical evidence other than documents will be presented;
 - (ii) inquire whether it will be necessary for the arbitral tribunal to carry out an on-site inspection of property or goods.

*Remarks**Item (i)*

1. It may be necessary for a complete understanding of facts to assess physical evidence other than documents (e.g., by inspecting samples of goods or other materials, viewing a film or a model or demonstrating the functioning of a machine). It may be useful to inquire whether a party intends to submit such evidence so that appropriate arrangements may be taken, such as fixing the time schedules for presenting the exhibits, ensuring that the other party has suitable opportunity to prepare itself for the presentation of the evidence, and possibly taking measures for safekeeping the exhibits.

Item (ii)

2. If a party intends to request, or the arbitral tribunal expects to order, an on-site inspection of property or goods, it may be useful to consider arrangements therefor and time schedules.

3. The site to be inspected is often under the control of one of the parties, which typically means that employees

of that party will be present to give guidance and explanations. In order to avoid communications between arbitrators and a representative or employee of a party without the presence of the opposing party, particular attention has to be paid to the invitations, timing and meeting places. Furthermore, it should be borne in mind that, unless those employees are heard as witnesses, replies to questions asked of such employees at the site are not testimonies and should not be treated as evidence in the proceedings.

H. Arrangements concerning evidence of witnesses

Agenda: The following may be considered:

- (i) written communications concerning evidence of witnesses;
- (ii) manner of taking oral evidence by witnesses;
- (iii) manner of taking evidence from persons affiliated with a party.

Remarks

Item (i)

1. Unless the agreed upon rules contain procedures for announcing and taking evidence of witnesses, it may be considered whether the party presenting witnesses should be required to submit to the arbitral tribunal and the other party, in advance of the hearing, a written communication concerning the evidence of witnesses. Such a communication may be required to contain some or all of the following elements:

- (a) the names and addresses of the witnesses and the language or languages to be used in case of oral testimony;
- (b) the subject on which the witness will give oral testimony; instead of requiring merely the subject of the testimony, the parties may be required to submit a summary of the statements to be made by the witness; another possibility may be to require a full statement signed by the witness;
- (c) particulars concerning the relationship with any of the parties, qualifications and experience of the witnesses, and how did the witness learn about the facts to which the testimony will relate.

In giving instructions to the parties, it may be useful to provide guidance also as to the expected level of detail of the statements and summaries.

2. As such procedures in taking evidence of witnesses are not known in all legal systems, it is advisable that an arbitral tribunal that directs such procedures take care that the parties understand what the tribunal desires.
3. Such written communications submitted ahead of hearings may facilitate and expedite the proceedings by making it easier for the opposing party to prepare for the hearings and for both parties to identify uncontested matters. If the communication sets out the full statement of the witness, the parties will sometimes agree to forgo oral testimony and rely on the written statement only.

4. A question to be decided is whether the communications will be exchanged simultaneously or consecutively. In certain circumstances, it may be felt that the party who is the first one to present a written statement of a witness is giving an advantage to the opponent in that the opponent, in preparing written statements of its witnesses, might be able to adapt them to the received written testimony. As a result of such considerations, it is sometimes preferred that the statements of witnesses be exchanged simultaneously. (See also below, J, "Arrangements concerning written submissions", item (iii), concerning the order of submitting written submissions.)

5. The tribunal may make it clear that it reserves the right to refuse to hear a witness at a hearing if the required communication has not been submitted in time.

6. Practices and laws differ as to whether written statements of witnesses are to be made under oath. If an oath is to be used, it may be unclear how and by whom the oath is to be administered. It is thus advisable to adopt a solution that is workable and acceptable for both parties. Among the possible solutions, one is to avoid a traditional oath and require the witness to sign a written declaration to the effect that the statement is true to the best of knowledge and belief of the witness.

Item (ii)

7. National arbitration laws usually neither prescribe detailed rules for hearing witnesses nor require adherence to rules used in court proceedings. Thus, as long as the principles of fairness and equality of parties are observed, procedures considered appropriate for the case may be adopted. It is advisable that the manner of hearing witnesses be clarified as much as possible before the hearing so as to avoid surprise and allow the parties to prepare for the hearings.

8. The preferred method of taking evidence by witnesses is usually a result of the experience of the participants with traditional approaches developed in court litigation. Those traditional approaches are in varying degrees influenced by one of the two major systems of procedural law. According to one system, it is in principle left to the parties to gather and present evidence at oral hearings. Thus it is for the party presenting a witness to ask questions of that witness, and for the opponent to test the veracity of the answers by cross-examining the witness. Under that system, the role of the judge is limited to the procedural control over the examination and cross-examination of the witnesses. According to the other system, the judges tend to participate more actively in the questioning of witnesses. An important element of this system is the expectation that the judge is as much as possible informed about the factual issues considered at the hearings, which is achieved by submitting to the judge written allegations and evidence before the hearings.

9. The method to be adopted for questioning witnesses may be inspired by one of the two following approaches:

- a witness may first be questioned by the arbitral tribunal, whereupon the party who called the witness is given the opportunity to examine the witness and the other party to cross-examine it under the control of the arbitral tribunal;

- a witness is questioned by each party in the appropriate order, while the arbitral tribunal retains control over the process and the possibility to pose questions during or after the questioning by the parties.

10. Arbitral practices vary as to the degree of control of the arbitral tribunal over the hearing. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, subject to procedural control of the arbitral tribunal, including the right to disallow a question; other arbitrators consider that questions by a party to a witness should be put through the arbitral tribunal. An early clarification is likely to be appreciated.

11. When several witnesses are to be heard over a period of more than a day or two, it is likely to reduce costs if the order in which the witnesses are to be heard is known in advance, and the presence of witnesses can be scheduled accordingly. Each party may be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the order and to authorize departures from it.

12. Some arbitrators favour the rule that, except if the circumstances require otherwise, the presence of a witness in the hearing-room is limited to the time when that witness is testifying; the purpose is not to let the witnesses be influenced by what they hear during the hearings. Other arbitrators, on the other hand, consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be immediately clarified or that their presence may act as a deterrent against untrue statements. Another possible approach may be that witnesses, who are ordinarily not present in the hearing-room before their testimony, stay in the room after they have testified.

13. Sometimes stenographic transcripts are made of the testimonies. Alternatively, summaries of the testimonies are dictated by an arbitrator, usually the presiding arbitrator. In other cases, the participants take only personal notes and no summary or transcript of the testimonies is made part of the written record of the proceedings. (See also below, L, "Hearings", item (vi).)

Item (iii)

14. The person from whom factual information is to be obtained may be affiliated with one of the parties in dispute, for example, as an agent, executive or employee. Differences exist among legal systems as to whether such persons interested in the outcome of the dispute can be heard as witnesses. Under some legal systems, such persons cannot be witnesses, in which case it may be necessary to consider criteria for determining the persons or categories of persons who are to be excluded. If some persons will not be accepted as witnesses, it may be useful to consider how the arbitral tribunal will receive information from them.

15. Where interested persons can be heard as witnesses, it is widely held that hearing statements of fact by those persons should in some respects be treated differently from the taking of evidence of other witnesses. Typical differences are the following: while the arbitral tribunal may

have discretion as to whether evidence of a particular witness is to be taken, the tribunal does not have such a discretion as to whether an agent of a party is to be heard; unlike an agent, who should be permitted to be present in the room throughout the hearings, the arbitral tribunal may decide that a witness should not be present when other witnesses testify or other evidence is taken; in addition, if witnesses are to give evidence under oath, this may not be appropriate for an agent.

I. Arrangements concerning evidence of experts

- Agenda:*
- (i) If the arbitral tribunal intends to appoint an expert, or more than one if necessary, consider relevant procedures;
 - (ii) inquire whether either party intends to present expert witnesses and, if so, consider procedures in that regard.

Remarks

1. Often, a number of matters concerning evidence of experts are addressed in the agreed upon arbitration rules and the applicable procedural law. As to the appointment of an expert, in many cases the arbitral tribunal as well as the parties may engage an expert to give evidence. In other cases, it is up to the parties to present expert testimony. In the latter case, the consideration at the preparatory conference would be limited to item (ii).

2. If, at the stage when the preparatory conference is held, the arbitral tribunal cannot yet judge whether it should appoint an expert, the consideration of this item may be postponed.

Item (i)

3. Discussing the question of possible engagement of a tribunal-appointed expert may be particularly useful when the parties, despite the fact that the arbitral tribunal is empowered to engage an expert, may be uneasy about the possibility that the opinion of a person unknown to them could influence the outcome of the dispute. Raising this question may also be useful when the arbitral tribunal is of the view that no expert is needed or, even if needed, the tribunal prefers not to appoint one, as such a view may influence the way in which the parties will present their evidence.

4. If an expert is to be appointed by the arbitral tribunal, the following matters may be discussed: (a) the appointment procedure, (b) the expert's terms of reference, (c) the manner in which the parties are to participate in the evaluation of the expert's report, including by presenting party-appointed experts, and (d) the costs.

5. Different ways are possible for the arbitral tribunal to appoint an expert. For example, the tribunal may appoint a person enjoying the confidence of the arbitrators. Another possibility may be for the tribunal to seek the views of the parties; this may be done without mentioning a candidate, by presenting a list of possible candidates, or by soliciting from each party a list with a view to identifying a mutually agreed candidate. The arbitral tribunal may wish to bear in

mind all circumstances of the case in selecting the method of appointment and in determining the degree to which it is desirable to strive to appoint an expert agreed to by the parties.

6. The purpose of the terms of reference of the expert is to specify the questions on which the expert is to provide clarification and to avoid opinions on points that are not for the expert to assess. Even if the terms of reference are for the arbitral tribunal to determine, it may wish to consult the parties before finalizing them. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in its report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report. Since matters to be covered by the report are ordinarily technical and detailed, it is usual that the expert is required to present a written report. For the case that oral hearings will be held, it is normal to require the expert to be ready to testify on the report at a hearing.

7. As the parties, in accordance with general principles of arbitral procedure, are entitled to be able to contradict or comment upon the expert's report, it may be useful to consider at the preparatory conference the procedures and time periods for doing so. If the expert is to present a written report, the parties should be given an opportunity to comment on it in writing. If, in addition to a written report, or in exceptional cases instead of a written report, hearings are to be held for the purpose of explaining the expert's conclusions, it would be in line with general principles of arbitral procedure to give each party an opportunity to interrogate the expert at the hearing, and to present an expert witness to testify on the points covered in the report of the tribunal-appointed expert.

8. For the case that the paid deposits for costs will not be sufficient to cover the costs of the tribunal-appointed expert, it may be necessary to clarify at the preparatory conference that, as soon as the estimated costs of the expert are ascertained, additional deposits are to be paid.

Item (ii)

9. If a party intends to present one or more expert witnesses, it may be decided that each expert must be announced, and that the expert should be available to participate in hearings and be called upon to answer questions, similarly as other witnesses (see above, H, "Arrangements concerning evidence of witnesses", items (i) and (ii)).

J. Arrangements concerning written submissions

Agenda: It may be useful to consider the following:

- (i) whether the parties will be requested, or whether they intend, to present written submissions, in addition to the statements of claim and defence;
- (ii) the stage at which written submissions are to be made;
- (iii) whether the arbitral tribunal expects the submissions on a particular issue to be made consecutively or simultaneously;

- (iv) the structure of a submission;
- (v) a time schedule for presenting the submissions;
- (vi) routing the submissions.

Remarks

Item (i)

1. After the parties have presented to the arbitral tribunal their claims and defences, they may wish, or the arbitral tribunal may request them, to submit further writings in which they provide explanations of evidence or law, analyse facts, admit or deny allegations, or make proposals and react to proposals. Such written submissions are in practice referred to by expressions such as memorial, counter-memorial, brief, counter-brief, *réplique*, *duplicque*, rebuttal, rejoinder. The expressions reflect either a particular linguistic usage ("memorial" as opposed to "brief") or a sequence of submissions.

2. Further kinds of documents that might be included in the submissions of the parties may include the following:

- list of points that are at issue between the parties (see above, D, "Defining issues and order of deciding them", item (i), remark 4);
- materials concerning the law applicable to the substance of the dispute such as texts of statutory provisions, texts of court decisions or other precedents, or legal opinions;
- lists of court cases or other precedents referred to in the submissions of the parties;
- chronology of events (in complex cases, a list of events relevant to the case, arranged in a sequential order, is sometimes prepared so as to facilitate discussions and references to individual events; the list may include both undisputed and disputed facts);
- list of persons (among the persons whose names may be mentioned in the proceedings, a number of them may not be known to every participant in the proceedings; for ease of reference, it may be useful to have available a list of those persons. An entry in the list might include the name and present function of the person and perhaps such additional particulars as the function during the events leading to the dispute, subsequent functions, address or nationality).

Item (ii)

3. Written submissions are often submitted before the hearings so as to clarify the issues and prepare the participants for the hearings, or, if no hearings are to be held, for deciding the case. If at the hearings new issues emerge, submissions after the hearings may be requested or allowed. Since such post-hearing submissions are typically limited to clarifying the remaining issues, they are usually subject to shorter time periods than pre-hearing submissions.

4. Some arbitral tribunals, however, follow the procedures according to which the parties are not required to present written evidence and legal arguments to the arbitral tribunal before the hearing. In such a case, the arbitral tribunal may consider it appropriate that written submissions be made after the hearings.

Item (iii)

5. Submissions on a particular issue may be made consecutively, i.e., the party who receives a submission is given a time period to react with its submission. This approach, which allows the reacting party to concentrate its arguments on points at issue, has the advantage of being an expeditious method for obtaining the views of the parties on a matter. A possible disadvantage, however, might be a perception that the party who is preparing a submission in response to arguments and proposals of the other party is advantaged by being able to tailor it better to its benefit. Such a perception is avoided when the parties are given the same time period for transmitting to the arbitral tribunal a statement on an issue; if both parties comply with the request, the submissions are transmitted simultaneously to the respective parties. (For a related consideration concerning the preparation of statements of witnesses, see above, H, "Arrangements concerning evidence of witnesses", remark 4).

Item (iv)

6. It is usually appropriate if a submission is structured so that it sets out the facts, states the law, and expresses a view or a proposal; the response may be arranged to present an admission or denial of the facts stated in the submission of the opponent, state any additional facts, make observations concerning the law as stated or interpreted in the submission replied to, possibly provide a different statement of law, and express a view or a proposal.

Item (v)

7. It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral tribunal may, on the one hand, wish to make sure that the case is not unduly protracted, but, on the other hand, it may wish to preserve a degree of flexibility and accept late submissions if this appears appropriate in light of the circumstances of the case. Considerations that may prompt the arbitral tribunal to accept a late submission may be, for example, fairness, the content of the late document, and the desirability for each party to have the feeling that it had a full opportunity of presenting its case. In any event, it may be useful to make each late submission subject to an explanation and a special ruling as to whether it is permitted. (See also above, F, "Arrangements for documentary evidence", item (i)).

Item (vi)

8. Different routes are possible for the exchange of written statements in arbitral proceedings. One possibility is that a party transmits the statements to the arbitral tribunal with the understanding that the arbitral tribunal will transmit a copy to the other party. When an institution is administering the case, another possibility is for the statements to be filed with the institution, which then transmits them to the arbitral tribunal and the other party. A further possibility is that the statements are exchanged directly between the parties, with copies being sent to the arbitral tribunal. When a secretary or a registrar of the arbitral tribunal has been appointed (see below, section O), one of its duties may be to organize the routing of statements between the parties and the arbitral tribunal.

K. Practical details concerning exhibits and writings

Agenda: Consider some practical details concerning writings and exhibits, such as the number of copies in which each writing is to be submitted; a uniform system for numbering of exhibits; a method for identifying exhibits, including tabs; the requirement that when a party refers to a submitted document, the document must be identified by its heading and document number assigned to it; the requirement that paragraphs in documents prepared for the proceedings be numbered in order to facilitate precise references to parts of a text; the determination as to whether translations will be included in the same volume as the original text or will be submitted in a separate volume; the desirable size of paper used for written submissions so as to facilitate an orderly maintenance of files.

Remark

It might be helpful to establish practical arrangements such as those mentioned, in particular when extensive documentation is to be managed.

L. Hearings

Agenda: Consider whether hearings will be held and, if so, it may be useful to discuss the following:

- (i) the expected length of hearings, whether the hearings will be held on consecutive days or will be separated, and a time schedule for the hearings;
- (ii) whether any time-limit should be imposed by the arbitral tribunal on the length of oral arguments or testimonies;
- (iii) the order in which the parties will make their oral presentations and whether opening statements or closing statements will be heard;
- (iv) whether the parties may submit a written summary of the arguments made orally; if so, whether summaries should be submitted at the hearing or could be submitted shortly thereafter;
- (v) whether witnesses will be required to make an oath or affirmation and, if so, its form, taking into account any laws of the place of arbitration governing the administration of oaths;
- (vi) notetaking at the hearings.

Remarks

1. National laws often have provisions, some of them mandatory, as to when oral hearings must be held and as to when the arbitral tribunal is free to decide whether to hold hearings. Many arbitration rules also deal with the matter.

[2. Advantages of holding hearings include the following: when pieces of evidence are in conflict, when the accuracy of a written statement of fact is in doubt, or when arguments in documents need to be clarified, it is usually quicker and easier to deal with those questions in oral contradictory

proceedings than by correspondence, which both parties must receive and have a possibility of commenting upon. Furthermore, a hearing offers a good opportunity for the arbitral tribunal to indicate to the parties, in a fair and impartial manner, what in the view of the tribunal are the strengths and weaknesses of their cases, which is likely to lead to a more effective presentation of cases. Disadvantages of oral hearings may include: high travel costs; presentation of a case at hearings requires experience and skill, which often makes expert representation necessary; in cases involving specialized professionals, whose calendars are frequently booked for months in advance, it may be difficult to agree on an expeditious schedule of hearings.]

Item (i)

3. When hearings are to be held, attitudes differ as to the appropriate length of hearings and how a hearing is to be organized. Some practitioners expect that most if not all evidence and arguments should be presented orally at the hearings, while others tend to rely more on documents and prefer to limit the hearings to issues that have not been clarified by the exchange of written submissions. A preparatory conference provides a useful opportunity to clarify such points.

4. When hearings are expected to last over a number of days, different approaches are followed in scheduling them. In some arbitration venues, hearings are usually planned to continue day by day until they are concluded. Some practitioners recommend that, after three or four days, hearings be interrupted for a day to review notes, analyse the progress and consider actions for the next block of hearings. In other arbitration venues, the tendency is to have, instead of a single long hearing, separate periods of hearings, for instance of two or three days, dealing with segments of the case; for example, the initial hearings may be devoted to hearing witnesses and later hearings to oral argument.

[5. The advantage of continuous hearings is that they involve less travel costs, the participants can concentrate on and dispose of the whole case, memory will not be faded, procedural momentum can better be maintained, and it is unlikely that people representing a party will have to change. On the other hand, the longer the hearings, the more difficult it is to find dates acceptable to all participants. The advantage of separate periods of hearings is that they are usually easier to schedule and that they leave time for analysing the records and negotiations between the parties on how to narrow the remaining issues by agreement. Narrowing of issues may be assisted if the arbitral tribunal, careful to maintain its impartiality, indicates to the parties its assessment of the argued issues.]

6. Whatever the chosen pattern of hearings, it may occur that new evidence or new issues emerge at the hearings or that the parties are unable during the planned time to present all evidence and complete their arguments. While by careful planning at a preparatory conference such a possibility can be reduced, it may be useful to plan some time to absorb such contingencies.

7. If, by the time the preparatory conference is held, the issues have not been fully defined by the exchange of written submissions, the arbitral tribunal is usually reluctant

to fix at the preparatory conference the dates for oral hearings. This has the disadvantage that, when the time comes for fixing the dates, some participants (e.g., specialist advocates or expert witnesses) may not be available on short notice. This disadvantage may be mitigated by agreeing at the preparatory conference on "target dates", with the understanding that those dates will be either confirmed or rescheduled within an agreed reasonable time.

Item (ii)

8. As to the length of oral arguments and any testimonies, the arbitral tribunal may wish to discuss with the parties how much time they think they will need. On the basis of the views of the parties, the arbitral tribunal may allocate to each party an appropriate number of hours to use for arguments and questioning its witnesses or the other party's witnesses. Usually, the same time for each party is appropriate, unless a different allocation appears suitable. The arbitral tribunal may also wish to obtain express commitments from the parties that they will observe the time-frame. Such planning of time and judiciously firm control by the arbitral tribunal of its use will allow the parties to prepare their speeches better and avoid that one party would unfairly use a disproportionate amount of time.

9. Furthermore, keeping the time for hearings within desirable limits will be facilitated if attention is paid to the need that the written submissions be appropriately structured and exhaustive, without being unduly copious.

Item (iii)

10. Under many arbitration rules and national laws, the tribunal has, within its authority to conduct the proceedings, broad prerogatives to determine the order of presentations at the hearings. As patterns of organizing a hearing differ, it will foster predictability and fairness of the proceedings, if the order of presentations is, at least in broad lines, clarified before the hearings. [In determining the order, the following two procedural patterns may be taken into consideration.]

[11. When the arbitral tribunal is not expected to be fully familiar with the issues to be argued at the hearing, it is normal that the claimant is given ample time to make an opening statement laying out the facts, the main arguments and what the evidence to be taken at the hearing is intended to demonstrate. After that, the claimant may call and examine its witnesses and the defendant is given the opportunity to test the testimony of the witnesses by cross-examination. Next, the defendant is called upon to make its opening statement and thereafter its witnesses are examined and cross-examined. At the end, the defendant and the claimant are given the opportunity to make closing statements.]

[12. When the arbitral tribunal has been informed before the hearing through the exchange of documentary evidence and written arguments about the points at issue, the opening statements of the parties are likely to be much shorter than in the case referred to in the preceding paragraph or may even not take place. If any witnesses are to be heard,

this usually happens after the opening statements, whereupon oral arguments are made. The claimant is often called upon to argue first and the defendant has the right to reply. Following such a symmetrical pattern, possibly with several rounds of arguments, it is often expected that the defendant will argue last, although sometimes the arbitral tribunal allows the claimant, who has the burden of proof on the claim, to have the last word.]

[13. The foregoing procedural patterns are examples that can be adapted to suit the circumstances of the case and inclinations of the arbitrators and the parties.]

Item (iv)

14. Some practitioners are used to submitting to the arbitral tribunal and the other party notes summarizing their oral arguments. When such notes are handed over, this is usually done at the end of hearings or shortly thereafter; in some cases, they are presented already before the hearing.

15. In order to avoid surprise, foster equality of the parties and facilitate preparations for the hearings, it is advisable to discuss at the preparatory conference whether and how notes are to be prepared and exchanged. The arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing the speeches and that, therefore, they should not contain or refer to new evidence or new legal texts or arguments.

Item (v)

16. Practices and laws differ as to whether oral testimony by a witness is to be given under oath. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other legal systems, oral testimonies under oath are either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths. (See also above, H, "Arrangements concerning evidence of witnesses", remark 6.)

Item (vi)

17. Different approaches may be taken to taking notes at hearings. One possibility is that the members of the arbitral tribunal take personal notes. Another one is that the presiding arbitrator consecutively dictates to a typist a summary of oral statements. A further possibility is that arrangements are made for hearings to be taped or for professional stenographers to take notes and for verbatim transcripts to be prepared within a specified period or sometimes even until the next day. The arbitral tribunal may wish to discuss with the parties the various methods, clarify the arrangements and, if professionals are to be hired, how the costs are to be borne.

18. If transcripts are to be produced, it may be agreed how the persons who made the statements would be able to check the transcript. For example, it may be agreed that the changes to the record would be approved by the parties or, failing their agreement, would be referred to one of the arbitrators or to the arbitral tribunal. If a secretary of the

arbitral tribunal is to be appointed, supervision over the changes to the record may be one of its tasks.

M. Language of proceedings

Agenda: If the parties have not agreed on the language or languages of the proceedings, determine the language or languages to be used in the proceedings.

Remarks

1. It is useful for the parties to settle the question of the language or languages to be used in the proceedings as early as possible, preferably already at the time when this could be taken into account in choosing the arbitrators, representatives or legal advisers. If the question has not been settled by the commencement of the arbitral proceedings, many arbitration rules and national procedural laws empower the arbitral tribunal to make the determination.

2. In any case, it may be useful to consider at the preparatory conference the extent to which the agreement of the parties or the determination by the arbitral tribunal is to be applied. The question may be in particular whether certain types of documents that are not in the language of the proceedings may be submitted in their original language or should be accompanied by a translation. For example, the participants may wish to clarify whether and the extent to which translations are needed of possibly long texts concerning the law applicable to the substance of the dispute such as statutes, court decisions or commentaries.

3. If interpretation is to be used during oral hearings, it is advisable to consider the arrangements therefor; in addition, it may be decided whether the costs will be paid out of the deposits and apportioned between the parties along with the other arbitration costs or whether the costs are to be paid directly by a party.

N. Administrative support

Agenda: Seek opinion from the parties about the type and extent of administrative services needed for the arbitral proceedings, the provider of the services and costs.

Remarks

1. The administrative support required in an arbitration may be, for example, the use of meeting rooms, photocopying, tape recording, transcribing of tapes and handling of financial deposits. When the parties have submitted the case to an arbitral institution, such services are typically arranged by the institution. Otherwise, organizations that may be able to provide those services include chambers of commerce, hotels or specialized firms providing secretarial services.

O. Secretary or registrar of arbitral tribunal

Agenda: Inquire whether it is warranted for the arbitral tribunal to appoint a person who is to carry out

administrative tasks under the direction of the arbitral tribunal (secretary, registrar or administrator).

Remarks

1. Different practices and attitudes exist with respect to the appointment of a secretary of an arbitral tribunal (registrar, administrator or similar terms are also used). In some regions or arbitration venues, secretaries of arbitral tribunals are frequently appointed, at least in certain types of cases, whereas elsewhere such appointments are not made.

2. If a secretary is to be appointed, according to the practice of some arbitrators, it is customary for the arbitral tribunal on its own motion to select the secretary, while in the practice of others the appointment is made after consultations between the arbitral tribunal and the parties.

3. As to the tasks that could properly be entrusted to a secretary, the practices and attitudes also differ. The tasks known to be entrusted to secretaries of arbitral tribunals may be grouped in two categories:

(a) *organizational arrangements*, which may include duties such as handling of financial deposits, reservations of meeting rooms, travel and hotel bookings for the arbitrators, securing the availability of equipment (e.g., photocopiers, word processors, tape recorders), procurement of office supplies, supervision or coordination of work of support staff (e.g., typists, stenographers, editors of transcripts, archivists, translators, interpreters), and sometimes also contracting support personnel;

(b) *legal research and other professional assistance to the arbitral tribunal*, which may include assignments such as collecting case law or published materials concerning issues specified by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case.

4. The types of tasks mentioned under (a) are usually not controversial. Tasks under (b), however, may be controversial, in particular if a duty is perceived as involving a delegation of a function incumbent on the arbitrators, or if a duty involves the presence of the secretary during consultations of the arbitral tribunal. Such a role of the secretary is in the view of some commentators inadmissible or is admissible under certain restrictions such as that both parties agree thereto and that the secretary's participation does not violate the fundamental principles of arbitral procedure.

P. Place of arbitration

- Agenda: (i) Unless it has already been determined, consider determining the place of arbitration, including the particular location where the arbitration is to be conducted;
- (ii) consider whether there exists a need for conducting a part of arbitral proceedings outside the location of the arbitration.

Remarks

Item (i)

1. The place of arbitration may be determined by specifying a jurisdiction (e.g., Egypt or British Columbia in Canada), a town or a location within the town (e.g., the offices of a chamber of commerce or a hotel). It is generally accepted that the arbitration is governed by the procedural law governing at the place of arbitration. Some national laws, however, permit parties to subject their arbitration to procedural law of a jurisdiction other than the one where the arbitration takes place.

[2. Various factors may influence the choice of the place of arbitration. Among the most prominent are the following: (a) convenience to the parties and the arbitrators; (b) availability of services needed in the proceedings; (c) costs that depend on the place of arbitration; (d) location of the subject-matter in dispute and access to evidence; (e) suitability of the law of arbitral procedure of the place of arbitration; (f) the extent to which court assistance and supervision are available at the place of arbitration (e.g., concerning the appointment, challenge and replacement of an arbitrator; disputes over the jurisdiction of the arbitral tribunal; requests for setting aside of awards; or recognition or enforcement of awards); (g) whether there is a multilateral or bilateral treaty in force between the State where the arbitration takes place and the State or States where the award may have to be enforced.]

3. If the parties have not agreed on a place of arbitration, many rules empower the arbitral tribunal to determine that place. Arbitral institutions may have special rules on the determination of the place of arbitration or may even specify the particular location where the arbitration is to be conducted.

Item (ii)

4. The agreed upon arbitration rules or the national law applicable to arbitration may allow the arbitral tribunal to conduct part of the arbitral proceedings away from the place of arbitration. The arbitral tribunal may consider that it will be more effective or cheaper if the arbitral tribunal meets away from the place of arbitration, for example, to inspect a property or documents, hear a witness, take expert evidence, or hold consultations among the members of the tribunal.

Q. Mandatory provisions governing arbitral proceedings

- Agenda: [(i) Request the parties to express their view on whether there are any provisions of the law applicable to the arbitration from which the parties cannot derogate that add requirements not expressed in any applicable arbitration rules;]
- (ii) inquire from the parties whether it is necessary or advisable to file or register the arbitral award with an authority or to deliver it to the parties in a particular manner.

Remarks

Item (i)

[1. It is a duty of the arbitral tribunal to obtain knowledge of and interpret the applicable procedural law, including mandatory law, and that duty cannot be delegated to the parties. Thus, an inquiry as indicated under (i) of this agenda item can only be one of the means for the arbitral tribunal to obtain knowledge of the procedural law. Such an inquiry may be useful, for instance, when the arbitral tribunal is insufficiently proficient in the language of the law at the place of arbitration, otherwise has limited means to obtain complete information about the law, and it is possible that the law contains mandatory rules not commonly found in legal systems.]

[2. There exists a set of widely accepted mandatory principles and rules found in many national procedural laws, albeit differently formulated and differing in details. Such principles and rules envisage, for example, that the arbitration agreement must be concluded in a particular form; that the parties must be treated with equality and that each party must be given a full opportunity of presenting its case; that an arbitrator must be impartial and independent and that a challenge procedure is available when impartiality and independence of an arbitrator is in question; that the arbitral tribunal must decide a dispute in accordance with rules of law and that a decision *ex aequo et bono* or as *amiable compositeur* requires an express authorization by the parties; that the award must be in writing and signed; that in certain instances a court of the State where the arbitration takes place is competent to intervene in the arbitration, most notably to decide on the jurisdiction of the arbitral tribunal, the mandate of an arbitrator, or to set aside the award.]

[3. The kinds of mandatory principles and rules that are widely considered as acceptable in national legislation are expressed in the UNCITRAL Model Law on International Commercial Arbitration, a text adopted by international consensus. It should be noted, however, that national laws based on the Model Law may contain additional mandatory rules.]

Item (ii)

4. Some national laws require arbitral awards to be filed or registered with a court or similar authority, or that they be delivered in a particular form or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g., to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, e.g., invalidity of the award or inability to enforce it in a particular manner).

5. If such requirements exist, it may be advisable to clarify details such as time-limits, costs and who among the participants in the arbitration is to take the necessary steps.

R. Multi-party arbitration

Agenda: When the arbitration involves more than two parties, consider the organization of the proceedings.

Remarks

1. A single arbitration that involves more than two parties ("multi-party" arbitration) may arise from different kinds of situations. The following are some of the many examples thereof:

(a) One is a case in which a particular event gives rise to disputes between different pairs of parties. This may occur, for instance, in a construction contract when an arbitration is to decide two disputes arising from one construction defect, one dispute between the purchaser and the designer and another one between the purchaser and the contractor; while both disputes arise from the same event and some of the evidence may be the same, the disputes are separate in the sense that the outcome in one dispute does not necessarily prejudice the outcome in the other one.

(b) Another example is an arbitration between two parties, but where a third party, who, while not being the claimant or the defendant, has an interest in the outcome of the dispute and who, because of that interest, is invited to join the proceedings in order to submit evidence and make statements in favour of a party to the dispute. Such a participation of a third party (sometimes referred to as "intervention", "joinder" or "impleader") may arise, for instance, in a dispute between buyer A and seller B because of a defect in the goods sold, if party C, who sold the goods to party B, is permitted and willing to join the dispute in order to help achieve a decision exonerating seller B from responsibility for the defect; party C has an interest in assisting party B to be exonerated so as to avert a claim for defective goods by party B against party C.

(c) A further example is an arbitration between parties to a multilateral contract such as a joint venture or consortium in which more than one contracting party act as claimants or defendants.

2. In multi-party arbitration, as in two-party arbitration, it is required that all the participating parties have agreed to arbitrate and that the arbitral tribunal is established pursuant to a procedure agreed by all the parties. However, if specified conditions are met, a few national laws allow a court-ordered multi-party arbitration even if all the parties have not agreed to hold a single arbitration.

3. Because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. A preparatory conference presents an opportunity to discuss the anticipated course of multi-party proceedings, to take steps to avoid unnecessary delays and costs, and to ensure the respect of each party's procedural rights.

4. It might be useful at the preparatory conference to identify the main points at issue in the various disputes involved, with a view to ascertaining whether it would be useful to divide the multi-party proceedings into stages. The first stage may be devoted to any objections concerning the jurisdiction of the arbitral tribunal. The following

stages may concentrate in appropriate order on reaching decisions that in some way constitute preliminary decisions in another dispute (e.g., facts to be established in one dispute may be relevant in another dispute, or liability found to exist in one dispute may affect the decision in another dispute).

5. It might also be useful to consider at the preparatory conference decisions concerning questions such as the scheduling of meetings, flow of communications among the parties and the arbitral tribunal, the manner in which the parties will participate in the taking of evidence of witnesses, appointment of experts, the participation of the parties in the taking of evidence by experts, the order in which the parties will make statements, and the apportionment of the deposits for costs.

[6. When there are more than one interrelated disputes, it is important to bear in mind that a decision in one dispute may affect the position of a party in another dispute, and that, therefore, each interested party must be given an opportunity to present its arguments on the issues affecting that party. Nevertheless, sometimes issues may have to be decided that do not affect all the parties involved, which may make it possible, for reasons of economy, to plan the hearings in such a way that some of the hearings would not require the presence of all the parties.]

S. Deposits for costs

Agenda: Review the anticipated costs of the proceedings and consider the deposits for the costs.

Remarks

1. It is customary that the arbitral tribunal upon its establishment requests the parties to deposit an equal amount as an advance for the costs of the arbitration. By the time the preparatory conference is held, it may become necessary, as a result of the matters considered at the conference, to request supplementary deposits from the parties.

2. In complex and expectedly lengthy arbitrations, staggered payments of deposits are occasionally agreed upon so as to spread the payment obligations over a longer period of time. To the extent a substantial part of the costs will be incurred only later in the proceedings, some arbitral tribunals may be ready to accept a suitable independent bank guarantee to cover those costs.

T. Any other procedural matter

The arbitral tribunal might, on its own motion or on a suggestion of a party, decide to consider another procedural matter with a view to facilitating the arbitral procedure.

V. POSSIBLE FUTURE WORK

A. Legal aspects of receivables financing: report of the Secretary-General (A/CN.9/397) [Original: English]

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-2
I. SCOPE OF WORK	3-19
A. Assignment of receivables	3-5
B. Assignment by way of sale and by way of security	6-9
C. Non-notification assignment	10
D. Factoring	11-12
E. Forfeiting	13
F. Securitization	14-15
G. Project finance	16
H. Commercial or consumer receivables	17
I. International or domestic receivables	18-19
II. POSSIBLE ISSUES	20-51
A. Assignability of receivables	20-25
1. No-assignment clauses	21-23
2. Bulk assignments	24-25
B. Form requirements	26-27
C. Effects of assignment between the assignor and the assignee	28
D. Effects of assignment towards the debtor	29-35
E. Effects of assignment towards third parties; priorities	36-42
F. Registration	43-51
III. CONCLUSIONS	52-56

INTRODUCTION

1. The Commission at its twenty-sixth session in 1993 considered a note by the Secretariat containing a brief discussion of certain legal problems in the area of assignment of claims and of past and current work on assignment and related topics.¹ After considering that note, the Commission requested the Secretariat to prepare, in cooperation with the International Institute for the Unification of Private Law (UNIDROIT) and other international organizations, a study on the feasibility of unification work in the field of assignment of claims, so as to permit the Commission to decide at its twenty-seventh session whether it should undertake work in this area of law.² The present report has been

prepared pursuant to that request. The report focuses on assignment of receivables as the legal technique used in the context of receivables financing.

2. With a view to determining the feasibility of any future work on receivables financing, the first part of the report discusses the possible scope of such work, and for the purposes of the discussion defines the concepts used in the report; in the second part, some problems arising in assignment of receivables are discussed along with possible solutions that could be adopted in any future uniform rules, whether in a convention or in a model law. In implementing its mandate to prepare this report in cooperation with UNIDROIT and other international organizations, the Secretariat made a preliminary draft of the report available to UNIDROIT, the Hague Conference on Private International Law and the European Bank for Reconstruction

¹A/CN.9/378/Add.3.

²Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), para. 301.

tion and Development (EBRD) for their comments. In addition, the Secretariat will orally introduce this report to the Governing Council of UNIDROIT at its upcoming meeting (Rome, 9-14 May 1994).

I. SCOPE OF WORK

A. Assignment of receivables

3. "Receivables financing" is a term used in practice to describe a wide range of transactions in which finance is raised on the basis of receivables. Receivables financing may be linked to complex transactions, such as joint ventures, other contractual arrangements or the issuance of securities.³ In an assignment of receivables, a party ("assignor") transfers to another party ("assignee") payment claims that the assignor has against a third party ("debtor") under a separate transaction for goods sold or leased, facilities made available or services rendered ("the original transaction"). The assignment is given in fulfilment of a sales or credit transaction in which the assignor is the debtor and the assignee is the creditor ("the underlying transaction"). The term "receivables", although there does not seem to be a generally accepted definition, is widely used as a generic description of payment claims. Receivables financing may involve assignments by way of sale or by way of security (see paragraphs 6-9), non-notification assignments (see paragraph 10), factoring (see paragraphs 11-12), forfaiting (see paragraph 13), or even more sophisticated techniques such as particular forms of securitization and project finance (see paragraphs 14-16).

4. It would appear that some unification work in the field of receivables financing might be considered both desirable and feasible. The differences existing between legal systems on assignment of receivables, and the fact that States generally require compliance with their own requirements and formalities for an assignment to be valid and effective towards the debtor and third parties, may result in one and the same assignment being valid in the State where it was concluded but unenforceable against the debtor in another State. In addition, the uncertainty of law resulting from the lack of adequate modern rules on assignment of receivables may render assignment impractical in a cross-border context. As a result parties may often be forced to forgo receivables financing in international trade and to revert to other, potentially more expensive means of financing, such as overdraft facilities, letters of credit or export guarantees, or to secure receivables through bank guarantees or letters of credit, or to accept that receivables are assigned at a value substantially less than their face value, due to the high risk that the assignee may not be able to collect part or all of their value.

5. Recent unification work in a part of this area of law may be seen as an indication that unification in the area of receivables financing may be considered feasible. The UNIDROIT Conventions on International Factoring and on International Financial Leasing (Ottawa, 1988) have been ratified by two States and require one more ratification or

accession in order to enter into force. In addition, a number of countries in which EBRD operates are about to enact or consider enacting legislation based on the Model Law on Secured Transactions prepared by EBRD.

B. Assignment by way of sale and by way of security

6. Receivables may either be sold or used as security, or, stated in commercial terms, they may be assigned in order to generate income (when they are sold) or to facilitate access to credit (when they are used as security). Assignment of receivables by way of sale may be defined as the transaction whereby the assignee acquires full property rights on the assigned receivables, advancing all or part of their value to the assignor. Assignment by way of sale may be with or without recourse, that is, it may or may not provide for the assignor to guarantee the assignee against default by the debtors. Such assignment is also known in practice as "invoice discounting" or "block discounting" (see paragraph 10). In certain circumstances, it is also referred to as "factoring" (see paragraphs 11-12). Assignment of receivables by way of security is the transaction whereby the assignee acquires limited property rights in the assigned receivables, in the sense that the assignee is entitled to collect them only in the event that the assignor defaults in the performance of its obligations towards the assignee under the underlying credit transaction. It may be noted that, in some jurisdictions, the assignee in an assignment by way of security acquires title to the receivables, and it is only the underlying transaction that may limit its powers if it is a credit transaction. While to a large extent the same issues arise in both kinds of assignment, there are some differences. For example, in case of default of the assignor in the performance of the underlying transaction, if an assignment by way of sale is involved, the assignee can retain any surplus from the assigned receivables that it collects, while in assignment by way of security any surplus is to be returned to the assignor. In addition, in case of assignment by way of security, if the assignee collects the assigned receivables from the debtor without the assignor having defaulted in the performance of the underlying transaction, it may be liable to the assignor for breach of contract.

7. There are several possible approaches as to the manner in which assignment of receivables could be addressed in the context of uniform rules. One possibility, based on an approach followed in some jurisdictions, would be to address assignment in general terms, and to leave specific issues of assignment by way of sale to the national law on sales, and specific issues of assignment by way of security to the national law on credit transactions. The main disadvantage of such an approach would be that, to a large extent, it would fail to produce uniform results. Another approach, followed in other jurisdictions, would be to cover assignment as a predominantly sales transaction. While such an approach would not preclude States from applying the uniform rules to assignment by way of security as well, it would fail to regulate an important part of receivables financing that could benefit from any uniform rules. In addition, it would fail to recognize the fact that, to a large extent, the issues raised in assignment by way of sale and

³Fidelis Odiah, *Legal aspects of receivables financing* (London, Sweet and Maxwell, 1991), p. 19.

by way of security are identical. Moreover, it would have the disadvantage of resulting in a duality of regimes. Yet another approach, followed in other jurisdictions and recommended here, would be to address both kinds of assignment in a single set of rules. Such an approach would have the advantage of recognizing the financing purpose of both kinds of assignment. Sales of receivables that are not for financing purposes, e.g., sales for collection only, sales in which the assignee is to perform the obligations of the assignor under the original transaction, sales of single receivables in payment of pre-existing debts and sales as part of a sale of a business, would presumably have to be excluded. While most issues could be addressed by common rules applicable to both kinds of assignment, other issues would have to be dealt with differently, e.g., the issue of default of the assignor.

8. In some jurisdictions, assignment by way of security is referred to as a secured transaction, namely, a transaction creating a security right in receivables, in the sense of a limited property right of the assignee to collect the receivables in case the assignor defaults in the performance of the underlying transaction. In those jurisdictions, even assignments by way of sale are viewed as secured transactions, provided that they are made for financing purposes. At the same time, in such jurisdictions, secured transactions are regulated in a comprehensive way in the sense that a single set of rules governs secured transactions in personal property, including goods, mobile equipment, inventory, receivables and general intangibles. It may be noted that such a comprehensive approach will be considered by the UNIDROIT secretariat which has been authorized by the Governing Council at its seventy-second session in June 1993 to prepare a study on the feasibility and desirability of drawing up a model law on secured transactions.⁴ In the preparation of that study and the eventual elaboration of any draft rules close cooperation between the Commission and UNIDROIT seems desirable (see also below, paragraph 55).

9. If the UNIDROIT study were to establish the feasibility of such a comprehensive approach, the relationship between such work and the suggested project on receivables financing would have to be decided upon in concrete terms, in particular whether any draft statutory provisions on receivables financing should eventually be incorporated into a considerably more comprehensive model law; at least, there should be means to prevent substantive inconsistencies between texts on transactions with common characteristics. It may be added that UNIDROIT itself would face the same situation in a more acute manner, in view of the fact that it currently follows also the sectoral approach by preparing a draft convention on certain aspects of security interests in mobile equipment, based on the understanding that a narrowly defined scope of work is an indispensable condition of the feasibility of such work.⁵

C. Non-notification assignment

10. "Non-notification assignment" refers to a type of assignment in which the debtor is not notified of the

assignment. A major reason for using a non-notification assignment is that assignment may be viewed as indicating financial or managerial weakness of the assignor. The debtor may be notified only in exceptional circumstances, such as in the case of insolvency of the assignor, where the assignee may need to enforce the receivables against the debtor. Non-notification assignment is inherently more risky for the assignee, since the debtor can pay the assignor and be discharged. In addition, depending on whether priority among several assignees is based on notification of the debtor or registration of the assignment, a subsequent assignee notifying the debtor first or registering the assignment first will have priority. Examples of non-notification assignment include "block discounting" and "invoice discounting". "Block discounting" involves a non-notification sale of receivables in which the assignee retains, in addition to a security in the form of part of the face value of the receivables, a discount calculated by the average period during which it will be out of its money. The assignee usually undertakes to collect the receivables as an agent of the assignor and to guarantee payment by the debtors. "Invoice discounting" involves a non-notification sale of receivables in which the assignor continues to be responsible for collections as agent of the assignee, the undisclosed principal.⁶

D. Factoring

11. Factoring is often understood in practice as the sale of receivables for financing and other purposes. However, the UNIDROIT Convention on International Factoring ("the UNIDROIT Factoring Convention") covers both assignments by way of sale and by way of security. For the purposes of the Convention, factoring means "a contract concluded between one party (the supplier) and another party (the factor) pursuant to which: (a) the supplier may or will assign to the factor receivables arising from contracts of sale of goods made between the supplier and its customers (debtors) other than those for the sale of goods bought primarily for their personal, family or household use; (b) the factor is to perform at least two of the following functions: finance for the supplier, including loans and advance payments; maintenance of accounts (ledgering) relating to receivables; collection of receivables; protection against default in payment by the debtors; (c) notice of the assignment of the receivables is to be given to debtors". (article 1). The Convention further specifies that "goods" includes services (article 1(2)) and that the Convention applies when the receivables arise from international sales of goods (the supplier and the debtor have their places of business in different countries) and the factor is situated in a third country or when both the contract of the sale of goods and the factoring contract are governed by the law of a contracting State (article 2).

12. Thus the Convention addresses a considerable number but not all kinds of factoring, and it leaves a number of issues arising in the area of factoring to the applicable national law (the title initially used for the Convention, i.e., "draft Convention on Certain Aspects of International

⁴UNIDROIT 1994, C.D. (73)8.

⁵UNIDROIT 1992, Study LXXII—Doc. 5, para. 6.

⁶Roy M. Goode, *Commercial Law* (Harmondsworth, Penguin Books, 1982), p. 856.

Factoring", clearly indicated that it was not intended to be comprehensive). In particular, the Convention does not cover factoring, if only financing, or just one additional service from the ones enumerated in article 1 of the Convention, is offered. The Convention does not cover assignment of domestic receivables or of receivables arising from leases or from transactions on the basis of which equipment or facilities are made available. Moreover, the Convention does not apply to non-notification assignment, such as block discounting or invoice discounting. At the same time, the Convention does not cover certain issues arising in assignment of receivables, especially effects of assignment towards third parties.

E. Forfaiting

13. Forfaiting may be described as the sale of documentary receivables, that is receivables incorporated in negotiable instruments, such as bills of exchange, promissory notes, or in letters of credit and bank guarantees. However, the term "forfaiting" may be used to indicate the sale of non-documentary receivables that often may be backed by a bank guarantee or a letter of credit. Any unification work on forfaiting of documentary receivables might not be desirable in view of the fact that the assignment of such documentary receivables is already regulated by uniform statutory rules (e.g., the Geneva Uniform Laws on Bills of Exchange, Promissory Notes and Cheques), or uniform rules at the contractual level (e.g., assignment of proceeds of letters of credit under the ICC Uniform Customs and Practice for Documentary Credits and assignment of proceeds of bank guarantees subject to the ICC Uniform Rules on Demand Guarantees), or is the subject of other ongoing unification work (e.g., the UNCITRAL draft Convention on Independent Guarantees and Stand-by Letters of Credit). In addition, it should be noted that the issues arising in assignment of receivables would have to be addressed differently if documentary receivables were involved. For example, in the assignment of documentary receivables only defences based on the document incorporating the receivables could be raised by the debtor against the assignee, and priority among several assignees would have to be based on possession of the document in due course. However, future unification work could cover forfaiting of non-documentary receivables.

F. Securitization

14. Possible future work of unification could extend to a wide range of transactions described by the term "securitization", which may involve, assignment of receivables, not from a trader to a financing institution, but from one financing institution to another. Securitization may serve a number of different purposes and encompass a wide range of assets while there does not seem to be a uniform definition or practice of securitization, it may be described as the transformation of non-marketed assets, such as home mortgage loans, into marketable assets, such as securities. A basic, general structure of securitization that may involve the assignment of trade receivables from one financing institution to another for refinancing purposes may be described as follows: in a first step, the company or

companies that created a discrete pool of financial assets ("the originator") may transfer them to another company, in return for capital stock or cash. In a second step, the initial transferee further transfers the assets to an investment fund, in return for cash and securities, i.e., equity or debt instruments of the type that the fund issues and sells to investors ("asset backed securities"). The initial transferee may take all the risk of loss on the assets and may have no recourse against the originator. Holders of securities issued by the investment fund may be entitled to a monthly distribution of interest at a stated rate.

15. Securitization is a relatively new financing technique growing internationally, which may serve a number of purposes, such as improvement of accounting status (e.g., replacement of non-cash assets on balance sheets by cash, improvement of return-on-assets and capital-to-assets calculations, which may improve the originator's standing towards its creditors), capital raising (higher credit rating for the securities than the originator itself possesses and lower financing costs) and regulatory compliance (e.g., compliance with lending limits and capital adequacy requirements).

G. Project finance

16. Work in the area of receivables financing could be relevant to project finance in which future revenues of an income-generating project are used to secure financing. Project finance may involve a sophisticated structure of a number of transactions, including assignment of receivables. It is a financing technique often used in projects related to the exploitation of natural resources, or projects related to the improvement of infrastructure, such as construction of power plants, bridges, highways and similar facilities. Project finance of this type appears to be increasingly of interest, in particular for developing countries and countries whose economies are in transition.

H. Commercial or consumer receivables

17. Future work could be restricted to commercial transactions, or it could encompass consumer transactions as well. One reason for not covering consumer transactions is that consumer law usually involves social policy matters that States tend to wish to decide for themselves, and is, therefore, not easily unified. Another reason might be that, at least at the present time, the volume of consumer transactions taking place at an international level might be too small to justify their consideration in an international context. It might, therefore, be preferable to limit the scope of any future work to commercial receivables only. On the other hand, the notion of "commercial" or "trade" receivables might raise some difficulties since, in some jurisdictions, no discrete body of commercial law exists. In other jurisdictions, the notion of "commercial" is defined on the basis of the nature of the transaction, or on the basis of the capacity of the parties as "merchants". It may be noted that the UNIDROIT Factoring Convention, like the United Nations Sales Convention, focuses on commercial transactions by excluding those transactions that are not "for personal, family or household" purposes.

I. International or domestic receivables

18. Another question of relevance to the scope of work is whether any possible future uniform law should apply to receivables arising only from international or also from domestic transactions. The criterion utilized in modern conventions, such as the United Nations Sales Convention and the UNIDROIT Factoring Convention, as the sole criterion for determining the internationality of a transaction is the place of business of the parties involved. Such an approach is deemed to be preferable from the standpoint of simplicity and maximization of the scope of work.⁷ In favour of addressing both international and domestic receivables, it could be maintained that the same need for legal certainty exists both in domestic and international trade. Moreover, a duality of regimes, a national one for domestic receivables and a uniform one for international receivables, might create obstacles to trade by adding to the existing diversity of applicable legal regimes. On the other hand, limiting the scope of any possible future work to international receivables would be in line with the purpose of facilitating international trade. Moreover, States might be reluctant to accept alterations of their national laws on assignment purely in a domestic context. In addition, a set of rules applicable only to international transactions might have a unifying effect even with regard to domestic transactions, since it would be open to individual States to apply these rules to domestic transactions as well. It might, therefore, be more appropriate to limit the scope of work to international receivables only.

19. However, a further limitation of the scope of future work to international assignments of international receivables only (i.e., when the assignor and the debtor have their places of business in different countries) would be unwarranted. Such a limitation could result in excluding the bulk of the assignments since assignments are usually domestic. In addition, the crucial problem of the possible unenforceability of international receivables arises irrespective of whether the assignment is domestic or international. Moreover, if future work were limited to international assignments only, there would be two legal regimes governing assignment, one applying to domestic assignments and another applying to international assignments. It may be noted that the UNIDROIT Factoring Convention applies to both domestic and international factoring of international receivables.

II. POSSIBLE ISSUES

A. Assignability of receivables

20. Generally speaking, all receivables are assignable, unless their assignment is prohibited by agreement, by statute, or due to public policy considerations. Statutory prohibitions of assignment of receivables, such as prohibitions against assignment of wages, will not be considered in this report; it would not be feasible or appropriate to attempt to prepare uniform rules covering all kinds of statutory prohibitions. However, prohibitions by agreement

and prohibitions due to public policy will be touched upon below, in view of their practical importance (see paragraphs 21-25).

1. No-assignment clauses

21. Parties often include in their contracts a clause precluding the creditor from assigning the rights arising therefrom. Legal systems differ as to the extent to which such clauses are upheld. Assignments concluded in violation of such clauses are in some jurisdictions valid in general, in other jurisdictions valid only as between the original creditor/assignor and the assignee, and generally invalid in yet other jurisdictions.

22. One approach that might be considered for a uniform text would be to treat an assignment concluded in violation of a no-assignment clause as valid only if certain requirements are met. Such an approach might have the advantage of protecting the debtor from a number of adverse effects that might arise from a change in the identity of the creditor, including: the burden of having to keep track of one or more assignments; the risk that the debtor might overlook a notice of assignment and have to pay a second time; and the risk that the debtor might not be able to set up against the assignee all defences, regardless of whether they arose before or after the notice of assignment. One possible requirement would be that, within a certain time period, the debtor does not object to, or consents to, an assignment concluded in violation of a no-assignment clause. However, it might be difficult to establish a method to calculate the time period. Moreover, adopting such a requirement would enable the debtor to decide which of several conflicting assignees would have priority merely by consenting to one assignment and objecting to another. Such a result would not be in line with the purpose of the no-assignment clause, which is to protect the interests of the debtor, and not to determine priorities among adverse claimants. Another requirement might be that the initial creditor/assignor should specifically accept the no-assignment clause in writing. However, this might be impractical in receivables financing, since assignees would have to check carefully each original transaction, in order to ascertain whether the assignor had specifically accepted the no-assignment clause.

23. Another approach might be to provide, as does the UNIDROIT Factoring Convention, that the assignment is effective notwithstanding any agreement between the assignor and the debtor prohibiting such assignment. Such a rule would facilitate the practice of receivables financing, which would benefit from unrestricted transferability of receivables. Moreover, it might be considered that debtors do not need the additional protection that no-assignment clauses are intended to grant them, since debtors are widely permitted to avail themselves of defences, including set-offs, against assignees. While keeping track of assignments and avoiding clerical and bookkeeping errors may entail some cost to the debtor, this could be viewed as a normal cost of doing business. It may be noted that, in order to accommodate the needs of States having a strong policy in favour of upholding no-assignment clauses, an exception to the above rule has been included in article 6 of the UNIDROIT Factoring Convention. This provision permits States to make a declaration to the effect that assignments contrary

⁷Roy M. Goods, "Reflections on the harmonization of law", *Uniform Law Review*, vol. I (1991), p. 64.

to no-assignment clauses shall have no effects towards the debtor, if, at the time of the conclusion of the original transaction, the debtor has its place of business in the State making the declaration.

2. Bulk assignments

24. Bulk assignments of future receivables are, in some jurisdictions, invalidated as being against public policy, in particular if the future receivables arise from contracts that do not exist at the time of assignment. In such jurisdictions, efforts are made by courts to remove obstacles to receivables financing by recognizing the validity of bulk assignments of future receivables provided that the future receivables are, at the time the receivables come into existence, "determined" or "determinable" as to their basic particulars (e.g., the amount and the identity of the debtor).⁸

25. One possible approach, adopted in article 5 of the UNIDROIT Factoring Convention, would be to provide that bulk assignments of all present and future claims are valid between the assignor and the assignee only, leaving the validity of assignment towards third parties to the applicable national law. Such a rule would have the disadvantage that one and the same bulk assignment may be valid as between the parties to the assignment and invalid towards the debtor and third parties. As a result, the debtor could claim that the assignment was invalid towards it, pay the assignor and thus be released. Similarly, if assignment is valid only between the assignor and the assignee, the creditors of the assignor could attach the receivables on the basis that the assignment was invalid towards them, with the result that the receivables would be effectively lost for the assignee. Another possible approach, widely adopted in national legal systems, would be to recognize in general the validity of bulk assignments of future receivables. Such an approach would facilitate receivables financing. The interests of the debtor would be protected, in as much as the debtor would not be obliged to pay the assignee until it would receive notice of the assignment (as to the interests of third parties, see paragraphs 36-42).

B. Form requirements

26. Legal systems differ widely as to the form required. In some jurisdictions, the assignment has to be in writing, while in other jurisdictions even a purely oral assignment suffices. As a result, one and the same assignment may be considered valid in one country and invalid in another. Another problem is that, even within a single jurisdiction, it may not be easy to ascertain the form requirement for a particular assignment, because there may be different requirements for different types of assignments (e.g., assignments by way of sale and assignments by way of security).

27. It appears that "writing", defined in a liberal fashion, would constitute an appropriate form requirement, since, even in the jurisdictions in which oral assignments are valid, parties tend to put assignment in writing. No other

form might be necessary for the validity of the assignment between the parties thereto. In addition to writing, one might require notification of the debtor. However, imposing such a requirement might create obstacles to assignment, in particular to non-notification assignment, without providing any additional protection for the debtor, since in any case the debtor, in the absence of notification or knowledge of the assignment, could refuse to pay the assignee.

C. Effects of assignment between the assignor and the assignee

28. The effects of assignment between the assignor and the assignee, as between themselves, are usually governed by their contract of assignment and, as against the debtor, are subordinated to the provisions of the original transaction. In practice, parties to receivables financing tend to be very specific in their dealings as to their rights and obligations. Moreover, under the general principles of contract law, the assignor and the assignee must refrain from any action that could defeat or impair the purpose of the assignment. In the absence of a sufficiently detailed agreement, the matter would be dealt with by statutory rules. Such rules tend to address the extent to which the assignor warrants the existence and enforceability of the receivables and the solvency of the debtor. There appear to be few differences between legal systems on this matter. Generally speaking, an assignor who receives a price for the receivables is deemed to warrant their existence. Such a warranty would not exist if the assignee acquired the receivables without paying a price for them, unless the assignor explicitly undertook a warranty. In addition, the assignor usually does not warrant the solvency of the debtor, unless otherwise expressly agreed.

D. Effects of assignment towards the debtor

29. The primary goal of any rules on assignment may be to strike a balance between, on the one hand, the need to allow parties to mobilize receivables in order to obtain finance and, on the other hand, the need to ensure that the legal position of the debtor, who is not a party to the assignment, is not adversely affected by the change in the identity of the creditor. There are two main issues that arise in this context, namely, the conditions that have to be met for the assignment to produce effects towards the debtor, and the defences that the debtor may raise against the assignee.

30. While an assignment may be valid and binding on the assignor and the assignee, it has no effects on the debtor, unless an additional condition is met. While the debtor's obligation to pay to the assignee depends on the debtor acquiring knowledge of the assignment, legal systems differ as to whether a notice to the debtor is required or whether any other act results in the debtor acquiring knowledge of the assignment. Moreover, legal systems requiring notice differ on the effects of knowledge of the assignment on the part of the debtor in case no notice is given.

31. The requirement of a complete written notice would protect the debtor from ambiguities that might arise without such notice, for example, when the debtor has received

⁸Hein Kötz, "Rights of third parties, third party beneficiaries and assignment", in *International Encyclopedia of Comparative Law*, (Tübingen, Mohr (Paul Siebeck) 1992) vol. VII, ch. 13, para. 82.

some information about the assignment but has no information as to the identity of the assignee or the exact value of the assigned receivables. Matters related to written notice include: whether it would cover modern means of communications, such as fax or electronic data communications; the minimum content of the notice, e.g., reasonable identification of the assigned receivables and the assignee; which party can give notice, the assignor or the assignee, e.g., if the assignee is authorized by the assignor to give notice; whether notice is effective when dispatched, received or actually read by the debtor. Another question that would have to be addressed is the question whether the debtor, who has no formal notice of the assignment but knows of it, could pay the assignor and be discharged.

32. Legal systems differ as to which defences the debtor may raise against the assignee. An approach adopted in some jurisdictions is to allow the debtor to raise against the assignee defences arising out of the same contract giving rise to the assigned receivables, no matter whether such defences arose before or after assignment or before or after notice thereof. Under an approach adopted in some other jurisdictions the debtor is permitted to raise defences arising from a separate contract between the debtor and the assignor, if those defences accrued before the debtor was notified about the assignment, irrespective of when the receivables become payable. An approach followed in yet other jurisdictions is to allow defences arising from a separate contract between the debtor and the assignor, provided that they involve claims that are due both at the time notification is given and at the time the assigned receivables become due. Yet another more liberal approach followed in some jurisdictions is to allow such defences irrespective of when notification took place or when the assigned receivables arise.

33. Legal systems differ on two other noteworthy issues related to defences of the debtor against the assignee demanding payment of the assigned receivables: the kind of proof the debtor is entitled to request, in case of doubt as to whether an assignment has been concluded; and whether the assignee has to return to the debtor any amount advanced, in case the assignor has not fulfilled its obligations towards the debtor under the original transaction. As to the first issue, a possible approach, adopted in some jurisdictions, is to provide that the debtor may request "reasonable" proof. A possible advantage of this approach is that the term "reasonable" is well known; even in jurisdictions in which that term has no technical legal meaning, it is commonly understood in practice. A possible disadvantage of this approach would be that use of the term "reasonable" would not achieve certainty and predictability, since its meaning would depend on the circumstances in which an assignment was concluded. A different approach would be to require written proof, so as to enhance certainty and predictability. As to the second issue, one approach, adopted in article 10 of the UNIDROIT Factoring Convention, is to provide that the assignee does not have to return any advances that the debtor might have made, unless unjust enrichment or bad faith on the part of the assignee was involved. Unjust enrichment could be involved if the assignee receives payment from the debtor but has not paid the assignor at the time the debtor demands the return of the advances made. The assignee might be in bad faith, if,

for example, it pays the assignor for the assigned receivables despite knowing that the assignor has not performed its obligations to the debtor under the original transaction.

34. A number of other questions might arise, with respect to which unification might not be needed or feasible, including: whether the debtor can raise defences arising from separate transactions between the debtor and the assignee, or between the debtor and other assignors which might have assigned their receivables to the same assignee; whether, in case of subsequent assignments, the debtor can raise against the last assignee demanding payment any defences that it might have had against a previous assignee.

35. Defences of the debtor against the assignee create uncertainty as to whether the assignee will be able to collect. For that reason, in practice, waiver-of-defences clauses are often included in the contractual terms of the original transaction. In most jurisdictions, such waiver-of-defences clauses agreed upon at the time of the conclusion of the original transaction are generally upheld in commercial, but not necessarily in consumer, settings.⁹ Some jurisdictions recognize waiver-of-defences clauses agreed upon between the debtor and the assignee after the debtor is notified of the assignment, as long as they involve defences that the debtor knew or ought to have known at the time of the waiver that they were available to him. In other jurisdictions, the debtor's acceptance of the assignment, orally or in writing, may be interpreted as a waiver of all or part of the defences that the debtor might otherwise have against the assignee, provided that it is clear and beyond any doubt that the debtor accepting the assignment intended to waive its defences.

E. Effects of assignment towards third parties; priorities

36. As assignment is, in most jurisdictions, considered to be a contract between the assignor and the assignee, it produces effects between them. However, assignment is also a means of transferring property, and as such it may have effects towards third parties, such as several conflicting assignees, the assignor's creditors and the trustee in the bankruptcy of the assignor. Legal systems differ on whether the effects of assignment towards third parties arise from the assignment itself or from an additional act, such as notification of the debtor or registration of the assignment. A related issue is the order of priority among several creditors laying a claim on the same receivables. The issue of priority arises mainly if the assigned receivables are the main assets the assignor is left with, in particular in the case of insolvency of the assignor, since otherwise the assignor will be able to satisfy its creditors on the basis of other assets. A conflict of priorities may arise in the following situations: between several assignees, due to multiple assignments of the same receivables because of fraud or an unconscionable act of the assignor; between the assignee and the bankruptcy trustee, who may, for example, seek to invalidate the assignment on the ground that it constitutes a fraudulent transaction; between the assignee and the Government as creditor of the assignor for taxes. As

⁹Ibid., para. 99.

priority conflicts with the bankruptcy trustee and the Government may involve general policy considerations of a social, economic and political character, they might best be left to the applicable national law or they might be addressed in the context of any possible future unification work on cross-border insolvency. This report will discuss only priority conflicts among several assignees or between the assignee and the assignor's creditors.

37. While the issue of third-party effects and the related issue of priorities is important in the context of some kinds of assignment, it may not be of such crucial importance in the context of other kinds of assignment, including: securitization, in which the risk of the insolvency of the assignor might be reduced by the fact that the assignor is usually a financing institution; forfaiting, in which receivables may be backed by a bank guarantee or a stand-by letter of credit and the assignee, in the case of insolvency of the assignor, might be paid out of the proceeds of the bank guarantee or the letter of credit; and project finance, in which the assignee might obtain a number of securities in addition to future proceeds from the project financed.

38. One approach, adopted in some jurisdictions, is to grant priority to the first assignee on the ground that once the assignor has assigned the receivables it does not own them any longer and therefore it cannot assign them a second time. Under such an approach, the assignor's creditors could not attach the receivables, since from the time of the assignment onwards, the receivables do no longer belong to the assignor. Another, similar approach, adopted recently in a jurisdiction in order to facilitate the assignment of trade receivables in the context of financing transactions, is to grant priority to the assignee that holds a document, signed by the assignor, listing the receivables, according to the date on that document (article 4 of the so-called *loi Dailly*). Such an approach has the advantage of simplicity and certainty, since in no instance could a subsequent assignee prevail. A difficulty with that approach, however, is that it provides no protection to subsequent assignees or to the assignor's creditors, who might have extended credit to the assignor relying on its receivables as security, and who have no way of knowing whether such receivables have already been assigned.

39. Another approach might be to grant priority to the first assignee to notify the debtor. In case of attachment of the assigned receivables by the assignor's creditors, the assignee would prevail, if it had notified the debtor before attachment. One justification for such an approach could be that, since title to movables passes as a rule only if possession is granted to the transferee, title to receivables should pass only if notice to the debtor, which may be viewed as the nearest equivalent to taking possession, is given. That rule affords some protection to third parties, such as potential creditors of the assignor, since they are in a position to inquire whether the debtor has received a notice of a previous assignment before extending credit to the assignor. However, the application of such a rule might be impractical in receivables financing, where third parties might have to check with a large number of debtors receiving several notices. In addition, debtors could not be forced to provide information to debtors or be made liable for providing inaccurate or false information.

40. Yet another approach might be to grant priority to the first assignee to register the assignment in a public register. In case of attachment of the assigned receivables, the assignee would prevail, if the date of registration would be earlier than the date of attachment (for a discussion of registration, see paragraphs 43-51). Another approach based on a different type of registration would be to grant priority to the assignee that first had its assignment registered in the commercial books of the assignor. Such a system, however, has certain disadvantages. It might be seen as being unreliable, since it would be based on the assumption that the assignor would properly register all assignments. In case the assignor failed to update its books or made an error in registration or registered a subsequent assignment first, the first assignee would lose its priority and might have no remedy against the assignor if the assignor becomes insolvent. One possible way to alleviate the difficulties arising with regard to this system would be to require the assignor to present its books to the assignee so that the assignee could verify the registration by the assignor or could itself register the assignment. However, the utility of such a system might be doubtful in view of the potential difficulty and the time and the cost involved in registering bulk assignments and obtaining access to registered information.

41. If a substantive-law solution to the problem of priorities could not be found, a private-international-law approach might be considered. One such private-international-law solution could be to provide that the effects of assignment toward third parties and the related issue of priorities would be governed by the law of the State where the assignor had its place of business. This approach presents certain advantages. It provides a single point of reference for the bulk assignment in the context of receivables financing, even though the debtors may be resident in several countries. In addition, the law of the assignor's place of business is ascertainable at the time of the assignment even where the debts have not yet come into existence. Moreover, the choice of this law appears to be appropriate in case there is a requirement for registration of the assignment, since potential assignees are likely to look to the assignor's place of business to see whether it has already assigned its receivables. One possible difficulty with such an approach is that it might not be easy to identify the place of business of the assignor, for example, in case a company was registered in one particular place but operated in other places. Another possible difficulty might be that the priority issue could be characterized as an issue of contract, tort, property, bankruptcy or procedural law, which would complicate the elaboration of a generally acceptable private international law rule.

42. Another possible approach would be to devise a rule combining substantive and private international law elements and providing that the first assignee in time, the first assignee to notify the debtor, or the first assignee to register the assignment in a public register would have priority, depending on the approach followed in the law of the State in which the assignor had its place of business. Such an approach would have the disadvantage of failing to produce uniform results. However, it would, to some degree, enhance certainty and could be acceptable in that it would not alter existing approaches to the issue of priorities.

F. Registration

43. Registration of an assignment could be described as the process of filing information about the assignment at a register administered by a public authority for the purpose of providing evidence of title to the receivables, notice about the assignment to interested third parties, or a method for determining priorities. Registration of assignments or other similar transactions is already practiced in some jurisdictions. In some other jurisdictions, registration is currently under consideration by law reform commissions entrusted with the task of modernizing the law on secured transactions, or is suggested as a plausible solution to the problem of priorities.¹⁰ In jurisdictions in which registration of assignments or similar transactions is not practised, the general concept of registration is not necessarily new, since other types of transactions or rights are already subject to registration, for example, secured transactions with regard to immovables and transactions involving rights related to ships, aircraft, patents, trademarks and copyrights. It should be noted that registration is also practised in an international context. For example, the World Intellectual Property Organization (WIPO) serves as a registering authority with regard to trademarks and designs. WIPO functions also as an international centralized data bank with regard to patents, which allows international users to obtain access to information registered at national registers. The utility of registration at an international level has also been recognized within the Study Group of UNIDROIT entrusted with the task of preparing uniform rules on certain international aspects of security interests in mobile equipment.¹¹

44. Beyond assignment of receivables, registration is an important issue arising in the context of other possible future work topics of UNCITRAL. Registration and transfer of rights at an international level is an important issue in the context of the negotiability of rights in goods. The Working Group on Electronic Data Interchange adopted at its twenty-seventh session (New York, 28 February–11 March 1994) a recommendation to the Commission that it should authorize the Working Group to undertake preliminary work on negotiability of rights in goods as soon as it has completed the preparation of the model statutory provisions on the legal aspects of electronic data interchange and related means of data communications.¹² It may also be noted that registration of dematerialized or uncertificated securities, i.e., securities that do not have a tangible form, is an important issue that will be touched upon in a preliminary note on future work which the Secretariat intends to submit to the Commission at a future session. Many of the legal issues arising with regard to registration in those different areas might be identical, irrespective of whether the rights transferred are in goods, receivables, or securities, while other legal issues might be different depending on whether registration of rights in goods, receivables or securities is involved.

45. It appears that a solution based on registration would protect the interests of third parties and provide an objective criterion on the basis of which conflicts of priority could be resolved. Moreover, the cost and time involved in registration might not be prohibitive since registration could be based on a computerized register accessible through modern communication systems. As to the issue of privacy of the assignor, which might be of importance for its image in the market, it should be noted that there could be ways to ensure that access to registered information would be available only under certain conditions and only to parties towards whom registration could produce effects (see paragraph 48). In this context, it should also be noted that financial data of companies, such as assets, encumbrances on assets, loans payments, defaults in payments, dishonoured checks, are, in many jurisdictions, already collected by central or commercial banks or other institutions and made available to financing institutions through a national or international telecommunications system. With regard to the concern that even a restricted publicity requirement might unduly interfere with the privacy of the assignor, it may be noted that the possible negative impact of a registration system on the privacy of the assignor would have to be weighed against the potential benefit of the increased chances for obtaining credit on the basis of receivables in an amount closer to their face value.

46. Registration could take place in an international register or in a central national register accessible through an international centralized data bank. An international register would facilitate both registration and access to registered information. Moreover, the legal framework for such an international register would require a set of uniform rules that in all likelihood would need to be in the form of a convention. As to the concerns related to cost of establishment and operation of an international register, simplicity and ease of registration and access to information registered in an international register, a way to alleviate those concerns, at least in part, might be to establish an international registration system with a United Nations agency as registering authority, which would make use of existing means and would be accessible throughout the world due to the universal nature of the United Nations. In case the establishment of an international register proves to be not feasible, a central international data bank might be established so that the information filed at national registers could be made available to international users through modern means of communications. Such a registration system would not necessarily make registration easier for international creditors but it could facilitate their access to the registered information. Central national registration accessible through an international centralized data bank could have the advantage that its implementation might be easier and less costly, since it could benefit from existing national registers and databases, which, with some modifications, could be integrated into a new registration system. However, such a registration system would to some extent fail to produce uniform results; registration and its effects on third parties would be subject to national law, while issues related to access to registered information could be addressed either in a convention or in a model law. Whether an international register or an international centralized data bank is preferred, the example of WIPO serving as an international registering authority with regard to trademarks and designs

¹⁰John Duley, *A National Register of Personal Property Securities* (Australian Law Reform Commission, Personal Property Securities Research Paper 1); Lane H. Blumenfeld, "A hole in the bucket. The unavailability of financial credit due to the lack of a registry in Russian collateral law", *Law in Transition*, Winter/Spring 1994, p. 14.

¹¹See UNIDROIT 1993, Study LXXII—Doc. 7, para. 11.

¹²A/CN.9/390, paras. 154–158.

and as an international centralized data bank with regard to patents could serve as a precedent (see paragraph 43).

47. Registration raises a number of legal issues, such as its legal effects, authentication of the document to be filed, liability of the registering authority for failing to follow authentication procedures or for errors in the record to be issued by the registering authority upon demand by interested parties, evidential weight of that record, and registration of a statement of release of the assignor in case of assignment by way of security.

48. Registration could be deemed to have a number of legal effects, including: evidence of title or other rights in receivables; notice to third parties about the assignment; and determination of priority among several adverse claimants. One issue that would have to be considered would be whether notice could produce effects against all third parties or against only some categories of third parties, e.g., third parties that could reasonably be expected to search in a register. Financing institutions, for example, that provide credit on the basis of receivables in the ordinary course of their business could reasonably be expected to search in a register. However, for medium-size or small suppliers of materials on credit, who retain the title on the materials until they are fully paid and obtain rights in the receivables arising from the resale of the end-product as assignees, it might be impracticable to search in registers. Another issue that would arise in case registration were to function as a system to settle priorities would be whether the first assignee to register would be deemed to have priority over assignees that failed to register or registered subsequently, and over creditors of the assignor that attempted to attach the assigned receivables after registration. Were such a rule to be adopted, some exceptions would need to be made.

49. The document to be filed, i.e., the contract of assignment in its entirety or a summary statement thereof, would need to be authenticated. Authentication would be necessary in order to confirm, in particular, whether the assignor and the assignee mentioned in the document filed are the actual parties to the assignment and approve the contents of the document filed. One issue arising in respect to authentication is the authentication procedure that the registering authority would have to follow, e.g., an agreed authentication method, or in the absence of agreement, a reasonable or any authentication method. Another related issue is the liability of the registering authority for failing to follow any authentication method with the result that inaccurate or false information is filed and damage is caused to the parties involved. Yet another issue is the liability of parties entitled to register for filing inaccurate or false information. Provision might have to be made to the effect that the assignee filing an inaccurate or false notice could not benefit from it, and that such an assignee should be liable in damages to the assignor, in case the latter suffers loss as a result of the misconduct. The allocation of responsibility for inaccurate or false filings would presumably have to be different if registration were a joint act of the assignor and the assignee.

50. Upon demand by parties entitled to obtain access to information filed, the registering authority would have to

issue a record reflecting the information filed. Such a record might be needed by the assignor or its potential creditors seeking to establish the "creditworthiness" of the assignor on the basis of its receivables. An important issue is the evidential weight of such a record, in particular if it is in the form of a fax or an electronic communication. A related question is the possible liability of the registering authority for errors in such a record, resulting in disparities between the information in the register and the information reflected on the record issued. The responsibility of the registering authority might be limited to direct damages caused by gross negligence and wilful conduct or be expanded to include profits lost as a result of errors in the record issued due to negligence. In this context, provision might have to be made for a mechanism for the payment of claims based on errors of the registering authority. For example, part of the registration fees or other income of the registering authority could be deposited in a fund, and claims against the registering authority could be paid out of the fund.

51. In case of an assignment by way of security in which the assignor fulfilled its obligations under the underlying credit transaction or provided other security, a statement of release of the assignor would have to be filed, whereby the interest of the assignee in the receivables would be waived. Such a statement could be filed by the assignee on its own initiative or upon written demand by the assignor. In case the assignee fails to file such a statement of release in a timely fashion, the assignor may not be able to utilize its receivables for obtaining further credit. In this regard, the issue of the remedies of the assignor arises. One possible remedy is to establish a right of the assignor to request and obtain upon presentation of certain documents a statement of release from the registering authority. Such an approach might be disadvantageous in that it would place an undue burden on the registering authority to check the substance of the documents submitted. Moreover, it could expose the registering authority to liability for errors in the evaluation of the documents. Another possible remedy is to give to the assignor the right to obtain interim relief in the form of an order to the registering authority to issue, or to the assignee to file, a statement of release.

III. CONCLUSIONS

52. On the basis of the above discussion, it may be concluded that the disparity of laws on assignment adversely affects the availability and functioning of receivables financing on the international plane. It may further be concluded that the situation could be improved by the preparation of a uniform legal text that would take into account the UNIDROIT Factoring Convention but would go far beyond it, especially as regards its scope of application.

53. As discussed in paragraphs 11-16, the scope could be extended to include not only those factoring situations not covered by the UNIDROIT Factoring Convention but also many other transactions encountered in such financial contexts as securitization, project finance and forfaiting of non-documentary receivables. A definite decision on whether assignments of receivables in each of these contexts should

be covered requires, it is suggested, a further study which would discuss in respect of these various financial contexts the other questions of scope mentioned in part I (paragraphs 3-10, 17-19) and, in considerable detail and possibly accompanied by some first draft rules, the various substantive issues identified and discussed in part II.

54. Of all the substantive issues addressed in part II, the effects of assignments on third parties, with the related question of priorities, is probably the most complex and difficult one. As may be concluded from the discussion in paragraphs 36-51, the feasibility of tackling that issue in an appropriate, universally acceptable manner may be viewed as depending, at least in part, on the feasibility of establishing a reliable registration system. Since such a registration system might be useful also in areas other than receivables (e.g. documents of title, security interests, securities), it is suggested that a separate study be undertaken which would discuss in detail the relevant points, especially

the legal aspects of the establishment and operation of a central international register.

55. Yet another conclusion that may be drawn from the discussion in this report is the desirability of the closest possible cooperation with UNIDROIT. Indeed, all possible means of cooperation, including hitherto untried ones, should be explored. For each stage of the preparatory work the most appropriate one should be selected, depending on UNIDROIT's attitude towards the suggested project and on its own work in related areas.

56. If the Commission were to share the above conclusions, it may wish to request the Secretariat to prepare the two studies mentioned in paragraphs 53 and 54. On the basis of those studies, it might wish to decide about the further course of action in this project, in particular whether at that stage a working group should be entrusted with the elaboration of a uniform legal text on receivables financing.

**B. Cross-border insolvency: report on UNCITRAL-INSOL Colloquium
on Cross-Border Insolvency: note by the Secretariat
(A/CN.9/398) [Original: English]**

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-3
I. DISCUSSION OF PREVAILING LEGAL ENVIRONMENT	4-14
A. General remarks	4-7
B. Law reform efforts at the national level	8-9
C. Initiatives at the international level	10-11
D. Cross-border judicial cooperation, ad hoc protocols and concordats ..	12-14
II. CONCLUSIONS	15-19

INTRODUCTION

1. At the UNCITRAL Congress "Uniform Commercial Law in the 21st Century", held in conjunction with the twenty-fifth session (1992), it was proposed that the Commission should consider undertaking work on international aspects of bankruptcy. Consequent to that decision, the Secretariat presented to the Commission at its twenty-sixth session (1993) a note on cross-border insolvency, outlining various legal issues that might give rise to problems due to a lack of harmony among national laws (A/CN.9/378/Add.4). That note also provided a brief description of previous work at the international level towards harmonization of laws in the area. The prevailing view at the last session was that, despite concerns about the feasibility of a project to harmonize rules on international aspects of insolvency, the practical problems caused by the disharmony among national laws governing cross-border insolvencies

warranted further study of legal issues in cross-border insolvencies and possible internationally acceptable solutions. The Secretariat was requested to prepare for a future session of the Commission an in-depth study on the desirability and feasibility of harmonized rules of cross-border insolvencies, a study that would consider which aspects of cross-border insolvency law lent themselves to harmonization and what might be the most suitable vehicle for harmonization (A/48/17, paras. 302-306).

2. As an initial step in gathering information for the feasibility assessment requested by the Commission, the Secretariat, with the co-sponsorship and organizational assistance of INSOL International, organized a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994). INSOL is an international association of practitioners from professions that participate in cross-border insolvency cases. The Colloquium was designed in particular to provide a

forum for a dialogue among insolvency practitioners from various regions that have been exposed first-hand to the practice of cross-border insolvency, as well as being involved in efforts that have been made to date in the direction of harmonization of rules. As such, the Colloquium was geared to enabling the Commission to assess from a practical standpoint the desirability and feasibility of any future work that it might consider undertaking in this area. The approximately 90 participants from various countries included lawyers, chartered accountants, bankers and judges that have presided over notable cross-border insolvency cases, as well as representatives of interested ministries of a number of Governments and of international organizations, such as INSOL and Committee J of the Section on Business Law of the International Bar Association (IBA). The main speakers included judges and practitioners that have had significant experience in cross-border insolvency cases, as well as individuals and representatives of organizations that have spearheaded international and regional harmonization efforts.

3. The present note presents an outline of the views and perspectives that were exchanged at the Colloquium, including a summary of possible directions and stages of work by the Commission that were indicated by the exchange of views and information that took place at the Colloquium.

I. DISCUSSION OF PREVAILING LEGAL ENVIRONMENT

A. General remarks

4. The view was widely shared at the Colloquium that the practical significance of legal aspects of cross-border insolvency would continue to grow, parallel to the ongoing expansion in multinational economic activity. Emphasis was placed on the corresponding need to develop legal mechanisms for limiting the extent to which, in the event of insolvency in a cross-border context, disparities in and conflicts between national laws created unnecessary obstacles to the achievement of the basic economic and social objectives of insolvency proceedings. Those objectives included, generally, protecting the rights and interests of creditors, employees and debtors. In more specific terms, the legal rules applied in cases of cross-border insolvency should facilitate the rehabilitation of businesses that, in particular from an economic standpoint, merited preservation, thereby serving the goal of preservation of employment, and, in the event of liquidation, maximizing the value of the assets that were available to pay creditors' claims, without undue regard to the location of those assets.

5. It was widely reported that, in sharp contrast to the proliferation of multinational economic activity, the prevailing legal environment was generally not suitably geared to achieving the above-mentioned objectives in cases of cross-border insolvency. Many national insolvency laws claimed, for their own insolvency proceedings, application of the principle of "universality", according to which a unified administration of the insolvency would be the objective and court orders would be effective with respect to assets located abroad, while failing to accord recognition

of universality to foreign insolvency proceedings. An example of difficulties that may arise in the context of a reorganization proceeding was the case in which one jurisdiction envisages a "debtor in possession" continuing to exercise management functions, while, under the law of another State in which a contemporaneous insolvency proceeding is being conducted with respect to the same debtor, existing management is displaced or the debtor's business is to be liquidated.

6. It was reported that, in such a prevailing legal environment, fragmentation and compartmentalization along national lines were prevalent in the administration of cross-border insolvencies. It was further reported that, in the face of gaps or inadequacies in the law, courts and practitioners attempting to harmonize administration of cross-border insolvencies might find that, at best, they had to attempt to rely on ad hoc protocols or agreements among the parties involved in administering the insolvency proceedings in order to provide for a harmonized administration of the insolvency estate in the cross-border context. Such procedures, which might be based on interpretations of general notions such as international comity, often would take place in an atmosphere of legal uncertainty that resulted from an inadequate legislative framework for cooperation.

7. While it was widely felt that it would not be feasible, at least in the foreseeable future, to solve those problems by way of a substantive unification of laws affecting cross-border insolvency proceedings, a variety of specific needs were identified that might be addressed by efforts short of unification of substantive law. Those specific needs included, in particular: systems to facilitate, in the context of liquidation proceedings, preservation of collateral and quick liquidation or, in the context of reorganization proceedings, mechanisms for facilitating rescue and rehabilitation of viable businesses by way of moratoria to prevent action by individual creditors; mechanisms at the legislative level to provide for the recognition of duly appointed representatives and the recovery of assets, including by way of providing information to foreign insolvency proceedings; greater information and certainty for secured lenders as to the identity of the items in which they hold security; simplified systems for proving claims, in particular allowing creditors in appropriate circumstances to claim in their own countries and in their own language; recognition of foreign court orders; and recognition and enforceability of "net positions" of banks involved in multilateral netting arrangements.

B. Law reform efforts at the national level

8. Attention was drawn to law-reform efforts in a limited number of States that had taken place, or that were in progress, designed to foster a greater degree of universality in administration of cross-border insolvencies, as a basis for assistance other than the basis of comity or mere rules of private international law. It was suggested that those efforts, which typically involved establishing mechanisms for granting court access to representatives of foreign insolvency proceedings and otherwise granting recognition to foreign proceedings, might serve as an indication of what might be feasible in terms of international harmonization.

9. Key features of such national law reforms intended to establish flexible frameworks for dealing with cross-border insolvencies included, for example: an opportunity for representatives of foreign insolvency proceedings to petition the bankruptcy court for ancillary proceedings, available at the discretion of the court or perhaps mandatory, to assist in the administration of the foreign insolvency proceeding; various forms of ancillary relief including injunctions blocking actions against the foreign debtor or property in the forum and turnover of property to the foreign representative for administration in the foreign proceeding; possible suspension or dismissal of a forum bankruptcy proceeding in deference to pending foreign insolvency proceedings; the opportunity for the foreign representative to petition for a full, involuntary insolvency proceeding as an alternative to a mere ancillary proceeding; appearances before forum courts by foreign representatives treated as "special appearances", thus not subjecting the foreign representative to the jurisdiction of the forum for any other purpose; criteria for assessing foreign proceedings for purposes of determining whether to recognize court exercise of discretion as to whether to grant recognition or ancillary relief (e.g., similarity on essential points between the legal system of the forum State and the foreign State; just treatment of all creditors; comity).

C. Initiatives at the international level

10. It was observed that, at the same time that specific provisions in national legislation designed to deal with cross-border insolvency remained the exception, there was also a lack of an extensive network of bilateral treaties that might provide relief, as well as a lack of a multilateral treaty arrangement on the global level. Multilateral treaties on a regional basis are, for example: in Latin America, the Montevideo Treaties of 1889 and 1940; in the Nordic region, the Convention between Denmark, Finland, Iceland, Norway and Sweden regarding bankruptcy (concluded in 1933 and amended in 1977 and 1982); among the member States of the Council of Europe, the European Convention on Certain International Aspects of Bankruptcy (Istanbul, 1990); and, in the European Union, the draft Convention on Insolvency Proceedings.

11. Mention was also made of certain non-governmental initiatives with a view to providing a legal framework or basis for harmonization of cross-border insolvency proceedings. One such initiative was the Model International Insolvency Cooperation Act (MIICA), formulated by Committee J of the Section on Business Law of IBA. The view was expressed that the experience of MIICA suggested the importance for the eventual success of harmonization efforts, in particular when those efforts took the form of model legislation, of involving Governments in the formulation process. It was noted that Committee J was currently engaged in a review and analysis of fundamental insolvency concepts with a view to developing a model insolvency code, a set of uniform concepts that would be acceptable to or adaptable into domestic legislation. Another initiative to which attention was drawn was the research being conducted by the American Law Institute into a framework for cross-border insolvencies among the member countries of the North American Free Trade Agreement (NAFTA).

(Additional information on multilateral initiatives towards regulation of cross-border insolvencies is presented in A/CN.9/378/Add.4.)

D. Cross-border judicial cooperation, ad hoc protocols and concordats

12. Particular attention was given in the discussion to the crucial function that is performed in cross-border insolvency by cooperation among the judges and counsel from the various States in which assets of the debtor might be found and in which insolvency proceedings are taking place. It was noted that the significance of such cooperation was enhanced, but that cooperation was made more difficult, by the absence of an adequate legislative framework for dealing with cross-border insolvencies and when there was a need to reconcile differences in the applicable national insolvency laws. Notable examples of judicial cooperation, and of cooperation among counsel and representatives of creditors and debtors, were described to the Colloquium by judges and counsel involved in a number of particularly significant cases of cross-border insolvency that have taken place in recent years. It was observed generally that an obstacle that hampered and made uncertain judicial cooperation was that judges seeking to establish cooperation typically had to do so without much guidance in the law.

13. Specific attention was also given in the discussion to the function that may be performed in a cross-border insolvency case by an ad hoc protocol agreed to by the various parties in interest and approved by the supervising judges. Such a protocol may be used, for example, to establish the system of corporate governance that will be applied to the debtor in a reorganization proceeding. A protocol dealing with corporate governance might address issues such as appointment of directors, procedural rules for boards of directors, judicial review procedures in connection with removal of directors, and recognition of certain rights of the insolvency administrator, including the right to receive information.

14. In connection with such ad hoc arrangements, the Colloquium noted with interest the work conducted by Committee J of the Section on Business Law of IBA on a "Cross-Border Insolvency Concordat". The purpose of the Concordat, the fundamental approach of which is based on rules of private international law, is to suggest rules, some of which may be applicable in any cross-border insolvency, which the participants or courts could adopt for dealing with a variety of issues. Those issues include, for example, designation of the administrative forum, application of that forum's priority rules, certain rules for cases in which there is more than one administrative forum, and designation of applicable rules for avoidance of transfers of assets that took place in the period preceding the insolvency.

II. CONCLUSIONS

15. It may be noted that at the Colloquium there was a high degree of receptivity to the interest expressed by the Commission in a possible project on cross-border insolvency. Taking particular note of the views and observations

concerning cross-border insolvency that were aired at the Colloquium by judges, practitioners, representatives of concerned organizations and Governments, the Secretariat will continue work relating to the assessment of the feasibility of work in this area requested by the Commission. In this endeavour, the Secretariat would cooperate with interested organizations and welcomes the offer of research assistance that has been extended by INSOL International.

16. Based on a current assessment of feasibility and drawing on the discussion at the Colloquium and the consultations with practitioners and interested organizations which it facilitated, it is possible at this stage to identify a number of sub-areas of the cross-border insolvency subject in which it would appear that some work by the Commission would not only be welcome, but feasible and useful. Moreover, it would appear possible to conduct work in those sub-areas without necessarily straying into what is generally recognized as not, at least at this stage, a feasible, or necessarily even desirable, area of work, namely, the substantive unification of insolvency law.

17. One of those sub-areas of work that may seem at first to be modest, but that drew particular attention at the Colloquium and in which it would appear feasible to make a useful contribution in a relatively short time, concerns judicial cooperation. An opportunity for pursuing work in this area has already presented itself, as INSOL International is proposing to co-sponsor with UNCITRAL and organize, in conjunction with a regional conference it is to hold at Toronto in March 1995, a colloquium for judges on judicial cooperation in cross-border insolvency. The twin objectives of the judges' colloquium would be: firstly, to elicit the views of judges as to the extent to which judicial cooperation was possible under current law, for example, by application of the notion of comity, and exploring limits to cooperation under current law; secondly, to determine what rules might be necessary to enable judicial cooperation as a first step in dealing with difficulties that arise as a result of parallel proceedings and potentially conflicting legal regimes and jurisdictions.

18. A second sub-area, which it would appear useful to pursue and which in some respects may overlap with the first sub-area, may be broadly referred to under the rubric "access and recognition". This area may be understood to concern the granting of access to the courts to representatives of foreign insolvency proceedings or creditors, and to giving recognition to orders issued by foreign courts administering insolvency proceedings. Preliminary work in this area could identify the advantages and disadvantages of the different approaches found in the existing legislative systems providing for access and recognition, as well as in legislative-reform efforts at the national and multilateral levels. It could also explore, from the standpoint of the needs of practice and the objectives of insolvency (e.g., equal treatment of creditors), the appropriateness of formulating uniform rules on access and recognition.

19. A third possibility that might in due time be considered for work by the Commission is the formulation of a set of model legislative provisions on insolvency. While it was not the conclusion of the Colloquium, and it is not here proposed to draft a comprehensive insolvency code with a view to achieving substantive unification of law, work in this area of law may eventually be important not only for Governments concerned with modernization of law, but also for the commercial community and for legal practitioners. It could be foreseen that much work might be conducted in a form that would avoid the difficulties that would be raised by attempting global unification of the substantive law of insolvency. In particular, such a project could be designed in a manner that would take into account the different policy options that a State would wish to consider in drafting its insolvency law, and would present model provisions for implementing those various policy options. The Commission may wish to note in connection with this type of possible work, and with a view to possible cooperation with Committee J of the Section on Business Law of IBA, the exploratory work being conducted by that body on fundamental concepts of a model insolvency code (see paragraph 11).

C. Build-operate-transfer projects: note by the Secretariat

(A/CN.9/399) [Original: English]

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1
I. THE BUILD-OPERATE-TRANSFER CONCEPT	2-8
II. THE UNDJIO GUIDELINES	9-11
III. CONCLUSION	12

INTRODUCTION

1. At the Congress on International Trade Law held in May 1992 in New York in the context of the twenty-fifth session of the Commission, it was proposed that the Commission consider undertaking work in the field of the build-operate-transfer (hereinafter referred to as "BOT") project financing concept. Consequent to that proposal, at its twenty-sixth session in 1993, the Commission had before it a note on possible future work (A/CN.9/378) in which the Secretariat informed the Commission that it was monitoring the work by the United Nations Industrial Development Organization (UNIDO) on the preparation of "Guidelines for the Development, Negotiating and Contracting of BOT Projects". The Commission emphasized the relevance of BOT and noted with appreciation the Secretariat's intention to present a note to the Commission on possible future work in the area. This note is intended to appraise the Commission of the current situation in this regard.

I. THE BUILD-OPERATE-TRANSFER CONCEPT

2. In its most basic form, a BOT project is one in which a Government grants a concession for a period of time to a private consortium for the development of a project; the consortium then builds, operates and manages the project for a number of years after its completion and recoups its construction costs and makes a profit out of the proceeds coming from the operation and commercial exploitation of the project and, at the end of the concession period, the project is transferred to the Government.

3. In this arrangement, the repayments of any loans or returns on the investments made on the project is not guaranteed by the Government, but depends on the revenue generated by the project. Since direct funds from the public budget are not required, the Government of a country will thus experience reduced pressure of public borrowing, while allowing the transfer of the industrial risks and also of new technologies to the private sector. Furthermore, since the project is built and, during the concession period, operated by the consortium, the Government gains the benefit of private sector expertise in these areas.

4. Although BOT projects have largely been used in the development of large infrastructural projects such as telecommunications networks, highways and other public transportation projects, port facilities and in energy supply, increasingly it is also being utilized for medium- and small-scale projects. Thus, the potential exists for BOT to provide added opportunities for increased international trade.

5. BOT projects are attractive for a number of reasons. Among these are that they provide countries with decreasing borrowing capacity and declining budgetary resources an opportunity to finance projects without involving public funds. Also, they offer the benefits of stimulating investments and promoting privatization. Therefore, an increasing number of States, in particular

developing countries, and lending agencies have become interested in offsetting such financial difficulties through BOT projects.

6. Among the main characteristics that differentiate BOT projects from other forms of project implementation are that the Government does not provide guarantees for the loans for the financing of the project, which necessitates non-traditional distribution of risks between a high number of contractually interrelated parties. Typically, the main parties in a BOT project would be: the project company (consortium), the Government, the lenders, the construction company, the insurers, the purchasers or users of the project's product. This multiplicity of parties and their interrelated contractual relationships give rise to complex and time-consuming negotiations. Furthermore, the lack of expertise in putting together a BOT project, particularly within Governments, acts as a hinderance in the negotiating process.

7. The fact that the responsibility for repayment of any loans shifts from the traditional "client" (the Government) to the private consortium implies an increased risk to the lenders. Lenders are therefore placed in a situation where they have to look for additional means of reducing their risks, including insurance. This element of non-traditional distribution of risks between the various parties makes the pre-contractual stage of a BOT project usually fairly complex.

8. Another aspect that sometimes acts as a barrier in establishing BOT projects is the lack of legal certainty in some States regarding the realization of particular aspects of a project. For example, it might not be clear as to what extent private entities may draw revenue from the operations of public infrastructural projects such as operating toll roads. In light of such uncertainty, it would be difficult for the Government, for example, to issue a concession for the development of a highway BOT project since the consortium would, in most cases, only be able to ensure returns on its investments by collecting road tolls. In other instances, there might be lack of clarity as to the basis and effect of certain long-term contractual assurances that the Government would need to make to the private consortium. Enabling legislation to make the underlying legal framework attractive for BOT projects may therefore need to be enacted.

II. THE UNIDO GUIDELINES

9. The above mentioned problems, among others, and the potential for the development of BOT projects, led UNIDO to initiate the preparation of "Guidelines for the Development, Negotiation and Contracting of BOT Projects". In addition to disseminating information on BOT projects, the objective of the Guidelines is to enable States and all other interested parties to devise and formulate the appropriate approach in promotion and development of BOT projects.

10. The UNIDO Guidelines will be divided into chapters entitled as follows:

Introduction to the BOT concept; Phases of a BOT project; Macroeconomic considerations; Role of Government; Financial analysis (feasibility study) and economic analysis; Risk allocation and management (financial structuring); Procurement issues; Transfer of technology and capacity-building; Building and construction; Operation and maintenance; Transfer of ownership; Contract package and coordinating the contracts (roadmap to the required contracts); Project agreement; Conclusion (possibly including a summary of success cases).

11. The Secretariat has been monitoring the progress within UNIDO on the Guidelines. The preparation is at an advanced stage and it is expected that the Guidelines will be finalized in September 1994.

III. CONCLUSION

12. Although legal aspects of BOT will form part of the UNIDO Guidelines, by reason of the large scope of the Guidelines, it will not be possible to deal with some of these aspects in a detailed manner. It is the intention of the Secretariat, once the UNIDO Guidelines are finalized, to study the desirability and feasibility of further work by the Commission on some of the problems raised with regard to BOT projects. This may include, for example, the creation of an enabling legal framework for BOT projects, in particular for the concession agreement, or guidance to the parties on contracting issues, for example, by supplementing the UNCITRAL Legal Guide on Contracts for the Construction of Industrial Works.

VI. INTERNATIONAL PAYMENTS

A. UNCITRAL Model Law on International Credit Transfers: note by the Secretariat*

(A/CN.9/384) [Original: English]

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1
I. FUNDS TRANSFERS IN GENERAL	2-6
II. UNIFICATION OF THE LAW	7-9
III. SCOPE OF APPLICATION	10-18
A. Categories of transactions covered by Model Law	10-15
B. Portions of an international credit transfer	16-18
IV. EXTENT TO WHICH MODEL LAW IS MANDATORY	19
V. SALIENT FEATURES OF THE MODEL LAW	20-51
A. Obligations of sender of payment order	20-27
B. Sender's payment to receiving bank	28-32
C. Obligations of receiving bank	33-42
D. Bank's liability for failure to perform one of its obligations	43-47
E. Completion of credit transfer and its consequences	48-51

INTRODUCTION

1. The UNCITRAL Model Law on International Credit Transfers, adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1992, was prepared in response to a major change in the means by which funds transfers are made internationally. This change involved two elements: the increased use of payment orders sent by electronic means rather than on paper, and the shift from the generalized use of debit transfers to the generalized use of credit transfers. One result was that previous efforts to unify the law governing international debit transfers were not relevant to the new funds transfer techniques. The Model Law offers the opportunity to unify the law of credit transfers by enacting a text that is drafted to meet the needs of modern funds transfer techniques.

I. FUNDS TRANSFERS IN GENERAL

2. Until the mid-1970s a person who wished to transfer funds to another country, whether to pay an obligation or

to provide itself with funds in that foreign country, had a limited number of ways in which to proceed. It could send its own personal or corporate cheque to the intended recipient of the funds, but international collection of such items was both slow and expensive. It could purchase from its bank a draft drawn by the bank on the bank's correspondent in the receiving country. Collection of such an international bank draft was faster than collection of a personal or corporate cheque since it was payable in the receiving country and in the funds of the receiving country.

3. A third and even faster procedure had also been available since the mid-nineteenth century. The originator's bank could send a payment order by telegraph to its correspondent bank in the receiving country instructing the receiving bank to pay the intended recipient of the funds. (The payment order could also be transmitted between the banks on paper. This is the common method for making funds transfers in many countries. However, it was less commonly used for international transfers.) While faster than the other two methods, the telegraph was a relatively expensive method of communication and it was prone to error. When telex replaced the telegraph, the basic banking transaction remained the same, but the cost was reduced and accuracy improved. That led to a gradual movement away from the use of bank cheques for international payments. With the introduction of computer-to-computer

*This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes only; it is not an official commentary on the Model Law. A commentary prepared by the secretariat on an earlier draft of the Model Law appears in A/CN.9/346 (reproduced in *United Nations Commission on International Trade Law: Yearbook*, vol. XXII: 1991, part two, I, A).

inter-bank telecommunications in the mid-1970s, the cost dropped still further, while speed and accuracy improved dramatically. The extension of computer-to-computer inter-bank telecommunication facilities to ever-increasing numbers of countries means that the use of bank cheques for international funds transfers has drastically decreased and the role of telex transfers has been significantly reduced.

4. The collection of bank cheques, telex transfers and the newer computer-to-computer transfers have one important element in common: value is transferred from the originator to the beneficiary by a debit to the bank account of the originator and a credit to the bank account of the beneficiary. Settlement between the banks is also accomplished by debits and credits to appropriate accounts. Those accounts may be maintained between the banks concerned or with third banks, including the central bank of one or both countries.

5. There is also a striking difference between, on the one hand, the collection of a bank cheque (or the collection of a personal or corporate cheque) and, on the other hand, a telex or computer-to-computer transfer. The cheque is transmitted to the beneficiary by mail or other means outside banking channels. Therefore, the banking procedures to collect the cheque are initiated by the beneficiary of the funds transfer. A funds transfer in which the beneficiary of the funds transfer initiates the banking procedures is more and more often called a debit transfer. Collection of a bill of exchange or a promissory note is also a debit transfer, since the beneficiary of the funds transfer initiates the funds transfer, and there are other debit transfer techniques available, including some that are based on the use of computers.

6. In telex transfers and computer-to-computer transfers it is the originator of the funds transfer who begins the banking procedures by issuing a payment order to its bank to debit its account and to credit the account of the beneficiary. A funds transfer in which the originator of the funds transfer initiates the banking procedures is often called a credit transfer, and that is the term used in the Model Law.

II. UNIFICATION OF THE LAW

7. As a result of the wide-spread international use of debit transfers arising out of the collection of cheques and bills of exchange, there have been several different efforts at unification of the law governing negotiable instruments and their collection.¹ Conversely, until recently there had been little interest in unifying the law governing the international use of paper-based and telex credit transfers.

¹The most successful to date have been the Uniform Law on Bills of Exchange and Promissory Notes and the Uniform Law on Cheques, which were adopted by the League of Nations in 1930 and 1931. A more recent effort is the United Nations Convention on International Bills of Exchange and International Promissory Notes, which was prepared by UNCITRAL and adopted by the General Assembly in 1988. The UNCITRAL Convention is designed for optional use in international trade (for information on that Convention see explanatory note in A/CN.9/386). To complement these intergovernmental efforts, the International Chamber of Commerce has formulated the Uniform Rules for Collections (ICC Publication No. 322), which have been adopted by banks in over 130 States and territories to govern the means by which banks collect drafts internationally. The Uniform Rules for Collections are under revision at the time of writing.

8. The situation began to change in 1975 when the first international inter-bank computer-to-computer message system came into service. Concurrently, electronic funds transfer systems for business or consumer use were beginning to appear in a number of countries. Since it was not clear whether the rules governing paper-based funds transfers should or would be applied to electronic funds transfers in whole or in part, UNCITRAL's first effort was to prepare the *UNCITRAL Legal Guide on Electronic Funds Transfers* (A/CN.9/SER.B/1, United Nations publication, Sales No. E.87.V.9). The *Legal Guide* explored the legal issues that would have to be faced in moving from a paper-based to an electronic funds transfer system. Since the focus of the *Legal Guide* was on the impact of the shift from paper to electronics, it discussed both debit and credit transfers.

9. When UNCITRAL authorized the publication of the *Legal Guide* in 1986, it also decided to prepare model legal rules so as to "influence the development of" national practices and laws governing the newly developing means of making funds transfers. Subsequently, it was decided that the model legal rules should be adopted in the form of a model law, and that the model law should be drafted with a view to its adoption by States.

III. SCOPE OF APPLICATION

A. Categories of transactions covered by Model Law

10. As indicated by its title, and in contrast to the *Legal Guide*, the Model Law applies to credit transfers. It does not apply to debit transfers, even when made in electronic form. The Model Law is not restricted to credit transfers made by computer-to-computer or other electronic techniques, even though it was the explosive growth of electronic credit transfer systems that brought about the need for the Model Law. Many credit transfers, both domestic and international, begin with a paper-based payment order from the originator to its bank to be followed by an inter-bank payment order in electronic form. Definition of an electronic credit transfer would, therefore, be difficult and unproductive. The appropriate solution for only a few legal issues seemed to depend on whether a payment order was in electronic or paper-based form. Appropriate rules have been drafted for those situations.

11. While many credit transfers require the services of only the originator's bank and the beneficiary's bank, other credit transfers require the services of one or more intermediary banks. In such a case the credit transfer is initiated by a payment order issued by the originator to the originator's bank, followed by payment orders from the originator's bank to the intermediary bank and from the intermediary bank to the beneficiary's bank. The credit transfer also requires payment by each of the three senders to its receiving bank. As expressed in article 2(a), a credit transfer, and therefore the transaction subject to the Model Law, includes the entire "series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary".

12. The Model Law is by its own terms restricted to international credit transfers. In part that decision was taken in recognition of the fact that UNCITRAL was created to unify the law governing international trade. An additional reason was that, while all countries face essentially the same legal and practical problems in implementing international credit transfers, the circumstances in which domestic credit transfers are carried out vary significantly.

13. The criteria set out in article 1 to determine whether a credit transfer is international, and therefore subject to the Model Law, is whether any sending bank and any receiving bank in the credit transfer are in different States. Once there is a sending and a receiving bank in different States, every aspect of the credit transfer is within the scope of the Model Law.

14. Although the means of making domestic credit transfers in some countries vary significantly from the means used for international credit transfers, the Commission recognized that none of the substantive rules in the Model Law were appropriate only for international credit transfers. Therefore, some States might wish to adopt the Model Law to govern their domestic credit transfers as well as their international credit transfers, thereby assuring unity of the law. All that would be necessary would be to change the scope of application in article 1.

15. Credit transfers may be made by individuals for personal reasons as well as by businesses for commercial reasons. Some countries have special consumer protection laws that govern certain aspects of a credit transfer. The footnote to article 1 recognizes that any such consumer protection law may take precedence over the provisions in the Model Law. If an individual is an originator or a beneficiary of a credit transfer, its rights and obligations would be governed by the Model Law, subject to any consumer protection law that might be applicable.

B. Portions of an international credit transfer

16. Once it was decided that the Model Law should be drafted to apply to the entire "series of operations . . . made for the purpose of placing funds at the disposal of a beneficiary", and not just to the payment order that passed from a bank in one country to a bank in another country, it was necessary to decide whether every aspect of a given international credit transfer should be subject to the Model Law as enacted in a given country. It was recognized by all concerned that such a result would be desirable, since it would ensure the application of a single legal regime to the entire credit transfer. At one stage a proposal was made that a rule to that effect should be included in the Model Law. UNCITRAL decided that such a rule, although desirable in the abstract, was neither technically nor politically feasible. Therefore, it was accepted by UNCITRAL that each of the operations carried out in the credit transfer would be subject to the law applicable to that operation. It was hoped, of course, that the Model Law would be widely adopted so that the different operations in a given credit transfer would be subject to a consistent legal regime.

17. Throughout the period that the Model Law was in preparation, UNCITRAL implemented its decision that each of the operations carried out in the credit transfer would be subject to the law applicable to that operation by means of an article on conflict of laws. That article allowed the parties to choose the law applicable to their relationship. Such a choice would probably be included in an agreement that pre-existed the credit transfer in question. In the absence of an agreement, the law of the State of the receiving bank would apply to the rights and obligations arising out of the payment order sent to that bank.

18. At the 1992 session of the Commission when the Model Law was adopted, it was decided to delete the conflict-of-laws provision from the Model Law proper. However, the article was included in a footnote to chapter I of the Model Law "for States that might wish to adopt it".

IV. EXTENT TO WHICH MODEL LAW IS MANDATORY

19. Article 4 provides that "Except as otherwise provided in this law, the rights and obligations of parties to a credit transfer may be varied by their agreement." This simple sentence embodies three propositions:

(a) In principle, the Model Law is not mandatory law. The parties to a credit transfer may vary their rights and obligations by agreement;

(b) The agreement must be between the parties whose rights and obligations are affected. That means, for example, that the agreement of a group of banks in regard to the transactions between them could modify the rights and obligations of those banks as they are set out in the Model Law. However, the agreement would have no effect on the rights and obligations of their customers, unless the customers had also agreed to such a modification of their rights and obligations. This rule is somewhat modified in articles 12(9) and 14(6), both of which provide that specific paragraphs in the Model Law governing the means of making a refund under certain limited circumstances "do not apply to a bank if they would affect the bank's rights or obligations under any agreement or any rule of a funds transfer system";

(c) Certain rights and obligations of the parties may not be varied by agreement, or may be varied only to a limited extent or under limited circumstances. Examples are to be found in articles 5(3), 14(2) and 17(7).

V. SALIENT FEATURES OF THE MODEL LAW

A. Obligations of sender of payment order

20. The sender of a payment order may be the originator of the credit transfer, since the originator sends a payment order to the originator's bank, or it may be a bank, since every bank in the credit transfer chain, except the beneficiary's bank, must send its own payment order to the next bank in the credit transfer chain.

21. Article 5(6) sets out the one real obligation of a sender, i.e., "to pay the receiving bank for the payment order when the receiving bank accepts it". There is a special rule

for payment orders that contain a future execution date; in that case the obligation to pay arises when the receiving bank accepts the payment order, "but payment is not due until the beginning of the execution period".

22. But what if there is a question as to whether the payment order was really sent by the person who is indicated as being the sender? In the case of a paper-based payment order the problem would arise as the result of an alleged forged signature of the purported sender. In an electronic payment order, an unauthorized person may have sent the message but the authentication by code, encryption or the like would be accurate.

23. The Model Law answers the question in three steps. The first step is described in article 5(1): "A sender is bound by a payment order . . . if it was issued by the sender or by another person who had the authority to bind the sender." The question as to whether the other person did in fact and in law have the authority to bind the sender is left to the appropriate legal rules outside the Model Law.

24. The second step described in article 5(2) is the most important:

"When a payment order . . . is subject to authentication [by agreement between the sender and the receiving bank], a purported sender . . . is . . . bound if

(a) the authentication is in the circumstances a commercially reasonable method of security against unauthorized payment orders, and

(b) the receiving bank complied with the authentication."

25. The assumption is that, in the case of an electronic payment order, the receiving bank determines the authentication procedures it is prepared to implement. Therefore, the bank bears all the risk of an unauthorized payment order when the authentication procedures are not at a minimum "commercially reasonable". The determination of what is commercially reasonable will vary from time to time and from place to place depending on the technology available, the cost of implementing the technology in comparison with the risk and such other factors as may be applicable at the time. Article 5(3) goes on to say that article 5(2) states an obligation that the receiving bank cannot avoid by agreement to the contrary. Article 5(2) does not apply, however, when the authentication procedure is "a mere comparison of signature", in which case the otherwise applicable law on the consequences of acting on a forged signature must be applied.

26. If the authentication procedure was commercially reasonable and the bank followed the procedure, the purported sender is bound by the payment order. This reflects two judgements. The first is that the bank has no means to distinguish the authorized use of the authentication from the unauthorized use of the authentication. Banks would be unable to offer electronic credit transfers at an acceptable price if they bore the risk that payment orders that were properly authenticated were nevertheless unauthorized. The second is the judgement that if the authentication procedure is commercially reasonable and the bank can show that it

followed the procedure, the chances are that it was the sender's fault that someone unauthorized learned how to authenticate the payment order.

27. That introduces the third step in the analysis as described in article 5(4). The sender or the receiving bank, as the case may be, would be responsible for any unauthorized payment order that could be shown to have been sent as a result of the fault of that party. For the rule as to who bears the burden of proof, see article 5(4).

B. Sender's payment to receiving bank

28. It happens, particularly in transfers by individuals, that an originator does not have an account with the originator's bank and that it pays the amount of the credit transfer plus the applicable fees to the originator's bank in cash. However, in most cases the originator, i.e., the sender, will have an account with the originator's bank, i.e., the receiving bank. It also often happens that a sending bank will have an account with the receiving bank. In any such case, payment to the receiving bank will normally be made by a debit to the account of the sender held by the receiving bank. Since the receiving bank is in a position to determine whether there is a sufficient credit balance in the account, or whether it is willing to extend credit to the sender to the extent of the resulting debit balance, article 6(a) provides that payment is made when the debit is made.

29. The reverse situation may also occur, that is, that the receiving bank maintains an account with the sending bank. Alternatively, both the sending bank and the receiving bank may maintain accounts with a third bank. Then the sending bank can pay the receiving bank by crediting the receiving bank's account or by instructing the third bank to credit the receiving bank's account, as the case may be. The result in either of those two situations is that the credit balance of the receiving bank with the sending bank or with the third bank is increased, with a concurrently larger credit risk. Normally that would be acceptable to the receiving bank. However, on occasion the credit balance, and the resulting credit risk, may be more than the receiving bank was willing to have with the sending bank or the third bank. Therefore, the Model Law provides in article 6(b)(i) and (ii) that payment takes place when the credit "is used [by the receiving bank] or, if not used, on the banking day following the day on which the credit is available for use and the receiving bank learns of that fact". In other words, if the receiving bank does not use the credit and does not wish to bear the credit risk, it has a short period of time to notify the sending bank that the payment is not acceptable to it.

30. When the third bank at which the receiving bank maintains an account is a central bank, whether the central bank of its country or of another country, there is no credit risk (at least when the credit is in the currency of the central bank). Therefore, article 6(b)(iii) says that the payment has been made "when final settlement is made in favour of the receiving bank".

31. A fourth principal means of paying the receiving bank is to net the obligation of the sending bank with other obligations arising out of other payment orders. The netting

may be pursuant to a bilateral netting agreement between the two banks. The netting may also be pursuant to "the rules of a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally". If netting takes place under any of these circumstances, article 6(b)(iv) provides that payment to the various receiving banks for each of the individual payment orders occurs "when final settlement is made in favour of the receiving bank in accordance with" the agreement or the rules.

32. A caveat should be entered at this point. Netting and the consequences of netting in case of the insolvency of one of the parties is a controversial matter. It is the subject of continuing study at the Bank for International Settlements. The Model Law does not take a position as to whether a netting agreement is valid or effective under the applicable law. All it does is to provide when a sending bank pays the receiving bank for an individual payment order where there is a valid netting agreement.

C. Obligations of receiving bank

33. The obligations of a receiving bank are divided into the obligations that are part of a successful credit transfer and the obligations that arise when something goes wrong. Most payment orders that are received by a bank are executed promptly and the credit transfer is completed successfully. In a real sense, a receiving bank in such a credit transfer never has an unexecuted obligation in regard to the payment order.

34. The Model Law provides in articles 8(2) and 10(1) the obligations of a receiving bank to execute a payment order that it "accepts". The obligation of a receiving bank other than the beneficiary's bank is to issue a payment order that will properly implement the payment order received. The obligation of the beneficiary's bank is to place the funds at the disposal of the beneficiary. Until the receiving bank "accepts" the payment order, it has no obligation to execute it. The rules as to when a receiving bank accepts a payment order are in articles 7(2) and 9(1).

35. In most cases a receiving bank that is not the beneficiary's bank accepts a payment order when it issues its own payment order intended to carry out the payment order received. A beneficiary's bank accepts a payment order when it credits the account of the beneficiary. In those two situations the receiving bank, whether it is or is not the beneficiary's bank, undertakes its primary obligation and discharges that obligation by the same act. However, a receiving bank may accept a payment order in some other way before it executes the payment order received.

36. Some funds transfer systems have a rule that a receiving bank is required to execute all payment orders it receives from another member of the funds transfer system. The Model Law provides that in such a case the receiving bank accepts the payment order when it receives it.

37. A receiving bank that debits the account of the sender as the means of receiving payment or that notifies the sender that it accepts the payment order, accepts the payment order when it debits the account or gives the notice.

38. A final method of accepting a payment order deserves special attention. The philosophy of the Model Law is that a bank that receives a payment order and payment for it must either implement the payment order or give notice of rejection. If the receiving bank does neither within the required time, the receiving bank is deemed to have accepted the payment order and the associated obligations. Article 11 provides that normally the receiving bank must execute the payment order by the banking day after it is received and for value as of the day of receipt.

39. The receiving bank also has obligations when something goes wrong. Some payment orders, or would-be payment orders, are defective. A message received may contain insufficient data to be a payment order or, being a payment order, it cannot be executed because of insufficient data. For example, a payment order that expresses the amount of money to be transferred in two different ways, such as in words and in figures, may indicate the amount in an inconsistent manner. The same thing may occur in identifying the beneficiary, for example, by name and by account number. Where there is insufficient data, the receiving bank is obligated to notify the sender of the problem. Where there is an inconsistency in the data and the receiving bank detects the inconsistency, the receiving bank is also obligated to notify the sender.

40. Other obligations may arise after the receiving bank has issued its own conforming payment order. Completion of an international credit transfer may be delayed and neither the originator nor the beneficiary knows what has happened. To help in such situations article 13 provides that each receiving bank is requested to assist the originator and to seek the assistance of the next receiving bank to complete the banking procedures of the credit transfer.

41. If the credit transfer is not completed, article 14(1) provides that "the originator's bank is obligated to refund to the originator any payment received from it, with interest from the day of payment to the day of refund." The originator's bank can in turn recover what it paid to its receiving bank, with interest, and that bank can recover from its receiving bank. The chain of responsibility for refunding stops at the bank that is unable to complete the credit transfer.

42. In practice, the chain of refunds may stop one bank before the bank unable to complete the credit transfer. A credit transfer may fail because a receiving bank becomes insolvent before it executes the payment order it has received, or because the State has issued an embargo on transfers of the type in question or because of war or unsettled conditions in the receiving bank's country. In those cases the same events that cause the credit transfer to fail may make it impossible for the bank to refund to its sending bank. Sometimes it is evident that use of a particular bank or of banks in a particular country would be risky. In such a situation a bank, and particularly an originator's bank, may refuse to accept the payment order unless it is directed by its sender to use a particular intermediary bank to complete the credit transfer. Where a receiving bank is directed to use a particular intermediary bank and it is unable to obtain a refund from the intermediary bank because that bank has suspended payment or is prevented by

law from making the refund, the receiving bank is not required to make a refund to its sender. However, in order to be sure that such special situations are not used as a pretext to undermine the obligation to refund, a receiving bank that systematically seeks directions from its senders as to the intermediary banks to be used in credit transfers remains obligated to refund in all cases.

D. Bank's liability for failure to perform one of its obligations

43. It has already been noted that the originator's bank must refund to the originator the amount of the transfer plus interest if the credit transfer is not completed. That so-called "money-back guarantee" is, however, in the nature of restitution and is not in the nature of liability for failure to perform an obligation.

44. Upon closer analysis of the credit transfer transaction, it becomes clear that, if the credit transfer is completed, the only kind of failure by a bank that could occur is one that results in a delay in completion of the credit transfer. No matter which receiving bank causes the delay, the originator's account would be debited at the time expected, but the beneficiary's account would be credited later than expected. Therefore, the Model Law takes the position in article 17(1) that the liability of the receiving bank in delay runs to the beneficiary. That position is taken even though the beneficiary does not have a contractual relationship with any bank in the credit transfer chain other than the beneficiary's bank.

45. The liability of the bank for causing delay is to pay interest. It is current practice in many credit transfer arrangements for a bank that delays implementing a payment order received to issue its payment order for the amount of the transfer plus the appropriate amount of interest for the delay. If the bank does so, its receiving bank is obligated to pass on that interest to the beneficiary. Since the delaying bank has acted in a manner calculated to compensate the beneficiary, the delaying bank is discharged of its liability. If the interest is not passed on to the beneficiary as contemplated by article 17, the beneficiary has a direct right to recover the interest from the bank that holds it.

46. If the purpose of the credit transfer was to discharge an obligation owed by the originator to the beneficiary, the beneficiary may have recovered interest from the originator for delay in discharging that obligation. In such a case article 17(3) permits the originator, rather than the beneficiary, to recover interest from the delaying bank.

47. With one exception, the remedy of recovery of interest stated in article 17 is the exclusive remedy available to the originator or the beneficiary. No other remedy that may exist under other doctrines of law is permitted. According to article 18 the one exception is when the failure to execute the payment order, or to execute it properly, occurred

"(a) with the specific intent to cause loss, or (b) recklessly and with actual knowledge that loss would be likely to result". In those unusual circumstances of egregious behaviour on the part of the bank, recovery may be based on whatever doctrines of law may be available in the legal system outside the Model Law.

E. Completion of credit transfer and its consequences

48. According to article 19(1), "a credit transfer is completed when the beneficiary's bank accepts a payment order for the benefit of the beneficiary". At that point the banking system has completed its obligations to the originator. The beneficiary's bank's subsequent failure to act properly, if that should occur, is the beneficiary's concern. It is not covered by the Model Law but is left to the law otherwise regulating the account relationship.

49. Article 19(1) further provides that, "when the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it". The Model Law does not enter into the question as to when the beneficiary's bank must credit the beneficiary's account or when it must make the funds available. Those are matters to be governed by the otherwise applicable law governing the account relationship, including any contractual arrangements between the beneficiary and the beneficiary's bank.

50. In many credit transfers the originator and the beneficiary are the same person; the bank customer is merely shifting its funds from one bank to another. In such a case completion of the credit transfer obviously does not change the legal relationship between the originator and the beneficiary. Completion of the credit transfer changes only the relationships between the customer as originator and the originator's bank and between the customer as beneficiary and the beneficiary's bank.

51. Other credit transfers are for the purpose of discharging an obligation due from the originator to the beneficiary. Many delegates to UNCITRAL thought that the Model Law should provide that completion of the credit transfer would discharge the obligation to the extent that the obligation would be discharged by payment of the same amount in cash. Other delegates did not think the Model Law should contain such a rule, either because they did not believe that a rule on discharge of an obligation arising out of contract or otherwise should be included in a law on the banking transaction or because they did not believe that the rule proposed was correct. The position finally taken in UNCITRAL was to include the rule in a footnote to article 19 "for States that may wish to adopt it".

Further information about the Model Law may be obtained from the UNCITRAL secretariat.

B. United Nations Convention on International Bills of Exchange and International Promissory Notes: note by the Secretariat*

(A/CN.9/386) [Original: English]

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-3
I. BACKGROUND TO THE CONVENTION	4-11
II. SALIENT FEATURES OF THE CONVENTION	12-46
A. Scope of application and form of the instrument	12-18
B. Interpretation of the Convention	19-20
C. The concepts of "holder" and "protected holder"	21-26
D. Transfer warranties	27-29
E. Guarantees and avals	30-32
F. Other novel provisions of practical importance	33-44
G. Final clauses	45-46

INTRODUCTION

1. The United Nations Convention on International Bills of Exchange and International Promissory Notes is the culmination of over 15 years of work by UNCITRAL. It was adopted by the General Assembly of the United Nations under recommendation of the Sixth (Legal) Committee on 9 December 1988.

2. The Convention presents, for optional use in international transactions, a modern, comprehensive set of rules for international bills of exchange and international promissory notes that satisfy its requisites of form. The text of the Convention reflects a deliberate policy to minimize departures from the content of the two existing principal legal systems, preserving, where possible, the rules on which those systems concur. Where conflicts exist, requiring selection of one system's rule or a compromise solution, the Convention introduces a number of novel provisions. Another group of new rules are the result of special efforts to have the Convention respond to modern commercial needs and banking and financial market practices.

3. The Convention is divided into nine chapters. Chapter one deals with the sphere of application of the Convention and the form of the instrument covered by it. Chapter two contains definitions and other general provisions, including rules on the interpretation of various formal requirements.

Chapter three addresses questions relating to the transfer of an instrument. The fourth chapter covers the rights and liabilities of parties to, and holders of, an instrument. The fifth chapter addresses issues relating to presentment of an instrument, dishonour by non-acceptance or non-payment, and the conditions precedent to parties' rights of recourse. The sixth chapter deals with the discharge of liability on an instrument. Chapters seven and eight deal with lost instruments and limitation of actions (prescription). Lastly, the final provisions are found in chapter nine.

I. BACKGROUND TO THE CONVENTION

4. The United Nations Convention on International Bills of Exchange and International Promissory Notes is the result of a movement to establish a modern, self-contained international legal regime that would apply worldwide.

5. At its very first session held in 1968, UNCITRAL decided that, along with international sale of goods and international commercial arbitration, international payments should be given priority in its programme of future work. It was thought to be necessary to support the continued use of bills of exchange and promissory notes for international payments despite the emergence of new payment mechanisms. The new practices and techniques, it was thought, would not displace the more conventional usages, especially in the important role of financing international transactions.

6. From the outset the work undertaken by UNCITRAL in this area consisted of finding ways to overcome the great many disparities between the various negotiable instruments laws of the world. Previous attempts at unifying the law of negotiable instruments had brought results only in a limited region or among countries of the same legal tradition. For

*This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes only; it is not an official commentary on the Convention. Commentaries prepared by the secretariat on earlier drafts of the Convention appear in A/CN.9/213 (reproduced in *United Nations Commission on International Trade Law: Yearbook*, vol. XIII: 1982, part two, II, A,4) and A/CN.9/67 (reproduced in *United Nations Commission on International Trade Law: Yearbook*, vol. III: 1972, part two, II,1).

instance, the efforts undertaken at The Hague in 1910 and 1912 and under the League of Nations in 1930 and 1931, culminating in the adoption of the Geneva Uniform Laws for Bills of Exchange, Promissory Notes and Cheques had resulted in the harmonization of the negotiable instruments laws of only part of the civil law world and, on the common-law side, a similar harmonization had flowed from the issuance of the Bills of Exchange Act 1882 of the United Kingdom, on which the United States Negotiable Instruments Law (superseded by article 3 of the Uniform Commercial Code) and the various Bills of Exchange Acts of the Commonwealth countries had been modelled. But notwithstanding these influences, considerable variation exists in the case law and commercial practice even among countries of the same legal tradition.

7. The first step taken by UNCITRAL was to consult with UNIDROIT which had previously addressed the subject of unification of the law relating to negotiable instruments. At the request of the Commission, UNIDROIT prepared a preliminary report on the possibilities of extending the unification of the law of bills of exchange and cheques. In the light of this report the Commission considered three possible methods of promoting unification. These were firstly, encouraging a wider acceptance of the Geneva Conventions of 1930 and 1931; secondly, revising the Geneva Conventions of 1930 and 1931 with a view to making them more acceptable to countries following the Anglo-American system; and, lastly, creating a new negotiable instruments law. The discussions showed that the method most likely to succeed would be the creation of a new negotiable instruments law. It was felt that merely revising the Geneva Conventions would not make them acceptable to common-law States.

8. Before resolving to begin the preparation of a new negotiable instruments law the Commission decided to conduct an extensive inquiry to obtain the views and suggestions of Governments, banks and trading institutions. The Commission prepared and distributed an elaborate questionnaire and analysed the replies given by respondents regarding the present methods and practice for making and receiving international payments, the problems encountered in settling international transactions by means of negotiable instruments and the possible extent of new uniform law. From this analysis it became clear that the only viable approach would be to prepare a new set of rules that would be applicable to a special negotiable instrument for optional use in international transactions.

9. The secretariat of UNCITRAL first prepared a draft Uniform Law on International Bills of Exchange and a Commentary. The draft was later extended to include international promissory notes. The draft was revised over 14 sessions of the Working Group on International Negotiable Instruments and 3 sessions of the Commission itself. At the fifth session of the Working Group it was decided to set forth the new provisions in the form of a convention rather than a uniform law.

10. The Convention as adopted aims at facilitating international trade and finance. Throughout the legislative process, attention was constantly given to the comments and

observations of Governments, banks, trading and other interested circles.

11. The Convention does not purport to replace existing domestic legislation. It presents for optional use in international transactions a comprehensive body of rules that are theoretically and practically sound, being derived from a coherent set of principles fundamental to all known laws governing bills of exchange and promissory notes.

II. SALIENT FEATURES OF THE CONVENTION

A. Scope of application and form of the instrument

12. The Convention applies only to international bills of exchange and international promissory notes when they comply with certain requisites of form. In particular, the Convention applies only to international instruments that bear in both their heading and their text the words "International bill of exchange (UNCITRAL Convention)" or "International promissory note (UNCITRAL Convention)". The use of an instrument governed by the Convention is thus entirely optional. Ratification or accession by a State does not subject all international instruments issued in that State to the legal regime of the Convention but merely opens the door for bankers and merchants to opt for this new legal regime if they deem it preferable in their professional judgement.

13. The Convention provides its own definitions of the terms "bill of exchange" and "promissory note" and explicitly states the conditions on which a bill of exchange or promissory note is considered to be international. According to the Convention, a bill of exchange is a written instrument which: (a) contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to its order; (b) is payable on demand or at a definite time; (c) is dated; and (d) is signed by the drawer. A promissory note is a written instrument which: (a) contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to its order; (b) is payable on demand or at a definite time; (c) is dated; (d) is signed by the maker.

14. In order to qualify as an international bill under the Convention a bill of exchange must specify at least two of the places listed in article 2(1) of the Convention, and any two so specified places must be situated in different States. The places listed are: the place where the bill is drawn, the place indicated next to the signature of the drawer, the place indicated next to the name of the drawee, the place indicated next to the name of the payee, and the place of payment. In its turn an international promissory note must specify at least two of the places listed in article 2(2) of the Convention, whereby any two so specified places must be situated in different States. The places listed are: the place where the note is made, the place indicated next to the signature of the maker, the place indicated next to the name of the payee, and the place of payment.

15. There is one last requirement that an instrument fulfilling the above criteria must meet in order to qualify as an

international instrument under the Convention: a certain place of importance situated in a State that is a party to the Convention must also be specified in the instrument. In the case of a bill of exchange, this will either be the place of drawing or the place of payment. In the case of a promissory note, this will be the place of payment. A State may however declare, in becoming a party to the Convention, that its courts will apply the Convention only if both the place indicated in the instrument where the bill is drawn, or the note is made, and the place of payment indicated in the instrument are situated in contracting States. This is the only reservation permitted under the Convention.

16. The legal rules provided by the Convention will apply even where there has been an incorrect or false statement in respect of a place indicated in an instrument. This rule continues the common policy of domestic bills of exchange laws to the effect that instruments are to be judged only by their texts—the material appearing on their faces. It may also be justified on the pragmatic ground that to have provided otherwise could have cast doubts on the applicability of the rules and eventually impaired the free circulation of international bills and notes. The Convention leaves to domestic laws the question of sanctions that may be imposed where such a false or incorrect statement has been made in an instrument.

17. Following the trend established by some domestic legal systems, the Convention does not allow negotiable instruments to be drawn on two or more drawees or to be issued payable to bearer. Neither restriction is significant in practice: nothing prevents a payee or special endorsee from making an instrument covered by the Convention payable to bearer by endorsing it in blank; and multiple-drawee instruments have proved to be quite rare and a source of confusion when they do occur.

18. The United Nations Convention on International Bills of Exchange and International Promissory Notes does not address international cheques. These have been the subject of a parallel project by UNCITRAL, the latest result of which is a draft Convention. The decision to draw up the uniform rules on international bills of exchange and international promissory notes and the uniform rules on international cheques as separate legal texts and not as a consolidated text was taken mainly to accommodate the civil law jurisdictions which have traditionally considered bills of exchange and cheques as separate instruments fulfilling separate functions. Work on the draft Convention on International Cheques was suspended in 1984, partly due to the fact that cheques were seen to play a less important role in international payments.

B. Interpretation of the Convention

19. An international body of rules aiming at the unification of a certain field of law can fulfil its ultimate purpose only if it is interpreted in a sensible and consistent manner by all legal systems applying it. Like many other international legal texts, the Convention requires courts that interpret it to have regard for its international character and for the need to promote uniformity in its application and the observance of good faith in international transactions.

20. The goal of uniform interpretation is furthered by a scheme called CLOUT (Case law on UNCITRAL texts) under which the Secretariat publishes abstracts of court decisions or arbitral awards that apply any of the Conventions or Model Laws that emanate from the work of UNCITRAL.

C. The concepts of "holder" and "protected holder"

21. In its desire to win commercial acceptance and free circulation of its instruments in international commerce, the Convention firmly upholds the principle of negotiability.

22. When dealing with the rights of the holder of an instrument and the limitations of those rights by the claims and defences of others, the drafters of the Convention were obliged to make a selection between the radically distinct, and yet justifiable, approaches of the civil and common law systems. The solution chosen was a pragmatic two-tier system that distinguishes between a mere holder and a "protected holder". The rights of the protected holder are freed from the claims and defences of other persons to a greater extent than are the rights vested in the ordinary holder.

23. The solution, although similar in technique to the scheme found in common law jurisdictions, is in fact a compromise since it borrows from both the civil and common law approaches. For instance, under the Convention, a person is not prevented from becoming a holder by the fact that the instrument was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or a defence against liability on, the instrument. That regime resembles the civil law much more than the common law on the issue. Perhaps most important, a person who is in possession of an instrument as an endorsee, or on which the last endorsement is in blank, and on which there appears an uninterrupted series of endorsements, can be awarded the protected holder status even though any endorsement appearing on the instrument was forged or signed by an agent without authority.

24. The Convention enlarges the protection of protected holders by omitting any requirement that a protected holder has given value for the instrument. Furthermore, the test that one must meet in order to attain the protected holder status is easily passed, and every holder is presumed to be a protected holder unless the contrary is proved.

25. Although not so well protected as a protected holder, a mere holder is not totally unprotected from adverse claims and defences. The holder in fact derives an appreciable degree of protection from the rules contained in the Convention that allow certain types of claims or defences only if the holder had knowledge of them or if it was involved in a fraud or theft concerning the instrument.

26. Under the Convention, the transfer of an instrument by a protected holder vests in any subsequent holder the rights to and on the instrument that the protected holder had. This so-called "shelter rule" again favours the negotiability of instruments. Its main value is to the protected

holder as transferor since it preserves the value it invested in taking the instrument in the first place. It is not possible, however, for a holder who is not entitled to any protection to simply "wash" an instrument by transferring it to a protected holder and then taking it back.

D. Transfer warranties

27. Article 45 of the Convention brings light to an area that is dealt with in different ways in the existing principal legal systems. Moreover, it brings into the realm of negotiable instruments law a principle that is left to the general law of sales or contracts in civil law jurisdictions.

28. The rule provides that, unless otherwise agreed, a person who transfers an instrument, by endorsement and delivery or by mere delivery, makes certain implied representations concerning the quality of the instrument and its lack of knowledge of any fact which could impair the right of the transferee to payment of the instrument against the primary obligor upon it. These representations as to quality consist of a warranty that the instrument does not bear any forged or unauthorized signature, and has not been materially altered. Liability of the transferor under the article is incurred only if the transferee took the instrument without knowledge of the matter giving rise to such liability.

29. The liability provided for here is in part weaker and in part stronger than the one incurred by an endorser. It is weaker in that it does not guarantee payment of the instrument and is available only for the benefit of the immediate transferee; it is stronger in that a transferee may recover, even before maturity, the amount paid by it to the transferor, independently of any presentment, dishonour or protest.

E. Guarantees and avals

30. The provisions of the Convention dealing with the liability of the guarantor comprise one of the most attractive features of the text. The Convention subtly recognizes both the aval, or the Geneva type of guarantee, and the other, weaker type of guarantee known in common law jurisdictions.

31. Article 46 of the Convention provides that payment of an instrument may be guaranteed either before or after acceptance, as to the whole or part of its amount, for the account of a party or the drawee. A guarantee may be given by any person, who may or may not already be a party. A guarantee is expressed by the words "guaranteed", "aval", "good as aval" or words of similar import, accompanied by the signature of the guarantor, or effected by a signature alone on the front of an instrument. In fact, any signature alone on the front of an instrument, other than that of the maker, the drawer or the drawee, is a guarantee. The words by which a guarantee is expressed determine the nature of the obligation undertaken by the guarantor. In the absence of some notation specifying the party for whom a guarantee is given, the rules of the Convention interpret it as a guarantee for the drawee, acceptor or maker.

32. The crucial difference between the two types of guarantees recognized by the Convention ultimately lies in

the defences that a guarantor may set up against a holder or a protected holder. They differ, depending upon the words used to express the guarantee (i.e. "guaranteed" produces a different result than "aval") and whether the guarantor is a financial institution. A guarantor that is a bank or other financial institution and which expresses its guarantee by a signature alone is considered to have contracted the stronger type of guarantee or "aval"; a guarantor that is not a bank or other financial institution and which does the same is considered to have contracted the weaker type of guarantee.

F. Other novel provisions of practical importance

33. The Convention introduces a number of provisions which ought to be of benefit in modern commercial practice. In this, the Convention reflects its recent development, while many of the rules found in the negotiable instruments laws of the world have not kept pace with changing business practices. The following novel provisions are of note.

1. Instruments with floating rates of interest

34. The Convention permits instruments to bear interest at a variable rate without loss of negotiability. Where the technique used is in accordance with the requirements of the Convention, the sum payable is deemed to be a definite sum despite the variable rate of interest. For the protection of debtors, the Convention permits rates to vary only in accordance with provisions stipulated in the instrument and in relation to one or more reference rates published or otherwise publicly available. As a further protection, the reference may not be subject, directly or indirectly, to unilateral determination by a person who is named in the instrument at the time the bill is drawn or the note is made, unless the person is named only in the reference rate provisions. There may also be stipulated limits to the permissible variations in the interest rate.

2. Rates of exchange outside instrument

35. The Convention also permits reference to a rate of foreign exchange outside an instrument, e.g. a bank exchange rate in a particular place at a certain date, in calculating the amount payable under the instrument. Here as well, the sum payable under an instrument is deemed to be a definite sum even though the instrument states that it is to be paid according to a rate of exchange indicated in the instrument or to be determined as directed by the instrument.

3. Instruments payable in instalments

36. The Convention allows instruments that are subject to it to be made payable by instalments at successive dates. They may also contain an "acceleration clause", i.e. a stipulation that upon default in payment of any instalment the entire unpaid balance becomes immediately due.

4. *Instruments denominated and payable in a monetary unit of account*

37. The Convention creates a regime in which instruments may be made payable in units of value other than the official currencies of nation States. This is accomplished by the definition of the terms "money" and "currency", which, in addition to referring to normal mediums of exchange adopted by Governments as their official currency, include a monetary unit of account which is established by an inter-governmental institution or by agreement between two or more States, e.g. the Special Drawing Right (SDR) of the International Monetary Fund, the European Currency Unit (ECU) and the Unit of Account of the Preferential Trade Area for Eastern and Southern African States (UAPTA). The Convention also contains a useful new rule selecting a currency of payment where the monetary unit of account in which an instrument is payable is not transferable between the person liable to pay the instrument and the person receiving the payment.

5. *Foreign currency obligations*

38. The Convention attempts to avoid the controversies that can arise with instruments drawn or made in a currency other than that of the place where payment is to be made. The text provides that, except for the cases where the drawer or maker of an instrument has indicated that it must be paid in a specified currency other than the currency in which the sum payable is expressed, payment must be made in the latter currency. Where applicable, this rule will prevent a debtor from discharging its obligation by payment in another currency, e.g. a local one. It should be of assistance by providing greater certainty in cases involving currency value fluctuations.

39. In an effort to avoid infringing on exchange control regulations and other provisions relating to the protection of the currency of a State, the Convention provides a number of modifying rules to apply in exceptional circumstances.

6. *Signature not in handwriting*

40. Here as well the Convention attempts to adapt the law to new technology by providing that the word "signature" includes not only a handwritten signature, but also a facsimile or an equivalent authentication effected by any other means.

7. *Rules on lost instruments*

41. New rules are provided concerning lost instruments. In particular, a party from whom payment of a lost instrument is claimed may require the person claiming payment to give security in order to indemnify it for any loss which it may suffer by reason of the subsequent payment of the lost instrument.

8. *Short form of protest*

42. The Convention relaxes the highly precise rules which are found in common law jurisdictions on protest. It also provides new common rules for Geneva States that lack regulation concerning the procedures for effecting protest. Under the new regime, unless an instrument stipulates that protest must be made, protest may be replaced by a declaration written on the instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument domiciled with a named person for payment, by that named person. The declaration must be to the effect that acceptance or payment is refused. The Convention also extends to four business days the period that is usually allowed to make protest.

9. *Uniform period of prescription*

43. The Convention provides a single period of prescription or limitation of actions. It is set at four years for almost all actions arising on an instrument under the Convention. The only exception is that, where a party pays an instrument on which another was primarily liable, the party's action for reimbursement (recourse) is barred after one year.

10. *Drawing of instruments "without recourse"*

44. The Convention contains a rule that should facilitate the practice of forfaiting. Under the new rule, the drawer of a bill may exclude or limit its own liability for acceptance or for payment by an express stipulation on the bill, e.g. by drawing the bill "without recourse". This stipulation will be effective only if another party is or becomes liable on the bill.

G. *Final clauses*

45. The final clauses contain the usual provisions designating the Secretary-General of the United Nations as depositary for the Convention. The Convention was open for signature until 30 June 1990 and remains subject to ratification, acceptance or approval by the signatory States. It is open for accession by all States which are not signatory States as from the date it was open for signature. According to article 89(1), the Convention enters into force on the first day of the month following the expiration of 12 months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession.

46. The Arabic, Chinese, English, French, Russian and Spanish texts of the Convention are equally authentic. The final clauses also contain provisions dealing with the implementation of the Convention in States having two or more territorial units where different legal systems apply.

Further information about the Convention may be obtained from the UNCITRAL secretariat.

VII. LIABILITY OF OPERATORS OF TRANSPORT TERMINALS

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade: note by the Secretariat*

(A/CN.9/385) [Original: English]

1. The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade was adopted on 17 April 1991 and was opened for signature on 19 April 1991 by a universal diplomatic conference at Vienna. The Convention is based upon a draft prepared by UNCITRAL and an earlier preliminary draft Convention elaborated by UNIDROIT.

2. The Convention establishes a uniform legal regime governing the liability of an operator of a transport terminal (referred to herein also as "terminal operator" or "operator") for loss of or damage to goods and for delay in handling goods over. Terminal operators are commercial enterprises that handle goods before, during or after the carriage of goods. Their services may be contracted for by the consignor, the carrier or the consignee. Typically, an operator performs one or more of the following transport-related operations: loading, unloading, storage, stowage, trimming, dunnaging or lashing. The terms used in practice to refer to such enterprises are varied and include, for example: warehouse, depot, storage, terminal, port, dock, stevedore, longshoremen's or dockers' companies, railway station, or air-cargo terminal. The applicability of the Convention is determined on the basis of the transport-related services such enterprises perform, irrespective of the name or designation of the enterprise.

A. Policies underlying the Convention

Need for mandatory liability rules

3. Under many national laws the parties are in principle free to regulate by contract the liability of terminal operators. Many operators take advantage of this freedom and include in their general contract conditions clauses that considerably limit their liability for the goods. In some national laws the freedom of terminal operators to limit their liability is subject to mandatory restrictions.

4. The limitations of liability found in general contract conditions restrict, for example, the standard of care owed by the operator, exclude or limit responsibility for acts of employees or agents of the operator, place on the claimant the burden of proof of circumstances establishing the operator's liability, stipulate short limitation periods for actions against the operator, and set low financial limits of

liability. The financial limits of liability are often so low that for most types of goods the maximum recoverable damages amount to a small fraction of the actual damage.

5. Such broad limitations and exclusions of liability give rise to serious concerns. It is considered in principle undesirable to shift the risk of loss or damage from the terminal operator, who is best placed to ensure the safety of goods, to the cargo owner, who has limited influence on the causes for loss or damage. Broad exclusions and limits of liability are likely, over a longer period of time, to reduce the incentive for terminal operators to pay continuous attention to working procedures designed to avoid loss or damage to goods. Furthermore, since the cargo owner has limited access to information about the origin of the damage, placing on the cargo owner the burden of proving facts establishing the operator's liability is seen as an improper impediment to recovery of damages.

6. Those concerns may become even more serious when transport-related services for a particular transport route are provided by only one or a limited number of operators.

Gaps in liability regimes left by international conventions

7. When the consignor hands over goods for carriage to a terminal operator, the carrier's liability may not yet begin; at the place of destination, the carrier's liability may end when the carrier hands the goods over to a terminal operator, which is usually before the goods are handed over to the consignee or to the next carrier. While the carrier's liability is through various transport conventions to a large degree subject to harmonized and mandatory rules, there may exist periods during which the goods in transit are not subject to a mandatory regime. The negative consequences of those gaps in the liability regime are serious because, according to statistics, most cases of lost or damaged goods occur not during the actual carriage but during transport-related operations before or after the carriage.

Need for harmonization and modernization

8. The rules in national legal systems governing the liability of terminal operators differ widely, as to both their source and content. The rules may be contained in civil or commercial codes or in other bodies of law governing the deposit or bailment of goods. As to the standard of liability, in some legal systems the terminal operator is strictly liable for the goods, and he can be exonerated only if certain narrow exonerating circumstances are established. In other

* This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes; it is not an official commentary on the Convention.

systems the operator is liable for negligence, i.e. if he did not take reasonable care of the goods. Further differences concern the burden of proving the circumstances establishing the operator's liability. Under many systems a limited quantum of evidence put forward by the claimant is sufficient to establish a presumption of the operator's liability, and it is then up to the operator to prove exonerating circumstances. There are, however, also legal systems in which it is up to the claimant to prove circumstances establishing the operator's liability. Disparities exist also in respect of financial limits of liability. In some legal systems the operator's liability is unlimited, while in others limits are established. Further differences concern limitation periods. In some legal systems these periods may be very long. The disparities may be complicated by the fact that in some legal systems operators are subject to different liability rules depending upon the nature of services rendered. For example, storing goods in the operator's warehouse and loading of goods into the vessel's hold may be subject to different sets of rules.

9. Such disparity of laws causes problems in particular to carriers and other users of transport-related services who are in contact with terminal operators in different countries.

10. Furthermore, many national laws are not suited for modern practices in transport terminals. For example, national laws may not accommodate the use of containers or computerized communication techniques or may not deal adequately with the question of dangerous goods.

Consequences and benefits of the Convention

11. The Convention was prepared in order to eliminate or reduce the above described deficiencies in the legal regimes applicable to the international carriage of goods. The solutions adopted bear in mind the legitimate interests of cargo owners, carriers and terminal operators.

12. The Convention benefits cargo owners in that it provides a certain and balanced legal regime for obtaining compensation from the operator. This is significant for the cargo owner in particular when goods are damaged or lost by the operator before the carrier has become responsible for the goods or after the carrier has ceased to be responsible for the goods. In such a situation, in which the terminal operator is normally the only person from whom compensation for the damage can be sought, the non-mandatory national liability rules may offer a limited possibility for the cargo owner to obtain compensation from the terminal operator.

13. The Convention also benefits carriers when goods are damaged by the terminal operator during the period in which the carrier is responsible for the goods. In such a case, in which the carrier is often liable to the owner of the goods under a mandatory regime, the carrier will be able to base the recourse action against the terminal operator on the mandatory regime of the Convention.

14. Improvement and harmonization of liability rules brought about by the Convention also benefits terminal operators. The Convention provides a modern legal regime

appropriate to the developing practices in terminal operations. Rules on documentation are liberal and harmonized, and they allow the operator to make use of electronic data interchange (EDI). Among other rules in the interest of the terminal operator are those establishing rather low financial limits of liability and those giving the operator a right of retention over goods for costs and claims due to the operator.

B. Preparatory work

15. The Convention has its origins in work by UNIDROIT on the topic of bailment and warehousing contracts, which led to the adoption in 1983 by the UNIDROIT Governing Council of the preliminary draft Convention on the Liability of Operators of Transport Terminals.¹

16. By agreement between UNIDROIT and UNCITRAL, the preliminary draft Convention was placed before UNCITRAL in 1984 with a view to preparing uniform rules on the subject. The UNCITRAL Working Group on International Contract Practices, to which the task of preparing uniform rules was assigned, devoted four sessions to the preparation of the uniform rules,² and recommended the adoption of the uniform rules in the form of a convention. The draft Convention was transmitted to all States and to interested international organizations for comments. In 1989, after making various modifications to the text,³ UNCITRAL adopted the draft Convention on the Liability of Operators of Transport Terminals in International Trade. The United Nations General Assembly, on the recommendation by UNCITRAL, decided to convene a diplomatic conference to conclude a Convention.

17. The United Nations Conference on the Liability of Operators of Transport Terminals in International Trade was held at Vienna from 2 to 19 April 1991. Forty-eight States were represented at the Conference as well as inter-governmental organizations and international non-governmental organizations interested in the topic. The Conference thoroughly reviewed all issues, including views that were considered and rejected during the preparatory work within UNCITRAL. The Convention was adopted on 17 April 1991.⁴ Until 30 April 1992, the deadline for signing the Convention, the following States signed it: France, Mexico, Philippines, Spain and United States of America.

¹The preliminary draft Convention and the explanatory report are published in UNIDROIT, Study XLIV—Doc. 24, Rome, September 1983.

²Report of the Working Group on International Contract Practices on the work of its eighth session (A/CN.9/260), reproduced in *United Nations Commission on International Trade Law: Yearbook* (hereafter referred to as "Yearbook"), vol. XVI: 1985, part two, IV, A; report of the Working Group on its ninth session (A/CN.9/275) (*Yearbook*, vol. XVII: 1986, part two, III, A); report of the Working Group on its tenth session (A/CN.9/287) (*Yearbook*, vol. XVIII: 1987, part two, III, A); and report of the Working Group on its eleventh session (A/CN.9/298) (*Yearbook*, vol. XIX: 1988, part two, II, A).

³The discussion in the Commission is reflected in the report of the Commission on its twenty-second session (A/44/17), reproduced in *United Nations Commission on International Trade Law Yearbook*, vol. XX: 1989, part one, A), paras. 11-225.

⁴The documents of the diplomatic conference have been compiled in A/CONF.152/14 (United Nations publication, Sales No. E.93.XI.3).

C. Salient features of the Convention

Definitions

18. For the Convention to apply, the transport-related services must be performed by a person who falls within the scope of the definition of the "operator of a transport terminal". The operator of a transport terminal is defined in article 1(a) as "a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage".

19. "*In the course of his business*". The Convention applies only if the transport-related services constitute a commercial activity. This does not mean that a particular transport-related service must be subject to the payment of a fee. For example, in some terminals short-term storage at the place of destination may be "free of charge" and the charges would start to accrue after the second or third day.

20. "*Goods involved in international carriage*". If transport-related services are performed with respect to goods involved in domestic carriage, the Convention does not apply. In order to provide certainty as to the applicable regime, article 1(c) provides that the places of departure and destination must be "identified" as being located in different States already at the time when the goods are taken in charge by the operator.

21. "*Transport-related services*". The Convention provides in article 1(d) a non-exhaustive list of services that fall within the category of transport-related services governed by the Convention. The examples given (storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing) indicate that those services include only physical handling of goods and not, for instance, industrial processing such as repacking or cleaning of goods, or financial or commercial services.

22. "*Area under his control or in respect of which he has a right of access or use*". At an early stage of the preparatory work within the UNCITRAL Working Group it was considered that the draft Convention should apply only if the safekeeping of goods was part of the operator's services. That approach would exclude, for example, those stevedoring companies that limited their services to loading and unloading of goods without themselves storing the goods. In order to express more clearly that approach, the Working Group included in the definition the criterion that the operator should perform his services "in an area under his control or in respect of which he has a right of access or use". The scope of application of the draft Convention was subsequently broadened to include the performance of various transport-related services even if no safekeeping of goods is involved. In light of the broadened scope of application, the criterion relating to the area in which the services are performed also has a broader meaning. It means, for example, that stowing or trimming of goods in the hold of a vessel would be considered a service

performed in an area to which the operator has a right of access; a wharf on which the operator moves goods and which is used by various enterprises would be an area of which the operator has a right of use; the operator's warehouse would be an area under his control.

23. "*A person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage*". The Convention excludes from its scope of application the cases when a person performs transport-related services while he is responsible for the goods under the rules of law governing carriage. For example, if a particular carriage of goods by sea is subject to the Hamburg Rules, and the carrier takes the goods in charge at the port of loading and stores them until the commencement of the voyage, or keeps the goods in his charge for some time at the port of discharge, the Hamburg Rules, and not the Convention on terminal operators, will govern the carrier's liability for the goods held by him in the port.

Period of responsibility

24. The operator's responsibility for goods begins when the operator has taken them in charge, and ends when the operator has handed them over to, or has placed them at the disposal of, the person entitled to take delivery of them (article 3). The concept of "taking goods in charge" should be seen in the light of the types of services that an operator might perform and in the light of the fact that an operator may perform the services while another person, usually a carrier, is responsible for the goods. When the operator takes goods over in order to put them in a warehouse, he would be in charge of the goods from the time he has custody of or control over the goods. When, however, the operator commences to handle goods by performing services such as loading, unloading, stowage, trimming, dunnaging or lashing, the operator's services may be performed while the goods are "in charge" of the carrier. During the performance of these services, the operator may not be considered to have assumed the custody of or full control over the goods. Being "in charge" of the goods in these cases may be considered to commence when the operator comes in physical contact with the goods.

25. Similarly, the meaning of the concept of "handing goods over or placing them at the disposal of the person entitled to take delivery of them" depends on the circumstances of the case. If "handing over" is done by releasing goods from the operator's warehouse and putting them in the custody of the carrier or the consignee, the relevant moment would be the one when the operator relinquishes his custody of or control over the goods. If the operator's services were limited, for example, to stowage, trimming, dunnaging or lashing, which are often performed while the goods are in the charge of the carrier, the operator's period of responsibility would end when the operator completes his manipulation of the goods.

26. The purpose of the concept of placing goods "at the disposal of the person entitled to take delivery of them" is to allow the operator to terminate his responsibility under the Convention when he has fulfilled all of his obligations even if the person entitled to take delivery of the goods fails to take them over. For the responsibility under

the Convention to be terminated, the placing of goods at the disposal of the entitled person must be done in accordance with the contract and the usages applicable to the situation.

Issuance of document

27. The Convention in principle leaves it up to the operator whether to issue a document acknowledging receipt of goods (article 4). However, if the customer requests such a document, the operator must issue it. Such a solution is necessary in order to take into account practices in various types of terminal operations. For example, when the operations are limited to lashing containers, stowing or trimming cargo, or dunnaging, it may be customary not to issue a document. When the operations include warehousing, operators usually issue a document acknowledging receipt of the goods.

28. The Convention provides that a document may be issued "in any form which preserves a record of the information contained therein". It is further provided that a signature can be a "handwritten signature, its facsimile or an equivalent authentication effected by any other means". This provision is not qualified by a requirement that a particular means of authentication must be permitted by the applicable law. The expression "equivalent authentication" should be understood as a requirement that the method used must be sufficiently reliable in the light of the usages relevant to the situation.

29. The Convention refers in several places to notices and requests (articles 4(1); 5(3)(4); 10(4); 11(1),(2),(5); 12(2), (4),(5)). Article 1(e) and (f) specifies that a notice or a request may be given "in a form which preserves a record of the information contained therein". The purpose of the provision, which parallels the provision on the form of a document issued by the operator and is modelled on equivalent formulations in several international legal texts, is to make it clear, on the one hand, that a notice or request under the Convention cannot validly be made orally, and, on the other hand, that a notice or request may be given in the form of a written paper or may be transmitted by the use of electronic data interchange (EDI). Since the use of EDI requires that both parties use suitable and compatible equipment, the use of electronic transmission techniques presupposes previous agreement by the parties.

Basis of liability

30. The Convention deals with the operator's liability for loss resulting from physical loss of or damage to goods as well as from delay in handing over the goods (article 5). The question whether the concept of "loss" includes lost profits is left to the applicable law.

31. The liability of the operator under the Convention is based on the principle of presumed fault or neglect. This means that, after a claimant has established that the loss or damage occurred during the operator's period of responsibility, it is presumed that the loss or damage was caused by the operator's negligence. The operator can be relieved of his liability if he proves that he, his servants or agents, or other persons of whose services the operator makes use for the performance of the transport-related services took all

measures that could reasonably be required to avoid the loss or damage.

32. Reservations were expressed about the principle of presumed liability on the ground that in some terminals people who deposited goods in the terminal may come in the terminal in order to inspect the goods, take samples or show the goods to prospective buyers, and that, as a result, the terminal operators could not exercise full control over goods. Those reservations were not accepted since it was considered that placing the burden of proof of negligence on the owner of goods would in practice often mean that the owner would not be able to establish liability for losses arising from pilferage, theft and poor organization of work. Moreover, it is reasonable to expect that operators should organize proper supervision over goods and that the principle of presumed liability was a suitable stimulus therefor.

Limits of liability

33. The Convention provides two different financial limits for the operator's liability, depending upon the mode of transport to which the terminal operations relate (articles 6 and 16). The lower limits are applicable to terminal operations relating to the carriage of goods by sea or inland waterways, and the higher limits apply to other terminal operations; this distinction reflects the fact that the value of goods carried by sea or inland waterways tends to be lower than in other modes of transport. Furthermore, those lower limits, which are close to the limits set in conventions dealing with carriage of goods by sea or inland waterways, are designed to treat sea and inland-waterways terminals in a similar way as the sea and inland-waterways carriers.

34. The limits for loss of, or damage to, goods are based exclusively on the weight of goods. The Convention does not provide an alternative limit based on the package or other shipping unit as, for example, do the Hamburg Rules and the Hague Rules. This will mean that, the lighter and smaller the packages, the lower will be the operator's limits compared to the sea carrier's limits. A reason for not providing a per-package limit was a desire to avoid difficulties in interpreting the limits based on the package or other shipping unit.

35. The Convention does not provide an overall limit of liability when damage is caused by a single event to goods pertaining to a number of different owners. For example, a fire in a terminal can give rise to an extensive liability of the operator despite the limitation applicable to each claimant. Such a "catastrophic" limit was not adopted because a single limit would likely be too low for large terminals and would not represent a real limitation of liability for the smaller ones. No satisfactory criterion could be found for providing different overall limits depending on the size of the terminal. Furthermore, it was considered that insurance can be a solution for liability arising from such catastrophic events.

Application to non-contractual claims

36. Article 7(2) and (3) deals with defences and liability limits enjoyed by the operator's servants, agents or independent contractors. The provisions do not establish a right

of action against those persons. The provisions merely extend to those persons the defences and liability limits if a right of action exists against them under the applicable law.

37. The Convention does not expressly address the question whether an agreement between the operator and a customer to increase liability limits or to waive defences binds the operator's servants, agents or independent contractors.

Loss of right to limit liability

38. The operator loses the benefit of the financial limits of liability if it is proved that he himself or his servants or agents acted in a reckless manner defined in article 8. The operator does not lose the benefit of liability limits if an operator's independent contractor acted in such manner.

39. During the preparation of the Convention, it was proposed that the operator should lose the benefit of the liability limit only if he himself acted with qualified fault and that he should not lose that benefit if his servants or agents so acted. The prevailing view, however, was that the operator has a duty to supervise his servants and agents and that he should bear the risk for their reckless actions.

Rights of security in goods

40. Article 10, which gives the operator a right of retention over goods for claims due to him, does not itself establish a right of sale of retained goods. The right of sale is dealt with in the Convention only to the extent such a

right exists under the law of the State where the retained goods are located.

Limitation of actions

41. In providing a two-year limitation period for actions against the operator (article 12), the drafters of the Convention wanted to avoid a situation in which it would be difficult or impossible for a carrier to institute a recourse action against the operator. This would be the case when the carrier is sued or held liable close to or after the expiration of the two-year limitation period. Article 12(5) allows a claim against the operator even after the expiration of the limitation period if the action is instituted within 90 days after the carrier has been held liable in an action against himself or has settled the claim upon which such action was based.

Final clauses

42. Despite proposals for permitting reservations to the Convention, it was decided not to allow reservations (article 21).

43. The desire for the Convention to enter into force soon is reflected in article 22, according to which the Convention enters into force when five States have adhered to it.

Further information about the Convention may be obtained from the UNCITRAL secretariat.

VIII. COORDINATION OF WORK

Uniform customs and practice for documentary credits: report of the Secretary-General

(A/CN.9/395) [Original: English]

1. By letter of 31 January 1994, the Secretary General of the International Chamber of Commerce (ICC) requested the Commission to consider endorsing for worldwide use the 1993 version of the Uniform Customs and Practice for Documentary Credits (referred to hereinafter as "UCP 500", based on the ICC publication number). A short explanatory note on UCP 500 prepared by ICC is contained in annex I. The original text of UCP 500, is contained in annex II.

2. By way of general background, it may be noted that the subject of documentary credits has been a topic in which the Commission has taken an interest since the time of its inception, having endorsed earlier versions of UCP for worldwide use. The Commission endorsed the 1962 version of UCP at its second session, the 1974 version at its eighth session, and the 1983 version ("UCP 400") at its seventeenth session.¹

ANNEX I

UCP 500 Explanatory note

As a result of the changes that have developed over the last 10 years, the International Chamber of Commerce's Commission on Banking Technique and Practice has revised the Uniform Customs and Practice for Documentary Credits (UCP 400). The new Rules, known as UCP 500, became effective on January 1, 1994.

Documentary credits, also known as letters of credit, are often used to effect payment for goods in international trade. A bank in the buyer's country undertakes to pay the seller against presentation of documents giving shipment and other key details of the goods. Usually the credit is made payable to the seller at a bank in his own country. Payment may be at sight or on deferred terms. Credits frequently stipulate that drafts are to be presented for acceptance or negotiation.

The international rules of practice applied to these operations were first codified by the ICC in 1933. The last revision, UCP 400, was accepted in nearly every country, and was commended for use by UNCITRAL on July 6, 1984.

The 1993 revision addresses new developments in the transport industry and new technological applications, and is also intended to improve the functioning of the UCP. Some surveys indicate that approximately 50 per cent of the documents presented under the documentary credit are rejected because of discrepancies or apparent discrepancies. This diminishes the effectiveness of the documentary credit and can have a financial impact on those involved in the product. It may also increase the costs and reduce the profit margins of importers, exporters and banks. The marked increase in litigation involving documentary credits has also been of great concern.

To achieve the objectives of the revision of UCP 400, ICC placed considerable emphasis on the integration of law and international business practice. The aims of the revision were (1) simplification of the rules; (2) an articulation of the banking practices as well as an effort to facilitate the development of these practices; (3) an improvement of the articles to define the integrity of the Confirming Bank; (4) a need to address non-documentary conditions; and (5) a need to list the elements of acceptability for each type of transport document presented under a documentary credit.

In the end, ICC's analysis was conducted by utilizing various information sources available to the banking industry and the transport industry, and by drawing upon their own considerable knowledge of the technological innovation being applied in other industries engaged in international trade. In order to achieve general Rules, rather than specific procedural Rules, ICC adopted as its working draft a document based on ICC National Committees' practices, important international judicial decisions, the Banking Commission's opinions and decisions, and case studies examined over the last 20 years. Consequently, the new revision of the UCP represents the culmination of extensive analysis, review, debate, and compromise among the various members of the Working Group, the members of the Banking Commission and the respective National Committees of ICC.

ANNEX II

The text of the *Uniform Customs and Practice for Documentary Credits** (1993 revision) is reproduced below with the original page numbers.

¹Endorsements by the Commission of the earlier versions of UCP are contained, respectively, in the reports on its second session (*Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, paras. 90-95), its eighth session (*Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017)*, paras. 33-41) and its seventeenth session (*Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17)*, paras. 125-129).

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CONTENTS

Please note that the title or classification on the heading of each Article is for reference as to intent and purpose. It is not to be construed as being other than solely for the benefit or guidance and there should be no legal imputation.

	Page
Foreword	3
Preface	4
	Article
A. General Provisions and Definitions	10
Application of UCP	1 10
Meaning of Credit	2 10
Credits v. Contracts	3 11
Documents v. Goods/Services/Performances	4 11
Instructions to Issue/Amend Credits	5 11
B. Form and Notification of Credits	12
Revocable v. Irrevocable Credits	6 12
Advising Bank's Liability	7 12
Revocation of a Credit	8 13
Liability of Issuing and Confirming Banks	9 13
Types of Credit	10 16
Teletransmitted and Pre-Advised Credits	11 17
Incomplete or Unclear Instructions	12 18
C. Liabilities and Responsibilities	19
Standard for Examination of Documents	13 19
Discrepant Documents and Notice	14 19
Disclaimer on Effectiveness of Documents	15 21
Disclaimer on the Transmission of Messages	16 22
Force Majeure	17 22
Disclaimer for Acts of an Instructed Party	18 22
Bank-to-Bank Reimbursement Arrangements	19 23
D. Documents	24
Ambiguity as to the Issuers of Documents	20 24
Unspecified Issuers or Contents of Documents	21 25

Issuance Date of Documents v. Credit Date	22 25
Marine/Ocean Bill of Lading	23 26
Non-Negotiable Sea Waybill	24 29
Charter Party Bill of Lading	25 32
Multimodal Transport Document	26 33
Air Transport Document	27 35
Road, Rail or Inland Waterway Transport Documents	28 37
Courier and Post Receipts	29 38
Transport Documents Issued by Freight Forwarders	30 39
«On Deck», «Shipper's Load and Count», Name of Consignor	31 40
Clean Transport Documents	32 40
Freight Payable/Prepaid Transport Documents	33 41
Insurance Documents	34 42
Type of Insurance Cover	35 43
All Risks Insurance Cover	36 43
Commercial Invoices	37 44
Other Documents	38 44

E. Miscellaneous Provisions 45

Allowances in Credit Amount, Quantity and Unit Price	39 45
Partial Shipments/Drawings	40 46
Instalment Shipments/Drawings	41 46
Expiry Date and Place for Presentation of Documents	42 46
Limitation on the Expiry Date	43 47
Extension of Expiry Date	44 47
Hours of Presentation	45 48
General Expressions as to Dates for Shipment	46 48
Date Terminology for Periods of Shipment	47 49

F. Transferable Credit 49

Transferable Credit	48 49
---------------------	-------

G. Assignment of Proceeds 52

Assignment of Proceeds	49 52
The ICC at a glance	54
Selected ICC publications	55

A. General Provisions and Definitions

Article 1

Application of UCP

The Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication N°500, shall apply to all Documentary Credits (including to the extent to which they may be applicable, Standby Letter(s) of Credit) where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressly stipulated in the Credit.

Article 2

Meaning of Credit

For the purposes of these Articles, the expressions "Documentary Credit(s)" and "Standby Letter(s) of Credit" (hereinafter referred to as "Credit(s)"), mean any arrangement, however named or described, whereby a bank (the "Issuing Bank") acting at the request and on the instructions of a customer (the "Applicant") or on its own behalf,

- i. is to make a payment to or to the order of a third party (the "Beneficiary"), or is to accept and pay bills of exchange (Draft(s)) drawn by the Beneficiary,

or

- ii. authorises another bank to effect such payment, or to accept and pay such bills of exchange (Draft(s)),

or

- iii. authorises another bank to negotiate,

against stipulated document(s), provided that the terms and conditions of the Credit are complied with.

For the purposes of these Articles, branches of a bank in different countries are considered another bank.

Article 3

Credits v. Contracts

- a Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.

- b A Beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank.

Article 4

Documents v. Goods/Services/Performances

In Credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate.

Article 5

Instructions to Issue/Amend Credits

- a Instructions for the issuance of a Credit, the Credit itself, instructions for an amendment thereto, and the amendment itself, must be complete and precise.

In order to guard against confusion and misunderstanding, banks should discourage any attempt:

- i. to include excessive detail in the Credit or in any amendment thereto;
- ii. to give instructions to issue, advise or confirm a Credit by reference to a Credit previously

issued (similar Credit) where such previous Credit has been subject to accepted amendment(s), and/or unaccepted amendment(s).

- b** All instructions for the issuance of a Credit and the Credit itself and, where applicable, all instructions for an amendment thereto and the amendment itself, must state precisely the document(s) against which payment, acceptance or negotiation is to be made.

B. Form and Notification of Credits

Article 6

Revocable v. Irrevocable Credits

- a** A Credit may be either
- i. revocable,
 - or
 - ii. irrevocable.
- b** The Credit, therefore, should clearly indicate whether it is revocable or irrevocable.
- c** In the absence of such indication the Credit shall be deemed to be irrevocable.

Article 7

Advising Bank's Liability

- a** A Credit may be advised to a Beneficiary through another bank (the "Advising Bank") without engagement on the part of the Advising Bank, but that bank, if it elects to advise the Credit, shall take reasonable care to check the apparent authenticity of the Credit which it advises. If the bank elects not to advise the Credit, it must so inform the Issuing Bank without delay.

- b** If the Advising Bank cannot establish such apparent authenticity it must inform, without delay, the bank from which the instructions appear to have been received that it has been unable to establish the authenticity of the Credit and if it elects nonetheless to advise the Credit it must inform the Beneficiary that it has not been able to establish the authenticity of the Credit.

Article 8

Revocation of a Credit

- a** A revocable Credit may be amended or cancelled by the Issuing Bank at any moment and without prior notice to the Beneficiary.
- b** However, the Issuing Bank must:
- i. reimburse another bank with which a revocable Credit has been made available for sight payment, acceptance or negotiation - for any payment, acceptance or negotiation made by such bank - prior to receipt by it of notice of amendment or cancellation, against documents which appear on their face to be in compliance with the terms and conditions of the Credit;
 - ii. reimburse another bank with which a revocable Credit has been made available for deferred payment, if such a bank has, prior to receipt by it of notice of amendment or cancellation, taken up documents which appear on their face to be in compliance with the terms and conditions of the Credit.

Article 9

Liability of Issuing and Confirming Banks

- a** An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with:

- i.** if the Credit provides for sight payment - to pay at sight;
- ii.** if the Credit provides for deferred payment - to pay on the maturity date(s) determinable in accordance with the stipulations of the Credit;
- iii.** if the Credit provides for acceptance:
 - a.** by the Issuing Bank - to accept Draft(s) drawn by the Beneficiary on the Issuing Bank and pay them at maturity,
 - or
 - b.** by another drawee bank - to accept and pay at maturity Draft(s) drawn by the Beneficiary on the Issuing Bank in the event the drawee bank stipulated in the Credit does not accept Draft(s) drawn on it, or to pay Draft(s) accepted but not paid by such drawee bank at maturity;
- iv.** if the Credit provides for negotiation - to pay without recourse to drawers and/or bona fide holders, Draft(s) drawn by the Beneficiary and/or document(s) presented under the Credit. A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as an additional document(s).

b. A confirmation of an irrevocable Credit by another bank (the "Confirming Bank") upon the authorisation or request of the Issuing Bank, constitutes a definite undertaking of the Confirming Bank, in addition to that of the Issuing Bank, provided that the stipulated documents are presented to the Confirming Bank or to any other Nominated Bank and that the terms and conditions of the Credit are complied with:

- i.** If the Credit provides for sight payment - to pay at sight;
- ii.** if the Credit provides for deferred payment - to pay on the maturity date(s) determinable in accordance with the stipulations of the Credit;

- iii.** if the Credit provides for acceptance:

- a.** by the Confirming Bank - to accept Draft(s) drawn by the Beneficiary on the Confirming Bank and pay them at maturity,

or

- b.** by another drawee bank - to accept and pay at maturity Draft(s) drawn by the Beneficiary on the Confirming Bank, in the event the drawee bank stipulated in the Credit does not accept Draft(s) drawn on it, or to pay Draft(s) accepted but not paid by such drawee bank at maturity;

- iv.** if the Credit provides for negotiation - to negotiate without recourse to drawers and/or bona fide holders, Draft(s) drawn by the Beneficiary and/or document(s) presented under the Credit. A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as an additional document(s).

- c i.** If another bank is authorised or requested by the Issuing Bank to add its confirmation to a Credit but is not prepared to do so, it must so inform the Issuing Bank without delay.
- ii.** Unless the Issuing Bank specifies otherwise in its authorisation or request to add confirmation, the Advising Bank may advise the Credit to the Beneficiary without adding its confirmation.

- d i.** Except as otherwise provided by Article 48, an irrevocable Credit can neither be amended nor cancelled without the agreement of the Issuing Bank, the Confirming Bank, if any, and the Beneficiary.
- ii.** The Issuing Bank shall be irrevocably bound by an amendment(s) issued by it from the time of the issuance of such amendment(s). A Confirming Bank may extend its confirmation to an amendment and shall be irrevocably bound

as of the time of its advice of the amendment. A Confirming Bank may, however, choose to advise an amendment to the Beneficiary without extending its confirmation and if so, must inform the Issuing Bank and the Beneficiary without delay.

- iii. The terms of the original Credit (or a Credit incorporating previously accepted amendment(s)) will remain in force for the Beneficiary until the Beneficiary communicates his acceptance of the amendment to the bank that advised such amendment. The Beneficiary should give notification of acceptance or rejection of amendment(s). If the Beneficiary fails to give such notification, the tender of documents to the Nominated Bank or Issuing Bank, that conform to the Credit and to not yet accepted amendment(s), will be deemed to be notification of acceptance by the Beneficiary of such amendment(s) and as of that moment the Credit will be amended.
- iv. Partial acceptance of amendments contained in one and the same advice of amendment is not allowed and consequently will not be given any effect.

Article 10

Types of Credit

- a All Credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation.

- b i. Unless the Credit stipulates that it is available only with the Issuing Bank, all Credits must nominate the bank (the "Nominated Bank") which is authorised to pay, to incur a deferred payment undertaking, to accept Draft(s) or to negotiate. In a freely negotiable Credit, any bank is a Nominated Bank.

Presentation of documents must be made to the Issuing Bank or the Confirming Bank, if any, or any other Nominated Bank.

- ii. Negotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation.

- c Unless the Nominated Bank is the Confirming Bank, nomination by the Issuing Bank does not constitute any undertaking by the Nominated Bank to pay, to incur a deferred payment undertaking, to accept Draft(s), or to negotiate. Except where expressly agreed to by the Nominated Bank and so communicated to the Beneficiary, the Nominated Bank's receipt of and/or examination and/or forwarding of the documents does not make that bank liable to pay, to incur a deferred payment undertaking, to accept Draft(s), or to negotiate.

- d By nominating another bank, or by allowing for negotiation by any bank, or by authorising or requesting another bank to add its confirmation, the Issuing Bank authorises such bank to pay, accept Draft(s) or negotiate as the case may be, against documents which appear on their face to be in compliance with the terms and conditions of the Credit and undertakes to reimburse such bank in accordance with the provisions of these Articles.

Article 11

Teletransmitted and Pre-Advised Credits

- a i. When an Issuing Bank instructs an Advising Bank by an authenticated teletransmission to advise a Credit or an amendment to a Credit, the teletransmission will be deemed to be the operative Credit instrument or the operative amendment, and no mail confirmation should be sent. Should a mail confirmation nevertheless be sent, it will have no effect and the Advising Bank will have no obligation to check such mail confirmation against the operative Credit instrument or the operative amendment received by teletransmission.

- ii. If the teletransmission states "full details to follow" (or words of similar effect) or states that the mail confirmation is to be the operative Credit instrument or the operative amendment, then the teletransmission will not be deemed to be the operative Credit instrument or the operative amendment. The Issuing Bank must forward the operative Credit instrument or the operative amendment to such Advising Bank without delay.

b If a bank uses the services of an Advising Bank to have the Credit advised to the Beneficiary, it must also use the services of the same bank for advising an amendment(s).

c A preliminary advice of the issuance or amendment of an irrevocable Credit (pre-advice), shall only be given by an Issuing Bank if such bank is prepared to issue the operative Credit instrument or the operative amendment thereto. Unless otherwise stated in such preliminary advice by the Issuing Bank, an Issuing Bank having given such pre-advice shall be irrevocably committed to issue or amend the Credit, in terms not inconsistent with the pre-advice, without delay.

Article 12

Incomplete or Unclear Instructions

If incomplete or unclear instructions are received to advise, confirm or amend a Credit, the bank requested to act on such instructions may give preliminary notification to the Beneficiary for information only and without responsibility. This preliminary notification should state clearly that the notification is provided for information only and without the responsibility of the Advising Bank. In any event, the Advising Bank must inform the Issuing Bank of the action taken and request it to provide the necessary information.

The Issuing Bank must provide the necessary information without delay. The Credit will be advised, confirmed or amended, only when complete and clear instructions have been received and if the Advising Bank is then prepared to act on the instructions.

C. Liabilities and Responsibilities

Article 13

Standard for Examination of Documents

a Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit.

Documents not stipulated in the Credit will not be examined by banks. If they receive such documents, they shall return them to the presenter or pass them on without responsibility.

b The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.

c If a Credit contains conditions without stating the document(s) to be presented in compliance therewith, banks will deem such conditions as not stated and will disregard them.

Article 14

Discrepant Documents and Notice

a When the Issuing Bank authorises another bank to pay, incur a deferred payment undertaking, accept Draft(s), or negotiate against documents which

appear on their face to be in compliance with the terms and conditions of the Credit, the Issuing Bank and the Confirming Bank, if any, are bound:

- i. to reimburse the Nominated Bank which has paid, incurred a deferred payment undertaking, accepted Draft(s), or negotiated,
- ii. to take up the documents.

b Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of the Credit, such banks may refuse to take up the documents.

c If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the Credit, it may in its sole judgment approach the Applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in sub-Article 13 (b).

- d** i. If the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, decides to refuse the documents, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, without delay but no later than the close of the seventh banking day following the day of receipt of the documents. Such notice shall be given to the bank from which it received the documents, or to the Beneficiary, if it received the documents directly from him.
- ii. Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.
- iii. The Issuing Bank and/or Confirming Bank, if

any, shall then be entitled to claim from the remitting bank refund, with interest, of any reimbursement which has been made to that bank.

e If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.

f If the remitting bank draws the attention of the Issuing Bank and/or Confirming Bank, if any, to any discrepancy(ies) in the document(s) or advises such banks that it has paid, incurred a deferred payment undertaking, accepted Draft(s) or negotiated under reserve or against an indemnity in respect of such discrepancy(ies), the Issuing Bank and/or Confirming Bank, if any, shall not be thereby relieved from any of their obligations under any provision of this Article. Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained.

Article 15

Disclaimer on Effectiveness of Documents

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s), or for the general and/or particular conditions stipulated in the document(s) or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any document(s), or for the good faith or acts and/or omissions, solvency, performance or standing of the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever.

Article 16**Disclaimer on the Transmission of Messages**

Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any message(s), letter(s) or document(s), or for delay, mutilation or other error(s) arising in the transmission of any telecommunication. Banks assume no liability or responsibility for errors in translation and/or interpretation of technical terms, and reserve the right to transmit Credit terms without translating them.

Article 17**Force Majeure**

Banks assume no liability or responsibility for the consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control, or by any strikes or lockouts. Unless specifically authorised, banks will not, upon resumption of their business, pay, incur a deferred payment undertaking, accept Draft(s) or negotiate under Credits which expired during such interruption of their business.

Article 18**Disclaimer for Acts of an Instructed Party**

- a** Banks utilizing the services of another bank or other banks for the purpose of giving effect to the instructions of the Applicant do so for the account and at the risk of such Applicant.
- b** Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank(s).
- c** i. A party instructing another party to perform services is liable for any charges, including commissions, fees, costs or expenses incurred by the instructed party in connection with its instructions.

- ii. Where a Credit stipulates that such charges are for the account of a party other than the instructing party, and charges cannot be collected, the instructing party remains ultimately liable for the payment thereof.

- d** The Applicant shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages.

Article 19**Bank-to-Bank Reimbursement Arrangements**

- a** If an Issuing Bank intends that the reimbursement to which a paying, accepting or negotiating bank is entitled, shall be obtained by such bank (the "Claiming Bank"), claiming on another party (the "Reimbursing Bank"), it shall provide such Reimbursing Bank in good time with the proper instructions or authorisation to honour such reimbursement claims.
- b** Issuing Banks shall not require a Claiming Bank to supply a certificate of compliance with the terms and conditions of the Credit to the Reimbursing Bank.
- c** An Issuing Bank shall not be relieved from any of its obligations to provide reimbursement if and when reimbursement is not received by the Claiming Bank from the Reimbursing Bank.
- d** The Issuing Bank shall be responsible to the Claiming Bank for any loss of interest if reimbursement is not provided by the Reimbursing Bank on first demand, or as otherwise specified in the Credit, or mutually agreed, as the case may be.
- e** The Reimbursing Bank's charges should be for the account of the Issuing Bank. However, in cases where the charges are for the account of another party, it is the responsibility of the Issuing Bank to so indicate in the original Credit and in the reimbursement authorisation. In cases where the

Reimbursing Bank's charges are for the account of another party they shall be collected from the Claiming Bank when the Credit is drawn under. In cases where the Credit is not drawn under, the Reimbursing Bank's charges remain the obligation of the Issuing Bank.

D. Documents

Article 20

Ambiguity as to the Issuers of Documents

a Terms such as "first class", "well known", "qualified", "independent", "official", "competent", "local" and the like, shall not be used to describe the issuers of any document(s) to be presented under a Credit. If such terms are incorporated in the Credit, banks will accept the relative document(s) as presented, provided that it appears on its face to be in compliance with the other terms and conditions of the Credit and not to have been issued by the Beneficiary.

b Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced:

- i. by reprographic, automated or computerized systems;
- ii. as carbon copies;

provided that it is marked as original and, where necessary, appears to be signed.

A document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication.

c i. Unless otherwise stipulated in the Credit, banks will accept as a copy(ies), a document(s) either

labelled copy or not marked as an original - a copy(ies) need not be signed.

- ii. Credits that require multiple document(s) such as "duplicate", "two fold", "two copies" and the like, will be satisfied by the presentation of one original and the remaining number in copies except where the document itself indicates otherwise.

d Unless otherwise stipulated in the Credit, a condition under a Credit calling for a document to be authenticated, validated, legalised, visaed, certified or indicating a similar requirement, will be satisfied by any signature, mark, stamp or label on such document that on its face appears to satisfy the above condition.

Article 21

Unspecified Issuers or Contents of Documents

When documents other than transport documents, insurance documents and commercial invoices are called for, the Credit should stipulate by whom such documents are to be issued and their wording or data content. If the Credit does not so stipulate, banks will accept such documents as presented, provided that their data content is not inconsistent with any other stipulated document presented.

Article 22

Issuance Date of Documents v. Credit Date

Unless otherwise stipulated in the Credit, banks will accept a document bearing a date of issuance prior to that of the Credit, subject to such document being presented within the time limits set out in the Credit and in these Articles.

Article 23**Marine/Ocean Bill of Lading**

a If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

i. appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

- the carrier or a named agent for or on behalf of the carrier, or
- the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting.

and

ii. indicates that the goods have been loaded on board, or shipped on a named vessel.

Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the bill of lading will be deemed to be the date of loading on board and the date of shipment.

In all other cases loading on board a named vessel must be evidenced by a notation on the bill of lading which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment.

If the bill of lading contains the indication "intended vessel", or similar qualification in relation to the vessel, loading on board a named vessel must be evidenced by an on board notation on the bill of lading which, in addition to the date on which the goods have been loaded on board, also includes the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named as the "intended vessel".

If the bill of lading indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the Credit and the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named in the bill of lading. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the bill of lading.

and

iii. indicates the port of loading and the port of discharge stipulated in the Credit, notwithstanding that it:

a. indicates a place of taking in charge different from the port of loading, and/or a place of final destination different from the port of discharge,

and/or

b. contains the indication "intended" or similar qualification in relation to the port of loading and/or port of discharge, as long as the document also states the ports of loading and/or discharge stipulated in the Credit,

and

iv. consists of a sole original bill of lading or, if issued in more than one original, the full set as so issued,

and

- v. appears to contain all of the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the bill of lading (short form/blank back bill of lading); banks will not examine the contents of such terms and conditions,

and

- vi. contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only,

and

- vii. in all other respects meets the stipulations of the Credit.

b For the purpose of this Article, transshipment means unloading and reloading from one vessel to another vessel during the course of ocean carriage from the port of loading to the port of discharge stipulated in the Credit.

c Unless transshipment is prohibited by the terms of the Credit, banks will accept a bill of lading which indicates that the goods will be transhipped, provided that the entire ocean carriage is covered by one and the same bill of lading.

d Even if the Credit prohibits transshipment, banks will accept a bill of lading which:

- i. indicates that transshipment will take place as long as the relevant cargo is shipped in Container(s), Trailer(s) and/or "LASH" barge(s) as evidenced by the bill of lading, provided that the entire ocean carriage is covered by one and the same bill of lading,

and/or

- ii. incorporates clauses stating that the carrier reserves the right to tranship.

Article 24

Non-Negotiable Sea Waybill

a If a Credit calls for a non-negotiable sea waybill covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

- i. appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

- the carrier or a named agent for or on behalf of the carrier, or
- the master or a named agent for or on behalf of the master,

Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting.

and

- ii. indicates that the goods have been loaded on board, or shipped on a named vessel.

Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the non-negotiable sea waybill that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the non-negotiable sea waybill will be deemed to be the date of loading on board and the date of shipment.

In all other cases loading on board a named vessel must be evidenced by a notation on the non-negotiable sea waybill which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment.

If the non-negotiable sea waybill contains the indication "intended vessel", or similar qualification in relation to the vessel, loading on board a named vessel must be evidenced by an on board notation on the non-negotiable sea waybill which, in addition to the date on which the goods have been loaded on board, includes the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named as the "intended vessel".

If the non-negotiable sea waybill indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the Credit and the name of the vessel on which the goods have been loaded, even if they have been loaded on a vessel named in the non-negotiable sea waybill. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the non-negotiable sea waybill,

and

- iii. indicates the port of loading and the port of discharge stipulated in the Credit, notwithstanding that it:

- a. indicates a place of taking in charge different from the port of loading, and/or a place of final destination different from the port of discharge,

and/or

- b. contains the indication "intended" or similar qualification in relation to the port of loading and/or port of discharge, as long as the document also states the ports of loading and/or discharge stipulated in the Credit.

and

- iv. consists of a sole original non-negotiable sea waybill, or if issued in more than one original, the full set as so issued,

and

- v. appears to contain all of the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the non-negotiable sea waybill (short form/blank back non-negotiable sea waybill); banks will not examine the contents of such terms and conditions,

and

- vi. contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only,

and

- vii. in all other respects meets the stipulations of the Credit.

b For the purpose of this Article, transhipment means unloading and reloading from one vessel to another vessel during the course of ocean carriage from the port of loading to the port of discharge stipulated in the Credit.

c Unless transhipment is prohibited by the terms of the Credit, banks will accept a non-negotiable sea waybill which indicates that the goods will be transhipped, provided that the entire ocean carriage is covered by one and the same non-negotiable sea waybill.

d Even if the Credit prohibits transhipment, banks will accept a non-negotiable sea waybill which:

- i. indicates that transhipment will take place as long as the relevant cargo is shipped in Container(s), Trailer(s) and/or "LASH" barge(s) as evidenced by the non-negotiable sea waybill, provided that the entire ocean carriage is covered by one and the same non-negotiable sea waybill,

and/or

- ii. incorporates clauses stating that the carrier reserves the right to tranship.

Article 25**Charter Party Bill of Lading**

a If a Credit calls for or permits a charter party bill of lading, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

- i. contains any indication that it is subject to a charter party,

and

- ii. appears on its face to have been signed or otherwise authenticated by:

- the master or a named agent for or on behalf of the master, or
- the owner or a named agent for or on behalf of the owner.

Any signature or authentication of the master or owner must be identified as master or owner as the case may be. An agent signing or authenticating for the master or owner must also indicate the name and the capacity of the party, i.e. master or owner, on whose behalf that agent is acting,

and

- iii. does or does not indicate the name of the carrier,

and

- iv. indicates that the goods have been loaded on board or shipped on a named vessel.

Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the bill of lading will be deemed to be the date of loading on board and the date of shipment.

In all other cases loading on board a named vessel must be evidenced by a notation on the bill of lading which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment,

and

- v. indicates the port of loading and the port of discharge stipulated in the Credit,

and

- vi. consists of a sole original bill of lading or, if issued in more than one original, the full set as so issued,

and

- vii. contains no indication that the carrying vessel is propelled by sail only,

and

- viii. in all other respects meets the stipulations of the Credit.

- b** Even if the Credit requires the presentation of a charter party contract in connection with a charter party bill of lading, banks will not examine such charter party contract, but will pass it on without responsibility on their part.

Article 26**Multimodal Transport Document**

a If a Credit calls for a transport document covering at least two different modes of transport (multimodal transport), banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

- i. appears on its face to indicate the name of the carrier or multimodal transport operator and to have been signed or otherwise authenticated by:

- the carrier or multimodal transport operator or a named agent for or on behalf of the carrier or multimodal transport operator, or
- the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier, multimodal transport operator or master must be identified as carrier, multimodal transport operator or master, as the case may be. An agent signing or authenticating for the carrier, multimodal transport operator or master must also indicate the name and the capacity of the party, i.e. carrier, multimodal transport operator or master, on whose behalf that agent is acting.

and

- ii.** indicates that the goods have been dispatched, taken in charge or loaded on board.

Dispatch, taking in charge or loading on board may be indicated by wording to that effect on the multimodal transport document and the date of issuance will be deemed to be the date of dispatch, taking in charge or loading on board and the date of shipment. However, if the document indicates, by stamp or otherwise, a date of dispatch, taking in charge or loading on board, such date will be deemed to be the date of shipment,

and

- iii. a.** indicates the place of taking in charge stipulated in the Credit which may be different from the port, airport or place of loading, and the place of final destination stipulated in the Credit which may be different from the port, airport or place of discharge,

and/or

- b.** contains the indication "intended" or similar qualification in relation to the vessel and/or port of loading and/or port of discharge,

and

- iv.** consists of a sole original multimodal transport document or, if issued in more than one original, the full set as so issued,

and

- v.** appears to contain all of the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the multimodal transport document (short form/blank back multimodal transport document); banks will not examine the contents of such terms and conditions,

and

- vi.** contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only,

and

- vii.** in all other respects meets the stipulations of the Credit.

- b** Even if the Credit prohibits transshipment, banks will accept a multimodal transport document which indicates that transshipment will or may take place, provided that the entire carriage is covered by one and the same multimodal transport document.

Article 27

Air Transport Document

- a** If a Credit calls for an air transport document, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

- i.** appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

- the carrier, or
- a named agent for or on behalf of the carrier.

Any signature or authentication of the carrier must be identified as carrier. An agent signing or authenticating for the carrier, must also indicate the name and the capacity of the party, i.e. carrier, on whose behalf that agent is acting,

and

- ii. indicates that the goods have been accepted for carriage,

and

- iii. where the Credit calls for an actual date of dispatch, indicates a specific notation of such date, the date of dispatch so indicated on the air transport document will be deemed to be the date of shipment.

For the purpose of this Article, the information appearing in the box on the air transport document (marked "For Carrier Use Only" or similar expression) relative to the flight number and date will not be considered as a specific notation of such date of dispatch.

In all other cases, the date of issuance of the air transport document will be deemed to be the date of shipment,

and

- iv. indicates the airport of departure and the airport of destination stipulated in the Credit,

and

- v. appears to be the original for consignor/shipper even if the Credit stipulates a full set of originals, or similar expressions,

and

- vi. appears to contain all of the terms and conditions of carriage, or some of such terms and conditions, by reference to a source or document other than the air transport document; banks will not examine the contents of such terms and conditions,

and

- vii. in all other respects meets the stipulations of the Credit.

- b** For the purpose of this Article, transshipment means unloading and reloading from one aircraft to another aircraft during the course of carriage from the airport of departure to the airport of destination stipulated in the Credit.

- c** Even if the Credit prohibits transshipment, banks will accept an air transport document which indicates that transshipment will or may take place, provided that the entire carriage is covered by one and the same air transport document.

Article 28

Road, Rail or Inland Waterway Transport Documents

- a** If a Credit calls for a road, rail, or inland waterway transport document, banks will, unless otherwise stipulated in the Credit, accept a document of the type called for, however named, which:

- i. appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by the carrier or a named agent for or on behalf of the carrier and/or to bear a reception stamp or other indication of receipt by the carrier or a named agent for or on behalf of the carrier.

Any signature, authentication, reception stamp or other indication of receipt of the carrier, must be identified on its face as that of the carrier. An agent signing or authenticating for the carrier, must also indicate the name and the capacity of the party, i.e. carrier, on whose behalf that agent is acting,

and

- ii. indicates that the goods have been received for shipment, dispatch or carriage or wording to

this effect. The date of issuance will be deemed to be the date of shipment unless the transport document contains a reception stamp, in which case the date of the reception stamp will be deemed to be the date of shipment,

and

iii. indicates the place of shipment and the place of destination stipulated in the Credit,

and

iv. in all other respects meets the stipulations of the Credit.

b In the absence of any indication on the transport document as to the numbers issued, banks will accept the transport document(s) presented as constituting a full set. Banks will accept as original(s) the transport document(s) whether marked as original(s) or not.

c For the purpose of this Article, transshipment means unloading and reloading from one means of conveyance to another means of conveyance, in different modes of transport, during the course of carriage from the place of shipment to the place of destination stipulated in the Credit.

d Even if the Credit prohibits transshipment, banks will accept a road, rail, or inland waterway transport document which indicates that transshipment will or may take place, provided that the entire carriage is covered by one and the same transport document and within the same mode of transport.

i. appears on its face to have been stamped or otherwise authenticated and dated in the place from which the Credit stipulates the goods are to be shipped or dispatched and such date will be deemed to be the date of shipment or dispatch,

and

ii. in all other respects meets the stipulations of the Credit.

b If a Credit calls for a document issued by a courier or expedited delivery service evidencing receipt of the goods for delivery, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

i. appears on its face to indicate the name of the courier/service, and to have been stamped, signed or otherwise authenticated by such named courier/service (unless the Credit specifically calls for a document issued by a named Courier/Service, banks will accept a document issued by any Courier/Service),

and

ii. indicates a date of pick-up or of receipt or wording to this effect, such date being deemed to be the date of shipment or dispatch,

and

iii. in all other respects meets the stipulations of the Credit.

Article 30

Transport Documents issued by Freight Forwarders

Unless otherwise authorised in the Credit, banks will only accept a transport document issued by a freight forwarder if it appears on its face to indicate:

i. the name of the freight forwarder as a carrier or multimodal transport operator and to have been signed or otherwise authenticated by the freight

Article 29

Courier and Post Receipts

a If a Credit calls for a post receipt or certificate of posting, banks will, unless otherwise stipulated in the Credit, accept a post receipt or certificate of posting which:

forwarder as carrier or multimodal transport operator,

or

- ii. the name of the carrier or multimodal transport operator and to have been signed or otherwise authenticated by the freight forwarder as a named agent for or on behalf of the carrier or multimodal transport operator.

Article 31

"On Deck", "Shipper's Load and Count", Name of Consignor

Unless otherwise stipulated in the Credit, banks will accept a transport document which:

- i. does not indicate, in the case of carriage by sea or by more than one means of conveyance including carriage by sea, that the goods are or will be loaded on deck. Nevertheless, banks will accept a transport document which contains a provision that the goods may be carried on deck, provided that it does not specifically state that they are or will be loaded on deck,

and/or

- ii. bears a clause on the face thereof such as "shipper's load and count" or "said by shipper to contain" or words of similar effect,

and/or

- iii. indicates as the consignor of the goods a party other than the Beneficiary of the Credit.

Article 32

Clean Transport Documents

- a A clean transport document is one which bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging.

- b Banks will not accept transport documents bearing such clauses or notations unless the Credit expressly stipulates the clauses or notations which may be accepted.

- c Banks will regard a requirement in a Credit for a transport document to bear the clause "clean on board" as complied with if such transport document meets the requirements of this Article and of Articles 23, 24, 25, 26, 27, 28 or 30.

Article 33

Freight Payable/Prepaid Transport Documents

- a Unless otherwise stipulated in the Credit, or inconsistent with any of the documents presented under the Credit, banks will accept transport documents stating that freight or transportation charges (hereafter referred to as "freight") have still to be paid.

- b If a Credit stipulates that the transport document has to indicate that freight has been paid or prepaid, banks will accept a transport document on which words clearly indicating payment or prepayment of freight appear by stamp or otherwise, or on which payment or prepayment of freight is indicated by other means. If the Credit requires courier charges to be paid or prepaid banks will also accept a transport document issued by a courier or expedited delivery service evidencing that courier charges are for the account of a party other than the consignee.

- c The words "freight prepayable" or "freight to be prepaid" or words of similar effect, if appearing on transport documents, will not be accepted as constituting evidence of the payment of freight.

- d Banks will accept transport documents bearing reference by stamp or otherwise to costs additional to the freight, such as costs of, or disbursements

incurred in connection with, loading, unloading or similar operations, unless the conditions of the Credit specifically prohibit such reference.

Article 34

Insurance Documents

- a** Insurance documents must appear on their face to be issued and signed by insurance companies or underwriters or their agents.
- b** If the insurance document indicates that it has been issued in more than one original, all the originals must be presented unless otherwise authorised in the Credit.
- c** Cover notes issued by brokers will not be accepted, unless specifically authorised in the Credit.
- d** Unless otherwise stipulated in the Credit, banks will accept an insurance certificate or a declaration under an open cover pre-signed by insurance companies or underwriters or their agents. If a Credit specifically calls for an insurance certificate or a declaration under an open cover, banks will accept, in lieu thereof, an insurance policy.
- e** Unless otherwise stipulated in the Credit, or unless it appears from the insurance document that the cover is effective at the latest from the date of loading on board or dispatch or taking in charge of the goods, banks will not accept an insurance document which bears a date of issuance later than the date of loading on board or dispatch or taking in charge as indicated in such transport document.
- f**
 - i.** Unless otherwise stipulated in the Credit, the insurance document must be expressed in the same currency as the Credit.
 - ii.** Unless otherwise stipulated in the Credit, the minimum amount for which the insurance document must indicate the insurance cover to

have been effected is the CIF (cost, insurance and freight (... "named port of destination")) or CIP (carriage and insurance paid to (... "named place of destination")) value of the goods, as the case may be, plus 10%, but only when the CIF or CIP value can be determined from the documents on their face. Otherwise, banks will accept as such minimum amount 110% of the amount for which payment, acceptance or negotiation is requested under the Credit, or 110% of the gross amount of the invoice, whichever is the greater.

Article 35

Type of Insurance Cover

- a** Credits should stipulate the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as "usual risks" or "customary risks" shall not be used; if they are used, banks will accept insurance documents as presented, without responsibility for any risks not being covered.
- b** Failing specific stipulations in the Credit, banks will accept insurance documents as presented, without responsibility for any risks not being covered.
- c** Unless otherwise stipulated in the Credit, banks will accept an insurance document which indicates that the cover is subject to a franchise or an excess (deductible).

Article 36

All Risks Insurance Cover

Where a Credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, whether or not bearing the heading "all risks", even if the insurance document indicates that certain risks are excluded, without responsibility for any risk(s) not being covered.

Article 37**Commercial Invoices**

a Unless otherwise stipulated in the Credit, commercial invoices;

i. must appear on their face to be issued by the Beneficiary named in the Credit (except as provided in Article 48),

and

ii. must be made out in the name of the Applicant (except as provided in sub-Article 48 (h)),

and

iii. need not be signed.

b Unless otherwise stipulated in the Credit, banks may refuse commercial invoices issued for amounts in excess of the amount permitted by the Credit. Nevertheless, if a bank authorised to pay, incur a deferred payment undertaking, accept Draft(s), or negotiate under a Credit accepts such invoices, its decision will be binding upon all parties, provided that such bank has not paid, incurred a deferred payment undertaking, accepted Draft(s) or negotiated for an amount in excess of that permitted by the Credit.

c The description of the goods in the commercial invoice must correspond with the description in the Credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit.

Article 38**Other Documents**

If a Credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or declaration of weight which appears to have been superimposed on the transport document by the carrier or his agent unless the Credit

specifically stipulates that the attestation or certification of weight must be by means of a separate document.

E. Miscellaneous Provisions**Article 39****Allowances in Credit Amount, Quantity and Unit Price**

a The words "about", "approximately", "circa" or similar expressions used in connection with the amount of the Credit or the quantity or the unit price stated in the Credit are to be construed as allowing a difference not to exceed 10% more or 10% less than the amount or the quantity or the unit price to which they refer.

b Unless a Credit stipulates that the quantity of the goods specified must not be exceeded or reduced, a tolerance of 5% more or 5% less will be permissible, always provided that the amount of the drawings does not exceed the amount of the Credit. This tolerance does not apply when the Credit stipulates the quantity in terms of a stated number of packing units or individual items.

c Unless a Credit which prohibits partial shipments stipulates otherwise, or unless sub-Article (b) above is applicable, a tolerance of 5% less in the amount of the drawing will be permissible, provided that if the Credit stipulates the quantity of the goods, such quantity of goods is shipped in full, and if the Credit stipulates a unit price, such price is not reduced. This provision does not apply when expressions referred to in sub-Article (a) above are used in the Credit.

Article 40**Partial Shipments/Drawings**

- a** Partial drawings and/or shipments are allowed, unless the Credit stipulates otherwise.
- b** Transport documents which appear on their face to indicate that shipment has been made on the same means of conveyance and for the same journey, provided they indicate the same destination, will not be regarded as covering partial shipments, even if the transport documents indicate different dates of shipment and/or different ports of loading, places of taking in charge, or despatch.
- c** Shipments made by post or by courier will not be regarded as partial shipments if the post receipts or certificates of posting or courier's receipts or dispatch notes appear to have been stamped, signed or otherwise authenticated in the place from which the Credit stipulates the goods are to be dispatched, and on the same date.

Article 41**Instalment Shipments/Drawings**

If drawings and/or shipments by instalments within given periods are stipulated in the Credit and any instalment is not drawn and/or shipped within the period allowed for that instalment, the Credit ceases to be available for that and any subsequent instalments, unless otherwise stipulated in the Credit.

Article 42**Expiry Date and Place for Presentation of Documents**

- a** All Credits must stipulate an expiry date and a place for presentation of documents for payment, acceptance, or with the exception of freely negotiable Credits, a place for presentation of documents for negotiation. An expiry date stipulated for payment,

acceptance or negotiation will be construed to express an expiry date for presentation of documents.

- b** Except as provided in sub-Article 44(a), documents must be presented on or before such expiry date.
- c** If an Issuing Bank states that the Credit is to be available "for one month", "for six months", or the like, but does not specify the date from which the time is to run, the date of issuance of the Credit by the Issuing Bank will be deemed to be the first day from which such time is to run. Banks should discourage indication of the expiry date of the Credit in this manner.

Article 43**Limitation on the Expiry Date**

- a** In addition to stipulating an expiry date for presentation of documents, every Credit which calls for a transport document(s) should also stipulate a specified period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of the Credit. If no such period of time is stipulated, banks will not accept documents presented to them later than 21 days after the date of shipment. In any event, documents must be presented not later than the expiry date of the Credit.
- b** In cases in which sub-Article 40(b) applies, the date of shipment will be considered to be the latest shipment date on any of the transport documents presented.

Article 44**Extension of Expiry Date**

- a** If the expiry date of the Credit and/or the last day of the period of time for presentation of documents stipulated by the Credit or applicable by virtue of Article 43 falls on a day on which the bank to which presentation has to be made is closed for reasons

other than those referred to in Article 17, the stipulated expiry date and/or the last day of the period of time after the date of shipment for presentation of documents, as the case may be, shall be extended to the first following day on which such bank is open.

- b** The latest date for shipment shall not be extended by reason of the extension of the expiry date and/or the period of time after the date of shipment for presentation of documents in accordance with sub-Article (a) above. If no such latest date for shipment is stipulated in the Credit or amendments thereto, banks will not accept transport documents indicating a date of shipment later than the expiry date stipulated in the Credit or amendments thereto.

- c** The bank to which presentation is made on such first following business day must provide a statement that the documents were presented within the time limits extended in accordance with sub-Article 44(a) of the Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No. 500.

Article 45

Hours of Presentation

Banks are under no obligation to accept presentation of documents outside their banking hours.

Article 46

General Expressions as to Dates for Shipment

- a** Unless otherwise stipulated in the Credit, the expression "shipment" used in stipulating an earliest and/or a latest date for shipment will be understood to include expressions such as, "loading on board", "dispatch", "accepted for carriage", "date of post receipt", "date of pick-up", and the like, and in the case of a Credit calling for a multimodal transport document the expression "taking in charge".

- b** Expressions such as "prompt", "immediately", "as soon as possible", and the like should not be used. If they are used banks will disregard them.

- c** If the expression "on or about" or similar expressions are used, banks will interpret them as a stipulation that shipment is to be made during the period from five days before to five days after the specified date, both end days included.

Article 47

Date Terminology for Periods of Shipment

- a** The words "to", "until", "till", "from" and words of similar import applying to any date or period in the Credit referring to shipment will be understood to include the date mentioned.

- b** The word "after" will be understood to exclude the date mentioned.

- c** The terms "first half", "second half" of a month shall be construed respectively as the 1st to the 15th, and the 16th to the last day of such month, all dates inclusive.

- d** The terms "beginning", "middle", or "end" of a month shall be construed respectively as the 1st to the 10th, the 11th to the 20th, and the 21st to the last day of such month, all dates inclusive.

F. Transferable Credit

Article 48

Transferable Credit

- a** A transferable Credit is a Credit under which the Beneficiary (First Beneficiary) may request the bank authorised to pay, incur a deferred payment

undertaking, accept or negotiate (the "Transferring Bank"), or in the case of a freely negotiable Credit, the bank specifically authorised in the Credit as a Transferring Bank, to make the Credit available in whole or in part to one or more other Beneficiary(ies) (Second Beneficiary(ies)).

b A Credit can be transferred only if it is expressly designated as "transferable" by the Issuing Bank. Terms such as "divisible", "fractionable", "assignable", and "transmissible" do not render the Credit transferable. If such terms are used they shall be disregarded.

c The Transferring Bank shall be under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank.

d At the time of making a request for transfer and prior to transfer of the Credit, the First Beneficiary must irrevocably instruct the Transferring Bank whether or not he retains the right to refuse to allow the Transferring Bank to advise amendments to the Second Beneficiary(ies). If the Transferring Bank consents to the transfer under these conditions, it must, at the time of transfer, advise the Second Beneficiary(ies) of the First Beneficiary's instructions regarding amendments.

e If a Credit is transferred to more than one Second Beneficiary(ies), refusal of an amendment by one or more Second Beneficiary(ies) does not invalidate the acceptance(s) by the other Second Beneficiary(ies) with respect to whom the Credit will be amended accordingly. With respect to the Second Beneficiary(ies) who rejected the amendment, the Credit will remain unamended.

f Transferring Bank charges in respect of transfers including commissions, fees, costs or expenses are payable by the First Beneficiary, unless otherwise agreed. If the Transferring Bank agrees to transfer the Credit it shall be under no obligation to effect the transfer until such charges are paid.

g Unless otherwise stated in the Credit, a transferable Credit can be transferred once only. Consequently, the Credit cannot be transferred at the request of the Second Beneficiary to any subsequent Third Beneficiary. For the purpose of this Article, a retransfer to the First Beneficiary does not constitute a prohibited transfer.

Fractions of a transferable Credit (not exceeding in the aggregate the amount of the Credit) can be transferred separately, provided partial shipments/drawings are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the Credit.

h The Credit can be transferred only on the terms and conditions specified in the original Credit, with the exception of:

- the amount of the Credit,
- any unit price stated therein,
- the expiry date,
- the last date for presentation of documents in accordance with Article 43,
- the period for shipment,

any or all of which may be reduced or curtailed.

The percentage for which insurance cover must be effected may be increased in such a way as to provide the amount of cover stipulated in the original Credit, or these Articles.

In addition, the name of the First Beneficiary can be substituted for that of the Applicant, but if the name of the Applicant is specifically required by the original Credit to appear in any document(s) other than the invoice, such requirement must be fulfilled.

i The First Beneficiary has the right to substitute his own invoice(s) (and Draft(s)) for those of the Second Beneficiary(ies), for amounts not in excess of the original amount stipulated in the Credit and for the

original unit prices if stipulated in the Credit, and upon such substitution of invoice(s) (and Draft(s)) the First Beneficiary can draw under the Credit for the difference, if any, between his invoice(s) and the Second Beneficiary's(ies') invoice(s).

When a Credit has been transferred and the First Beneficiary is to supply his own invoice(s) (and Draft(s)) in exchange for the Second Beneficiary's(ies') invoice(s) (and Draft(s)) but fails to do so on first demand, the Transferring Bank has the right to deliver to the Issuing Bank the documents received under the transferred Credit, including the Second Beneficiary's(ies') invoice(s) (and Draft(s)) without further responsibility to the First Beneficiary.

- i** The First Beneficiary may request that payment or negotiation be effected to the Second Beneficiary(ies) at the place to which the Credit has been transferred up to and including the expiry date of the Credit, unless the original Credit expressly states that it may not be made available for payment or negotiation at a place other than that stipulated in the Credit. This is without prejudice to the First Beneficiary's right to substitute subsequently his own invoice(s) (and Draft(s)) for those of the Second Beneficiary(ies) and to claim any difference due to him.

ICC ARBITRATION

Contracting parties that wish to have the possibility of resorting to ICC Arbitration in the event of a dispute with their contracting partner should specifically and clearly agree upon ICC Arbitration in their contract or, in the event no single contractual document exists, in the exchange of correspondence which constitutes the agreement between them. The fact of issuing a letter of credit subject to the UCP 500 does NOT by itself constitute an agreement to have resort to ICC Arbitration. The following standard arbitration clause is recommended by the ICC:

"All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules".

G. Assignment of Proceeds

Article 49

Assignment of Proceeds

The fact that a Credit is not stated to be transferable shall not affect the Beneficiary's right to assign any proceeds to which he may be, or may become, entitled under such Credit, in accordance with the provisions of the applicable law. This Article relates only to the assignment of proceeds and not to the assignment of the right to perform under the Credit itself.

IX. STATUS OF UNCITRAL TEXTS

A. Status of Conventions: note by the Secretariat

(A/CN.9/401) [Original: English]

1. At its thirteenth session the Commission decided that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.¹

2. The present note is submitted pursuant to that decision. The annex hereto sets forth the state of signatures, ratifications, accessions and approvals as of 11 May 1994 to the following conventions: Convention on the Limitation Period in the International Sale of Goods (New York, 1974); Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg); United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991); and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The latter Convention, which has not emanated from the work of the Commission, has been included because of the close interest of the Commission in it, particularly in connection with the Commission's work in the field of international commercial arbitration. In addition, the annex sets forth those jurisdictions that have

enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration.

3. Since the most recent report in this series, showing the status of conventions as of 14 July 1993 (A/CN.9/381), the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) received four additional adherences (Bosnia and Herzegovina, Czech Republic, Ukraine, United States of America) and the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980) received two adherences (Czech Republic, United States of America). The United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) has received two more adherences (Austria, Cameroon), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) four more adherences (Bosnia and Herzegovina, Czech Republic, Estonia and Slovenia) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) has received five additional adherences (Croatia, Czech Republic, Estonia, Saudi Arabia and The former Yugoslav Republic of Macedonia). Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Bermuda, Egypt, Finland, Mexico and the Russian Federation.

4. The names of the States that have ratified or acceded to the conventions since the preparation of the last report are in *italics*, including those new States that have deposited instruments of succession.

¹Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), para. 163.

ANNEX

1. Convention on the Limitation Period in the International Sale of Goods (New York, 1974)^{*}

<i>State^a</i>	<i>Signature</i>	<i>Ratification Accession Approval Succession (*)</i>	<i>Entry into force</i>
Argentina		9 October 1981	1 August 1988
Belarus	14 June 1974		
<i>Bosnia and Herzegovina</i>		12 January 1994*	6 March 1992
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Costa Rica	30 August 1974		
<i>Czech Republic^b</i>		30 September 1993*	1 January 1993
Dominican Republic		23 December 1977	1 August 1988
Egypt		6 December 1982	1 August 1988
Ghana	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991	1 August 1991
Hungary	14 June 1974	16 June 1983	1 August 1988
Mexico		21 January 1988	1 August 1988

<i>State^a</i>	<i>Signature</i>	<i>Ratification Accession Approval Succession (*)</i>	<i>Entry into force</i>
Mongolia	14 June 1974		
Nicaragua	13 May 1975		
Norway ¹	11 December 1975	20 March 1980	1 August 1988
Poland	14 June 1974		
Romania		23 April 1992	1 November 1992
Russian Federation ^c	14 June 1974		
Slovakia ^b		28 May 1993*	1 January 1993
Uganda		12 February 1992	1 September 1992
Ukraine	14 June 1974	13 September 1993	1 April 1994
United States of America		5 May 1994	1 December 1994
Yugoslavia		27 November 1978	1 August 1988
Zambia		6 June 1986	1 August 1988

Signatures only: 8; ratifications, accessions and successions: 17

^aThe Convention was concluded in authentic Chinese, English, French, Russian and Spanish texts. On 11 August 1992, the Secretary-General, in accordance with a request of the United Nations Commission on International Trade Law, circulated a proposal for the adoption of an authentic Arabic text of the Convention. No objections having been raised, the Arabic text was deemed adopted on 9 November 1992 with the same status as that of the other authentic texts referred to in the Convention.

^bThe Convention had been signed by the former German Democratic Republic on 14 June 1974, ratified by it on 31 August 1989 and entered into force on 1 March 1990.

^cThe Convention was signed by the former Czechoslovakia on 29 August 1975 and an instrument of ratification was deposited on 26 May 1977, with the Convention entering into force for the former Czechoslovakia on 1 August 1988. On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession with effect from 1 January 1993, the date of succession of States.

^dThe Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

Declarations and reservations

¹Upon signature Norway declared, and confirmed upon ratification, that in accordance with article 34 the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Denmark, Finland, Iceland, Norway and Sweden).

2. Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980)

<i>State^a</i>	<i>Accession Succession (*)</i>	<i>Entry into force</i>
Argentina	19 July 1983	1 August 1988
Czech Republic ^b	30 September 1993*	1 January 1993
Egypt	6 December 1982	1 August 1988
Guinea	23 January 1991	1 August 1991
Hungary	16 June 1983	1 August 1988
Mexico	21 January 1988	1 August 1988
Romania	23 April 1992	1 November 1992
Slovakia ^b	28 May 1993*	1 January 1993
Uganda	12 February 1992	1 September 1992
United States of America ¹	5 May 1994	1 December 1994
Zambia	6 June 1986	1 August 1988

In accordance with articles XI and XIV of the Protocol, the Contracting States to the Protocol are considered to be Contracting Parties to the Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol in relation to one another and Contracting Parties to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol.

^aThe Protocol was acceded to by the former German Democratic Republic on 31 August 1989 and entered into force on 1 March 1990.

⁶The Protocol was acceded to by the former Czechoslovakia on 5 March 1990, with effect from 10 October 1990.¹ On 28 May 1993 Slovakia and on 30 September 1993 the Czech Republic, deposited instruments of succession, with effect from 1 January 1993, the date of succession of States.

Declarations and reservations

¹Upon accession, Czechoslovakia and the United States of America declared that, pursuant to article XII, it did not consider itself bound by article I.

3. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession</i>	<i>Entry into force</i>
Austria	30 April 1979	29 July 1993	1 August 1994
Barbados		2 February 1981	1 November 1992
Botswana		16 February 1988	1 November 1992
Brazil	31 March 1978		
Burkina Faso		14 August 1989	1 November 1992
Cameroon		21 October 1993	1 November 1994
Chile	31 March 1978	9 July 1982	1 November 1992
Denmark	18 April 1979		
Ecuador	31 March 1978		
Egypt	31 March 1978	23 April 1979	1 November 1992
Finland	18 April 1979		
France	18 April 1979		
Germany	31 March 1978		
Ghana	31 March 1978		
Guinea		23 January 1991	1 November 1992
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	1 November 1992
Kenya	31 July 1989	1 November 1992	
Lebanon		4 April 1983	1 November 1992
Lesotho		26 October 1989	1 November 1992
Madagascar	31 March 1978		
Malawi		18 March 1991	1 November 1992
Mexico	31 March 1978		
Morocco		12 June 1981	1 November 1992
Nigeria		7 November 1988	1 November 1992
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982	1 November 1992
Senegal	31 March 1978	17 March 1986	1 November 1992
Slovakia ⁶	28 May 1993		
Sierra Leone	15 August 1978	7 October 1988	1 November 1992
Singapore	31 March 1978		
Sweden	18 April 1979		
Tunisia		15 September 1980	1 November 1992
Uganda		6 July 1979	1 November 1992
United Republic of Tanzania		24 July 1979	1 November 1992
United States of America	30 April 1979		
Venezuela	31 March 1978		
Zaire	19 April 1979		
Zambia		7 October 1991	1 November 1992

Signatures only: 21; ratifications and accessions: 22

⁶The Convention was signed by the former Czechoslovakia on 6 March 1979.¹ On 28 May 1993, Slovakia deposited an instrument of succession to the signature.

Declarations and reservations

¹Upon signing the Convention the former Czechoslovakia declared in accordance with article 26 a formula for converting the amounts of liability referred to in paragraph 2 of that article into

the Czechoslovak currency and the amount of the limits of liability to be applied in the territory of Czechoslovakia as expressed in the Czechoslovak currency.

4. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Approval Acceptance Succession (*)</i>	<i>Entry into force</i>
Argentina ¹		19 July 1983	1 January 1988
Australia		17 March 1988	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Belarus ¹		9 October 1989	1 November 1990
Bosnia and Herzegovina		12 January 1994*	6 March 1992
Bulgaria		9 July 1990	1 August 1991
Canada ²		23 April 1991	1 May 1992
Chile ¹	11 April 1980	7 February 1990	1 March 1991
China ³	30 September 1981	11 December 1986	1 January 1988
Czech Republic ⁴		30 September 1993*	1 January 1993
Denmark ⁴	26 May 1981	14 February 1989	1 March 1990
Ecuador		27 January 1992	1 February 1993
Estonia ¹		20 September 1993	1 October 1994
Egypt		6 December 1982	1 January 1988
Finland ⁴	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982	1 January 1988
Germany ^{4, 5}	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980		
Guinea		23 January 1991	1 February 1992
Hungary ^{1, 6}	11 April 1980	16 June 1983	1 January 1988
Iraq		5 March 1990	1 April 1991
Italy	30 September 1981	11 December 1986	1 January 1988
Lesotho	18 June 1981	18 June 1981	1 January 1988
Mexico		29 December 1987	1 January 1989
Netherlands	29 May 1981	13 December 1990	1 January 1992
Norway ⁴	26 May 1981	20 July 1988	1 August 1989
Poland	28 September 1981		
Romania		22 May 1991	1 June 1992
Russian Federation ^{4, 1}		16 August 1990	1 September 1991
Singapore	11 April 1980		
Slovakia ⁴		28 May 1993*	1 January 1993
Slovenia		7 January 1994*	25 June 1991
Spain		24 July 1990	1 August 1991
Sweden ⁴	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990	1 March 1991
Syrian Arab Republic		19 October 1982	1 January 1988
Uganda		12 February 1992	1 March 1993
Ukraine ¹		3 January 1990	1 February 1991
United States of America ⁷	31 August 1981	11 December 1986	1 January 1988
Venezuela	28 September 1981		
Yugoslavia	11 April 1980	27 March 1985	1 January 1988
Zambia		6 June 1986	1 January 1988

Signatures only: 4; ratifications, accessions, approval, acceptance and successions: 38

¹The Convention was signed by the former Czechoslovakia on 1 September 1981 and an instrument of ratification was deposited on 5 March 1990, with the Convention entering into force for the former Czechoslovakia on 1 April 1991.⁷ On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession, with effect from 1 January 1993, the date of succession of States.

²The Convention was signed by the former German Democratic Republic on 13 August 1981, ratified on 23 February 1989 and entered into force on 1 March 1990.

³The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

Declarations and reservations

¹Upon adherence to the Convention the Governments of Argentina, Belarus, Chile, Estonia, Hungary, Russian Federation and Ukraine stated, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had his place of business in their respective States.

²Upon accession the Government of Canada declared that, in accordance with article 93 of the Convention, the Convention will extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. Upon accession the Government of Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it will not be bound by article 1(1)(b) of the Convention. In a notification received on 31 July 1992, the Government of Canada withdrew that declaration. In a declaration received on 9 April 1992 the Government of Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to Yukon.

³Upon approving the Convention the Government of China declared that it did not consider itself bound by subparagraph (b) of paragraph 1 of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11.

⁴Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared in accordance with article 92(1) that they would not be bound by Part II of the Convention (Formation of the Contract). Upon ratifying the Convention the Governments of Denmark, Finland, Norway and Sweden declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.

⁵Upon ratifying the Convention the Government of Germany declared that it would not apply article 1(1)(b) in respect of any State that had made a declaration that that State would not apply article 1(1)(b).

⁶Upon ratifying the Convention the Government of Hungary declared that it considered the General Conditions of Delivery of Goods between organizations of the member countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

⁷Upon ratifying the Convention the Governments of Czechoslovakia and of the United States of America declared that they would not be bound by subparagraph (1)(b) of article 1.

5. United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)

State	Signature	Ratification Accession	Entry into force
Canada	7 December 1989		
Guinea		23 January 1991	
Mexico		11 September 1992	
Russian Federation ^a	30 June 1990		
United States of America	29 June 1990		

Signatures only: 3; ratifications and accessions: 2; ratifications and accessions necessary to bring the Convention into force: 10

^aThe Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

6. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)

State	Signature	Ratification Accession	Entry into force
France	15 October 1991		
Mexico	19 April 1991		
Philippines	19 April 1991		
Spain	19 April 1991		
United States of America	30 April 1992		

Signatures only: 5; ratifications and accessions necessary to bring the Convention into force: 5

7. UNCITRAL Model Law on International Commercial Arbitration (1985)

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Australia, *Bermuda*, Bulgaria, Canada (by the Federal Parliament and by the Legislatures of all Provinces and Territories), Cyprus, *Egypt*, *Finland*, Hong Kong, *Mexico*, Nigeria, Peru, *Russian Federation*, Scotland, Tunisia and, within the United States of America, California, Connecticut, Oregon and Texas.

8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

State	Signature	Ratification Accession Succession (*)
Algeria ^{1, 2}		7 February 1989
Antigua and Barbuda ^{1, 2}		2 February 1989
Argentina ^{1, 2, 7}	26 August 1958	14 March 1989
Australia		26 March 1975
Austria		2 May 1961
Bahrain ^{1, 2}		6 April 1988
Bangladesh		6 May 1992
Barbados ²		16 March 1993
Belarus ^{1, 3}	29 December 1958	15 November 1960
Belgium ¹	10 June 1958	18 August 1975
Benin		16 May 1974
Bosnia and Herzegovina ^{1, 2, 6}		6 March 1992*
Botswana ^{1, 2}		20 December 1971
Bulgaria ^{1, 3}	17 December 1958	10 October 1961
Burkina Faso		23 March 1987
Cambodia		5 January 1960
Cameroon		19 February 1988
Canada ⁴		12 May 1986
Central African Republic ^{1, 2}		15 October 1962
Chile		4 September 1975
China ^{1, 2}		22 January 1987
Colombia		25 September 1979
Costa Rica	10 June 1958	26 October 1987
Côte d'Ivoire		1 February 1991
Croatia ^{1, 2, 6}		26 July 1993*
Cuba ^{1, 2, 3}		30 December 1974
Cyprus ^{1, 2}		29 December 1980
Czech Republic ⁴		30 September 1993*
Denmark ^{1, 2}		22 December 1972
Djibouti		14 June 1983
Dominica		28 October 1988
Ecuador ^{1, 2}	17 December 1958	3 January 1962
Egypt		9 March 1959
El Salvador	10 June 1958	
Estonia		30 August 1993
Finland	29 December 1958	19 January 1962
France ¹	25 November 1958	26 June 1959
Germany ^{4, 1}	10 June 1958	30 June 1961
Ghana		9 April 1968
Greece ^{1, 2}		16 July 1962
Guatemala ^{1, 2}		21 March 1984
Guinea		23 January 1991
Haiti		5 December 1983
Holy See ^{1, 2}		14 May 1975
Hungary ^{1, 2}		5 March 1962
India ^{1, 2}	10 June 1958	13 July 1960
Indonesia ^{1, 2}		7 October 1981
Ireland ¹		12 May 1981
Israel	10 June 1958	5 January 1959
Italy		31 January 1969
Japan ¹		20 June 1961
Jordan	10 June 1958	15 November 1979
Kenya ¹		10 February 1989
Kuwait ¹		28 April 1978
Latvia		14 April 1992
Lesotho		13 June 1989

<i>State</i>	<i>Signature</i>	<i>Ratification Accession Succession (*)</i>
Luxembourg ¹	11 November 1958	9 September 1983
Madagascar ^{1, 2}		16 July 1962
Malaysia ^{1, 2}		5 November 1985
Mexico		14 April 1971
Monaco ^{1, 2}	31 December 1958	2 June 1982
Morocco ¹		12 February 1959
Netherlands ¹	10 June 1958	24 April 1964
New Zealand ¹		6 January 1983
Niger		14 October 1964
Nigeria ^{1, 2}		17 March 1970
Norway ^{1, 5}		14 March 1961
Pakistan	30 December 1958	
Panama		10 October 1984
Peru		7 July 1988
Philippines ^{1, 2}	10 June 1958	6 July 1967
Poland ^{1, 2}	10 June 1958	3 October 1961
Republic of Korea ^{1, 2}		8 February 1973
Romania ^{1, 2, 3}		13 September 1961
Russian Federation ^{1, 3}	29 December 1958	24 August 1960
San Marino		17 May 1979
Saudi Arabia		19 April 1994
Singapore ¹		21 August 1986
Slovakia ¹		28 May 1993*
Slovenia ^{1, 2, 6}		25 June 1991*
South Africa		3 May 1976
Spain		12 May 1977
Sri Lanka	30 December 1958	9 April 1962
Sweden	23 December 1958	28 January 1972
Switzerland ^{1, 6}	29 December 1958	1 June 1965
Syrian Arab Republic		9 March 1959
Thailand		21 December 1959
<i>The former Yugoslav Republic of Macedonia^{1, 2, 6}</i>		10 March 1994*
Trinidad and Tobago ^{1, 2}		14 February 1966
Tunisia ^{1, 2}		17 July 1967
Turkey ^{1, 2}		2 July 1992
Uganda ¹		12 February 1992
Ukraine ^{1, 3}	29 December 1958	10 October 1960
United Kingdom of Great Britain and Northern Ireland ¹		24 September 1975
United Republic of Tanzania ¹		13 October 1964
United States of America ^{1, 2}		30 September 1970
Uruguay		30 March 1983
Yugoslavia ^{1, 2, 6}		26 February 1982

Signatures only: 2; ratifications, accessions and successions: 96

¹The Convention was signed by the former Czechoslovakia on 3 October 1958 and an instrument of ratification was deposited on 10 July 1959.^{1, 3} On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession.

²The Convention was acceded to by the former German Democratic Republic on 20 February 1975 with reservations 1, 2 and 3.

³The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

Declarations and reservations

(Excludes territorial declarations and certain other reservations
and declarations of a political nature)

¹State will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.

²State will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law.

³With regard to awards made in the territory of non-contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.

⁴The Government of Canada has declared that Canada will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation.

⁵State will not apply the Convention to differences where the subject-matter of the proceedings is immovable property situated in the State, or a right in or to such property.

⁶State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

⁷The present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution.

⁸On 23 April 1993, the Government of Switzerland notified the Secretary-General its decision to withdraw the declaration it had made upon ratification.

B. Status of the Hamburg Rules: note by the Secretariat

(A/CN.9/401/Add.1) [Original: English]

CONTENTS

	Paragraphs
INTRODUCTION.....	1-4
A. Regime intended to be replaced by the Hamburg Rules	5-9
B. Some major differences between Hamburg and Hague regimes	10-26
C. Some problems caused by coexistence of Hamburg and Hague regimes	27-34
CONCLUSIONS.....	35-40

INTRODUCTION

1. The United Nations Convention on the Carriage of Goods by Sea, 1978 ("Hamburg Rules") was adopted on 31 March 1978 at the universal diplomatic conference held at Hamburg.¹ Sixty-eight States voted for the Convention, three abstained and none voted against. Until 30 April 1979, the time-limit for signature, 27 States had signed it. After 20 States had become party to it, the Convention entered into force on 1 November 1992. Since then two more States have acceded to it.

2. The initiatives that led to the preparation of the Convention were taken at about the same time in 1968 in the context of the United Nations Conference on Trade and Development (UNCTAD) and UNCITRAL. After initial consideration in the two organizations, UNCITRAL was eventually called upon by the General Assembly to perform the preparatory work, which culminated in the diplomatic conference at Hamburg.

3. The General Assembly, after previous similar calls, adopted on 9 December 1993 resolution 48/34, in which it invited all States to consider becoming parties to the Hamburg Rules, and requested the Secretary-General to continue to make increased efforts to promote wider adherence to the Convention.

4. The purpose of this note is to summarize the changes resulting from the entry into force of the Hamburg Rules so as to facilitate the Commission's considerations concerning steps to be taken to accelerate the process of adhesion to the Hamburg Rules.

A. Regime intended to be replaced by the Hamburg Rules

5. The purpose of preparing the Hamburg Rules was to establish a modern and fair liability system for the carriage of goods by sea. The new system was intended to replace the regime based on the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924) ("Hague Rules").

6. The regime based on the Hague Rules is not uniform. Some States are party only to the original Hague Rules, while some others have adhered to the "Hague-Visby Rules", i.e., the Hague Rules as amended by the Protocol

¹Published in *United Nations Conference on the Carriage of Goods by Sea, Official Records, A/CONF.89/14* (United Nations publication, Sales No. E.80.VIII.1) (Final Act of the Conference, A/CONF.89/13); in *United Nations Commission on International Trade Law: Yearbook, volume IX: 1978, part three, I, B*; and in a brochure available from the secretariat of the Commission.

of 23 February 1968. In addition, a limited number of States are party to the Protocol of 21 December 1979 to the Hague-Visby Rules, which introduced Special Drawing Rights (SDR) for expressing the financial limits of the carrier's liability.

7. A further degree of disharmony in the regime based on the Hague Rules results from the fact that the manner in which States have incorporated the Hague or Hague-Visby Rules in their legislation has not been uniform in that in many cases the scope of application of the Rules has been expanded. Moreover, as noted below in paragraph 17, the divergent standards of conversion of the provisions of the Hague regime concerning the financial limits of liability has led to widely discrepant liability limits.

8. Additional uncertainty regarding the Hague regime stems from the fact that some States have modelled their legislation wholly or partly on the Hague Rules or Hague-Visby Rules without becoming parties to them. In recent years some States have adopted, and presently some other States are about to adopt, laws that combine elements from the Hague regime and the Hamburg Rules; those laws, however, do not follow a uniform approach in combining the two regimes.

9. For situations in which the Hague regime does not apply, transport documents often contain clauses ("paramount clauses") according to which the Hague Rules or, less frequently, the Hague-Visby Rules apply as contractually agreed rules.

B. Some major differences between Hamburg and Hague regimes

10. The scope and purpose of this document do not permit a full description of the differences between the Hamburg Rules and the regime based on the Hague or Hague-Visby Rules. However, for the purposes of general information and orientation, some of the main differences are noted in the following paragraphs.²

Scope of application

11. The Hamburg Rules apply to all contracts of carriage by sea between two different States provided that the port of loading, the port of discharge or the place where the bill of lading or other transport document has been issued is located in a Contracting State. The Hamburg Rules apply

irrespective of whether a bill of lading or other transport document has been issued.

12. By their terms, the Hague Rules apply only to bills of lading issued in a Contracting State. The Hague-Visby Rules apply to bills of lading relating to the carriage of goods between different States, provided the bill of lading is issued in a Contracting State, the carriage is from a port in a Contracting State, or the parties have agreed to the application of the Convention. The Hague and Hague-Visby Rules do not apply when a transport document other than a bill of lading is issued in connection with the carriage.

Period of responsibility

13. The mandatory liability regime of the Hamburg Rules covers the period from the time the carrier takes the goods in charge at the port of loading until the time the carrier delivers the goods at the port of discharge. Thus, the Hamburg liability regime extends beyond the actual carriage, to the extent the carrier keeps the goods in its charge in the port before they are loaded or after they are unloaded.

14. The mandatory liability regime of the Hague Rules and the Hague-Visby Rules commences when the goods are loaded onto the ship and ends when they are discharged from the ship. This means that the carrier's liability under the Hague regime does not apply beyond the defined limits even if the carrier has goods in its charge before they are loaded onto the ship or after they were unloaded from the ship.

"Nautical fault"

15. Under the Hague and Hague-Visby Rules the carrier is free from liability when the loss or damage arose from an act, even if it was a negligent act, in the navigation or in the management of the ship. The Hamburg Rules, in line with the international treaties governing the other modes of transport, do not exonerate the carrier from negligence in such cases.

Financial limits of liability

16. Under the Hamburg Rules, the liability of the carrier is limited to 835 Special Drawing Rights (SDR) per shipping unit or 2.5 SDR per kilogram of the goods, whichever is the higher.

17. The Hague and Hague-Visby Rules specify the financial limits in monetary units of gold value. In practice, however, the liability limits differ widely as a result of differing methods of conversion of those monetary units into national currencies. In some States the market value of gold is used as the standard of conversion while other standards are used elsewhere. Where the market value of gold is used, the resulting limits of liability are considerably higher than the limits specified in the Hamburg Rules.

18. The 1979 Protocol to the Hague-Visby Rules sets the limit at 666.67 SDR per shipping unit or 2 SDR per kilogram of goods, whichever is the higher.

²More comprehensive studies of the differences are contained, for example, in the following publications: United Nations Conference on Trade and Development, "The economic and commercial implications of the entry into force of the Hamburg Rules and the Multimodal Transport Convention" (TD/B/C.4/315 (part I)); "United Nations Convention on the Carriage of goods by Sea, 1978 (Hamburg): note by the Secretariat" (A/CN.9/306) (reproduced in *United Nations Commission on International Trade Law: Yearbook*, volume XIX: 1988, part two, IV); the explanatory documentation prepared for Commonwealth Jurisdictions by H.M. Joko Smart in association with the Commonwealth Secretariat, *United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)*, 1989; and John O. Honnold, "Ocean carriers and cargo: clarity and fairness—Hague or Hamburg?", *Journal of Maritime Law and Commerce*, vol. 24, No. 1 (January 1993), pp. 75-109.

Deck cargo

19. Under the Hague regime the carrier is not liable for cargo carried on deck under a bill of lading that states that the cargo is so carried. In practice, the carrier's liability in such cases is left to contractual stipulations, which, however, are not subject to the mandatory rules of an international treaty.

20. The Hamburg Rules, taking into account modern transport techniques, which often involve stowing containerized goods on deck, provide suitable rules for deck cargo.

Delay

21. The Hamburg Rules provide for a mandatory liability for delay in delivery of goods. The financial limit for such liability is two and a half times the freight payable for the goods delayed. The Hague and Hague-Visby Rules do not provide for liability for delay.

Liability of actual carrier

22. The Hamburg Rules, as do international conventions for the carriage of goods by air and the carriage of passengers by sea, govern the liability of both the "contractual carrier" (i.e. the carrier with whom the consignor concluded a contract for the carriage of those goods) as well as the liability of the "actual carrier" (i.e. a carrier whom the contractual carrier engaged to perform a part of or the whole carriage contracted for by the consignor). Essentially, the Hamburg Rules make the contractual carrier liable for the whole carriage, including the part of carriage performed by the actual carrier, while enabling the cargo owner to hold also the actual carrier liable for its part of the carriage.

23. The Hague and Hague-Visby Rules do not deal with the liability of the actual carrier who has not issued a bill of lading to the consignor. This means that under the Hague regime the contractual carrier has a possibility to include in the bill of lading a clause entitling the carrier to subcontract a part or even the whole voyage and at the same time excluding the liability for the subcontracted part of the voyage.

"Paramount clause"

24. According to the Hamburg Rules, the transport document must contain a statement that the carriage is subject to those provisions of the Hamburg Rules which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee. Furthermore, it is provided that the carrier must pay compensation to the claimant who has incurred loss as a result of the omission of that required statement. The Hague or Hague-Visby Rules do not contain a similar requirement.

Jurisdiction and arbitration

25. The Hamburg Rules have mandatory provisions on jurisdiction and arbitration, according to which the claimant, at its option, may institute an action in a court (or may initiate arbitration, if arbitration has been agreed upon)

at one of the following places: the place of business of the defendant; the place where the transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; the port of loading; the port of discharge; or any other agreed place.

26. The Hague or Hague-Visby Rules do not contain rules on jurisdiction or arbitration. This has led to the common inclusion of clauses in bills of lading requiring any claim to be brought at the carrier's place of business. Since such clauses may be unfair towards the cargo owner, a number of national laws have established mandatory restrictions on such jurisdiction clauses.

C. Some problems caused by coexistence of Hamburg and Hague regimes

27. Until the Hague liability regime is replaced by the regime of the Hamburg Rules, conflicts of jurisdictions and practical problems will arise, in particular in voyages between States adhering to different regimes.

28. When the carriage is from a State party to the Hague Rules or Hague-Visby Rules to a State party to the Hamburg Rules, the liability regime will depend on where the action is brought. If it is brought in the State of the port of loading, the court will apply the Hague regime; if the transport document contains a clause providing for the applicability of the Hamburg Rules (above, paragraph 24), the effectiveness of the clause will depend on whether the State concerned has enacted the provisions on the scope of application of the Hague regime as mandatory law. If the action is brought in the State of the port of discharge, the Hamburg Rules will be applied.

29. In the case of the carriage from a State party to the Hamburg Rules to a State party to the Hague Rules or Hague-Visby Rules, the court in the State of the port of loading will apply the Hamburg Rules. The court in the State of the place of discharge may apply the Hague or Hague-Visby Rules if the State has extended the applicability of the Hague or Hague-Visby regime to inbound cargo, which many States have done. If the Hague or Hague-Visby Rules have not been so extended, the court at the place of discharge will apply its conflict-of-laws rules to determine the applicable regime.

30. Several undesirable consequences arise from the possibility that a given dispute may fall within the jurisdiction of different States applying different regimes. One is that the claimant may choose to bring the action in a particular jurisdiction in order to obtain the applicability of a legal regime thought to be the most favourable to the claimant or merely to pre-empt the other party from bringing an action in another, less favourable jurisdiction. Such "forum shopping" is wasteful, might result in concurrent proceedings possibly with inconsistent decisions, and might lead to uncertainty in the recognition and enforcement of arbitral or court decisions.

31. Another possible consequence is that various parts of cargo carried in a single vessel are subject to different liability regimes, depending on the States in which the

particular parts of the cargo were loaded or discharged, or where the documents evidencing the contracts of carriage for the different parts of the cargo were issued. Such mixing of regimes is undesirable from a managerial point of view, as, for example, it hinders the use of uniform transport documentation that would be in harmony with the underlying liability regime.

32. A further consequence is that, in the case of a chartered ship, the shipowner, who often does not know in advance where the charterer will employ the ship, does not know when it can be held liable as the actual carrier under the Hamburg Rules.

33. Yet another consequence is related to the assessment that, on balance, the users of transport services enjoy a better liability protection under the Hamburg Rules than under the Hague regime. Thus, a State continuing to be party to the Hague regime will increasingly be seen as maintaining a situation in which the carriers from that State are providing to the cargo owners using ports in that State a less favourable regime than to those foreign cargo owners who can rely on the Hamburg Rules.

34. The ability of parties themselves to avoid those consequences by stipulating the applicability of the Hamburg Rules is limited. One limitation is that P & I Clubs (mutual transport-liability insurance entities owned by the carriers), in the context of their efforts to block enactment or use of the Hamburg Rules, have declared that if a carrier voluntarily adopts the Hamburg Rules for a voyage to which the Rules do not compulsorily apply, the carrier's cover will be prejudiced. Another limitation arises from the fact that, with respect to certain limited but commercially important issues, the Hague liability regime is more favourable for the cargo owner than the Hamburg Rules. Since the minimum level of liability prescribed in the Hague regime is mandatory, the effectiveness of stipulations in favour of the Hamburg Rules may be called into question. For example, the provisions on liability for fire appear, as regards the burden of proof, more favourable for the cargo owner in the Hague or Hague-Visby Rules than in the Hamburg Rules. Another such case are the financial limits of liability, which, as noted above in paragraph 17, are lower under the Hamburg Rules than under the Hague Rules and Hague-Visby Rules in those States where the market value of gold is used as the standard of conversion of the limitation amounts.

CONCLUSIONS

35. The described problems will gradually cease to occur to the extent the disparate and to a significant degree outdated Hague regime is being replaced by the modern Hamburg Rules. The pace of that replacement, however, has been slow, apparently to a large extent due to viewpoints such as the following.

36. In many States, including States with sizeable merchant fleets, the opinion has been expressed that, while the Hamburg Rules constitute the most modern and optimal regime, adherence to the Hamburg Rules should be deferred until certain other States have adhered to the Rules. The usual argument is that legislative action should be postponed until the Hamburg Rules have been accepted by particular States with which the State in question maintains close maritime trade links. Such an attitude may have been the most important reason for the slow progress in the acceptance of the Hamburg Rules.

37. Some persons have raised the idea that, since the carriers in some countries oppose the adherence to the Hamburg Rules, an attempt should be made to revise the Hamburg Rules. It will be noted, however, that a revision would increase the disparity of laws by adding a new treaty to the existing ones without any assurance that uniformity of law would be achieved in that way. It should be recalled that the legislative process leading to the Hamburg Rules involved all the interest groups and a truly universal representation of States; during that process, all arguments were weighed, well-considered concessions and counter-concessions were made, and the result of the negotiations met, as noted above in paragraph 1, with a broadly based approval. In view of those circumstances, it appears to be unwise to attempt to repeat the negotiations.

38. A further view, which has been directed to some States party to the Hague Rules or Hague-Visby-Rules, is that, until the Hamburg Rules are widely adopted, those States, in order to modernize their law, may want to add to their existing legislation certain provisions based on the Hamburg Rules, to the extent they are not in conflict with the Hague Rules or the Hague-Visby Rules. As noted above in paragraph 8, some States have indeed adopted or are about to adopt laws combining the provisions of the Hague regime and the provisions of the Hamburg Rules. The serious problem with this approach is that it increases the disparity of laws to a level at which the international carriers and their customers cannot rely on an international treaty to ascertain their rights and obligations. Moreover, for States party to the Hague Rules or Hague-Visby Rules it may be open to debate as to whether a provision transposed from the Hamburg Rules to the Hague regime is in conflict with the international obligations arising from the Hague regime.

39. The above views are sometimes combined with strong lobbying campaigns against the Hamburg Rules which include arguments that are inaccurate, unproven or exaggerated.

40. It appears that, in order to accelerate the process of modernization and harmonization of the laws on carriage of goods by sea and to overcome the delaying effect of the above-mentioned viewpoints, a concerted and decisive action of States is necessary. The Commission may wish to consider how to achieve such a concerted action.

X. TRAINING AND ASSISTANCE

Training and technical assistance: note by the Secretariat (A/CN.9/400) [Original: English]

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-2
I. UNCITRAL SEMINARS	3-6
II. OTHER SEMINARS, CONFERENCES, COURSES AND WORKSHOPS ...	7
III. TECHNICAL ASSISTANCE	8
IV. FUTURE ACTIVITIES	9-12
A. Training and technical assistance	9-11
B. Coordination of training and technical assistance with other organizations	12
V. INTERNSHIP PROGRAMME	13
VI. FINANCIAL AND ADMINISTRATIVE CONSIDERATIONS	14-17
	<i>Page</i>
<i>Annex. Sample programme of UNCITRAL Seminar on International Trade Law ..</i>	302

INTRODUCTION

1. The purpose of the training and technical assistance activities of the Commission is generally to disseminate information on international commercial law to lawyers, government officials, the commercial and trading community, judges, arbitrators and scholars, particularly from developing countries. In those activities, the particular focus is on the legal texts that have emanated from the work of UNCITRAL, although information is also provided on certain texts of other organizations relevant to international commercial law. A principal way in which dissemination of information about the work and legal texts of UNCITRAL takes place is through the holding of seminars focusing on those legal texts. Those seminars, as well as other UNCITRAL training and assistance activities, are designed to explain the background and salient features of the texts. They also provide an opportunity to consider the trade and investments benefits that can be derived from adopting trade legislation based on internationally developed model laws and adhering to conventions that have been elaborated taking into account the interests and views of States from all regions, rather than, for example, modelling a legal regime for international trade solely on the national law of another State. Technical assistance takes the form in particular of consultations designed to assist Governments preparing legislation based on UNCITRAL model laws or considering

adhesion to UNCITRAL conventions, including, for example, reviews of preparatory drafts of legislation from the viewpoint of UNCITRAL model laws and comments on reports of law reform commissions.

2. This note sets out activities of the Secretariat subsequent to the twenty-sixth session of the Commission (1993) and discusses possible future activities. It may be noted at the outset that there has been in the past year a continuing and increasing demand for training and technical assistance from the UNCITRAL secretariat, particularly from developing countries, newly independent States, and States whose economies are in transition. This increasing demand reflects an upsurge in those States in law reform relating to international trade. The Secretariat has made every effort during that period to accommodate the increasing demand for training and technical assistance, but it was unable to meet more than a portion of the demand and the needs of those States, due to a severe shortage of financial and human resources.

I. UNCITRAL SEMINARS

3. As indicated below, since the previous session, the Secretariat organized seminars in a number of States. The lectures at UNCITRAL seminars provide information on the basic elements and rules of the major international

uniform legal texts in the principal subject areas of international trade law, focusing on the conventions, model laws, contract rules and legal guides of UNCITRAL, but also providing information on important legal texts formulated by other international organizations involved in the harmonization of international trade law (e.g., the Uniform Customs and Practice for Documentary Credits and INCOTERMS, both formulated by ICC, and the Factoring, Financial Leasing, and Agency Conventions of UNIDROIT. The main subject areas include international sale of goods, international transport and storage of goods, banking and international payments, government purchasing and international dispute settlement. (More detailed information concerning the content of a typical UNCITRAL seminar is presented in the annex to this note, in the form of a sample programme for a three-day seminar).

4. Lectures at UNCITRAL seminars are generally given by one or two members of the Secretariat, by experts from the host countries and occasionally by external consultants, who receive only a symbolic fee, if any at all. The seminars are attended by government officials, in particular from interested ministries such as trade, foreign affairs, justice and transport, practising lawyers, judges, officials from arbitral institutions, members of the commercial and trading community and academics. After the seminars, the UNCITRAL secretariat remains in close contact with seminar participants in order to provide the host countries with the maximum possible support during the contemplation and legislative process relating to the adoption and use of UNCITRAL legal texts.

5. The following is a list of the national seminars that have taken place since the previous session:

(a) *Mongolia (23-24 September 1993)*, held in cooperation with the Government of Mongolia, and attended by approximately 30 participants;

(b) *Karachi, Pakistan (29-30 September 1993)*, held in cooperation with the Training Institute of the Customs Authority and the Research Society for International Law, and attended by approximately 35 participants;

(c) *Bishkek, Kyrgyzstan (5-7 October 1993)*, held in cooperation with the Government of Kyrgyzstan, and attended by approximately 15 participants;

(d) *Buenos Aires, Argentina (20-21 October 1993)*, held in cooperation with the Government of Argentina, and attended by approximately 130 participants;

(e) *Rio de Janeiro, Brazil (25-26 October 1993)*, lectures on UNCITRAL texts held in cooperation with Candido Mendes University and PETROBRAS, and attended by approximately 65 participants;

(f) *Istanbul, Turkey (25-27 April 1994)*, held in cooperation with Marmara University and the Union of Turkish Chambers of Commerce, and attended by approximately 50 participants.

6. The following regional seminar has taken place since the previous session:

Colombo, Sri Lanka, 13-16 September 1993, at which time a four-day UNCITRAL seminar was held within the framework of the biennial conference of The Law Association for Asia and the Pacific (LAWASIA), LAWASIA'93.

II. OTHER SEMINARS, CONFERENCES, COURSES AND WORKSHOPS

7. Members of the UNCITRAL secretariat have participated as speakers in the following seminars and courses where UNCITRAL legal texts were presented for examination and discussion:

Twelfth Course of the International Association of Law Libraries (Barcelona, 17-21 August 1993);

Pacific Economic Cooperation Council (PECC) Meeting on Harmonization of International Trade Law Instruments (Singapore, 9-10 September 1993);

First International Conference on Commercial Arbitration in Croatia and Slovenia, sponsored by the Croatian Chamber of Commerce (Zagreb, 8-10 December 1993);

Worldwide Electronic Commerce—Law Policy and Controls Conference sponsored by the American Bar Association (New York, 17-18 January 1994);

Thirty-third Session of the Asian-African Legal Consultative Committee (AALCC) (Tokyo, 17-21 January 1994);

"L'échange de données informatisé, entreprises-banques" sponsored by Forum du droit et des affaires (Paris, 26-27 January 1994);

Third lawyers' conference (SAARCLAW) of the South Asian Association for Regional Cooperation (SAARC) (New Delhi, 26-27 January 1994);

"Reforming and Modernizing Procurement Rules" sponsored by the Cairo Regional Centre for International Commercial Arbitration and the International Law Institute of Washington, D.C. (Cairo, 29-31 January 1994);

International Arbitration Conference sponsored by EKIURIS Ltd. (Company for Economic and Legal Studies) (Moscow, 31 January-2 February 1994);

1994 Annual Survey of Letter of Credit Law and Practice, sponsored by the Institute of International Banking Law and Practice, Letter of Credit UPDATE, and the United States Council on International Banking (New York, 24-25 February 1994);

Slovak National Seminar in Support of Public Procurement sponsored by SIGMA and the Slovak Ministry of Transport, Communications and Public Works (Bratislava, 2-3 February 1994);

UN/ECE Working Party on Facilitation of International Trade Procedures (WP.4) (Geneva, 14-18 March 1994);

Colloquium on Cross-Border Insolvency, co-sponsored by the secretariat of UNCITRAL and INSOL International (Vienna, 17-19 April 1994) (for further information, see A/CN.9/398);

Briefings in Support of Public Procurement Legislation, sponsored by the Public Procurement Unit of the Office of the Polish Council of Ministers (Warsaw, 26-27 April 1994);

Arbitrators' Symposium of the London Court of International Arbitration (Budapest, 29 April-1 May 1994).

III. TECHNICAL ASSISTANCE

8. The Secretariat has continued to provide technical assistance to States that are considering adhesion to Conventions formulated by UNCITRAL and that are preparing legislation based on UNCITRAL model laws. For example,

consultations were held with Governments concerning technical questions that arose during their consideration of adhesion to the United Nations Convention on Contracts for the International Sale of Goods, the United Nations Convention on the Limitation Period in the International Sale of Goods, and the United Nations Convention on the Carriage of Goods by Sea, 1978. Consultations were held for the purpose of providing technical assistance and information to States considering the UNCITRAL Model Laws on International Commercial Arbitration, International Credit Transfers, and Procurement of Goods and Construction. The Secretariat has responded to a considerable number of requests for review of draft legislation and for comments on reports of law-reform commissions relating to UNCITRAL legal texts, and requests for information concerning the establishment of arbitration centres using the UNCITRAL Arbitration Rules.

IV. FUTURE ACTIVITIES

A. Training and technical assistance

9. The Secretariat will make efforts to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade law, especially for developing countries and newly independent States. For the remainder of 1994, seminars and legal-assistance briefing missions are being planned in Africa, Asia, Latin America, eastern Europe and Asia. The Secretariat may be requested to provide such a briefing mission when, for example, a developing country or newly independent State is considering the role that UNCITRAL legal texts are to play in its law reform. It should be emphasized that the ability of the Secretariat to implement these plans is contingent upon the receipt of sufficient funds in the form of contributions to the UNCITRAL Trust Fund.

10. The Secretariat agreed to co-sponsor the three-month International Trade Law Post-Graduate Course to be organized in 1994 by the University of Turin Institute of European Studies and the International Training Centre of the International Labour Organisation at Turin. In 1994, the fourth year in which the course is being offered, 20 of the participants are expected to be from Italy and 26 from outside of Italy, with 16 of those being from developing countries. Issues of harmonization of international trade law and various items on the Commission's work programme are covered in the course.

11. A two-day programme focusing on the United Nations Commission on International Trade Law is to take place in New York, 25-26 May 1994. That programme is organized by the Union Internationale des Avocats, sponsored by the American Bar Association, the Association of the Bar of the City of New York and the New York Country Lawyers Association, and hosted by the School of Law of Fordham University.

B. Coordination of training and technical assistance with other organizations

12. It may be noted that the General Assembly at its forty-eighth session appealed to the United Nations

Development Programme and other United Nations bodies responsible for development assistance to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission. It is the intention of the Secretariat to explore concrete steps that might be taken to establish such cooperation and coordination. At a time when there appears to be increased attention being paid to law reform as an integral component of development aid, cooperation and coordination, in particular with aid agencies within the United Nations system, are essential to ensure the appropriate dissemination of information concerning the legal texts formulated by UNCITRAL when States receive law-reform assistance from entities within the United Nations system.

V. INTERNSHIP PROGRAMME

13. The internship programme is designed to enable persons who have obtained a law degree to serve as interns in the International Trade Law Branch of the Office of Legal Affairs, which functions as the secretariat of the Commission. Interns are assigned specific tasks in connection with projects being worked on by the Secretariat. Persons participating in the programme are able to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law. In addition, the Secretariat occasionally accommodates research in the Branch and in the UNCITRAL Law Library by scholars and legal practitioners for a limited period of time. Unfortunately, no funds are available to the Secretariat to assist interns to cover their travel or other expenses. Interns are often sponsored by an organization, university or a government agency, or they meet their expenses from their own means. During the past year the Secretariat has received four interns, originating from Australia, China and Germany.

VI. FINANCIAL AND ADMINISTRATIVE CONSIDERATIONS

14. In particular in recent years, the Secretariat has endeavoured to devise a more extensive training and technical assistance programme. This has been in response to a considerably greater demand from States for training and assistance, as well as to the call of the Commission at the twentieth session (1987) for an increased emphasis both on training and assistance and on the promotion of the legal texts prepared by the Commission.¹ It was recognized that the holding of seminars and symposia in developing countries would increase the awareness of universally acceptable international trade law instruments that offer the benefit of removing impediments to international trade caused by disparities and inadequacies of national laws. In recent years, the need for increased training and technical assistance from UNCITRAL has been compounded by the appearance of a large number of countries whose economies are in transition, a process in which reform of

¹Report of the United Nations Commission on International Trade Law on the work of its twentieth session, *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

laws affecting international trade plays an important part. Furthermore, the need for increased training and assistance activities centered on the UNCITRAL legal texts was given particular emphasis by speakers at the UNCITRAL Congress on International Trade Law, which was held as part of the twenty-fifth session of the Commission (1992).

15. As has been pointed out above, and in similar notes in previous years, the programme of training and assistance, in particular the holding of seminars, depends on the continued availability of sufficient financial resources. No funds for the travel expenses of lecturers or participants are provided for in the regular budget. As a result, expenses have to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia. Of particular value are contributions made to that Trust Fund on a multi-year basis, because they permit the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. Such a contribution has been received from Canada. In addition, contributions from France and Switzerland have been used for the seminar programme. The Commission may wish to express its appreciation to those States and organizations that have contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars.

16. The planning and implementation of UNCITRAL training and technical assistance activities have been hampered by the fact that no additional States have made contributions, some existing contributors have reduced the level of their contributions, and some other States have discontinued their contributions or have informed the Secretariat that contributions would be discontinued in the future. Particular attention may be drawn to the fact that the funds needed for efficient training and technical assistance in the area of international trade law and the dissemination of information concerning the legal texts prepared by the Commission are comparatively small amounts, but without those funds the relatively large expenditures of the Organization and its Member States on the preparation of the legal texts in question may fail to achieve the intended result of unification and harmonization of international trade law.

17. In view of the above, the Commission may again wish to appeal to all States to consider making contributions to the UNCITRAL Trust Fund for Symposia so as to enable the Secretariat to meet the increasing demands in developing countries and newly independent States for training and assistance. The Commission may also wish to appeal to aid agencies, particularly those in the United Nations system, for increased support, cooperation and coordination.

Annex

Sample Programme

UNCITRAL SEMINAR ON INTERNATIONAL TRADE LAW

First Day

09.00-10.00 Registration

Opening

10.00-10.30	Opening session and welcome address
10.30-11.15	UNCITRAL's history and activities
11.15-11.45	Break
11.45-12.30	Salient features of the United Nations Sales Convention
13.00-14.30	Lunch
14.30-15.00	UNCITRAL Legal Guide on International Countertrade Transactions
15.00-15.30	Comments by host-country specialists and discussion
15.30-15.45	Break
15.45-16.45	Other conventions and uniform rules on the international sale of goods (e.g. Prescription Convention (UNCITRAL), Agency, Factoring and Financial Leasing Conventions (UNIDROIT), Convention on Law Applicable to Contracts for the International Sale of Goods (Hague Conference on Private International Law), INCOTERMS (ICC))
17.15-18.00	Comments by host-country specialists and discussion

Second Day

Construction contracts

10.00-10.45	UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works
10.45-11.30	Comments by host-country specialists and discussion
11.30-12.00	Break

Government purchasing

12.00-12.30	UNCITRAL Model Law on Procurement; Guide to Enactment of the Model Law
12.30-13.00	Comments by host-country specialists and discussion
13.00-14.30	Lunch

Banking and payments

14.30-15.00	Salient features of the UNCITRAL Bills and Notes Convention
15.00-15.30	UNCITRAL Model Law on International Credit Transfers
15.30-16.00	Comments by host-country specialists and discussion
16.00-16.30	Break
16.30-17.15	Other legal texts on international payments and banking (e.g. Uniform Customs and Practice on Documentary Credits and Uniform Rules for Demand Guarantees and Stand by Letters of Credit)
17.15-18.00	Comments by host-country specialists and discussion

Third day

Transport of goods

10.00-11.00	From The Hague to Hamburg (A comparison of the Hague Rules and the Hamburg Rules)
11.00-11.30	Comments by host-country specialists and discussion
11.30-12.00	Break
12.00-12.30	Salient features of the Terminal Operators Convention

12.30-13.00	Comments by host-country specialists and discussion	15.45-16.15	Practical steps to foster arbitration in host-country
13.00-14.30	Lunch	16.14-16.45	Comments by host-country specialists and discussion
	Settlement of commercial disputes	16.45-17.00	Break
14.30-15.00	UNCITRAL Arbitration and Conciliation Rules		Final conclusions
15.00-15.45	UNCITRAL Arbitration Model Law; 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards	17.00-17.45	Conclusions drawn by host-country specialists and general discussion
		17.45-18.00	Closing of seminar

I. UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES*

PREAMBLE

WHEREAS the [Government] [Parliament] of . . . considers it desirable to regulate procurement of goods, construction and services 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, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;
- (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; and
- (f) Achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application*

- (1) This Law applies to all procurement by procuring entities, except as otherwise provided by paragraph (2) of this article.
- (2) Subject to the provisions of paragraph (3) of this article, this Law does not apply to:
 - (a) Procurement involving national defence or national security;
 - (b) . . . (the enacting State may specify in this Law additional types of procurement to be excluded); or
 - (c) Procurement of a type excluded by the procurement regulations.
- (3) This Law applies to the types of procurement referred to in paragraph (2) of this article where and to the extent that the procuring entity expressly so declares to suppliers or contractors when first soliciting their participation in the procurement proceedings.

*The UNCITRAL Model Law on Procurement of Goods, Construction and Services was adopted by the United Nations Commission on International Trade Law (UNCITRAL) at its twenty-seventh session, without thereby superseding the UNCITRAL Model Law on Procurement of Goods and Construction, adopted by the Commission at its twenty-sixth session. The present consolidated text consists of the provisions found in the Model Law on Procurement of Goods and Construction and provisions on procurement of services. The Commission has also issued a Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/403).

Article 2. *Definitions*

For the purposes of this Law:

- (a) "Procurement" means the acquisition by any means of goods, construction or services;
- (b) "Procuring entity" means:
 - (i) *Option I for subparagraph (i)*
Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except . . .; (and)
Option II for subparagraph (i)
Any department, agency, organ or other unit, or any subdivision 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");
- (c) "Goods" means 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; (the enacting State may include additional categories of goods)
- (d) "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;
- (e) "Services" means any object of procurement other than goods or construction; (the enacting State may specify certain objects of procurement which are to be treated as services)
- (f) "Supplier or contractor" means, according to the context, any potential party or the party to a procurement contract with the procuring entity;
- (g) "Procurement contract" means a contract between the procuring entity and a supplier or contractor resulting from procurement proceedings;
- (h) "Tender security" means a security provided to the procuring entity to secure the fulfilment of any obligation referred to in article 32(1)(f) and includes such arrangements as bank guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange;
- (i) "Currency" includes monetary unit of account.

Article 3. *International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]*

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 . . . (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. *Public accessibility of legal texts*

The text of this Law, procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained.

Article 6. *Qualifications of suppliers and contractors*

(1) (a) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings;

(b) In order to participate in procurement proceedings, suppliers or contractors must qualify by meeting such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

- (i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;
- (ii) That they have legal capacity to enter into the procurement contract;
- (iii) 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;
- (iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;
- (v) 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 disbarment proceedings.

(2) 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 such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (1)(b).

(3) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, 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 article.

(4) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations.

(5) Subject to articles 8(1), 34(4)(d) and 39(2), 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 on the basis of nationality, or that is not objectively justifiable.

(6) (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 be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity.

Article 7. *Prequalification proceedings*

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapter III, IV or V, suppliers and contractors that are qualified. The provisions of article 6 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to prequalify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of printing them and providing them to suppliers or contractors.

(3) The prequalification documents shall include, at a minimum:

(a) The following information:

- (i) Instructions for preparing and submitting prequalification applications;
- (ii) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

- (iii) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
 - (iv) The manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;
 - (v) 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 submission of applications to prequalify and to the prequalification proceedings; and
- (b) (i) In proceedings under chapter III, the information required to be specified in the invitation to tender by article 25(1)(a) to (e), (h) and, if already known, (j);
- (ii) In proceedings under chapter IV, the information referred to in article 38(a), (c), if already known, (g), (p) and (s).
- (4) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely submission of its application to prequalify. 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 provided the prequalification documents.
- (5) The procuring entity shall make a decision with respect to the qualifications of each supplier or contractor submitting an application to prequalify. In reaching that decision, the procuring entity shall apply only the criteria set forth in the prequalification documents.
- (6) The procuring entity shall promptly notify each supplier or contractor submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified. Only suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings.
- (7) The procuring entity shall upon request communicate to suppliers or contractors that have not been prequalified the grounds therefor, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.
- (8) The procuring entity may require a supplier or contractor that has been prequalified to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

Article 8. *Participation by suppliers or contractors*

- (1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in

cases in which the procuring entity decides, on grounds specified in the procurement regulations or according to other provisions of law, to limit participation in procurement proceedings on the basis of nationality.

(2) A procuring entity that limits participation on the basis of nationality pursuant to paragraph (1) of this article shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered. However, if it decides to limit participation pursuant to paragraph (1) of this article, it shall so declare to them.

Article 9. *Form of communications*

(1) Subject to other provisions of this Law and any requirement of form specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings, documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a supplier or contractor or by a supplier or contractor to the procuring entity shall be in a form that provides a record of the content of the communication.

(2) Communications between suppliers or contractors and the procuring entity referred to in articles 7(4) and (6), 12(3), 31(2)(a), 32(1)(d), 34(1), 36(1), 37(3), 44(b) to (f) and 47(1) may be made by a means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation.

(3) The procuring entity shall not discriminate against or among suppliers or contractors on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

Article 10. *Rules concerning documentary evidence provided by suppliers or contractors*

If the procuring entity requires the legalization of documentary evidence provided by suppliers or contractors to demonstrate their qualifications in procurement proceedings, 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.

Article 11. *Record of procurement proceedings*

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) A brief description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;

(b) The names and addresses of suppliers or contractors that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;

(c) Information relative to the qualifications, or lack thereof, of suppliers or contractors that submitted tenders, proposals, offers or quotations;

(d) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract, where these are known to the procuring entity;

(e) A summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference pursuant to articles 34(4)(d) and 39(2);

(f) If all tenders, proposals, offers or quotations were rejected pursuant to article 12, a statement to that effect and the grounds therefor, in accordance with article 12(1);

(g) If, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor;

(h) The information required by article 15, if a tender, proposal, offer or quotation was rejected pursuant to that provision;

(i) In procurement proceedings involving the use of a procurement method pursuant to paragraph (2) or subparagraph (a) or (b) of paragraph (3) of article 18, the statement required under article 18(4) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(j) In the procurement of services by means of chapter IV, the statement required under article 41(2) of the grounds and circumstances on which the procuring entity relied to justify the selection procedure used;

(k) In procurement proceedings involving direct solicitation of proposals for services in accordance with article 37(3), a statement of the grounds and circumstances on which the procuring entity relied to justify the direct solicitation;

(l) In procurement proceedings in which the procuring entity, in accordance with article 8(1), limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;

(m) A summary of any requests for clarification of the pre-qualification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

(2) Subject to article 33(3), the portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) of this article shall, on request, be made available to any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract.

(3) Subject to article 33(3), the portion of the record referred to in subparagraphs (c) to (g), and (m), of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract. Disclosure of the portion of the record referred to in subparagraphs (c) to (e), and (m), may be ordered at an earlier stage by a competent court. However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) Information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices, other than the summary referred to in paragraph (1)(e).

(4) The procuring entity shall not be liable to suppliers or contractors for damages owing solely to a failure to maintain a record of the procurement proceedings in accordance with the present article.

Article 12. *Rejection of all tenders, proposals, offers or quotations*

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval)), and if so specified in the solicitation documents or other documents for solicitation of proposals, offers or quotations, the procuring entity may reject all tenders, proposals, offers or quotations at any time prior to the acceptance of a tender, proposal, offer or quotation. The procuring entity shall upon request communicate to any supplier or contractor that submitted a tender, proposal, offer or quotation, the grounds for its rejection of all tenders, proposals, offers or quotations, but is not required to justify those grounds.

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have submitted tenders, proposals, offers or quotations.

(3) Notice of the rejection of all tenders, proposals, offers or quotations shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations.

Article 13. *Entry into force of the procurement contract*

(1) In tendering proceedings, acceptance of the tender and entry into force of the procurement contract shall be carried out in accordance with article 36.

(2) In all the other methods of procurement, the manner of entry into force of the procurement contract shall be notified to the suppliers or contractors at the time that proposals, offers or quotations are requested.

Article 14. *Public notice of procurement contract awards*

(1) The procuring entity shall promptly publish notice of procurement contract awards.

(2) The procurement regulations may provide for the manner of publication of the notice required by paragraph (1).

(3) Paragraph (1) is not applicable to awards where the contract price is less than [...].

Article 15. *Inducements from suppliers or contractors*

(Subject to approval by ... (the enacting State designates an organ to issue the approval)), a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it 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, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.

Article 16. *Rules concerning description of goods, construction or services*

(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, construction or services to be procured, and requirements concerning testing

and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services, that create obstacles to participation, including obstacles based on nationality, by suppliers or contractors in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

(2) To the extent possible, any specifications, plans, drawings, designs and requirements or descriptions of goods, construction or services shall be based on the relevant objective technical and quality characteristics of the goods, construction or services to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods, construction or services to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, construction or services to be procured shall be used, where available, in formulating any specifications, plans, drawings and designs to be included in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations.

Article 17. *Language*

The prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations shall be formulated in . . . (the enacting State specifies its official language or languages) (and in a language customarily used in international trade except where:

(a) The procurement proceedings are limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) 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).

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 18. *Methods of procurement**

(1) Except as otherwise provided by this chapter, a procuring entity engaging in procurement of goods or construction shall do so by means of tendering proceedings.

(2) In the procurement of goods and construction, a procuring entity may use a method of procurement other than tendering proceedings only pursuant to article 19, 20, 21 or 22.

(3) In the procurement of services, a procuring entity shall use the method of procurement set forth in chapter IV, unless the procuring entity determines that:

(a) It is feasible to formulate detailed specifications and tendering proceedings would be more appropriate taking into account the nature of the services to be procured; or

(b) It would be more appropriate (, subject to approval by . . . (the enacting State designates an organ to issue the approval),) to use a method of procurement referred to in articles 19 to 22, provided that the conditions for the use of that method are satisfied.

(4) If the procuring entity uses a method of procurement pursuant to paragraph (2) or subparagraph (a) or (b) of paragraph (3), it shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of that method.

Article 19. *Conditions for use of two-stage tendering, request for proposals or competitive negotiation*

(1) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of two-stage tendering in accordance with article 46, or request for proposals in accordance with article 48, or competitive negotiation in accordance with article 49, in the following circumstances:

(a) It is not feasible for the procuring entity to formulate detailed specifications for the goods or construction or, in the case of services, to identify their characteristics and, in order to obtain the most satisfactory solution to its procurement needs,

(i) It seeks tenders, proposals or offers as to various possible means of meeting its needs; or,

(ii) Because of the technical character of the goods or construction, or because of the nature of the services, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(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 goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) When the procuring entity applies this Law, pursuant to article 1(3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) When tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article 12, 15 or 34(3), and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings 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; or,

(b) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods.

Article 20. *Conditions for use of restricted tendering*

(Subject to approval by . . . (the enacting State designates an organ to issue the approval),) the procuring entity may, where necessary for reasons of economy and efficiency, engage in

*States may choose not to incorporate all these methods of procurement into their national legislation. On this question, see Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/403).

procurement by means of restricted tendering in accordance with article 47, when:

(a) The goods, construction or services, by reason of their highly complex or specialized nature, are 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 goods, construction or services to be procured.

Article 21. *Conditions for use of request for quotations*

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of a request for quotations in accordance with article 50 for the procurement of readily available goods or services that are not specially produced or provided to the particular specifications 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 amount set forth in the procurement regulations.

(2) A procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1) of this article.

Article 22. *Conditions for use of single-source procurement*

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in single-source procurement in accordance with article 51 when:

(a) The goods, construction or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, construction or services, and no reasonable alternative or substitute exists;

(b) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings or any other method of procurement 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;

(c) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) 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;

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

(f) The procuring entity applies this Law, pursuant to article 1(3), to procurement involving national defence or national security and determines that single-source procurement is the most appropriate method of procurement.

(2) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage

in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 34(4)(c)(iii) or 39(1)(d), provided that procurement from no other supplier or contractor is capable of promoting that policy.

CHAPTER III. TENDERING PROCEEDINGS

Section I. *Solicitation of tenders and of applications to prequalify*

Article 23. *Domestic tendering*

In procurement proceedings in which

(a) Participation is limited solely to domestic suppliers or contractors pursuant to article 8(1), or

(b) 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 submitting tenders,

the procuring entity shall not be required to employ the procedures set out in articles 24(2), 25(1)(h), 25(1)(i), 25(2)(c), 25(2)(d), 27(j), 27(k), 27(s) and 32(1)(c) of this Law.

Article 24. *Procedures for soliciting tenders or applications to prequalify*

(1) A procuring entity shall solicit tenders or, where applicable, applications to prequalify by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to tender or to prequalify is to be published).

(2) The invitation to tender or invitation to prequalify 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.

Article 25. *Contents of invitation to tender and invitation to prequalify*

(1) The invitation to tender shall contain, at a minimum, the following information:

(a) The name and address of the procuring entity;

(b) 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;

(c) 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;

(d) The criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article 6(1)(b);

(e) A declaration, which may not later be altered, that suppliers or contractors may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality pursuant to article 8(1), as the case may be;

(f) The means of obtaining the solicitation documents and the place from which they may be obtained;

(g) The price, if any, charged by the procuring entity for the solicitation documents;

(h) The currency and means of payment for the solicitation documents;

(i) The language or languages in which the solicitation documents are available;

(j) The place and deadline for the submission of tenders.

(2) An invitation to prequalify shall contain, at a minimum, the information referred to in paragraph (1)(a) to (e), (g), (h) and, if it is already known, (j), as well as the following information:

(a) The means of obtaining the prequalification documents and the place from which they may be obtained;

(b) The price, if any, charged by the procuring entity for the prequalification documents;

(c) The currency and terms of payment for the prequalification documents;

(d) The language or languages in which the prequalification documents are available;

(e) The place and deadline for the submission of applications to prequalify.

Article 26. *Provision of solicitation documents*

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified 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 printing them and providing them to suppliers or contractors.

Article 27. *Contents of solicitation documents*

The solicitation documents shall include, at a minimum, the following information:

(a) Instructions for preparing tenders;

(b) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 34(6);

(c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) The nature and required technical and quality characteristics, in conformity with article 16, of the goods, construction or services to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; any incidental services to be performed; the location where the construction is to be effected or the services are to be provided; and the desired or required time, if any, when the goods are to be delivered, the construction is to be effected or the services are to be provided;

(e) The criteria to be used by the procuring entity in determining the successful tender, including any margin of preference and any criteria other than price to be used pursuant to article 34(4)(b), (c) or (d) and the relative weight of such criteria;

(f) 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;

(g) If alternatives to the characteristics of the goods, construction, services, contractual terms and conditions or other requirements set forth 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 and compared;

(h) If suppliers or contractors are permitted to submit tenders for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which tenders may be submitted;

(i) 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 goods, construction or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes;

(j) The currency or currencies in which the tender price is to be formulated and expressed;

(k) The language or languages, in conformity with article 29, in which tenders are to be prepared;

(l) 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 submitting tenders, 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 materials bonds;

(m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security, a statement to that effect;

(n) The manner, place and deadline for the submission of tenders, in conformity with article 30;

(o) The means by which, pursuant to article 28, 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;

(p) The period of time during which tenders shall be in effect, in conformity with article 31;

(q) The place, date and time for the opening of tenders, in conformity with article 33;

(r) The procedures to be followed for opening and examining tenders;

(s) The currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 34(5) 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, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity;

(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) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(w) Notice of the right provided under article 52 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(x) If the procuring entity reserves the right to reject all tenders pursuant to article 12, a statement to that effect;

(y) Any formalities that will be required once a 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 36, 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;

(z) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings.

Article 28. *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 the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its tender 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 submission of tenders, 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 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 tenders.

Section II. Submission of tenders

Article 29. *Language of tenders*

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language that the procuring entity specifies in the solicitation documents.

Article 30. *Submission of tenders*

(1) The procuring entity shall fix the place for, and a specific date and time as the deadline for, the submission of tenders.

(2) If, pursuant to article 28, the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for the submission of tenders, extend the deadline if

it is not possible for one or more suppliers or contractors to submit their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5) (a) Subject to subparagraph (b), a tender shall be submitted in writing, signed and in a sealed envelope;

(b) Without prejudice to the right of a supplier or contractor to submit a tender in the form referred to in subparagraph (a), a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality;

(c) The procuring entity shall, on request, provide to the supplier or contractor a receipt showing the date and time when its tender was received.

(6) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the supplier or contractor that submitted it.

Article 31. *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, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness;

(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 the submission of 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 the submission of tenders.

Article 32. *Tender securities*

(1) When the procuring entity requires suppliers or contractors submitting tenders to provide a tender security:

(a) The requirement shall apply to all such 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;

(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 forth 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 submitting a tender, 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 submitting the tender shall not relate to conduct other than:

- (i) Withdrawal or modification of the tender after the deadline for submission of tenders, or before the deadline if so stipulated in the solicitation documents;
- (ii) Failure to sign the procurement contract if required by the procuring entity to do so;
- (iii) Failure to provide a required security for the performance of the contract after the tender 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 tender 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 termination of the tendering proceedings without the entry into force of a procurement contract;
- (d) The withdrawal of the tender prior to the deadline for the submission of tenders, unless the solicitation documents stipulate that no such withdrawal is permitted.

Section III. Evaluation and comparison of tenders

Article 33. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at 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 submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 11.

Article 34. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask suppliers or contractors for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. 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;

(b) Notwithstanding subparagraph (a) of this paragraph, 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 submitted the tender.

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents;

(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 forth 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 and comparison of tenders.

(3) The procuring entity shall not accept a tender:

- (a) If the supplier or contractor that submitted the tender is not qualified;
- (b) If the supplier or contractor that submitted 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 15.

(4) (a) The procuring entity shall evaluate and compare the tenders that have been accepted in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

- (i) The tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph; or
- (ii) If the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of criteria specified in the solicitation documents, which criteria shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable;

(c) In determining the lowest evaluated tender in accordance with subparagraph (b)(ii) of this paragraph, the procuring entity may consider only the following:

- (i) The tender price, subject to any margin of preference applied pursuant to subparagraph (d) of this paragraph;
- (ii) The cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services;

- (iii) The effect that acceptance of a tender would have on the balance of payments position and foreign exchange reserves of [this 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 enacting State may expand subparagraph (iii) by including additional criteria)]; and
- (iv) National defence and security considerations;

(d) If authorized by the procurement regulations, (and subject to approval by ... (the enacting State designates an organ to issue the approval),) in evaluating and comparing tenders a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors or for the benefit of tenders for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, and according to the rate specified in the solicitation documents pursuant to article 27(s), for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article 7, the procuring entity may require the supplier or contractor submitting the tender that has been found to be the successful tender pursuant to paragraph (4)(b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article 6. The criteria and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications 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, subject to the right of the procuring entity, in accordance with article 12(1), to reject all remaining tenders.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in article 11.

Article 35. *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 submitted by the supplier or contractor.

Article 36. *Acceptance of tender and entry into force of procurement contract*

(1) Subject to articles 12 and 34(7), the tender that has been ascertained to be the successful tender pursuant to article 34(4)(b)

shall be accepted. Notice of acceptance of the tender shall be given promptly to the supplier or contractor submitting the tender.

(2) (a) Notwithstanding the provisions of paragraph (4) of this article, the solicitation documents may require the supplier or contractor whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) and the supplier or contractor shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor;

(b) Subject to paragraph (3) of this article, where a written procurement contract is required to be signed pursuant to subparagraph (a) of this paragraph, the procurement contract enters into force when the contract is signed by the supplier or contractor and by the procuring entity. Between the time when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor and the entry into force of the procurement contract, neither the procuring entity nor the supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(3) 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 of the tender 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 tenders specified in the solicitation documents pursuant to article 31(1) or the period of effectiveness of tender securities that may be required pursuant to article 32(1).

(4) Except as provided in paragraphs (2)(b) and (3) of this article, a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) of this article is dispatched to the supplier or contractor that submitted the tender, provided that it is dispatched while the tender is in force. The notice is dispatched when it is 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 a mode authorized by article 9.

(5) If the supplier or contractor whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 34(4) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 12(1), to reject all remaining tenders. The notice provided for in paragraph (1) of this article shall be given to the supplier or contractor that submitted that tender.

(6) 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 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.

CHAPTER IV. PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES

Article 37. *Notice of solicitation of proposals*

(1) A procuring entity shall solicit proposals for services or, where applicable, applications to prequalify by causing a notice seeking expression of interest in submitting a proposal or in

prequalifying, as the case may be, 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 name and address of the procuring entity, a brief description of the services to be procured, the means of obtaining the request for proposals or prequalification documents and the price, if any, charged for the request for proposals or for the prequalification documents.

(2) The notice shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade or professional publication of wide international circulation except where participation is limited solely to domestic suppliers or contractors pursuant to article 8(1) or where, in view of the low value of the services to be procured, the procuring entity decides that only domestic suppliers or contractors are likely to be interested in submitting proposals.

(3) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) where direct solicitation is necessary for reasons of economy and efficiency, the procuring entity need not apply the provisions of paragraphs (1) and (2) of this article in a case where:

(a) The services to be procured are available only from a limited number of suppliers or contractors, provided that it 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 services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) Direct solicitation is the only means of ensuring confidentiality or is required by reason of the national interest, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(4) The procuring entity shall provide the request for proposals, or the prequalification documents, to suppliers or contractors in accordance with the procedures and requirements specified in the notice or, in cases in which paragraph (3) applies, directly to participating suppliers or contractors. The price that the procuring entity may charge for the request for proposals or the prequalification documents shall reflect only the cost of printing and providing them to suppliers or contractors. If prequalification proceedings have been engaged in, the procuring entity shall provide the request for proposals to each supplier or contractor that has been prequalified and that pays the price charged, if any.

Article 38. *Contents of requests for proposals for services*

The request for proposals shall include, at a minimum, the following information:

- (a) The name and address of the procuring entity;
- (b) The language or languages in which proposals are to be prepared;
- (c) The manner, place and deadline for the submission of proposals;
- (d) If the procuring entity reserves the right to reject all proposals, a statement to that effect;
- (e) The criteria and procedures, in conformity with the provisions of article 6, relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article 7(8);
- (f) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(g) The nature and required characteristics of the services to be procured to the extent known, including, but not limited to, the location where the services are to be provided and the desired or required time, if any, when the services are to be provided;

(h) Whether the procuring entity is seeking proposals as to various possible ways of meeting its needs;

(i) If suppliers or contractors are permitted to submit proposals for only a portion of the services to be procured, a description of the portion or portions for which proposals may be submitted;

(j) The currency or currencies in which the proposal price is to be formulated or expressed, unless the price is not a relevant criterion;

(k) 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 services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes, unless the price is not a relevant criterion;

(l) The procedure selected pursuant to article 41(1) for ascertaining the successful proposal;

(m) The criteria to be used in determining the successful proposal, including any margin of preference to be used pursuant to article 39(2), and the relative weight of such criteria;

(n) The currency that will be used for the purpose of evaluating and comparing 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;

(o) If alternatives to the characteristics of the services, contractual terms and conditions or other requirements set forth in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared;

(p) 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;

(q) The means by which, pursuant to article 40, 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;

(r) 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;

(s) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 52 or give rise to liability on the part of the procuring entity;

(t) Notice of the right provided under article 52 to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings;

(u) 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;

(v) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of proposals and to other aspects of the procurement proceedings.

Article 39. *Criteria for the evaluation of proposals*

(1) The procuring entity shall establish criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of proposals. Those criteria shall be notified to suppliers or contractors in the request for proposals and may concern only the following:

(a) The qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services;

(b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity;

(c) The proposal price, subject to any margin of preference applied pursuant to paragraph (2), including any ancillary or related costs;

(d) The effect that the acceptance of a proposal will have on the balance of payments position and foreign exchange reserves of [this State], the extent of participation by local suppliers and contractors, the economic development potential offered by the proposal, including domestic investment or other business activity, the encouragement of employment, the transfer of technology, the development of managerial, scientific and operational skills and the countertrade arrangements offered by suppliers or contractors (. . . (the enacting State may expand subparagraph (d) by including additional criteria));

(e) National defence and security considerations.

(2) If authorized by the procurement regulations (and subject to approval by . . . (each State designates an organ to issue the approval)), in evaluating and comparing the proposals, a procuring entity may grant a margin of preference for the benefit of domestic suppliers of services, which shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings.

Article 40. *Clarification and modification of requests for proposals*

(1) A supplier or contractor may request a clarification of the request for proposals from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the request for proposals that is received by the procuring entity within a reasonable time prior to the deadline for the submission of proposals. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely submission of its proposal 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 request for proposals.

(2) At any time prior to the deadline for submission of proposals, 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 request for proposals by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the request for proposals and shall be binding on those suppliers or contractors.

(3) 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 request for proposals, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors participating in the procurement proceedings, so as to enable those suppliers or contractors to take the minutes into account in preparing their proposals.

Article 41. *Choice of selection procedure*

(1) The procuring entity, in ascertaining the successful proposal, shall use the procedure provided for in article 42(2)(a), 42(2)(b), 43 or 44 that has been notified to suppliers or contractors in the request for proposals.

(2) The procuring entity shall include in the record required under article 11 a statement of the grounds and circumstances on which it relied to justify the use of a selection procedure pursuant to paragraph (1) of this article.

(3) Nothing in this chapter shall prevent the procuring entity from resorting to an impartial panel of external experts in the selection procedure.

Article 42. *Selection procedure without negotiation*

(1) Where the procuring entity, in accordance with article 41(1), uses the procedure provided for in this article, it shall establish a threshold with respect to quality and technical aspects of the proposals in accordance with the criteria other than price as set out in the request for proposals and rate each proposal in accordance with such criteria and the relative weight and manner of application of those criteria as set forth in the request for proposals. The procuring entity shall then compare the prices of the proposals that have attained a rating at or above the threshold.

(2) The successful proposal shall then be:

(a) The proposal with the lowest price; or

(b) The proposal with the best combined evaluation in terms of the criteria other than price referred to in paragraph (1) of this article and the price.

Article 43. *Selection procedure with simultaneous negotiations*

(1) Where the procuring entity, in accordance with article 41(1), uses the procedure provided for in this article, it shall engage in negotiations with suppliers or contractors that have submitted acceptable proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all such suppliers or contractors.

(2) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(3) In the evaluation of proposals, the price of a proposal shall be considered separately and only after completion of the technical evaluation.

(4) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals as well as with the relative weight and manner of application of those criteria as set forth in the request for proposals.

Article 44. Selection procedure with consecutive negotiations

Where the procuring entity, in accordance with article 41(1), uses the procedure provided for in this article, it shall engage in negotiations with suppliers and contractors in accordance with the following procedure:

- (a) Establish a threshold in accordance with article 42(1);
- (b) Invite for negotiations on the price of its proposal the supplier or contractor that has attained the best rating in accordance with article 42(1);
- (c) Inform the suppliers or contractors that attained ratings above the threshold 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;
- (d) Inform the other suppliers or contractors that they did not attain the required threshold;
- (e) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to subparagraph (b) of this article will not result in a procurement contract, inform that supplier or contractor that it is terminating the negotiations;
- (f) 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 for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

Article 45. Confidentiality

The procuring entity shall treat proposals in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors. Any negotiations pursuant to article 43 or 44 shall be confidential and, subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other information relating to the negotiations without the consent of the other party.

CHAPTER V. PROCEDURES FOR ALTERNATIVE METHODS OF PROCUREMENT

Article 46. 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 submit, 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 goods, construction or services 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 negotiations with any supplier or contractor whose tender has not been rejected pursuant to articles 12, 15 or 34(3) concerning any aspect of its tender.
- (4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those

specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods, construction or services to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit 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. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 34(4)(b).

Article 47. Restricted tendering

- (1) (a) When the procuring entity engages in restricted tendering on the grounds referred to in article 20(a), it shall solicit tenders from all suppliers and contractors from whom the goods, construction or services to be procured are available;
- (b) When the procuring entity engages in restricted tendering on the grounds referred to in article 20(b), 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.
- (2) When the procuring entity engages in restricted tendering, it shall cause a notice of the restricted-tendering proceeding to be published in . . . (each enacting State specifies the official gazette or other official publication in which the notice is to be published).
- (3) The provisions of chapter III of this Law, except article 24, shall apply to restricted-tendering proceedings, except to the extent that those provisions are derogated from in this article.

Article 48. Request for proposals

- (1) Requests for proposals shall be addressed to as many suppliers or contractors as practicable, but to at least three, if possible.
- (2) The procuring entity shall publish in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation a notice seeking expressions of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.
- (3) The procuring entity shall establish the criteria for evaluating the proposals and determine the relative weight to be accorded to each such criterion and the manner in which they are to be applied in the evaluation of the proposals. The criteria shall concern:
 - (a) The relative managerial and technical competence of the supplier or contractor;
 - (b) The effectiveness of the proposal submitted by the supplier or contractor in meeting the needs of the procuring entity; and
 - (c) The price submitted by the supplier or contractor for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.
- (4) A request for proposals issued by a procuring entity shall include at least the following information:
 - (a) The name and address of the procuring entity;

(b) A description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected and, in the case of services, the location where they are to be provided;

(c) The criteria for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such criterion and the manner in which they will be applied in the evaluation of the proposal; and

(d) The desired format and any instructions, including any relevant timetables applicable in respect of the proposal.

(5) Any modification or clarification of the request for proposals, including modification of the criteria for evaluating proposals referred to in paragraph (3) of this article, shall be communicated to all suppliers or contractors participating in the request-for-proposals proceedings.

(6) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing suppliers or contractors.

(7) The procuring entity may engage in negotiations with suppliers or contractors with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential;

(b) Subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) The opportunity to participate in negotiations is extended to all suppliers or contractors that have submitted proposals and whose proposals have not been rejected.

(8) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(9) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) Only the criteria referred to in paragraph (3) of this article as set forth in the request for proposals shall be considered;

(b) The effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price;

(c) The price of a proposal shall be considered by the procuring entity only after completion of the technical evaluation.

(10) Any award by the procuring entity shall be made to the supplier or contractor whose proposal best meets the needs of the procuring entity as determined in accordance with the criteria for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those criteria indicated in the request for proposals.

Article 49. *Competitive negotiation*

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

(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 shall be communicated on an equal basis to all other suppliers or

contractors engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.

Article 50. *Request for quotations*

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three, if possible. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the goods or services 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 submitted by the supplier or contractor.

(3) The procurement contract shall be awarded to the supplier or contractor that gave the lowest-priced quotation meeting the needs of the procuring entity.

Article 51. *Single-source procurement*

In the circumstances set forth in article 22 the procuring entity may procure the goods, construction or services by soliciting a proposal or price quotation from a single supplier or contractor.

CHAPTER VI. REVIEW*

Article 52. *Right to review*

(1) Subject to paragraph (2) of this article, any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the procuring entity by this Law may seek review in accordance with articles 53 to [57].

(2) The following shall not be subject to the review provided for in paragraph (1) of this article:

(a) The selection of a method of procurement pursuant to articles 18 to 22;

(b) The choice of a selection procedure pursuant to article 41(1);

(c) The limitation of procurement proceedings in accordance with article 8 on the basis of nationality;

*States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures.

(d) A decision by the procuring entity under article 12 to reject all tenders, proposals, offers or quotations;

(e) A refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 48(2);

(f) An omission referred to in article 27(t) or article 38(s).

Article 53. Review by procuring entity (or by approving authority)

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, as the case may be.)

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 20 days of when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The head of the procuring entity (or of the approving authority) need not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the supplier or contractor that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 30 days 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, indicate the corrective measures that are to be taken.

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4) of this article, the supplier or contractor submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [54 or 57]. Upon the institution of such proceedings, the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [54 or 57].

Article 54. Administrative review*

(1) A supplier or contractor entitled under article 52 to seek review may submit a complaint to [insert name of administrative body]:

(a) If the complaint cannot be submitted or entertained under article 53 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 20 days after the earlier of the time when the supplier or contractor submitting it became aware of the circumstances giving rise to the complaint or the time when that supplier or contractor should have become aware of those circumstances;

(b) If the head of the procuring entity does not entertain the complaint because the procurement contract has entered into force, provided that the complaint is submitted within 20 days after the issuance of the decision not to entertain the complaint;

(c) Pursuant to article 53(5), provided that the complaint is submitted within 20 days after the expiry of the period referred to in article 53(4); or

(d) If the supplier or contractor claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 53, provided that the complaint is submitted within 20 days after the issuance of the decision.

(2) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(3) The [insert name of administrative body] may [grant] [recommend]* one or more of the following remedies, unless it dismisses the complaint:

(a) Declare the legal rules or principles that govern the subject-matter of the complaint;

(b) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) 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;

(d) Annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force;

(e) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force;

(f) Require the payment of compensation for

Option I

Any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

Option II

Loss or injury suffered by the supplier or contractor submitting the complaint in connection with the procurement proceedings;

(g) Order that the procurement proceedings be terminated.

(4) The [insert name of administrative body] shall within 30 days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(5) The decision shall be final unless an action is commenced under article 57.

Article 55. Certain rules applicable to review proceedings under article 53 [and article 54]

(1) Promptly after the submission of a complaint under article 53 [or article 54], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all suppliers or contractors participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

*States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 54 and provide only for judicial review (article 57).

*Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

(2) Any such supplier or contractor or any governmental authority whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. A supplier or contractor that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within five days after the issuance of the decision to the supplier or contractor submitting the complaint, to the procuring entity and to any other supplier or contractor or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition.

Article 56. *Suspension of procurement proceedings*

(1) The timely submission of a complaint under article 53 [or article 54] suspends the procurement proceedings for a period of seven days, provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors.

(2) When the procurement contract enters into force, the timely submission of a complaint under article 54 shall suspend perform-

ance of the procurement contract for a period of seven days, provided the complaint meets the requirements set forth in paragraph (1) of this article.

(3) The head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body],] may extend the suspension provided for in paragraph (1) of this article, [and the [insert name of administrative body] may extend the suspension provided for in paragraph (2) of this article,] in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed 30 days.

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

(5) Any decision by the procuring entity under this article and the grounds and circumstances therefor shall be made part of the record of the procurement proceedings.

Article 57. *Judicial review*

The [insert name of court or courts] has jurisdiction over actions pursuant to article 52 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 53 [or 54].

II. GUIDE TO ENACTMENT OF UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES

(A/CN.9/403) [Original: English]

CONTENTS

	<i>Page</i>
INTRODUCTION	324
I. MAIN FEATURES OF THE MODEL LAW	325
II. ARTICLE-BY-ARTICLE REMARKS	330
Preamble	330
Chapter I. General provisions	330
Article 1. Scope of application	330
Article 2. Definitions	330
Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	330
Article 4. Procurement regulations	331
Article 5. Public accessibility of legal texts	331
Article 6. Qualifications of suppliers and contractors	331
Article 7. Prequalification proceedings	331
Article 8. Participation by suppliers or contractors	332
Article 9. Form of communications	332
Article 10. Rules concerning documentary evidence provided by suppliers or contractors	332
Article 11. Record of procurement proceedings	332
Article 12. Rejection of all tenders, proposals, offers or quotations	333
Article 13. Entry into force of the procurement contract	333
Article 14. Public notice of procurement contract awards	333
Article 15. Inducements from suppliers or contractors	333
Article 16. Rules concerning description of goods, construction or services ..	333
Article 17. Language	334
Chapter II. Methods of procurement and their conditions for use	334
Article 18. Methods of procurement	334
Article 19. Conditions for use of two-stage tendering, request for proposals or competitive negotiation	334
Article 20. Conditions for use of restricted tendering	335
Article 21. Conditions for use of request for quotations	335
Article 22. Conditions for use of single-source procurement	335
Chapter III. Tendering proceedings	335
Section I. Solicitation of tenders and of applications to prequalify	335
Article 23. Domestic tendering	335
Article 24. Procedures for soliciting tenders or applications to prequalify ...	335
Article 25. Contents of invitation to tender and invitation to prequalify	335
Article 26. Provision of solicitation documents	336
Article 27. Contents of solicitation documents	336
Article 28. Clarifications and modifications of solicitation documents	336
Section II. Submission of tenders	336
Article 29. Language of tenders	336

	Page
Article 30. Submission of tenders	336
Article 31. Period of effectiveness of tenders; modification and withdrawal of tenders	337
Article 32. Tender securities	337
Section III. Evaluation and comparison of tenders	338
Article 33. Opening of tenders	338
Article 34. Examination, evaluation and comparison of tenders	338
Article 35. Prohibition of negotiations with suppliers or contractors	339
Article 36. Acceptance of tender and entry into force of procurement contract	339
Chapter IV. Principal method for procurement of services	339
Article 37. Notice of solicitation of proposals	340
Article 38. Contents of requests for proposals for services	340
Article 39. Criteria for the evaluation of proposals	340
Article 40. Clarification and modification of requests for proposals	340
Article 41. Choice of selection procedure	340
Article 42. Selection procedure without negotiation	341
Article 43. Selection procedure with simultaneous negotiations	341
Article 44. Selection procedure with consecutive negotiations	341
Article 45. Confidentiality	341
Chapter V. Procedures for alternative methods of procurement	341
Article 46. Two-stage tendering	341
Article 47. Restricted tendering	342
Article 48. Request for proposals	342
Article 49. Competitive negotiation	342
Article 50. Request for quotations	342
Article 51. Single-source procurement	343
Chapter VI. Review	343
Article 52. Right to review	343
Article 53. Review by procuring entity (or by approving authority)	344
Article 54. Administrative review	344
Article 55. Certain rules applicable to review proceedings under article 53 [and 54]	345
Article 56. Suspension of procurement proceedings	346
Article 57. Judicial review	346

INTRODUCTION

History and purpose of UNCITRAL Model Law on Procurement of Goods, Construction and Services

1. At its nineteenth session, in 1986, the United Nations Commission on International Trade Law (UNCITRAL) decided to undertake work in the area of procurement. The UNCITRAL Model Law on Procurement of Goods and Construction, and its accompanying Guide to Enactment, were adopted by the Commission at its twenty-sixth session (Vienna, 5-23 July 1993). The Model Law on Procurement of Goods and Construction is intended 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 presently exists. The text of the Model Law on Procurement of Goods and Construction is set forth in annex I to the report of UNCITRAL on the work of its twenty-sixth session¹.

2. On the understanding that certain aspects of the procurement of services were governed by different considerations from those that governed the procurement of goods or construction, a decision had been made to limit the work at the initial stage to the formulation of model legislative provisions on the procurement of goods and construction. At the twenty-sixth session, having completed work on model statutory provisions on procurement of goods and construction, the Commission decided to proceed with the elaboration of model statutory provisions on procurement of services. Accordingly, at the twenty-seventh session (New York, 31 May-17 June 1994), the Commission discussed additions and changes to the Model Law on Procurement of Goods and Construction that would need to be made so as to encompass procurement of services and adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereinafter referred to as the "Model Law"), without thereby superseding the earlier text, whose scope is limited to goods and construction. The text of the Model Law is set forth in annex I to the report of UNCITRAL on the work of its twenty-seventh session². At the

¹Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17).

²Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17).

same session, the Commission also adopted the present Guide as a companion to the Model Law.

3. The decision by UNCITRAL to formulate model legislation on procurement was taken in response to the fact that in a number of countries the existing legislation governing procurement is inadequate or outdated. This results in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds. While sound laws and practices for public sector procurement are necessary in all countries, this need is particularly felt in many developing countries, as well as in countries whose economies are in transition. In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy.

4. Furthermore, the Model Law may help to remedy disadvantages that stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. 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.

5. UNCITRAL is an organ of the United Nations General Assembly established to promote the harmonization and unification of international trade law, so as to remove unnecessary obstacles to international trade caused by inadequacies and divergences in the law affecting trade. Over the past quarter of a century, UNCITRAL, whose membership consists of States from all regions and of all levels of economic development, has implemented its mandate by formulating international conventions (the United Nations Conventions on Contracts for the International Sale of Goods, on the Limitation Period in the International Sale of Goods, on Carriage of Goods by Sea ("Hamburg Rules"), on Liability of Terminal Operators in International Trade, and on International Bills of Exchange and International Promissory Notes), model laws (in addition to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the UNCITRAL Model Laws on International Commercial Arbitration and International Credit Transfers), the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules, and legal guides (on construction contracts, countertrade transactions and electronic funds transfers).

Purpose of this Guide

6. In preparing and adopting the Model Law, the Commission was mindful that the Model Law would be a more effective tool for States modernizing their procurement legislation if background and explanatory information would be provided to executive branches of Governments and to parliaments to assist them in using the Model Law. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of procurement procedures in the Model Law.

7. The information presented in the Guide is intended to explain why the provisions in the Model Law have been included as essential minimum features of a modern procurement law designed to achieve the objectives set forth in the Preamble to the Model Law. Such information might assist States also 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 national circumstances. For example, options have been included on issues that were 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; imposition of the requirement of a higher approval for certain key decisions and actions in the procurement proceedings; methods of procurement other than tendering for exceptional cases in the case of goods or construction, or, in the case of services, methods other than the principal method for procurement of services; and the form of and remedies available under review procedures. Furthermore, taking into account that the Model Law is a "framework" law providing only a minimum skeleton of essential provisions and envisaging the issuance of procurement regulations, the Guide identifies and discusses possible areas to be addressed by regulation rather than by statute.

I. MAIN FEATURES OF THE MODEL LAW

A. Objectives

8. The objectives of the Model Law, which include maximizing competition, according fair treatment to suppliers and contractors bidding to do government work, and enhancing transparency and objectivity, are essential for fostering economy and efficiency in procurement and for curbing abuses. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State may create an environment in which the public is assured that the government purchaser is likely to spend public funds with responsibility and accountability and thus to obtain fair value, and an environment in which parties offering to sell to the Government are confident of obtaining fair treatment.

B. Scope of the Model Law

9. The Model Law as adopted by UNCITRAL at its twenty-seventh session is designed to be applicable to the procurement of goods, construction and services. Within that basic scope of application, the objectives of the Model Law are best served by the widest possible application of the Model Law. Thus, although there is provision made in the Model Law for exclusion of defence and security related procurement, as well as other sectors that might be indicated by the enacting State in the law or its implementing procurement regulations, an enacting State might decide not to enact in its legislation substantial restrictions on the scope of application of the Model Law. In order to facilitate the widest possible application of the Model Law, it is provided in article 1(3) that, even in the excluded sectors, it is possible, at the discretion of the procuring entity, to apply the Model Law. 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.

10. The Model Law sets forth procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract. The Model Law does not purport to address the contract performance or implementation

phase. Accordingly, one will not find in the Model Law provisions on issues arising in the contract implementation phase, issues such as contract administration, resolution of performance disputes or contract termination. The enacting State would have to ensure that adequate laws and structures are available to deal with the implementation phase of the procurement process.

11. To take account of certain differences between the procurement of goods and construction and the procurement of services, the Model Law sets forth in chapter IV a set of procedures especially designed for the procurement of services. The main differences referred to above in paragraph 2 arise from the fact that, unlike the procurement of goods and construction, procurement of services typically involves the supply of an intangible object whose quality and exact content may be difficult to quantify. The precise quality of the services provided may be largely dependent on the skill and expertise of the suppliers or contractors. Thus, unlike procurement of goods and construction where price is the predominant criterion in the evaluation process, the price of services is often not considered as important a criterion in the evaluation and selection process as the quality and competence of the suppliers or contractors. Chapter IV is intended to provide procedures that reflect these differences.

C. A "framework" law to be supplemented by procurement regulations

12. 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 forth all the rules and regulations that may be necessary to implement those procedures in an enacting State. Accordingly, the Model Law envisages the issuance by enacting States of "procurement regulations" to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State—without compromising the objectives of the Model Law.

13. It should be noted that the procurement proceedings in the Model Law, beyond raising matters of procedure to be addressed in the implementing procurement regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law.

D. Procurement methods in the Model Law

14. The Model Law presents several procurement methods to enable the procuring entity to deal with the varying circumstances that it might encounter, as well as to take account of the multiplicity of methods that are used in practice in different States. This enables an enacting State to aim for as broad an application of the Model Law as possible. As the rule for normal circumstances in procurement of goods or construction, the Model Law mandates the use of tendering, the method of procurement widely recognized as generally most effective in promoting competition, economy and efficiency in procurement, as well as the other objectives set forth in the Preamble. For normal circumstances in the procurement of services, the Model Law prescribes the use of the "principal method for procurement of services" (chapter IV), which is designed to give due weight in the evaluation process to the qualifications and expertise of the service providers. For the exceptional circumstances in which tendering is not appropriate or feasible for procurement of goods or construction, the Model Law offers alternative methods of procurement; it also does so for the circumstances in which resort to the principal method for procurement of services is not appropriate or feasible.

15. However, as mentioned in the footnote to article 18 of the Model Law, States may choose not to incorporate all of the alternative methods of procurement into their national law. While an enacting State would wish to retain request for quotations and single-source procurement, it need not incorporate all of the methods set forth in article 19. Furthermore, since the procedures for the methods in article 19 are in many respects similar to the procedures in the principal method for procurement of services (chapter IV), the enacting State may choose not to extend to procurement of services a method in article 19 that it has incorporated for use in procurement of goods and construction.

Tendering

16. Some of the key features of tendering as provided for in the Model Law include: as a general rule, unrestricted solicitation of participation by suppliers or contractors; comprehensive description and specification in solicitation documents of the goods, construction or services to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender (i.e., price alone, or a combination of price and some other technical or economic criteria); strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; public opening of tenders at the deadline for submission of tenders; and disclosure of any formalities required for entry into force of the procurement contract.

Principal method for procurement of services

17. Since the principal method for procurement of services (chapter IV) is the method of procurement to be used in typical circumstances in the procurement of services, chapter IV contains procedures that promote competition, objectivity and transparency, while taking account of the predominant weight accorded to the qualifications and expertise of the service providers in the evaluation process. The main features of the principal method for procurement of services include, for example, unrestricted solicitation of suppliers and contractors as the general rule, and predisclosure in the request for proposals of the criteria for evaluation of proposals and predisclosure of the selection procedure, among the three options available, to be used in the selection process. According to the first selection procedure, which is set forth in article 42, the procuring entity subjects proposals that obtain a technical rating above a set threshold to a straightforward price competition. The second selection procedure (article 43) provides a method by which the procuring entity negotiates with suppliers and contractors, after which they submit their best and final offers, a process akin to the request for proposals procedure in article 48. Under the third selection procedure (article 44), the procuring entity holds negotiations solely on price with the supplier or contractor who obtained the highest technical rating. Under this procedure, the procuring entity may negotiate with the other suppliers or contractors in a sequential fashion, one by one, on the basis of their rating, but only after terminating negotiations with the previous, higher-ranked supplier or contractor, which negotiations, once terminated, may not be reopened.

Two-stage tendering, request for proposals, competitive negotiation

18. For cases in the procurement of goods and construction in which it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings, as well as for a number of other special circumstances referred to in article 19(1), the Model Law offers three options for incorporation into national law. These include two-stage tendering, request for proposals, and competitive negotiation. Whichever of those three procurement methods have been

included by the enacting State in its law might also be used for procurement of services. However, for one of these other methods to be used, the condition for its use would have to be present. All three of those methods of procurement have been included for consideration by enacting States because practice varies as to the method used in circumstances of the type in question. A situation in which it is not feasible for the procuring entity to formulate precise or final specifications may arise in two types of cases. The first is when the procuring entity has not determined the exact manner in which to meet a particular need and therefore seeks proposals as to various possible solutions (e.g., it has not decided upon the type of material to be used for building a bridge). The second case is the procurement of high technology items such as large passenger aircraft or sophisticated computer equipment. In the latter type of exceptional case, because of the technical sophistication and complexity of the goods, it might be considered undesirable, from the standpoint of obtaining the best value, for the procuring entity to proceed on the basis of specifications it has drawn up in the absence of negotiations with suppliers and contractors as to the exact capabilities and possible variations of what is being offered.

19. No hierarchy has been assigned to the three methods set forth in article 19, and an enacting State, though it should incorporate at least one of those methods, may choose not to incorporate all of them into its procurement law. While each of those three methods shares the common feature of providing the procuring entity with an opportunity to negotiate with suppliers and contractors with a view to settling upon technical specifications and contractual terms, they employ different procedures for selecting a supplier or contractor.

20. Two-stage tendering, in its first stage, provides an opportunity for the procuring entity to solicit various proposals relating to the technical, quality or other characteristics of the procurement as well as to the contractual terms and conditions of its supply. Upon the conclusion of that first stage, the procuring entity finalizes the specifications and, on the basis of those specifications, in the second stage, conducts a regular tendering proceeding subject to the rules set forth in chapter III of the Model Law. Request for proposals is a procedure in which the procuring entity typically approaches a limited number of suppliers or contractors and solicits various proposals, negotiates with them as to possible changes in the substance of their proposals, requests "best and final offers" from them and then assesses and compares those best and final offers in accordance with the predisclosed evaluation criteria, the relative weight and manner of application of which have also been predisclosed to the suppliers or contractors. By contrast to two-stage tendering, at no stage in request-for-proposals proceedings does a procuring entity conduct a tendering proceeding. Competitive negotiation differs from both two-stage tendering and request for proposals in that it is by its nature a relatively unstructured method of procurement, for which the Model Law therefore provides few specific procedures and rules, beyond those found in the applicable general provisions. The Model Law also provides, in article 19(2), that competitive negotiation may be used in cases of urgency as an alternative to single-source procurement (see comment 4 on article 19).

Restricted tendering

21. For two types of exceptional cases, the Model Law offers restricted tendering, a method of procurement that differs from tendering only in that it permits the procuring entity to extend the invitation to tender to a limited number of suppliers or contractors. These are the case of technically complex or specialized goods, construction or services available from only a limited number of suppliers and the case of procurement of such a low value that economy and efficiency is served by restricting the number of tenders that would have to be considered by the procuring entity.

Request-for-quotations, single-source procurement

22. For cases of low-value procurement of standardized goods or services, the Model Law offers the request-for-quotations method, which involves a simplified, accelerated procedure fitting the relatively low value involved. Under this method, which is sometimes referred to in practice as "shopping", the procuring entity solicits quotations from a small number of suppliers and selects the lowest-priced, responsive offer. Lastly, for exceptional circumstances such as urgency due to catastrophic events and the availability of goods, construction or services from only one supplier or contractor, the Model Law offers single-source procurement.

E. Qualifications of suppliers and contractors

23. The Model Law includes provisions designed to ensure that the suppliers and contractors with whom the procuring entity contracts are qualified to perform the procurement contracts awarded to them and that create a procedural climate conducive to fairness and participation by qualified suppliers and contractors in procurement proceedings. Article 6, in addition to requiring that, no matter which method of procurement is utilized, suppliers and contractors must be qualified in order to enter into a procurement contract, specifies the criteria and procedures that the procuring entity may use to assess the qualifications of suppliers and contractors, requires the pre-disclosure to suppliers and contractors of the criteria to be used for the evaluation of their qualifications, and requires the application of the same criteria to all suppliers or contractors participating in the procurement proceedings. While those provisions aim at equal treatment and prevention of arbitrariness, the procuring entity is afforded sufficient flexibility to determine the exact extent to which it is appropriate to examine qualifications in a given procurement proceeding. In addition to those basic provisions on qualifications, the Model Law provides procedures for prequalification of suppliers and contractors at early stages of procurement proceedings, as well as on reconfirmation at later stages of the qualifications of suppliers and contractors that had been prequalified.

F. Provisions on international participation in procurement proceedings

24. In line with the mandate of UNCITRAL to promote international trade, and with the notion underlying the Model Law that the wider the degree of competition the better the value received for expenditures from the public purse, the Model Law provides that, as a general rule, suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality and that foreign suppliers and contractors should not otherwise be subject to discrimination. In the contexts of tendering proceedings and the principal method for procurement of services, that general rule is given effect by a number of procedures designed, for example, to ensure that invitations to tender or to submit proposals and invitations to prequalify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors.

25. At the same time, the Model Law recognizes that enacting States may wish in some cases to restrict foreign participation with a view in particular to protecting certain vital economic sectors of their national industrial capacity against deleterious effects of unbridled foreign competition. Such restrictions are subject to the requirement in article 8(1) that the imposition of the restriction by the procuring entity should be based only on grounds specified in the procurement regulations or should be pursuant to other provisions of law. That requirement is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation. The reference in article 8 to exclusions of suppliers or contractors on the basis of nationality

pursuant to provisions in the procurement regulations or other provisions of law, supported also by article 3 on the primacy of international obligations of the enacting State, also permits the Model Law to take account of cases in which the funds being used are derived from a bilateral tied-aid arrangement. Such an arrangement would require that procurement with the funds should be from suppliers and contractors in the donor country. Similarly, recognition is thereby 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 economic sanctions imposed by the United Nations Security Council.

26. It may be noted that the Model Law provides in article 34(4)(d) and 39(2) for the use of 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 national industrial capacity, without resorting to purely domestic procurement. The margin of preference permits the procuring entity to select the lowest-priced tender or, in the case of services, the proposal of a local supplier or contractor when the difference in price between that tender or proposal and the overall lowest-priced tender or proposal 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. It is important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. Accordingly, the margin of preference could be a preferable means of fostering the competitiveness of local suppliers and contractors, not only as effective and economic providers for the procurement needs of the procuring entity, but also as a source of competitive exports.

27. Aside from cases of domestic procurement that result from requirements of law referred to above in paragraph 25, in which the procuring entity may dispense with the special measures in the Model Law designed to facilitate international participation, the Model Law also permits the procuring entity engaging in tendering proceedings or using the principal method for procurement of services to forgo those procedures in the case of low-value procurement in which there is unlikely to be interest on the part of foreign suppliers or contractors. At the same time, the Model Law recognizes that in such 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. It may be noted that for the purposes of determining what is a low-value procurement contract, the threshold level as regards procurement of goods and construction might be higher than that for procurement of services.

G. Prior-approval requirement for use of exceptional procedures

28. The Model Law provides that certain important actions and decisions by the procuring entity, in particular those involving the use of exceptional procedures (e.g., use of a procurement method other than tendering for the procurement of goods and construction or, in the case of services, a method other than the principal method for procurement of services or other than tendering), should be subject to prior approval by a higher authority. The advantage of 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, particularly where the enacting State has an otherwise decentralized procurement system. However, the prior-approval requirement is presented in the Model Law as an option. This is because a prior-approval system is not traditionally applied in all countries, in particular where control over the procurement practices is exercised primarily through audit.

29. The references in the Model Law to approval requirements leave it up to the enacting State to designate the organ or organs responsible for issuing the various approvals. The authority exercised as well as the organ exercising the approval function may differ. An approval function may be vested in an organ or authority that is wholly autonomous of the procuring entity (e.g., ministry of finance or of commerce, or central procurement board) or, alternatively, it may be vested in a separate supervisory organ of the procuring entity itself. In the case of procuring entities that are autonomous of the governmental or administrative structure of the State, such as some State-owned commercial enterprises, States may find it preferable for the approval function to be exercised by an organ 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. In any case, it is important that the organ or authority 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 the approval function to be exercised by a committee of persons, rather than by one single person.

H. Review procedures

30. An important safeguard of proper adherence to procurement rules is that suppliers and contractors have the right to seek review of actions by the procuring entity in violation of those rules. Such a review process, which is set forth in chapter VI, 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, who have a natural interest in monitoring compliance by procuring entities with the provisions of the Model Law.

31. The Model Law recognizes that, because of considerations relating to the nature and structure of legal systems and systems of administration, which are closely linked to the question of review of governmental actions, States might, to one degree or another, see fit to adapt the articles in chapter VI in line with those considerations. Because of this special circumstance, the provisions on review are of a more skeletal nature than other portions of the Model Law. What is crucial is that, whatever the exact form of review procedures, an adequate opportunity and effective procedures for review should be provided. Furthermore, it is recognized that the articles in the Model Law on review may be used by the enacting State merely to measure the adequacy of existing review procedures.

32. As to their content, the provisions establish in the first place that suppliers and contractors have a right to seek review. In the first instance, that review is to be sought from the procuring entity itself, in particular where the procurement contract is yet to be awarded. That initial step has been included so as to facilitate economy and efficiency, since in many cases, in particular prior to the awarding of the procurement contract, the procuring entity may be quite willing to correct procedural errors, of which it may even not have been aware. The Model Law also provides for review by higher administrative organs of Government, where such a procedure would be consistent with constitutional, administrative and judicial structures. Finally, the Model Law affirms the right to judicial review, but does not go beyond that to address matters of judicial-procedure law, which are left to the applicable national law.

33. In order to strike a workable balance between, on the one hand, the need to preserve the rights of suppliers and contractors and the integrity of the procurement process and, on the other hand, the need to limit disruption of the procurement process, chapter VI includes a number of restrictions on the review procedures that it establishes. These include: limitation of the right to review under the Model Law to suppliers and contractors; time-limits for filing of applications for review and for disposition of cases, including any suspension of the procurement proceedings that may apply at the level of administrative review; exclusion from the review procedures of a number of decisions that are left to the discretion of the procuring entity and that do not directly involve questions of the fairness of treatment accorded suppliers and contractors (e.g., selection of a method of procurement; the limitation of participation in procurement proceedings on the basis of nationality in accordance with article 8).

I. Record requirement

34. One of the principal mechanisms for promoting adherence to the procedures set forth in the Model Law and for facilitating the accountability of the procuring entity to supervisory bodies in Government, to suppliers and contractors, and to the public at large is the requirement set forth in article 11 that the procuring entity maintain a record of the key decisions and actions taken by the procuring entity during the course of the procurement proceedings. Article 11 provides rules as to which specific actions and decisions are to be reflected in the record. It also establishes rules as to which portions of the record are, at least under the Model Law, to be made available to the general public, and which portions of the record are to be disclosed only to suppliers and contractors.

J. Other provisions

35. The Model Law also includes a variety of other provisions designed to support the objectives and procedures of the Model Law. These include provisions on: public accessibility of laws and regulations relating to procurement; form of communications between the procuring entity and suppliers and contractors; documentary evidence provided by suppliers and contractors concerning their qualifications; public notification of procurement-contract awards; mandatory rejection of a tender or offer in case of improper inducements from suppliers and contractors; manner of formulating specifications for goods or construction to be procured; language of documents for solicitation of tenders, proposals, offers or quotations; procedures to be followed in the various procurement methods available under the Model Law (e.g., for tendering proceedings; provision on contents of solicitation documents; tender securities; opening of tenders; examination, evaluation and comparison of tenders; rejection of all tenders; and entry into force of the procurement contract).

K. Proper administrative structure for implementation of the Model Law

36. The Model Law sets forth only the procedures to be followed in selecting the supplier or contractor with whom the contract will be concluded. The Model Law assumes that the enacting State has in place, or will put into place, the proper institutional and bureaucratic structures and human resources necessary to operate and administer the type of procurement procedures provided for in the Model Law.

37. In addition to designating the organ or authority to perform the approval function referred to above in paragraphs 28 and 29, an enacting State may find it desirable to provide for the overall supervision of and control over procurement to which the Model Law applies. An enacting State may vest all of those functions in

a single organ or authority (e.g., ministry of finance or of commerce, or central procurement board), or they may be allocated among two or more organs or authorities. The functions might include, for example, some or all of those mentioned here:

(a) *Supervising overall implementation of procurement law and regulations.* This may include, for example, issuance of procurement regulations, monitoring implementation of the procurement law and regulations, making recommendations for their improvement, and issuing interpretations of those laws. In some cases, e.g., in the case of high-value procurement contracts, the organ might be empowered to review the procurement proceedings to ensure that they have conformed to the Model Law and to the procurement regulations, before the contract can enter into existence.

(b) *Rationalization and standardization of procurement and of procurement practices.* This may include, for example, coordinating procurement by procuring entities, and preparing standardized procurement documents, specifications and conditions of contract.

(c) *Monitoring procurement and the functioning of the procurement law and regulations from the standpoint of broader government policies.* This may include, for example, examining the impact of procurement on the national economy, 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. The organ or authority may be charged with issuance of approvals for particular procurement prior to the commencement of the procurement proceedings.

(d) *Training of procurement officers.* The organ or authority could also be responsible for training the procurement officers and other civil servants involved in operating the procurement system.

38. The organ or authority to exercise administrative and oversight functions in a particular enacting State, and the precise functions that the organ or authority is to exercise, will depend, for example, 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 economy and efficiency in mind, since 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.

39. It may be noted that a State enacting the Model Law does not thereby commit itself to any particular administrative structure; neither does the adoption of such legislation necessarily commit the enacting State to increased government expenditures.

40. It may be noted that a variety of the institutional, staff development and training, and policy issues affecting public procurement, in particular in developing countries, are discussed in *Improving Public Procurement Systems*, Guide No. 23 issued by the International Trade Centre UNCTAD/GATT (Geneva).

L. Assistance from UNCITRAL secretariat

41. In line with its training and assistance activities, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services, as it may for Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

42. Further information concerning the Model Law, as well as the Guide, and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

International Trade Law Branch
Office of Legal Affairs, United Nations
Vienna International Centre, P. O. Box 500
A-1400, Vienna, Austria
Telex: 135612 uno a
Fax: (43-1) 237-485
Phone: (43-1) 21345-4060

II. ARTICLE-BY-ARTICLE REMARKS

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 contractors or suppliers. 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.

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 in principle for the coverage of all types of procurement, but at the same time to recognize that an enacting State may wish to exempt certain types of procurement from coverage. The provision limits exclusions of the Model Law to cases provided for either by the Law itself or by regulation. This is done so that exclusions would not be made in a secretive or informal manner. In order to expand as far as possible the application of the Model Law, article 1(3) provides for complete or partial application of the Model Law even to excluded sectors. It may be further noted that, despite the exclusion in article 1(2)(a) of procurement involving national defence or security, it is not the intent of the Model Law to suggest that an enacting State that was prepared as a general rule to apply the Model Law to such procurement should not do so.

2. It is recommended that application of the Model Law be made as wide as possible. Particular caution should be used in excluding the application of the Model Law by way of the procurement regulations, since such exclusions by means of administrative rather than legislative action may be seen as negatively affecting the objectives of the Model Law. Furthermore, the broad variety of procedures available under the Model Law to deal with the different types of situations that may arise in procurement may make it less necessary to exclude the procedures provided in the Model Law. States excluding the application of the Model Law by way of procurement regulations should take note of article 5.

Article 2. Definitions

1. The Model Law is intended to cover primarily procurement by governmental units and other entities and enterprises within the public sector. Which exactly those entities are will differ from

State to State due to differences in the allocation of legislative competence among different levels of Government. Accordingly, subparagraph (b)(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.

2. In subparagraph (b)(ii), the enacting State may extend 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.

3. Editorial language has been included at the end of the definitions of "goods" and of "services" in subparagraphs (c) and (e) indicating that a State may wish to refer specifically in those definitions to categories of items that would be treated as goods or services, as the case may be, and whose classification might otherwise be unclear. The intent of this technique is to provide clarity with respect to what is and what is not to be treated as "goods" or "services" and it is therefore not meant to be used to limit the scope of application of the Model Law, which can be done by way of article 1(2)(b). Such an added degree of specificity might be considered desirable by the enacting State, in particular in view of the open-ended definition of services. For example, the enacting state may wish to specify the definition under which printing would fall, or the classification of other items, such as real estate, that might be made subject to the procurement law but whose classification would not be readily apparent.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within [this State]]

1. An enacting State may be subject to international agreements or obligations with respect to procurement. For example, a number of States are parties to the GATT 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 the 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.

2. Optional 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.

Article 4. Procurement regulations

1. As noted in paragraphs 7 and 12 of section I of the Guide, the Model Law is a "framework law", setting forth 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" technique 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 expressly provide for supplementation 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 regulations should be consistent with the Model Law.

2. Examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: application of the Model Law to excluded sectors (article 1(2)); prequalification proceedings (article 7(3)(v)); the manner of publication of the notice of procurement-contract awards (article 14); limitation of the quantity of procurement carried out in cases of urgency using a procurement method other than tendering (to the quantity that is required to deal with the urgent circumstances); details concerning the procedures for soliciting tenders or applications to prequalify (article 24); requirements relating to the preparation and submission of tenders (article 27(z)); and, in procurement of services, rules to guard against conflicts of interest in a determination to use single-source procurement for reasons of compatibility with previous services.

3. In some cases failure to issue procurement regulations when the regulations are referred to 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 on the ground of nationality (article 8(1)); use of the request-for-quotations method of procurement, since that method may be used only below threshold levels set in the procurement regulations (article 21); and authority and procedures for application of a margin of preference in favour of national suppliers or contractors (article 34(4)(d) and 39(2)).

Article 5. Public accessibility of legal texts

1. This article is intended to promote transparency in the laws, regulations and other legal texts relating to procurement by requiring public accessibility to those legal texts. Inclusion of this article may be considered important not only in States in which such a requirement is not already found in its existing administrative law, but even in States in which such a requirement was already found in the existing applicable law. In the latter case, the legislature may consider that a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers and contractors on the requirement of adequate public disclosure of legal texts concerned with procurement procedures.

2. In many countries there exist official publications in which laws, regulations and administrative rulings and directives are routinely published. The texts referred to in the present article could be published in those publications. Where there do not exist publications for one or more of those categories of texts, the texts should be promptly made accessible to the public, including foreign suppliers and contractors, in another appropriate manner.

Article 6. Qualifications of suppliers and contractors

The function and broad outlines of article 6 have been noted in paragraph 23 of section I of the Guide. Paragraph (1)(b)(v) of article 6 refers to disqualification of suppliers and contractors pursuant to administrative suspension or disbarment proceedings. Such administrative proceedings—in which alleged wrongdoers should be given some procedural rights such as an opportunity to disprove the charges—are commonly used to suspend or disbar suppliers and contractors found guilty of wrongdoing such as faulty accounting, default in contractual performance, or 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 (1)(b)(v) should disqualify a supplier or contractor from being considered for a procurement contract.

Article 7. Prequalification proceedings

1. Prequalification proceedings are intended to eliminate, early in the procurement proceedings, suppliers or contractors that are not 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 involve a very specialized nature. The reason for this is that the evaluation and comparison of tenders, proposals and offers in those cases is much more complicated, costly and time consuming. The use of prequalification proceedings may narrow down the number of tenders, proposals or offers that the procuring entity must evaluate and compare. In addition, competent suppliers and contractors are sometimes reluctant to participate in procurement proceedings for high-value contracts, where the cost of preparing the tender, proposal or offer may be high, if the competitive field is too large and where they run the risk of having to compete with unrealistic tenders, proposals or offers submitted by unqualified or disreputable suppliers or contractors.

2. The prequalification procedures set forth in article 7 are made subject to a number of important safeguards. These safeguards include the subjugation of prequalification procedures to the limitations contained in article 6, in particular as to assessment of qualifications, and the procedures found in paragraphs (2) through (7) of article 7. This set of procedural safeguards is included to ensure that prequalification procedures are conducted

only on non-discriminatory terms and conditions that are fully disclosed to participating suppliers or contractors, and that otherwise ensure at least a required minimum level of transparency and facilitate the exercise by a supplier or contractor that has not been prequalified of its right to review.

3. The purpose of article 7(8) is to provide for reconfirmation, at a later stage of the procurement proceedings, of the qualifications of suppliers or contractors that had been prequalified. Such "post-qualification proceedings" are intended to permit the procuring entity to ascertain whether the qualification information submitted by a supplier or a contractor at the time of prequalification remains valid and accurate. The procedural requirements for post-qualification 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.

Article 8. Participation by suppliers or contractors

As noted in paragraphs 24 to 27 of section I of the *Guide*, making provision for international procurement proceedings has important advantages. Therein is found a description of the general approach and rationale of the provisions in the Model Law on international participation of suppliers and contractors in procurement proceedings, including the manner in which the general principle of international participation may be limited to take into account differing applicable legal obligations and the margin of preference in favour of local suppliers and contractors.

Article 9. Form of communications

1. Article 9 is intended to provide certainty as to the required form of communications between the procuring entity and suppliers and contractors provided for under the Model Law. The essential requirement, subject to other provisions of the Model Law, is that a communication must be in a form that provides a record of its content. This approach is designed not to tie communication to the use of paper, taking into account that communications are increasingly carried out through means such as electronic data interchange ("EDI"). In view in particular of the as yet uneven availability and use of non-traditional means of communication such as EDI, paragraph (3) has been included as a safeguard against discrimination against or among suppliers and contractors on the basis of the form of communication that they use.

2. Obviously, article 9 does not purport to answer all the technical and legal questions that may be raised by the use of EDI or other non-traditional methods of communication in the context of procurement proceedings, and different areas of the law would apply to ancillary questions such as the electronic issuance of a tender security and other matters that are beyond the sphere of "communications" under the Model Law.

3. In order to permit the procuring entity and suppliers and contractors to avoid unnecessary delays, paragraph (2) permits certain specified types of communications to be made on a preliminary basis through means, in particular telephone, that do not leave a record of the content of the communication, provided that the preliminary communication is immediately followed by a confirming communication in a form that leaves a record of the content of the confirming communication.

Article 10. Rules concerning documentary evidence provided by suppliers or contractors

1. In order to facilitate participation by foreign suppliers and contractors, article 10 bars the imposition of any requirements as

to the legalization of documentary evidence provided by suppliers and contractors as to their qualifications other than those 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 contractors and suppliers 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.

2. It may be noted that the expression "the laws of this State" is meant to refer not only to the statutes, but also to the implementing regulations as well as to the treaty obligations of the enacting State. In some States such a general reference to "laws" would suffice to indicate that all of the above-mentioned sources of law were being referred to. However, in other States a more detailed reference to the various sources of law would be warranted in order to make it clear that reference was being made not merely to statutes.

Article 11. Record of procurement proceedings

1. One of the most important ways to promote transparency and accountability is to include provisions requiring that the procuring entity maintain a record of the procurement proceedings. A record summarizes key information concerning the procurement proceedings. It facilitates the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds. The rationale behind limiting disclosure of information required to be disclosed under article 11(1)(d) to that which is known to the procuring entity is that there may be procurement proceedings in which not all proposals would be 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 reference in this paragraph to "a basis for determining the price" is meant to reflect the possibility that in some instances, particularly in procurement of services, the tenders, proposals, offers or quotations would contain a formula by which the price could be determined rather than an actual price quotation.

2. 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 broad 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 review; and the need to protect the confidential trade information of suppliers and contractors. In view of these considerations, article 11 provides two levels of disclosure. It mandates disclosure to any member of the general public of the information referred to in article 11(1)(a) and (b)—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 for the benefit of suppliers and contractors, 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.

3. As mentioned above, among the necessary objectives of disclosure provisions is to avoid the disclosure of confidential trade information of suppliers and contractors. That is true in particular

with respect to what is disclosed concerning the evaluation and comparison of tenders, proposals, offers and quotations, as excessive disclosure of such information may be prejudicial to the legitimate commercial interests of suppliers and contractors. Accordingly, the information referred to in paragraph (1)(e) involves only a summary of the evaluation and comparison of tenders, proposals, offers or quotations, while paragraph (3)(b) restricts the disclosure of more detailed information that exceeds what would be disclosed in such a summary.

4. The purpose of requiring disclosure to the suppliers or contractors at the time when the decision is made to accept a particular tender, proposal or offer is to give efficacy to the right to review under article 52. Delaying disclosure until entry into force of the procurement contract might deprive aggrieved suppliers and contractors of a meaningful remedy.

5. The limited disclosure scheme in paragraphs (2) and (3) does not preclude the applicability to certain parts of the record of other statutes in the enacting State that confer on the public at large a general right to obtain access to government records. Disclosure of the information in the record to legislative or parliamentary oversight bodies may be mandated pursuant to the law applicable in the enacting State.

Article 12. Rejection of all tenders, proposals, offers or quotations

1. The purpose of article 12 is to enable the procuring entity to reject all tenders, proposals, offers or quotations. Inclusion of this provision is important because a procuring entity may need to do so 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 goods, construction or services ceases, or where the procurement can no longer take place due to a change in government policy or a withdrawal of funding. Public law in some countries may restrict the exercise of this right, e.g., by prohibiting actions constituting an abuse of discretion or a violation of fundamental principles of justice.

2. The requirement in paragraph (3) that notice of the rejection of all tenders, proposals, offers or quotations be given to suppliers or contractors that submitted them, together with the requirement in paragraph (1) that the grounds for the rejection be communicated upon request to those suppliers or contractors, is designed to foster transparency and accountability. Paragraph (1) does not require the procuring entity to justify the grounds that it cites for the rejection. This approach is based on the premise that the procuring entity should be free to abandon the procurement proceedings on economic, social or political grounds which it need not justify. The protection of this power is further buttressed by the fact that the decision of the procuring entity to reject all tenders, proposals, offers or quotations is not subject, in accordance with article 52(2)(d), to the right to review provided by the Model Law; it is also supported by paragraph (2), which provides that the procuring entity is to incur no liability towards suppliers or contractors, such as compensation for their costs of preparing and submitting tenders, proposals, offers or quotations, solely by virtue of its invoking paragraph (1). The potentially harsh effects of article 12 are mitigated by permitting the procuring entity to reject all tenders, proposals, offers or quotations only if the right to do so has been reserved in the solicitation documents.

Article 13. Entry into force of the procurement contract

Article 13 is included because, 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.

In the context of tendering, article 36 sets forth detailed rules applicable to the entry into force of the procurement contract, which is reflected in paragraph (1). However, no rules on entry into force of the procurement contract are provided for the other methods of procurement in view of the varying circumstances that may surround the use of other procurement methods and the procedurally less detailed treatment of them in the Model Law. It is expected that, in most instances, entry into force of the procurement contract for the other methods of procurement will be determined in accordance with other bodies of law, such as the contract or administrative law of the enacting State. In order to ensure an adequate degree of transparency, however, it is provided for those other methods that the procuring entity predisclose to the suppliers and contractors the rules that will be applicable to the entry into force of the procurement contract.

Article 14. Public notice of procurement contract awards

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 14 requires publication of a notice of award of the procurement contract. This obligation is separate from the notice of award required to be given pursuant to article 36(6) to suppliers and contractors that have participated in tendering proceedings, and independent from the requirement that information of that nature in the record should be made available to the general public under article 11(2). The Model Law does not specify the manner of publication of the notice, which is left to the enacting State and which paragraph (2) suggests may be dealt with in the procurement regulations.

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 (3) 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.

Article 15. Inducements from suppliers or contractors

1. Article 15 contains an important safeguard against corruption: the requirement of rejection of a tender, proposal, offer or quotation if the supplier or contractor in question attempts to improperly influence the procuring entity. A procurement law cannot be expected to eradicate completely such abusive practices. However, the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption. In addition, 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.

2. To guard against abusive application of article 15, rejection is made subject to approval, to a record requirement and to a duty of prompt disclosure to the alleged wrongdoer. The latter is designed to permit exercise of the right to review.

Article 16. Rules concerning description of goods, construction or services

The purpose of including article 16 is to make clear the importance of the principle of clarity, completeness and objectivity in the description of the goods, construction or services to be

procured in prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations. Descriptions with those characteristics encourage participation by suppliers and contractors in procurement proceedings, enable suppliers and contractors to formulate tenders, proposals, offers and quotations 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 to be concluded, and thus to offer their most advantageous prices and other terms and conditions. Furthermore, properly prepared descriptions in solicitation documents 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. Furthermore, application of the rule that specifications should be written so as not to favour particular contractors or suppliers will make it more likely that the procurement needs of the procuring entity may be filled 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 resort to single-source procurement.

Article 17. Language

1. The function of the bracketed language at the end of the *chapeau* is to facilitate participation in procurement proceedings by helping to make the prequalification documents, solicitation documents and other documents for solicitation of proposals, offers or quotations understandable to foreign suppliers and contractors. The reference to a language customarily used in international trade need not be adopted by an enacting State whose official language is one customarily used in international trade. Subparagraphs (a) and (b) have been incorporated in order to provide the procuring entity with the flexibility needed to waive application of the foreign language requirement in cases in which participation is restricted to domestic suppliers or contractors and in cases in which, while there is no such restriction imposed, foreign suppliers or contractors are not expected to be interested in participating.

2. 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 language versions are of equal weight.

Chapter II. Methods of procurement and their conditions for use

Article 18. Methods of procurement

1. Article 18 establishes the rule, already discussed in paragraph 14 of section I of the Guide, that, for the procurement of goods or construction, tendering is the method of procurement to be used normally, while the principal method for procurement of services, as set out in chapter IV, is the method to be used normally for procurement of services. For those exceptional cases of procurement of goods or construction in which tendering, even if feasible, is not judged by the procuring entity to be the method most apt to provide the best value, the Model Law provides a number of other methods of procurement. In the case of services, the procuring entity may use tendering where it is feasible to formulate detailed specifications and the nature of the services allow for tendering (for example, general building management

services); furthermore, it may use one of the other methods of procurement available under the Model Law if the conditions for its use are met.

2. Article 18(4) sets forth the requirement that a decision to use a method of procurement other than tendering in the case of goods or construction, or, in the case of services, a method of procurement other than the principal method for procurement of services, should be supported in the record by a statement of the grounds and circumstances underlying that decision. That requirement is included because the decision to use an exceptional method of procurement, rather than the method that is normally required (i.e., tendering for goods or construction, or the principal method for procurement of services) should not be made secretly or informally.

Article 19. Conditions for use of two-stage tendering, request for proposals or competitive negotiation

1. As noted in paragraph 18 of section I of the Guide, for the circumstances specified in article 19(1), the Model Law provides the enacting State with a choice among three different methods of procurement other than tendering or the principal method for procurement of services—two-stage tendering, request for proposals, and competitive negotiation. As further noted in paragraph 19 of section I of the Guide, an enacting State need not necessarily enact each of the three methods for the common circumstances referred to in article 19 or even enact more than one of them. An enacting State might decide not to enact more than one of the methods in view of the uncertainty likely to be encountered by procuring entities in trying to discern the most appropriate method from among two or three similar methods. In deciding which of the three methods to enact, a decisive criterion for the enacting State might be that, from the standpoint of transparency, competition and objectivity in the selection process, two-stage tendering and request for proposals are likely to offer more than competitive negotiation, with its high degree of flexibility and possibly higher risk of corruption. At least one of the three methods should be enacted, since the cases in question might otherwise only be dealt with through the least competitive of the procurement methods, single-source procurement.

2. The enacting State also might decide not to extend to procurement of services the methods of procurement set forth in article 19. The rationale behind such a decision could be a determination that the principal method for procurement of services (chapter IV) already contains procedures that are in many respects similar to the procedures for the methods of procurement set forth in article 19.

3. It may be noted that in the cases referred to in article 19(1)(a), in which it is not feasible for the procuring entity to formulate specifications for the goods or construction or, in the case of services, to identify their characteristics, the procuring entity, before deciding to use a method of procurement other than tendering, might wish to consider whether the specifications could be prepared with the assistance of consultants.

4. Subparagraphs (b) and (c) of article 22(1) (single-source procurement), referring, respectively, to cases of non-catastrophic and catastrophic urgency, are identical to subparagraphs (a) and (b) of article 19(2), which permit the use of competitive negotiation in such cases of urgency. The purpose of this overlap is to permit the procuring entity to decide which of the two methods best suits the circumstances at hand. For both procurement methods, the urgency cases contemplated are intended to be truly exceptional, and not merely cases of convenience. In the application of the Model Law to procurement involving national defence or national security and in cases of research contracts for the

procurement of a prototype, the procuring entity is, for similar reasons, given a choice between the methods of procurement provided for in article 19 and single-source procurement. Thus, an enacting State may, even if it does not enact competitive negotiation for the circumstances referred to in paragraph (1), enact competitive negotiation for the circumstances referred to in paragraph (2).

Article 20. Conditions for use of restricted tendering

1. Article 20 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. Inclusion of this method in the Model Law is not intended to encourage its use. On the contrary, strict and narrow conditions for use have been included for restricted tendering since the unjustified resort to that method of procurement would impair fundamentally the objectives of the Model Law.

2. In order to give effect to the purpose of article 20 to limit the use of restrictive tendering to truly exceptional cases while maintaining the appropriate degree of competition, minimum solicitation requirements are set forth in article 47(1) that are tailored specifically to each of the two types of cases reflected in the conditions for use in article 20. When resort is made to restricted tendering on the ground, referred to in article 20(a), of a limited number of suppliers or contractors being available, all the suppliers or contractors that could provide the goods, construction or services are required to be invited to participate; when the ground is the low value of the procurement contract, the case referred to in article 20(b), suppliers or contractors should be invited in a non-discriminatory manner and in a sufficient number to ensure effective competition.

Article 21. Conditions for use of request for quotations

1. The request-for-quotations method of procurement provides a method of procurement appropriate for low-value purchases of standardized goods or services. In such cases, engaging in tendering proceedings, which can be costly and time consuming, may not be justified. Article 21(2), however, strictly limits the use of this method to procurement of a value below the threshold set in the procurement regulations. In enacting article 21, it should be made clear that use of request for quotations is not mandatory for procurement below the threshold value. It may indeed be advisable in certain cases that fall below the threshold to use tendering or one of the other methods of procurement. This may be the case, for example, when an initial low-value procurement would have the long-term consequence of committing the procuring entity to a particular type of technological system.

2. Paragraph (2) 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 packages of goods or services 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.

Article 22. Conditions for use of single-source procurement

1. In view of the non-competitive character of single-source procurement, its use is strictly limited to the exceptional circumstances set forth in article 22.

2. Paragraph (2) 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.

3. Paragraph (2) contains safeguards to ensure that it does not give rise to more than a very exceptional use of single-source procurement. As regards the approval requirement mentioned in paragraph (2), it may be noted that enacting States that incorporate the over all approval requirement for the use of single-source procurement might not necessarily have to incorporate the approval requirement referred to in paragraph (2). At the same time, however, it would have to be recognized that the decision to use single-source procurement in the economic emergency type of circumstance referred to would and should ordinarily be taken at the highest levels of Government.

Chapter III. Tendering proceedings

Section I. Solicitation of tenders and of applications to prequalify

Article 23. Domestic tendering

As pointed out in paragraph 27 of section I of the Guide, article 23 has been included in order to specify the exceptional cases in which application of various procedures in the Model Law to solicit foreign participation in the tendering proceedings would not be required.

Article 24. Procedures for soliciting tenders or applications to prequalify

1. In order to promote transparency and competition, article 24 sets forth the minimum publicity procedures to be followed for soliciting tenders and applications to prequalify 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 they may monitor in order to stay abreast of procurement opportunities in the enacting State. In view of the objective of the Model Law of fostering participation in procurement proceedings without regard to nationality and maximizing competition, article 24(2) requires publication of the invitations also in a publication of international circulation. One possible medium of such publication is *Development Business*, published by the United Nations Department of Public Information.

2. The publicity requirements in the Model Law are only minimum requirements. The procurement regulations may require procuring entities to publicize the invitation to tender or the invitation to prequalify 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, and 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.

Article 25. Contents of invitation to tender and invitation to prequalify

In order to promote efficiency and transparency, article 25 requires that invitations to tender as well as invitations to prequalify contain the information required for suppliers or contractors to be able to ascertain whether the goods, construction or services being procured are of a type that they can provide and, if so, how they can participate in the tendering proceedings. The specified information requirements are only the required minimum so as

not to preclude the procuring entity from including additional information that it considers appropriate.

Article 26. Provision of solicitation documents

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 tendering proceedings will be conducted. Article 26 has been included in order to ensure that all suppliers or contractors that have expressed an interest in participating in the tendering proceedings and that comply with the procedures set forth by the procuring entity are provided with solicitation documents. 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 printing and providing those documents, but to avoid excessively high charges that could inhibit qualified suppliers or contractors from participating in the tendering proceedings.

Article 27. Contents of solicitation documents

1. Article 27 contains a listing of the information required to be included in the solicitation documents. An indication in the procurement law of those requirements is useful to ensure that the solicitation documents include the information necessary to provide a basis for enabling suppliers and contractors to submit tenders that meet the needs of the procuring entity and that the procuring entity can compare in an objective and fair manner. Many of the items listed in article 27 are regulated or dealt with in other provisions of the Model Law. 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.

2. One category of items listed in article 27 concerns instructions for preparing and submitting tenders (subparagraphs (a), (i) through (r), and (t)); issues such as the form and manner of signature, of 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 even rejected due to lack of clarity as to how the tenders should be prepared. Other items in article 27 concern in particular the manner in which the tenders will be evaluated; their disclosure is required to achieve transparency and fairness in the tendering proceedings.

3. 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 smaller suppliers or contractors, who may have the capacity to submit tenders only for certain portions of the procurement. Article 27(h) is included to 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.

Article 28. Clarifications and modifications of solicitation documents

1. The purpose of article 28 is to establish procedures for clarification and modification of the solicitation documents in a manner that will foster efficient, fair and successful conduct of tendering proceedings. The right of the procuring entity to modify the solicitation documents is important in order to enable the procuring entity to obtain what is required to meet its needs. Article 28 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 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 finding out that a clarification had been made.

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 submission of tenders. Prompt communication of clarifications and modifications also enables suppliers or contractors to exercise their right under article 31(3) to modify or withdraw their tenders prior to the deadline for submission of tenders, unless that right has been superseded by a stipulation 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 tenders.

Section II. Submission of tenders

Article 29. Language of tenders

Article 29 provides that tenders may be formulated in any language in which the solicitation documents have been formulated or in any other language specified in the solicitation documents. This rule, which is linked to the general language rule in article 17, has been included in order to facilitate participation by foreign suppliers and contractors.

Article 30. Submission of tenders

1. An important element in fostering participation and competition is the granting to suppliers and contractors of a sufficient period of time to prepare their tenders. Article 30 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 tenders. Thus, it is left up to the procuring entity to fix the deadline by which tenders must be submitted, 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 the submission of tenders.

2. In order to promote competition and fairness, paragraph (2) requires the procuring entity to extend the deadline in the exceptional case of late issuance of clarifications or modifications of the solicitation documents, or of late issuance of minutes of a meeting of suppliers or contractors. Paragraph (3) permits, but does not compel, the procuring entity to extend the deadline for submission of tenders in other cases, i.e., when one or more suppliers or contractors are unable to submit their tenders on time due to any circumstances beyond their control. This is designed to protect the level of competition when a potentially important element of that competition would otherwise be precluded from participation. It may be noted that an extension of the deadline in

the circumstances referred to in paragraph (2) is required rather than discretionary, and would thus be subject to the right to review. By contrast, an extension under paragraph (3) is, as indicated in paragraph (3), absolutely discretionary and therefore intended to be beyond the right to review provided for in article 52.

3. The requirement in paragraph (5)(a) that tenders are to be submitted in writing is subject to the exception in subparagraph (b) permitting the use of a form of communication other than writing, such as electronic data interchange (EDI), provided that the form used is one that provides a record of the content of the communication. Additional safeguards are included to protect the integrity of the procurement proceedings, as well as the particular interests of the procuring entity and of suppliers and contractors: that the use of a form other than writing must be permitted by the solicitation documents; that suppliers and contractors must always be given the right to submit tenders in writing, an important safeguard against discrimination in view of the uneven availability of non-traditional means of communication such as EDI; and that the alternative form must be one that provides at least a similar degree of authenticity, security and confidentiality. It may be further noted that the implementation of paragraph (5) to accommodate the submission of tenders in non-traditional forms would necessitate elaboration of special rules and techniques to guard the confidentiality of tenders and to prevent "opening" of the tenders prior to the deadline for submission of tenders, and to deal with other issues that might arise when a tender is submitted other than in writing (e.g., the form that the tender security would take).

4. The rule in paragraph (6) 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.

*Article 31. Period of effectiveness of tenders;
modification and withdrawal of tenders*

1. Article 31 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 long period of effectiveness hoping to cover the needs of most if not all tendering proceedings. This would be inefficient since for many cases the period would be longer than necessary. Excessively long periods of effectiveness 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)(b) has been included to enable the procuring entity to deal with delays in the tendering proceedings by requesting 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 to prolong, where necessary, also 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.

4. Paragraph (3) is an essential companion of the provisions in article 28 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 remarks under article 46.)

Article 32. Tender securities

1. The procuring entity may suffer losses if suppliers or contractors withdraw tenders or if a procurement contract with the supplier or contractor whose tender had been accepted is not concluded due to the fault of that supplier or contractor (e.g., the costs of new procurement proceedings and losses due to delays in procurement). Article 32 authorizes the procuring entity to require the suppliers or contractors participating in the tendering proceedings to post a tender security so as to cover such losses and to discourage them from defaulting. Procuring entities are not required to impose tender security requirements in all tendering proceedings. Tender securities are usually important when the 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.

2. 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 tenders they have submitted and to post a security for performance of the procurement contract, if required to do so.

3. 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, there is optional language at the end of paragraph (1)(c) providing flexibility on this point for procuring entities in States in which acceptance of tender securities not issued in the enacting State would be a violation of law.

4. The reference to confirmation of the tender security 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 tendering proceedings (e.g., difficulties in obtaining the local confirmation prior to the deadline for submission of tenders and added costs for foreign suppliers and contractors).

5. 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 does article 31(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 submission of tenders is not subject to forfeiture of the tender security.

Section III. Evaluation and comparison of tenders

Article 33. 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.

2. Paragraph (2) sets forth the rule that the procuring entity must permit all suppliers or contractors that have submitted tenders, or their representatives, to be present at the opening of tenders. This rule 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 submitted 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.

Article 34. Examination, evaluation and comparison of tenders

1. 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, evaluation and comparison 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.

2. 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.

3. Although ascertaining the successful tender on the basis of the tender price alone provides the greatest objectivity and predictability, in some tendering proceedings the procuring entity may wish to select a tender not purely on the basis of the price factor. Accordingly, the Model Law enables the procuring entity to select the "lowest evaluated tender", i.e., one that is selected on the basis of criteria in addition to price. Paragraph (4)(c)(ii) and (iii) list such criteria. The criteria in paragraph (4)(c)(iii) related to economic-development objectives have been included because, in some countries, particularly developing countries and countries whose economies are in transition, it is important for procuring entities to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives. It is envisaged in the Model Law that some enacting States may wish to list additional such criteria. However, caution is advisable in expanding the list of non-price criteria set forth in paragraph (4)(c)(iii) in view of the risk that such other criteria may pose to the objectives of good procurement practice. Criteria of this type are sometimes less objective and more discretionary than those referred to in paragraph (4)(c)(i) and (ii), and therefore their use in evaluating and comparing tenders could impair competition and economy in procurement, and reduce confidence in the procurement process.

4. Requiring that the non-price criteria should be objective and quantifiable to the extent practicable, and that they be given a relative weight in the evaluation procedure or be expressed in monetary terms, is aimed at enabling tenders to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. The enacting State may wish to spell out in the procurement regulations how such factors are to be formulated and applied. One possible method is to quantify in monetary terms the various aspects of each tender in relation to the criteria set forth in the solicitation documents and to combine that quantification with the tender price. The tender resulting in the lowest evaluated price would be regarded as the successful tender. Another method may be to assign relative weightings (e.g., "coefficients" or "merit points") to the various aspects of each tender in relation to the criteria set forth in the solicitation documents. The tender with the most favourable aggregate weighting would be the lowest evaluated tender.

5. Paragraph (4)(d) permits a procuring entity to grant a margin of preference to domestic tenders, but makes its availability contingent upon rules for calculation to be set forth in the procurement regulations. (See paragraph 26 of section 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.) It should be noted, however, that States that are parties to the GATT Agreement on Government Procurement and member States of regional economic integration groupings such as the European Union may be restricted in their ability to accord such preferential treatment. In order to promote transparency, resort to the margin of preference may be made only if authorized by the procurement regulations and approved by the approving authority. Furthermore, the use of the margin of preference is required to be disclosed in the solicitation documents and reflected in the record of the procurement proceedings.

6. The envisaged procurement regulations setting forth rules concerning the calculation and application of a margin of preference could also establish criteria for qualifying as a "domestic" contractor or supplier 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 goods and for construction. As to the mechanics of applying the margin of preference, this may be

done, for example, by deducting from the tender prices of all tenders import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting tender 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.

7. 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 (see article 27(s)).

8. 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. 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 and establishes the procedures to be followed by the procuring entity to select a successful tender in such a case.

Article 35. Prohibition of negotiations with suppliers or contractors

Article 35 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.

Article 36. Acceptance of tender and entry into force of procurement contract

1. The purpose of paragraph (1) is to state clearly the rule that the tender ascertained to be the successful one pursuant to article 34(4)(b) is to be accepted and that notice of the acceptance is to be given promptly to the supplier or contractor that submitted the tender. Absent the provision in paragraph (4) on entry into force of the procurement contract, the entry into force of the procurement contract would be governed by general legal rules, which in many cases might not provide solutions appropriate for the procurement context.

2. The Model Law provides for different methods of entry into force of the procurement contract in the context of tendering proceedings, in recognition 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. Depending upon its preferences and traditions, an enacting State may wish to incorporate one or more of these methods.

3. Under one method (set forth in paragraph (4)), 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 submitted the successful tender. The second method (set forth in paragraph (2)), ties the entry into force of the procurement contract to the signature by the supplier or contractor submitting the successful tender of a written procurement contract conforming to the tender. Paragraph

(2) contains an optional reference to "the requesting ministry" as a signatory to the procurement contract in order to take into account that in some States the procurement contract is signed on behalf of the Government by the ministry for whose use the goods, construction or services were destined, but which did not itself conduct the procurement proceedings nor act as the procuring entity within the meaning of the Model Law. In States with such a procurement practice, procurement proceedings may be conducted by a central entity such as a central procurement or tendering board.

4. A third method of entry into force (set forth in paragraph (3)), provides for entry into force upon approval of the procurement contract by a higher 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). The reference in paragraph (3) to stipulation of the approval requirement in the solicitation documents is included to give a clear statement of the role of the solicitation documents in giving notice to suppliers or contractors of formalities required for entry into force of the procurement contract. 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 tender 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.

5. 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 tendering proceedings. In order to bind the supplier or contractor to a procurement contract, including to obligate it to sign any written procurement contract, the procuring entity has to give notice of acceptance while the tender 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 tender, 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 tender that the tender 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.

6. In order to promote the objectives of good procurement practice, paragraph (5) makes it clear that, in the event that the supplier or contractor whose tender the procuring entity has selected fails to sign a procurement contract in accordance with paragraph (2), the selection of another tender from among the remaining tenders must be in accordance with the provisions normally applicable to the selection of tenders, subject to the right of the procuring entity to reject all tenders.

Chapter IV. Principal method for procurement of services

This chapter presents the procurement method normally to be used in procurement of services. Since, as noted in paragraph 11 of section I of the Guide, the main difference between procurement of goods and construction and procurement of services is in

the evaluation and selection process, the features of chapter IV that differ most markedly from tendering are to be found in articles 42, 43 and 44 on the selection procedures. Otherwise, the articles in this chapter, for example on solicitation of proposals and on contents of the request for proposals, generally parallel provisions on analogous points in chapter III, on tendering proceedings. This is because tendering and the principal method for procurement of services are the methods to be used in the bulk of procurement and, as such, are designed to maximize economy and efficiency in procurement and promote the other objectives set forth in the Preamble.

Article 37. Notice of solicitation of proposals

1. In line with the objective of the Model Law of fostering competition in procurement, and since the principal method for procurement of services is the one typically to be used, article 37 is aimed at ensuring that as many suppliers and contractors as possible get the opportunity to become aware of the procurement proceedings and to express their interest in participating. As is the case also in tendering proceedings, this is achieved by providing that the notice seeking expressions of interest should be publicized widely.

2. However, recognizing that in certain instances generally parallel to those reflected in the conditions for use of restricted tendering (article 20), the requirement of open solicitation might be unwarranted or might defeat the objectives of economy and efficiency, paragraph (3) sets out those cases where the procuring entity may engage in direct solicitation. The enacting State may wish to establish in the procurement regulations the value threshold below which procuring entities need not, in accordance with paragraphs (2) and (3) of the article, resort to open solicitation. The level at which the threshold would be set for services might be lower than the level at which it would be set for goods and construction. In deciding to engage in direct solicitation, the procuring entity should give consideration as to whether it will reject any unsolicited proposals or as to the manner in which it would consider any such proposals.

Article 38. Contents of requests for proposals for services

1. Article 38 contains a list of the minimum information that should be contained 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. In view of the predominant role of the principal method for procurement of services, article 38 is largely parallel in level of detail and in substance to the provisions on the required contents of solicitation documents in tendering proceedings (article 27).

2. Paragraphs (g) and (h) reflect the fact that, in many instances of procurement of services, the full nature and characteristics of the services to be procured might not be known to the procuring entity. Since, as discussed in paragraph 11 of section 1 of the Guide, the proposal price might not always be a relevant criterion in the procurement of services, paragraphs (j) and (k) are only applicable if price is a relevant criterion in the selection process.

Article 39. Criteria for the evaluation of proposals

1. Article 39 sets out the permissible range of criteria that the procuring entity may apply in evaluating the proposals. As is the case elsewhere in the Model Law where such types of criteria are listed, for example, article 48(3), the procuring entity is not required necessarily to apply each of the criteria in every instance of procurement. In the interests of transparency, however, the procuring entity is to apply the same criteria to all proposals in a

given procurement proceeding and it is precluded from applying criteria that have not been predisclosed to the suppliers or contractors in the request for proposals.

2. In reflecting the importance of the skill and expertise of the suppliers and contractors in the bulk of the cases of procurement of services, paragraph (1)(a) lists as one of the criteria the qualifications and abilities of the personnel who will be involved in providing the services. This criterion would be particularly relevant in the procurement of those services that require a high degree of personal skill and knowledge on the part of the service providers, for example, in an engineering consultancy contract. By establishing the effectiveness of the proposal in meeting the needs of the procuring entity as one of the possible criteria, paragraph (1)(b) enables the procuring entity to disregard a proposal that has been inflated with regard to technical and quality aspects beyond what is required by the procuring entity in an attempt to obtain a high ranking in the selection process, thereby artificially attempting to put the procuring entity in the position of having to negotiate with the proponent of the inflated proposal.

3. Paragraphs (1)(d) and (e), and (2), are similar to provisions applicable to tendering by way of article 34(4)(c)(iii) and (iv), and (d). The comments in the Guide on those provisions in the context of tendering (see paragraphs 3-6 of the comments on article 34) are therefore relevant to article 39.

Article 40. Clarification and modification of requests for proposals

Article 40 mirrors the provisions of article 28 on the analogous matter in the context of tendering and the comments in the Guide on article 28 are thus relevant to article 40.

Article 41. Choice of selection procedure

1. In articles 42, 43 and 44, three procedures for selecting the successful proposal are provided so as to enable the procuring entity, within the context of a proceeding under chapter IV, to utilize a procedure that best suits the particular requirements and circumstances of each given case. The choice of a particular selection procedure is largely dependent on the type of service being procured and the main factors that will be taken into account in the selection process, in particular, whether the procuring entity wishes to hold negotiations with suppliers and contractors, and if so, at which stage in the selection process. For example, if the services to be procured are of fairly standard nature where no great personal skill and expertise is required, the procuring entity may wish to resort to the selection procedure under article 42, which is more price oriented and which, like tendering, does not involve negotiations. On the other hand, in particular for services of a complex nature in which the personal skill and expertise of the supplier or contractor are crucial considerations, the procuring entity may wish to resort to one of the procedures in articles 43 or 44, since they permit greater emphasis to be placed on those selection criteria and provide for negotiation.

2. Paragraph (3) makes allowance for the use of an external and impartial panel of experts in the selection process, a procedure that is sometimes used by procuring entities, particularly in the adjudication of design contests or in procurement of services with a high artistic or aesthetic content. Enacting States using such panels may wish to provide further rules in the procurement regulations, with regard, for example, to any distinctions that would have to be drawn between panels whose role was merely advisory, panels whose role was limited to the aesthetic and artistic aspects of the proposals and panels empowered to make decisions that would bind the procuring entity.

Article 42. Selection procedure without negotiation

As mentioned above, the procedure provided for under this article may be more compatible with the procurement of services that are of a relatively non-complex nature where the price rather than the personal skill and expertise of the suppliers or contractors is the dominant consideration and the procuring entity does not wish to negotiate. However, to ensure that the suppliers and contractors possess sufficient competence and expertise to perform the procurement contract, the Model Law provides that the procuring entity should establish a threshold level by which to measure the non-price aspects of the proposals. If this threshold is set at a sufficiently high level, then all the suppliers or contractors whose proposals attain a rating at or above the threshold can in all probability provide the services at a more or less equivalent level of competence. This allows the procuring entity to be more secure in selecting the winning proposal on the basis of price alone in accordance with paragraph (2)(a), or, in accordance with paragraph (2)(b), on the basis of the best combined evaluation of price and non-price aspects.

Article 43. Selection procedure with simultaneous negotiations

Article 43 sets forth a selection procedure that is akin to the evaluation procedures for the request for proposals method under article 48. It is therefore best suited in those circumstances where the procuring entity seeks various proposals on how best to meet its procurement needs. By allowing for early negotiations with all suppliers or contractors, the procuring entity is able to clarify better what its needs are, which can be taken into account by suppliers or contractors when preparing their "best and final offers". Paragraph (3) has been included in order to ensure that the price of the proposal is not given undue weight in the evaluation process to the detriment of the evaluation of the technical and other aspects of the proposal, including the evaluation of the competence of those who will be involved in providing the services.

Article 44. Selection procedure with consecutive negotiations

A third procedure for selecting the successful proposal, one that also involves negotiations, and which traditionally has been widely used in particular in procurement of intellectual services, is set forth in article 44. In this procedure, 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 above the threshold, ensuring that the suppliers or contractors with whom it will negotiate are capable of providing the services required. The procuring entity then holds negotiations with those suppliers or contractors, one at a time, starting with the supplier or contractor that was ranked highest, proceeding on the basis of their ranking until it concludes a procurement contract with one of them. These negotiations are aimed at ensuring that the procuring entity obtains a fair and reasonable price for the services to be provided. The rationale for not providing the procuring entity with the ability to reopen negotiations with suppliers or contractors with whom it had already terminated negotiations is to avoid open-ended negotiations which could lead to abuse and cause unnecessary delay. However, although this has the benefit of imposing a measure of discipline in the procurement, it denies the procuring entity the opportunity to reconsider a proposal that subsequent negotiations with suppliers or contractors at a later stage would show to have been more favourable. Nevertheless, the procuring entity may find such a negotiation procedure, although it does not emphasize price competition, appealing in some cases, such as the procurement of architectural and engineering services where considerations of technical quality are particularly important.

Article 45. Confidentiality

Article 45 is included because, in order to prevent abuse of the selection procedures and to promote confidence in the procurement process, it is important that confidentiality be observed by all parties, especially where negotiations are involved. Such confidentiality is important in particular to protect any trade or other information that suppliers or contractors might include in their proposals and that they would not wish to be made known to their competitors.

Chapter V. Procedures for alternative methods of procurement

1. Articles 46-51 present procedures to be used for the methods of procurement other than tendering or other than the principal method for procurement of services. As noted in paragraphs 18 and 19 of section I of the Guide, as well as in comment 1 on article 19, there is an overlap in the conditions for use of two-stage tendering, request for proposals and competitive negotiation, and enacting States might not wish to enact in their procurement laws each of those three methods. The decision as to which of those methods to enact will therefore determine which of articles 46 (procedures for two-stage tendering), 48 (procedures for request for proposals) and 49 (procedures for competitive negotiation) will be retained.

2. With respect to request for proposals, competitive negotiation, request for quotations and single-source procurement, chapter V does not provide as full a procedural framework as chapter III does with respect to tendering proceedings (as well as two-stage tendering and restricted tendering), and as chapter IV does with respect to the principal method for procurement of services. This is mainly because the methods of procurement in chapter V involve more procedural flexibility than do tendering or the principal method of procurement of services. Some of the questions that for tendering, as well as for two-stage tendering and restricted tendering, are answered definitively in the Model Law (e.g., entry into force of the procurement contract) may be answered for those other methods of procurement in other bodies of the applicable law, which procuring entities will generally want to be the law of the State of the procuring entity. Where the applicable law is the United Nations Convention on Contracts for the International Sale of Goods, matters such as the formation of contract will be subject to the internationally uniform rules contained in the Convention. An enacting State may consider it useful to incorporate into the procurement law some of those solutions from other bodies of applicable law, as well as to supplement chapter V with rules in the procurement regulations. It should also be noted that chapters I and VI are generally applicable to all the methods of procurement.

Article 46. Two-stage tendering

The rationale behind the two-stage procedure used in this method of procurement is to combine two elements: the flexibility afforded to the procuring entity in the first stage by the ability to negotiate with suppliers or contractors in order to arrive at a final set of specifications for what is to be procured, and, in the second stage, the high degree of objectivity and competition provided by tendering proceedings under chapter III. The general thrust of the provisions of article 46, which establish the specific procedures that distinguish two-stage tendering from ordinary tendering proceedings, has been noted in paragraph 20 of section I of the Guide. They include the requirement in paragraph (4) that the procuring entity should notify all suppliers or contractors remaining for the second stage of any changes made to the original specifications and should permit suppliers or contractors to forgo

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 necessary to make the two-stage procedure hospitable to participation by suppliers or contractors since, upon the deadline for submission of tenders in the first stage, the suppliers or contractors cannot be expected to know what the specifications will be for the second stage.

Article 47. Restricted tendering

1. As noted in comment 2 on article 20, article 47 sets forth solicitation requirements designed to ensure that, in the case of resort to restricted tendering on the grounds referred to in article 20(a), tenders are solicited from all suppliers or contractors from whom the goods, construction or services to be procured are available, and, in the case of resort to restricted tendering on the grounds referred to in article 20(b), from a sufficient number of suppliers or contractors to ensure effective competition. Incorporation of those solicitation requirements is an important safeguard to ensure that the use of restricted tendering does not subvert the objective of the Model Law of promoting competition.

2. Paragraph (2) promotes transparency and accountability as regards the decision to use restricted tendering by requiring publication of a notice of the restricted tendering in a publication to be specified by the enacting State in its procurement law. Also relevant in this regard is the generally applicable rule in article 18(4) that the procuring entity include in the record of procurement proceedings a statement of the grounds and circumstances relied upon to justify the selection of one of the alternative methods of procurement provided for under chapter V.

3. The function of paragraph (3) is to provide that, beyond the specific procedures set forth in paragraphs (1) and (2), the procedures to be applied in restricted tendering are those normally applied to tendering proceedings, with the exception of article 24.

Article 48. Request for proposals

1. While request for proposals is a method in which the procuring entity typically solicits proposals from a limited number of suppliers or contractors, article 48 contains provisions designed to ensure that a sufficient number of suppliers or contractors have an opportunity to express their interest in participating in the proceedings and that a sufficient number actually do participate so as to foster adequate competition. In that regard, paragraph (1) requires the procuring entity to solicit proposals from as many suppliers or contractors as practicable, but from a minimum of three if possible. The companion provision in paragraph (2) is designed to potentially widen participation by requiring the procuring entity, unless this is not desirable on the grounds of economy and efficiency, to publish in a publication of international circulation a notice seeking expressions of interest in participating in the request-for-proposals proceedings. In order to protect the procurement proceedings from inordinate delays that might result if the procuring entity were obligated to admit all suppliers or contractors that responded to such a notice, publication of the notice does not confer any rights on suppliers or contractors.

2. The procurement regulations may set forth further rules for the procuring entity in this type of a notice procedure. For example, the practice in some countries is that a request for proposals is sent as a general rule to all suppliers or contractors that respond to the notice, unless the procuring entity decides that it wishes to send the request for proposals only to a limited number of suppliers or contractors. The rationale behind such an approach is that those suppliers or contractors that expressed an interest should be given an opportunity to submit proposals and that the number asked to submit proposals should be limited only when

important administrative reasons can be established. A countervailing consideration is that, while the wider notification procedure should not be foregone casually, such a procedure might create an extra burden for the procuring entity at a time when it is already busy.

3. The remainder of article 48 sets forth the essential elements of request-for-proposals proceedings as regards the evaluation and comparison of proposals and the selection of the winning proposal. They are designed to maximize transparency and fairness in competition, and objectivity in the comparison and evaluation of proposals.

4. The relative managerial and technical competence of the supplier or contractor is included in paragraph 3(a) as a possible evaluation factor since the procuring entity might feel more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the proposal. This provision should be distinguished from the authority granted to the procuring entity by virtue of article 6 not to evaluate or pursue the proposals of suppliers or contractors deemed unreliable or incompetent.

5. The "best and final offer" procedure required by paragraph (8) is intended to maximize competition and transparency by providing for a culminating date by which suppliers or contractors are to make their best and final offers. That procedure puts an end to the negotiations and freezes all the specifications and contract terms offered by suppliers and contractors so as to restrict the undesirable situation in which the procuring entity uses the price offer made by one supplier or contractor to pressure another supplier or contractor to lower its price. Otherwise, in anticipation of such pressure, suppliers or contractors may be led to raise their initial prices.

Article 49. Competitive negotiation

1. Article 49 is a relatively short provision since, subject to the applicable general provisions and rules set forth in the Model Law and in the procurement regulations, and subject to any rules of other bodies of applicable law, the procuring entity may organize and conduct the negotiations as it sees fit. Those rules that are set forth in the present article are intended to allow that freedom to the procuring entity while attempting to foster competition in the proceedings and objectivity in the selection and evaluation process, in particular by providing in paragraph (4) that the procuring entity should, at the end of the negotiations, request suppliers or contractors to submit best and final offers, on the basis of which the successful offer is to be selected.

2. The enacting State may wish to require in the procurement regulations that the procuring entity take steps such as the following: establish basic rules and procedures relating to the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; prepare various documents to serve as a basis for the negotiations, including documents setting forth 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 request the suppliers or contractors with whom 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.

Article 50. Request for quotations

It is important to include in a procurement law minimum procedural requirements for request for quotations of the type set forth in the Model Law. They are designed to foster an adequate

level and quality of competition. 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.

Article 51. Single-source procurement

The Model Law does not prescribe procedures to be followed specifically in single-source procurement. This is because single-source procurement is subject to very exceptional conditions of use and involves a sole supplier or contractor, thus making the procedure essentially a contract negotiation which it would not be appropriate for the Model Law to specifically regulate. It may be noted, however, that the provisions of chapter I would be generally applicable to single-source procurement, including article 11 on record requirements and article 14 on publication of notices of procurement contract awards.

Chapter VI. Review

1. An effective means to review acts and decisions of the procuring entity and procedures followed by the procuring entity is essential to ensure the proper functioning of the procurement system and to promote confidence in that system. Chapter VI of the Model Law sets forth provisions establishing a right to review and governing its exercise.

2. It is recognized that there exist in most States mechanisms and procedures for review of acts of administrative organs and other public entities. In some States, review 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. Certain important aspects of proceedings for review, such as the forum where review may be sought 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. Many legal systems provide for review of acts of administrative organs and other public entities before an administrative body that exercises hierarchical authority or control over the organ or entity (hereinafter referred to as "hierarchical administrative review"). In legal systems that provide for hierarchical administrative 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 the context of procurement, for example, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g., a central procurement board); in other States the review function is performed by the body that exercises financial control and oversight over operations of the Government and of the public administration. Some States provide for review by the Head of State in certain cases.

3. In some States, the review function in respect of particular types of cases involving administrative organs or other public entities is performed by specialized independent administrative bodies whose competence is sometimes referred to as "quasi-judicial". Those bodies are not, however, considered in those States to be courts within the judicial system.

4. Many national legal systems provide for judicial review of acts of administrative organs and public entities. In several of those legal systems judicial review is provided in addition to administrative review, while in other systems only judicial review is provided. Some legal systems provide only administrative review, and not judicial review. In some legal systems where both

administrative and judicial review is provided, judicial review may be sought only after opportunities for administrative review have been exhausted; in other systems the two means of review are available as options.

5. In view of the above, and in order to avoid impinging upon fundamental conceptual and structural aspects of legal systems and systems of State administration, the provisions in chapter VI are of a more skeletal nature than other sections of the Model Law. As indicated in the asterisk footnote in the Model Law at the head of chapter VI, some States may wish to incorporate the articles on review without change or with only minimal changes, while other States might not see fit, to one degree or another, to incorporate those articles. In the latter cases, the articles on review may be used to measure the adequacy of existing review procedures.

6. In order to enable the provisions to be accommodated within the widely differing conceptual and structural frameworks of legal systems throughout the world, only basic features of the right of review and its exercise are dealt with. Procurement regulations to be formulated by an enacting State might include more detailed rules concerning matters that are not dealt with by the Model Law or by other legal rules in the State. In some cases, alternative approaches to the treatment of particular issues have been presented.

7. Chapter VI does not deal with the possibility of dispute resolution through arbitration, since the use of arbitration in the context of procurement proceedings is relatively infrequent. 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.

Article 52. Right to review

1. The purpose of article 52 is to establish the basic right to obtain review. Under paragraph (1), the right to review appertains only to suppliers and contractors, and not to members of the general public. Subcontractors have been intentionally omitted from the ambit of the right to review provided for in the Model Law. This limitation is designed to avoid an excessive degree of disruption, which might impact negatively on the economy and efficiency of public purchasing. 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 are left to be resolved in accordance with the relevant legal rules in the enacting State.

2. The reference in paragraph (1) to article 57 has been placed within square brackets because the article number will depend on whether or not the enacting State provides for hierarchical administrative review (see comment 1 on article 54).

3. Not all of the provisions of the Model Law impose obligations which, if unfulfilled by the procuring entity, give rise under the Model Law to a right to review. Paragraph (2) provides that certain types of actions and decisions by the procuring entity which involve an exercise of discretion are not subject to the right of review provided for in paragraph (1). The exemption of certain acts and decisions is based on a distinction between, on the one hand, requirements and duties imposed on the procuring entity that are directed to its relationship with suppliers and contractors and that are intended to constitute legal obligations towards suppliers and contractors, and, on the other hand, other requirements that are regarded as being only "internal" to the administration, that are aimed at the general public interest, or that for other reasons are not intended to constitute legal obligations of the

procuring entity towards suppliers and contractors. The right to review is generally restricted to cases where the first type of requirement is violated by the procuring entity. (See also comment 2 on article 30.)

*Article 53. Review by procuring entity
(or by approving authority)*

1. The purpose of providing for first-instance review by the head of the procuring entity (or of the approving authority) is essentially to enable that officer to correct defective acts, decisions or procedures. Such an approach can avoid unnecessarily burdening higher levels of review and the judiciary with cases that might have been resolved by the parties at an earlier, less disruptive stage. References to the approving authority in paragraph (1), as well as elsewhere in article 53 and the other articles on review, have been placed in parentheses since they may not be relevant to all enacting States (see paragraph 28 of section I of the Guide).

2. The policy rationale behind requiring initiation of review before the procuring entity or the approving authority only if the procurement contract has not yet entered into force is that, once the procurement contract has entered into force, there are limited corrective measures that the head of the procuring entity or of the approving authority could usefully require. The latter cases might better fall within the purview of hierarchical administrative review or judicial review.

3. The purpose of the time-limit in paragraph (2) is to ensure that grievances are promptly filed so as to avoid unnecessary delays and disruption in the procurement proceedings at a later stage. Paragraph (2) does not define the notion of "days" (i.e., whether calendar or working days) since most States have enacted interpretation acts that would provide a definition.

4. Paragraph (3) is a companion provision to paragraph (1), providing that, for the reasons referred to in comment 2 on the present article, the head of the procuring entity or of the approving authority need not entertain a complaint, or continue to entertain a complaint, once the procurement contract has entered into force.

5. Paragraph (4)(b) leaves it to the head of the procuring entity or of the approving authority to determine what corrective measures would be appropriate in each case (subject to any rules on that matter contained in the procurement regulations; see also comment 7 on the present article). Possible corrective measures might include the following: requiring the procuring entity to rectify the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rule of law; if a decision has been made to accept a particular tender and it is shown that another tender should be accepted, requiring the procuring entity not to issue the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other tender; or terminating the procurement proceedings and ordering new proceedings to be commenced.

6. An enacting State should take the following action with respect to the references within square brackets in paragraphs (5) and (6) to article "54 or 57". If the enacting State provides judicial review but not hierarchical administrative review (see comment 1 on article 54), the reference should be only to the article appearing in this Model Law as article 57. If the enacting State provides both forms of review but requires the supplier or contractor submitting the complaint to exhaust the right to hierarchical administrative review before seeking judicial review, the reference should be only to article 54. If the enacting State provides both forms of review but does not require the right to hierarchical

administrative review to be exhausted before seeking judicial review, the reference should be to "article 54 or 57".

7. Certain additional rules applicable to review proceedings under this article are set forth in article 55. Furthermore, the enacting State may include in the procurement regulations detailed rules concerning the procedural requirements to be met by a supplier or contractor in order to initiate the review proceedings. For example, such regulations could clarify whether a succinct statement made by telex, with evidence to be submitted later, would be regarded as sufficient. The procurement regulations may also include detailed rules concerning the conduct of review proceedings under this article (e.g., concerning the right of suppliers or contractors participating in the procurement proceedings, other than the party submitting the complaint, to participate in the review proceedings (see article 55); the submission of evidence; the conduct of the review proceedings; and the corrective measures that the head of the procuring entity or of the approving authority may require the procuring entity to take).

8. Review proceedings under this article should be designed to provide an expeditious disposition of the complaint. If the complaint cannot be disposed of expeditiously, the proceedings should not unduly delay the institution of proceedings for hierarchical administrative review or judicial review. To that end, paragraph (4) provides a thirty-day deadline for the issuance by the procuring entity (or by the approving authority) of a decision on the complaint; in the absence of a decision, paragraph (5) entitles the supplier or contractor that submitted the complaint to initiate administrative review under article 54 or, if such review is not available in the enacting State, judicial review under article 57.

Article 54. Administrative review

1. States where hierarchical administrative 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 57).

2. In some legal systems that provide for both hierarchical administrative review and judicial review, proceedings for judicial review may be instituted while administrative review proceedings are still pending, or vice versa, and rules are provided as to whether or not, or the extent to which, the judicial review proceedings supplant the administrative review proceedings. If the legal system of an enacting State that provides both means of review does not have such rules, the State may wish to establish them by law or by regulation.

3. An enacting State that wishes to provide for hierarchical administrative review but that does not already have a mechanism for such review in procurement matters should vest the review function in a relevant administrative body. The function may be vested in an appropriate 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 (e.g., a central procurement board), 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, such as a "procurement review board". It is important that the body exercising the review function be independent of the procuring entity. In addition, if the administrative body is one that, under the Model Law as enacted in the State, is to approve certain actions or decisions of, or procedures followed by, the procuring entity, care should be taken to ensure that the section of

the body that is to exercise the review function is independent of the section that is to exercise the approval function.

4. While paragraph (1)(a) establishes time-limits for the commencement of administrative review actions with reference to the point of time when the complainant became aware of the circumstances in question, the Model Law leaves to the applicable law the question of any absolute limitation period for the commencement of review.

5. The suppliers and contractors entitled to institute proceedings under paragraph (1)(d) are not restricted to suppliers or contractors who participated in the proceedings before the head of the procuring entity or of the approving authority (see article 54(2)), but include any other suppliers or contractors claiming to be adversely affected by a decision of the head of the procuring entity or of the approving authority.

6. The requirement in paragraph (2) is included so as to enable the procuring entity or the approving authority to carry out its obligation under article 55(1) to notify all suppliers or contractors of the filing of a petition for review.

7. With respect to paragraph (3), the means by which the supplier or contractor submitting the complaint establishes its entitlement to a remedy depends upon the substantive and procedural law applicable in the review proceedings.

8. Differences exist among national legal systems with respect to the nature of the remedies that bodies exercising hierarchical administrative review are competent to grant. In enacting the Model Law, a State may include all of the remedies listed in paragraph (3), or only those remedies that an administrative body would normally be competent to grant in the legal system of that State. If in a particular legal system an administrative body can grant certain remedies that are not already set forth in paragraph (3), those remedies may be added to the paragraph. The paragraph should list all of the remedies that the administrative body may grant. The approach of the present article, which specifies the remedies that the hierarchical administrative body may grant, contrasts with the more flexible approach taken with respect to the corrective measures that the head of the procuring entity or of the approving authority may require (article 53(4)(b)). The policy underlying the approach in article 53(4)(b) is that the head of the procuring entity or of the approving authority should be able to take whatever steps are necessary in order to correct an irregularity committed by the procuring entity itself or approved by the approving authority. Hierarchical administrative authorities exercising review functions are, in some legal systems, subject to more formalistic and restrictive rules with respect to the remedies that they can grant, and the approach taken in article 54(3) seeks to avoid impinging on those rules.

9. Optional language is included in the *chapeau* of paragraph (3) in order to accommodate those States where review bodies do not have the power to grant the remedies listed in paragraph (3) but can make recommendations.

10. With respect to the types of losses in respect of which compensation may be required, paragraph (3)(f) sets forth two alternatives for the consideration of the enacting State. Under Option I, 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 that are compensable under Option II are broader than those under Option I, and might include lost profit in appropriate cases.

11. If the procurement proceedings are terminated pursuant to paragraph (3)(g), the procuring entity may institute new procurement proceedings.

12. There may be cases in which it would be appropriate for a procurement contract that has entered into force to be annulled. This might be the case, for example, where a contract was awarded to a particular supplier or contractor as a result of fraud. However, as annulment of procurement contracts may be particularly disruptive of the procurement process and might not be in the public interest, it has not been provided for in the Model Law itself. Nevertheless, the lack of provisions on annulment in the Model Law does not preclude the availability of annulment under other bodies of law. Instances in which annulment would be appropriate are likely to be adequately dealt with by the applicable contract, administrative or criminal law.

13. If detailed rules concerning proceedings for hierarchical administrative review do not already exist in the enacting State, the State may provide such rules by law or in the procurement regulations. Rules may be provided, for example, concerning: the right of suppliers and contractors, other than the one instituting the review proceedings, to participate in the review proceedings (see article 55(2)); the burden of proof; the submission of evidence; and the conduct of the review proceedings.

14. The overall period of 30 days imposed by paragraph (4) may have to be adjusted in countries in which administrative proceedings take the form of quasi-judicial proceedings involving hearings or other lengthy procedures. In such countries the difficulties raised by the limitation can be treated in the light of the optional character of article 54.

Article 55. Certain rules applicable to review proceedings under article 53 [and 54]

1. This article applies only to review proceedings before the head of the procuring entity or of the approving authority, and before a hierarchical administrative body, but not to judicial review proceedings. There exist in many States rules concerning the matters addressed in this article.

2. References within square brackets in the heading and text of this article to article 54 and to the administrative body should be omitted by enacting States that do not provide for hierarchical administrative review.

3. The purpose of paragraphs (1) and (2) of this article is to make suppliers or contractors aware that a complaint 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 paragraph (2), and other steps that may be provided for under applicable legal rules. The possibility of broader participation in the review proceedings is provided since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible.

4. While paragraph (2) establishes a fairly broad right of suppliers and contractors to participate in review proceedings that they have not themselves generated, the Model Law does not provide detailed guidance as to the extent of the participation to be allowed to such third parties (e.g., whether the participation of such third parties would be at a full level, including the right to submit statements). Enacting States may have to ascertain whether there is a need in their jurisdictions for establishing rules to govern such issues.

5. In paragraph (3), the words "any other supplier or contractor or governmental authority that has participated in the review

proceedings" refer to suppliers or contractors participating pursuant to paragraph (2) and to governmental authorities such as approving authorities.

Article 56. Suspension of procurement proceedings

1. An automatic suspension approach (i.e., suspension of the procurement proceedings triggered by the mere filing of a complaint) is followed in the procurement laws of some countries. The purpose of suspension is to enable the rights of the supplier or contractor instituting review proceedings to be preserved pending the disposition of those proceedings. Without a suspension, a supplier or contractor submitting a complaint might not have sufficient time to seek and obtain interim relief. In particular, it will usually be important for the supplier or contractor to avoid the entry into force of the procurement contract pending disposition of the review proceedings and, if an entitlement to interim relief would have to be established, there might not be sufficient time to do so and still avoid entry into force of the contract (e.g., where the procurement proceedings are in their final stages). With an automatic suspension approach, there is a greater possibility of settlement of complaints at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement. At the same time, the disadvantage of an automatic suspension approach is that it would increase the extent to which the review procedures would result in disruption and delay in the procurement process, thus affecting the operations of the procuring entity.

2. The approach taken in article 56 with regard to suspension is designed to strike a balance between the right of the supplier or contractor to have a complaint 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. In the first place, in order to limit the unnecessary triggering of a suspension, the suspension provided for in article 56 is not automatic, but is subject to the fulfillment of the conditions set forth in paragraph (1). The requirements set forth in paragraph (1) as to the declaration to be made by a supplier or contractor in applying for a suspension are not intended to involve an adversarial or evidentiary process as this would run counter to the objective of a swift triggering of a suspension upon timely filing of a complaint. Rather, what is involved is an *ex parte* process based on the affirmation by the complainant of the existence of certain circumstances, circumstances of the type that must be alleged in many legal systems in order to obtain preliminary relief. The requirement that the complaint not be frivolous is included since, even in the context of *ex parte* proceedings, the reviewing body should be enabled to look on the face of the complaint to reject frivolous complaints.

3. In order to mitigate the potentially disruptive effect of a suspension, only a short initial suspension of seven days may be triggered through the fairly simple procedure envisaged in article 56. This short initial suspension is intended to permit the procuring entity or other reviewing administrative body to assess the merits of the complaint and to determine whether a prolongation of the initial suspension under paragraph (3) would be warranted. The potential for disruption is further limited by the overall thirty-day cap on the total length of the suspension in accordance with paragraph (3). Furthermore, paragraph (4) allows avoidance of the suspension in exceptional circumstances if the procuring entity certifies that urgent public interest considerations require the procurement to proceed without delay, for example, when the procurement involves goods needed urgently at the site of a natural disaster.

4. Paragraph (2) provides for the suspension for a period of seven days of a procurement contract that has already entered into force in the event that a complaint is submitted in accordance with article 54 and meets the requirements of paragraph (1). This suspension can also be avoided under paragraph (4) and, as noted above, is subject to extension up to a thirty-day total period under paragraph (3).

5. Since, beyond what is contained in article 57, the Model Law does not deal with judicial review, article 56 does not purport to address the question of court-ordered suspension, which may be available under the applicable law.

Article 57. Judicial review

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.

III. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE PREPARATION OF THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES

Summary record of the 520th meeting

Tuesday, 31 May 1994, at 10.30 a.m.

[A/CN.9/SR.520]

Temporary Chairman: Mr. CORELL (Under-Secretary-General, The Legal Counsel)

later: Mr. HERRMANN (Secretary of the Commission)

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 10.45 a.m.

OPENING OF THE SESSION

1. The TEMPORARY CHAIRMAN said that current international developments made the unification and harmonization of international trade law increasingly important. There was therefore a crucial need for a modern legal order governing cross-border commerce, and the United Nations Commission on International Trade Law (UNCITRAL) had made a valuable contribution in that area. The consensus in the international community that economic development required the existence of a legal order to enhance the rule of law also rendered the Commission's work more valuable, since, from a developmental perspective, the rule of law was no longer limited to constitutional and judicial issues, but extended to the establishment of a proper legal infrastructure which promoted trade and investment and facilitated the fair and speedy settlement of disputes.

2. The Commission had decided the previous year that the major item for consideration at the current session would be the draft model provisions on procurement of services, which would provide States with a comprehensive model law that would cover all types of procurement. The Commission's work on procurement was already eliciting interest in a number of countries, especially in newly independent States and States whose economies were in transition and where legislation on procurement often did not exist. Several States were already enacting procurement legislation based on the UNCITRAL Model Law on Procurement of Goods and Construction. Since procurement of services was a relatively new area in which many States did not have a developed practice, it was of particular importance that the model provisions should be practicable.

3. The Commission had also made a valuable contribution in the area of international arbitration. The UNCITRAL Arbitration Rules (1976) and the UNCITRAL Model Arbitration Law (1985), for example, had become the universal standards against which arbitration rules and national laws on international arbitration were assessed and modelled. The current draft guidelines for preparatory conferences in arbitral proceedings, which were intended

to foster efficiency and predictability in international arbitrations, were an appropriate complement to existing UNCITRAL legal texts.

4. The proposed discussion of the implications of the entry into force of the Hamburg Rules (1978) was both timely and useful, since the current situation of the law of the carriage of goods by sea was unsatisfactory. He hoped that the Commission's deliberations would lead to an accelerated transition from the legal regime based on The Hague Rules to the modern regime of the Hamburg Rules. Other important topics for possible future work, namely cross-border insolvency and receivables financing, would also be discussed at the current session.

5. The promotion of the Commission as an institution and of its legal texts had become a regular part of the Secretariat's work. As a result of such activities and the political and economic changes that were taking place in many countries, there had been a considerable increase in requests for technical assistance and for regional and national seminars. While efforts to meet those requests placed an additional strain on the Secretariat's human and financial resources, the Commission would undoubtedly adopt additional texts in the foreseeable future. Despite frequent appeals from the Commission and the General Assembly, contributions to the UNCITRAL Trust Fund for Symposia had been declining. Commission members should therefore urge their respective Governments to increase their contributions to the Fund or to second a lawyer for a year or so to the International Trade Law Branch of the Office of Legal Affairs.

6. Lastly, he paid a tribute to the memory of Professor Willem Vis, former Secretary of the Commission, who had passed away since the previous session.

The meeting was suspended at 11 a.m. and resumed at 11.35 a.m.

Mr. Herrmann (Secretary of the Commission) took the Chair.

ELECTION OF OFFICERS

7. Mr. JAMES (United Kingdom of Great Britain and Northern Ireland), seconded by Mr. GUENTCHEV (Bulgaria), said that he wished to nominate Mr. Morán (Spain) as Chairman of the twenty-seventh session on the understanding that the Chairman of the twenty-eighth session would be from the Eastern European group of States.

8. *Mr. Morán (Spain) was elected Chairman by acclamation.*

9. *Mr. Morán (Spain) took the Chair.*

ADOPTION OF THE AGENDA

10. Mr. MELAIN (France) said it was unfortunate that the Secretariat had failed to make available on time the French text of the report of the Working Group on the New International Economic Order on the work of its seventeenth session (A/CN.9/392). As a result, French-speaking delegations had not had time to consult their Governments on the report.

11. Mr. LEVY (Canada) said that the Secretariat was to be congratulated for its excellent work in faithfully reflecting the decisions reached by the Working Group after two sessions. He therefore hoped that the debate from those sessions would not be reopened, as such a procedure would delay the work of the current session.

12. After a procedural discussion in which Mr. CHOUKRI SBAI (Morocco), Mr. JAMES (United Kingdom), Mr. LOBSIGER (Observer for Switzerland) and Mr. BAVYKIN (Russian Federation) took part, Mr. HERRMANN (Secretary of the Commission), said that the Office of Conference Services in general and the French Translation Service in particular were understaffed and overworked, and that tight schedules did not improve matters. In the future, the Commission would reduce the workload it required of conference services. Turning to the scheduling of meetings, he said that the discussions on the complex subject of procurement should be completed before the Commission took up the issue of arbitration.

13. *The agenda was adopted.*

NEW INTERNATIONAL ECONOMIC ORDER:
PROCUREMENTUNCITRAL MODEL LAW ON PROCUREMENT OF
GOODS AND CONSTRUCTION AND GUIDE TO
ENACTMENT OF THAT LAW (A/CN.9/393)PROCUREMENT OF SERVICES (A/CN.9/389, A/CN.9/392
and A/CN.9/394)

14. Mr. HUNJA (International Trade Law Branch), introducing the item, said that the Working Group on the New International Economic Order had devoted its sixteenth and seventeenth sessions to the issue of procurement. At its sixteenth session, the report of which was contained in document A/CN.9/389, the Working Group had decided that a special procedure for procurement of services, entitled "Request for proposals for services" and contained in article 39 *bis*, would be required to expand the scope of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services to include procurement of services. The Working Group had taken two decisions at its seventeenth session which were reflected in the report of that session (A/CN.9/392) and the annex thereto, entitled "Draft UNCITRAL Model Law on Procurement of Goods, Construction and Services" and which would form the basis of discussions at the Commission's current session.

15. The first decision had been to include the model provisions on procurement of services in a separate chapter dealing with

procurement of services, chapter IV *bis*, entitled "Request for proposals for services". That chapter provided three methods for selecting the successful proposal. The second major decision was that, in addition to requests for proposals for services, all the other methods that were available for procurement of goods and construction services would also be available for procurement of services. There had also been some discussion aimed at simplifying the structure of the Model Law in order to make it easier for States that were considering adopting legislation based on it to do so. The Working Group had also recommended the draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/394) for adoption simultaneously with the amended draft Model Law.

16. Mr. WALLACE (United States of America) said that the drafting of the individual provisions was largely satisfactory and reflected the progress made. The two remaining issues concerned chapter IV *bis*, in connection with which the Commission should proceed as it had in the past, and the structure of the Model Law and the multiplicity of methods provided for, which gave rise to some concern. It might be preferable for the Commission to delegate responsibility for those issues to a Working Group, which could then present conclusions to the Commission itself.

17. Mr. LEVY (Canada) said that the multiplicity of methods should not present any particular problem, since States were free to make use of the methods they wished. The Commission could note that agreement to include all existing methods had been reached after difficult negotiations, but it would not be wise to reopen the question. The suggestion to refer the matter to a working group was not all that helpful, since the decision ultimately lay with the Commission itself. Much work had been expended in devising the structure before the Commission, and delegations should focus on the substantive work before the Commission rather than becoming embroiled in tangential issues.

18. Mr. JAMES (United Kingdom) agreed with the representative of Canada: the proposals before the Commission had emerged after much discussion, and the important point was for the Commission to reach the crucial article 16 as quickly as possible. In any event there would scarcely be time to schedule meetings of a working group.

19. Mr. MELAIN (France) endorsed the views of the previous two speakers. The availability of all methods had been agreed by consensus and the question should not be reopened. He agreed that it was important for the Commission in its entirety to deal with article 16 at an early stage.

20. Mr. CHATURVEDI (India) asked whether the decision to include services in the Model Law had been taken by the Commission or by the Working Group.

21. Mr. GOH PHAI (Singapore) supported the views expressed by the United Kingdom and agreed that the Commission should proceed with its substantive work as quickly as possible.

22. Mr. HUNJA (International Trade Law Branch) said that the question of the addition of services to the Model Law had been dealt with by the Commission at its twenty-sixth session and was reflected in paragraph 262 of its report to the General Assembly (A/48/17). The Commission should note that the Model Law on Procurement of Goods and Construction, already adopted by the General Assembly, would still be available to those States that were not interested in services.

23. Mr. CHATURVEDI (India) said that his delegation reserved its position on the draft Model Law.

24. The CHAIRMAN invited the Commission to consider the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services, contained in the annex to document A/CN.9/392.

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services

Preamble

25. The preamble was approved.

Article 1

26. Article 1 was approved.

Article 2(a)

27. Article 2(a) was approved.

Article 2(b)

28. Article 2(b) was approved.

The meeting rose at 1 p.m.

Summary record of the 521st meeting

Tuesday, 31 May 1994, at 3 p.m.

[A/CN.9/SR.521]

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.05 p.m.

**NEW INTERNATIONAL ECONOMIC ORDER:
PROCUREMENT (continued)**

PROCUREMENT OF SERVICES (continued) (A/CN.9/392)

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (continued)

Article 2, subparagraph (c) (continued)

1. Mr. TUVAYANOND (Thailand), with reference to the definition of "goods", requested clarification as to whether the services rendered in supplying the goods should be understood as including their transport. If so, he thought there might be some overlap, since procurement of services would be analogous to the procurement of transport, which was a service.

2. The CHAIRMAN said it seemed clear, in the Spanish version at least, that the services entailed in supplying the goods were incidental in nature. The draft defined goods as objects of every kind and description together with the services incidental to the supply of the goods, provided the value of those services did not exceed the value of the goods themselves.

3. Mr. TUVAYANOND (Thailand) referred to a hypothetical case in which the procuring entity wished to purchase a given quantity of goods and transport was not included in the price, so that the procuring entity was obliged to arrange for transport; under those circumstances, he wished to know whether that would be considered goods or services.

4. The CHAIRMAN said that as he understood it, the procuring entity, when soliciting tenders for the supply of goods, would make it clear in the solicitation documents that transport should be included in the final price of the goods. Even if no mention of transport was made when tenders for the supply of goods were solicited, it would be self-evident that the procuring entity in all likelihood expected the goods to be delivered to their destination, and hence the question of awarding a contract for services would not arise there; it would be obvious that the procuring entity wanted the goods to be delivered to their destination, and the supplier would have to resolve the problem as it saw fit.

5. Mr. HUNJA (International Trade Law Branch) suggested a way for the procuring entity to approach the problem. He pointed out that if the contract for procurement of goods did not include transport, the reason might be that the procuring entity had its own means of transport. If that were not the case, and a separate contract had to be concluded for transport, the transport services would be governed by the provisions of the Model Law that referred to procurement of services. It would all depend on the way the contract was structured.

6. The CHAIRMAN said that if there were no objections, he would take it that the Commission wished to adopt subparagraph (c) of article 2.

7. It was so decided.

Article 2, subparagraphs (d) and (d bis)

8. Mr. LEVY (Canada) recalled that the reason for including the language in parentheses at the end of subparagraph (d bis) was that there was a possibility of confusion concerning some objects of procurement, such as intellectual property, which might be considered goods under some legal systems and services under others. Therefore, the Drafting Group had stipulated that the enacting State could specify certain categories of services. Although he did not wish to suggest that changes should be made in the present text, he thought that it would be helpful for the Guide to Enactment to contain a brief explanation of the reasons for inserting the text in parentheses; otherwise, under some legal systems it might be assumed that all such items should be included under services. It should be stated in the Guide that the intention was to cover certain unusual situations in order to avoid erroneous interpretations.

9. Mr. UEMURA (Japan), referring to article 2, subparagraph (d), said that procurement of construction should be handled in the same way as procurement of services. At the previous session of UNCITRAL, it had been noted with reference to procurement of services that the quality of the services depended to a great extent on the knowledge and skills of the suppliers. That suggestion had led UNCITRAL to begin drafting new provisions on procurement of services. In his view, the situation was similar with regard to procurement of construction, since construction

normally combined a number of different types of services, and it was hard for the procuring entity to supervise and monitor the quality of the services being rendered during construction. Since, by the time a defect was revealed in the finished work, it was already too late to deal with it effectively, it was important to take into account the technical competence of contractors during the procurement of construction. Therefore, it would be more appropriate to equate procurement of construction with procurement of services, rather than with procurement of goods. Furthermore, construction was treated as a type of service in the GATT Agreement on Government Procurement. Therefore, he suggested that the term "construction" should be dropped from the Model Law and that the Guide should explain that construction work was considered to be included under services.

10. Mr. CHATURVEDI (India) said that while his delegation did not object to UNCITRAL dealing with the question of services, it disagreed with the manner in which that had been done in the annex to document A/CN.9/392. In dealing with the question of services, the Commission should not amend its Model Law on Procurement of Goods and Construction, which, from the point of view of developing countries, was extremely useful. To incorporate the concept of services into various articles of the draft Model Law was to amend the Model Law adopted in 1993. It was his delegation's view that the appropriate way to deal with the matter would be to incorporate autonomous clauses concerning services in a protocol to the 1993 Model Law or in a completely separate document.

11. As for subparagraph (c) of article 2, where the concept of "goods" was defined, he pointed out that goods were tangible and material, whereas services were not. It was therefore incorrect to state that goods included services; the two definitions must be separate. He could offer no solution to that problem, but he felt that it should be kept in mind when the text was being finalized.

12. Mr. TUVAYANOND (Thailand) stated that his delegation had initially had misgivings about the inclusion of services in the definition of "goods"; but after hearing the explanation offered by the Secretary of the Commission, it found the present text acceptable, since much would depend on the wording of the contract. If the price of the goods included transport, that should be included in the definition of goods.

13. As for the definition of construction, he agreed with the point made by the Japanese delegation. Construction fell into the category of services rather than goods and should not be subject to the same regulations as those governing the procurement of goods. In Thai law, construction was considered to be a service; it would therefore be easier for his country to accept parallel regulations for construction and for services. It would be more logical to delete the word "construction", assuming that construction was included in the definition of services.

14. Mr. HERRMANN (Secretary of the Commission) noted in clarification that although he did not wish to involve himself in the discussion, he must remind delegations that they could not simply suggest deletion of the word "construction", since UNCITRAL itself had adopted a Model Law on Procurement of Goods and Construction in 1993. In attempting to determine the appropriate regime for services, one might examine other types of procurement to decide which one most closely resembled services, but the task of UNCITRAL in 1994 should be to add appropriate provisions on services without raising the possibility of eliminating the concept of "construction", which it was technically unable to do.

15. Mr. WALLACE (United States of America) reiterated the Secretary's statement. It was his understanding that UNCITRAL was obliged to follow certain procedural norms, as a result of

which a law, once approved, could not be modified by it unless absolutely necessary. That did not mean, however, that the remarks of the Thai delegation regarding terminology should be ignored.

16. As a second point, with regard to the statement made by the delegation of India, in the Working Group it had also been understood that the Group's mandate did not permit it to make unjustified changes. The few references to services in the present draft were the minimum necessary to complete the task assigned to the Group by UNCITRAL in 1993, that of establishing special regulations for procurement of services. Short of adopting an independent law which would include all the general provisions of chapter I, and there was no clear majority in favour of doing so, the only way of dealing with the problem had been to include references to services in several articles of the Model Law.

17. As for the definition of "goods", in his opinion that definition resembled the one established under existing law, although he did not understand why such extensive underlining was necessary. The definition of goods resembled that used in the Convention on the Law Applicable to International Sales of Goods, which had served as a basis for the Model Law.

18. Finally, as other delegations had pointed out, to refer to goods and services in the same definition was probably to mix two quite different things. But that was probably inevitable, and his delegation would not wish to introduce unnecessary modifications to the existing definition.

19. Moreover, he doubted that it would be useful to specify that the price of incidental services must be included in documents soliciting tenders. In his opinion, the Commission intended that procurement of those services should be done separately and should therefore be governed by chapter IV *bis*.

20. The same was true in the case of procurement of construction; if it was specified from the beginning that incidental services would have to be provided in the course of construction, those services would be governed by the regulations applicable to construction; if, on the other hand, incidental services were procured separately, they should be governed by the regulations applicable to services.

21. Mr. HUNJA (International Trade Law Branch) announced that the Model Law, which was included as an annex to the report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session, had now been issued as a separate document.

22. Mr. JAMES (United Kingdom), supported by the representative of Australia, said that the delegation of Canada was correct in stating that the commentary would need to clarify the meaning of subparagraph (d *bis*). The United Kingdom wished to stress the importance of that commentary, especially in regard to services.

23. Mr. HERRMANN (Secretary of the Commission) said that the delegation of Canada had informed him that the text of paragraph 12 of document A/CN.9/394, in which reference was made to the words in parentheses in subparagraphs (c) and (d *bis*) of document A/CN.9/392, resolved to that delegation's satisfaction the question which it had previously raised. Nevertheless, if any delegation found the wording of paragraph 12 unsatisfactory, it should say so without delay.

24. Mr. CHATURVEDI (India) said that subparagraphs (b), (d) and (d *bis*) had the same purpose: they all concerned the question of services. Services were defined in subparagraphs (c) and (d). At the same time, in subparagraph (d *bis*), the word "services"

was said to mean "any object of procurement other than goods or construction". If services were defined in one paragraph, it was unnecessary to repeat the definition elsewhere. He therefore wondered whether subparagraph (d) was really necessary. In any case, he felt that the definition of services should be limited to one paragraph.

25. Mr. JAMES (United Kingdom) said that the wording of paragraph 12 of document A/CN.9/394 was somewhat elliptical, and that it might be appropriate to add a sentence to clarify the meaning.

26. Mr. HERRMANN (Secretary of the Commission) said that the Secretariat shared the wish of the delegation of India to simplify and shorten the provisions of the draft before the Commission. The Working Group had considered at some length the wording of subparagraphs (c), (d) and (d bis), but had not been able to devise a more appropriate formulation. Those paragraphs were not intended simply to define services, but also to specify the treatment appropriate to the kind of service. There were, in fact, three categories of services: services incidental to the supply of goods, services incidental to construction, and services in general. The current formulation of the paragraphs reflected that fact.

27. Mr. TUVAYANOND (Thailand) asked whether the words in parentheses in subparagraph (d bis) were really necessary. If those words were interpreted in a strict sense they could serve as an escape clause, which a State could make use of to specify improperly that such services were not within the scope of the Model Law, particularly if account were taken of the open-ended nature of the definition of services in paragraph 12 of document A/CN.9/394. He wondered whether it would not be preferable to delete the words in parentheses, since, if they were retained, the Model Law would authorize States to use the provision to achieve a result other than that implied by the definition in the draft Model Law itself.

28. Mr. HUNJA (International Trade Law Branch) said that it might be necessary to clarify the scope of the words in parentheses in subparagraph (d bis), both in that paragraph and in the Guide (A/CN.9/393). The aim was to give States an opportunity to specify in which cases the object of procurement should not be included in the category of goods and construction, particularly where the wording of subparagraph (d bis) was not sufficiently specific, as well as in borderline cases. Nevertheless, such wording should not be used for exclusionary purposes that did not accord with the Model Law. Perhaps the Drafting Group should review the current formulation to make sure it expressed what was intended.

29. The CHAIRMAN said that, if there were no objection, he would take it that the Commission wished to approve the current formulation of articles 2(d) and (d bis).

30. *It was so decided.*

Articles 2(e) to (h) and article 3

31. The CHAIRMAN said that, if there were no objection, he would take it that the Commission wished to approve articles 2(e) to (h) and article 3.

32. *It was so decided.*

Article 4

33. Mr. CHATURVEDI (India) said that he was aware that draft article 4 appeared in the Model Law already adopted by the General Assembly, but he wondered whether it was appropriate to authorize States to enact regulations of the kind referred to in the article.

34. The CHAIRMAN noted that article 4 confined itself to drawing to the attention of national legislators certain points which should probably be included in the regulations needed to give effect to the Model Law. Further, the wording appeared in the UNCITRAL Model Law on Procurement of Goods and Construction, adopted by the General Assembly on the recommendation of the Commission, and it would be unfortunate to now recommend something else.

35. Mr. WALLACE (United States of America) said that he fully shared the view of the Chairman, although he understood the concern of the representative of India. He thus suggested that the commentary on article 4 should include some examples of the regulations mentioned in the text, in which connection his delegation intended to make specific proposals.

Article 5

36. The CHAIRMAN said that, if there were no objection, he would take it that the Commission wished to approve article 5.

37. *It was so decided.*

Article 6

38. Mr. KLEIN (Observer for the Inter-American Development Bank) said that paragraph 6(c) was imprecise and did not clearly express the intended aim, which was to avoid the disqualification of contractors on the ground of minor technical errors or omissions, as frequently occurred. As currently worded, the paragraph did not clearly explain which errors or omissions would permit disqualification and which would not. The paragraph should thus be reworded accordingly.

39. The CHAIRMAN recalled that the paragraph in question, which had already been approved by the Drafting Group, had been considered in great detail at Vienna, and that the Commission must thus act with caution in considering the possibility of making changes. In any event the Spanish text drew a clear distinction between the substantive and incidental aspects.

40. Mr. WALLACE (United States of America) said that he agreed with the Chairman. He recalled that the matter had been debated at length at Vienna, the point being to make articles 6 and 7 consistent. In his view it was not simply possible to introduce further changes.

41. Mr. TUVAYANOND (Thailand) asked whether, in the interest of greater coherence and to expedite the Commission's work, it would not be appropriate to proceed on the basis that, apart from cases where the nature of the procurement of services justified the adoption of completely different rules, a text should be adopted which was a simple copy of the first Model Law.

42. Mr. HERRMANN (Secretary of the Commission) said that the Commission was in fact proceeding on that basis. There was a Model Law on Procurement of Goods and Construction, which had already been adopted by the Commission, and the task now was not to revise that law but, as determined by the Working Group, to expand it to include rules on the procurement of services. Accordingly the changes from the original Model Law had been marked, so that, in considering each provision, the aim was not to improve the drafting but to see whether the Commission considered the changes acceptable or whether they should be amended or added to given the special nature of the procurement of services. The new text was not to be a second model law, but an alternative for those wishing to include the three categories of procurement.

43. Mr. CHATURVEDI (India) welcomed the clarification by the Commission Secretary, which was useful as a general guide,

and agreed that what had already been adopted should be followed as far as possible. Nevertheless the inclusion of services in the Model Law was already tantamount to an amendment, and those who wished to express their views should not be prevented from doing so.

44. Mr. CHOUKRI SBAL (Morocco) said that the text of paragraph 1(b)(v) of article 6 was unclear, since it seemed to cover the directors or officers of suppliers, inasmuch as they should not have been convicted of certain offences, and he requested clarification.

45. Mr. HUNJA (International Trade Law Branch) emphasized the importance of the provision, particularly from the viewpoint of the integrity of the procurement process. The intention was, of course, to cover all those involved in the supply of goods and construction and now of services, and establish that they must not have been involved in any offence. He wondered whether the representative of Morocco thought that, in terms of the procurement of services, there was some omission in referring to directors or officers.

46. Mr. KLEIN (Observer for the Inter-American Development Bank), referring to paragraph 6(c), said that the provision was badly drafted, since the important point was not the nature of the error but that it should be made good.

47. Mr. CHATURVEDI (India) said that in the English text of paragraph 1(b)(v) the word "disbarment" was wrongly used; he wondered whether "debarment" should be used instead.

48. The CHAIRMAN said that there were no errors in the Spanish version. He therefore took it that the Commission wished to adopt article 6 as a whole.

49. *It was so decided.*

Article 7

50. Mr. LEVY (Canada) said that in article 7, paragraph 1, reference should be made to chapter IV *bis*.

51. The CHAIRMAN said that that point could be settled when the text as a whole was adopted. In the meantime, paragraphs 1 and 2 of that article would be adopted.

52. Mr. LEVY (Canada) said that there was a duplication between the provisions of paragraph 3(a)(ii) and article 41 *ter*.

53. Ms. SABO (Canada) said that the French version of paragraph 3(b)(ii) should read article 41 *ter* instead of article 39 *ter*.

54. The CHAIRMAN said that in view of the difficulties arising from references in one provision to another, that issue could be clarified following a careful study by the Drafting Group of the provisions involved, especially the cross references.

55. Mr. CHATURVEDI (India) suggested that paragraph 3(b)(ii) should be deleted so that the text would remain as originally drafted.

56. Mr. JAMES (United Kingdom) said that, in his opinion, the confusion was caused by the fact that article 23 dealt with the contents of invitation to tender and invitation to prequalify while article 41 concerned soliciting a proposal or price quotation. The issue should be referred to the Drafting Group.

57. Mr. LEVY (Canada) suggested that the Drafting Group should consider whether paragraph 3(b)(ii) was compatible with the rest of the Draft Model Law.

58. The CHAIRMAN said that if he heard no objections, he would take it that the Commission endorsed the suggestion.

59. *It was so decided.*

60. Mr. SHI Zhaoyu (China) said that as paragraph 3(a)(v) was in contradiction with paragraph 3(a)(iii) some amendments were in order.

61. The CHAIRMAN said that paragraph 3(a)(v) reflected the text that the General Assembly had recommended to Member States and that it had already been adopted.

62. Mr. HUNJA (International Trade Law Branch) said that paragraph 3(a)(v) concerned "any other requirements" not provided for in paragraphs 3(a)(i) to 3(a)(iv) and had to do with prequalification. Those requirements had to be compatible with the provisions of paragraph 3(a)(iii).

63. Mr. CHATURVEDI (India) said that although he did not believe that paragraphs 3(a)(iii) and 3(a)(v) were incompatible, the latter could be deleted.

64. The CHAIRMAN said that deleting paragraph 3(a)(v) would limit the options available to the procuring entity; the paragraph should therefore be retained.

65. Mr. CHATURVEDI (India) said that deleting paragraph 3(a)(v) would not limit options available to the procuring entity.

66. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt article 7 with the exception of paragraph 3(b)(ii).

67. *It was so decided.*

Articles 8, 9 and 10

68. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt articles 8, 9 and 10.

69. *It was so decided.*

Article 11, paragraph 1

70. Mr. WALLACE (United States of America) said that article 41 *bis* paragraphs 3(a), (b) and (c) provided for three very broad exceptions. In that connection, it might be useful to have the record-keeping requirement provided for under article 11, paragraph 1 apply to such cases also. Therefore, it would be appropriate to wait until article 41 *bis* had been considered before taking any decision on article 11, paragraph 1.

71. Ms. SABO (Canada) said that the reference made in the French version of paragraph 1(i) *bis*, to article 41, paragraph 1(b) did not appear to correspond to the English version.

72. Mr. TUVAYANOND (Thailand) sought clarifications concerning the inclusion of the underlined text in paragraph 1(d).

73. Mr. JAMES (United Kingdom), replying to the delegation of Thailand, said that when a consultant was hired on an hourly basis, there was no knowing beforehand how many hours he was going to work. Therefore, paragraph 1(d) made reference to "the

basis for determining the price" which would make it possible to calculate, for example, the cost of each hour of work performed by the consultant. That was related in particular to the procurement of services as were the words "if these are known to the procuring entity" at the end of paragraph 1(d) since the procurement proceedings could begin before the processing of the documents ended.

74. Mr. TUVAYANOND (Thailand) said that he still did not understand why the words "if these are known to the procuring entity" had been included. Since the basis for determining the price needed to be known, those words were superfluous.

75. Mr. WALLACE (United States of America) said that the problem stemmed partly from the fact that the procuring entity had to prepare, in accordance with paragraph 1(e), a summary of the evaluation and comparison of tenders, proposals, offers or quotations and must be in a position to include in the summary at least the price, of the offer it had accepted. In the case of tendering proceedings, the price was known after all the tenders had been opened and that was why paragraph 1(d) had been included so that there would be no problems later on; however, concerning services, if the fourth method were used, whereby tenders were placed in a certain order, theoretically some of them might never be opened. That was why paragraph 1(e) had been included. The United Kingdom delegation had already explained the reasons for the inclusion of paragraph 1(d).

76. Mr. CHATURVEDI (India) said that, in his delegation's opinion, the inclusion of paragraph 1(e) made it unnecessary to include the underlined words in paragraph 1(d). Therefore, paragraph 1(e) as currently drafted, should be retained and the words underlined in paragraph 1(d) should be deleted.

77. Requiring the procuring entity to investigate for instance the basis for determining prices in foreign countries would be asking it to do too much. It should be enough to mention the price and the principal terms and conditions of each tender. Therefore, the words underlined in paragraph 1(d) should be deleted.

78. The CHAIRMAN said that in his view, retaining the underlined text would give the procuring entity more flexibility since the price might not be known at the time the proceedings were initiated.

79. Mr. HUNJA (International Trade Law Branch) said that the words underlined gave greater flexibility to the procuring entity and reflected what happened in practice in the procurement of services, since most bidders did not set fixed prices but rather provided a formula by which a price could be calculated. For that reason alone, it was important for the procuring entity to have the authority to include in the record the basis for determining the price and not an exact figure.

80. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt article 11, paragraph 1, as a whole.

81. *It was so decided.*

Article 11, paragraphs 2 to 4

82. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt the text of article 11, paragraphs 2 to 4, without any amendments in view of the fact that they reflected the UNCITRAL Model Law that had been adopted in 1993.

83. *It was so decided.*

Article 11 bis

84. Mr. CHATURVEDI (India) said that he would appreciate an explanation as to why the underlined words had been included. In his delegation's opinion, offers, proposals or quotations could not always be rejected as happened in the case of tendering. Therefore, the inclusion of those words would have to be justified.

85. Mr. HUNJA (International Trade Law Branch) said that offers, proposals or quotations could indeed also be rejected by the procurement entity under certain conditions, as provided for by article 11 bis, which was based on article 33 of the original Model Law. In the original Model Law, article 33 had been put under chapter III, which concerned only tendering. However, when the Working Group had considered the topic of services, it had decided that that regulation was also applicable to offers, proposals or quotations; accordingly, while the substance of the article had not changed, because it was included under chapter I on general provisions, those words had had to be underlined.

86. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt article 11 bis, paragraphs 1, 2 and 3.

87. *It was so decided.*

Article 11 ter

88. The CHAIRMAN said that as indicated in the footnote, article 11 ter was a new text and therefore did not contain any underlined words. The Working Group had decided that it would be advisable to include it because it dealt with the culmination of the procurement proceedings and the entry into force of the procurement contract awarded.

89. Mr. CHATURVEDI (India) said that while his delegation considered the wording of article 11 ter appropriate, it would nevertheless like to suggest a minor amendment, namely, the addition of the words "or accepted" at the end of paragraph 2.

90. Mr. TUVAYANOND (Thailand), supported by Mr. LEVY (Canada), said that, since potential suppliers or contractors needed to know it beforehand, the date of entry into force of the contract should be notified at the time that offers, proposals and quotations were requested.

91. Mr. CHATURVEDI (India) said that his delegation believed that the date of entry into force of contracts must be notified at the time that offers, proposals or quotations were accepted.

92. The CHAIRMAN said that since none of the other members of the Commission seemed to support the Indian delegation's proposal, he would take it that the Commission wished to adopt article 11 ter as currently drafted.

93. *It was so decided.*

Article 12

94. Mr. WALLACE (United States of America) highlighted the innovative nature of article 12 which required that notice of all procurement contract awards, including cases of single-source procurement, be published. The purpose of the draft article was to protect citizens from possible abuses and to promote transparency. Thus, it might be advisable to make the point more clearly in the corresponding commentary, indicating that the notice would be published even in cases of single-source procurement contracts so that contractors would know that such proceedings were under way. It was an established practice in some States, and should be

extended to the others. The explanation that his delegation proposed to include in the commentary would draw the attention of all States to that practice so that others could adopt it if they saw fit.

95. The CHAIRMAN said that the preamble to the draft Model Law clearly indicated that its purpose was to promote competition. What was at stake was the protection of consumers and taxpayers; the United States delegation's proposal was therefore pertinent.

96. Mr. CHATURVEDI (India) said that he failed to grasp the significance of article 12, paragraph 1, and suggested that it should be formulated more clearly. In any case, he doubted whether the article could be applied in practice in major countries given the enormous number of notices that would have to be published.

97. The CHAIRMAN said that the meaning of the paragraph under consideration was clear. Obviously, the publication of such

notices could be a costly matter but that was the price that citizens must pay, through taxes, in order to safeguard the international nature of tendering, which was the intended purpose. In any case, article 12, paragraph 3, authorized the State to specify that paragraph 1 was not applicable to awards where the contract price involved was less than a specified amount. In other words, the States could ease the difficulty indicated by the Indian delegation.

98. Mr. LEVY (Canada) said that in many States, notices of contract awards were routinely published in the official gazette. Article 12 merely reflected that practice, and was fully satisfactory.

99. Mr. TUVAYANOND (Thailand) proposed that the words "less than" in paragraph 3 should be replaced by the words "of a small amount" in order to avoid having to constantly be changing the price that would be indicated in the national legislation pursuant to the provision, in the event of inflation.

The meeting rose at 6.05 p.m.

Summary record of the 522nd meeting

Wednesday, 1 June 1994, at 10 a.m.

[A/CN.9/SR.522]

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 10.05 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*)

PROCUREMENT OF SERVICES (*continued*) (A/CN.9/392)

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (*continued*)

Article 12 (*continued*)

1. The CHAIRMAN invited the Commission to resume its discussion of article 12 of the draft Model Law on Procurement of Goods, Construction and Services.

2. Mr. TUVAYANOND (Thailand) suggested that rather than specifying a price, in article 12, paragraph 3, it might be preferable to say "where the contract price is of a minor amount".

3. Mr. WALLACE (United States of America) agreed, adding that the threshold for services might be different from that for construction or goods. Rather than changing the Model Law, it might be better to state in the commentary that legislators in their individual countries could adapt national regulations.

4. Mr. JAMES (United Kingdom) agreed with the representative of the United States of America that the commentary should specify that each State should enact its own regulations, and that the specific amount might vary, depending on whether the contract involved goods, construction or services. Article 12 was intended to protect the rights of suppliers and contractors, and also those of taxpayers by informing them of the procurements that had occurred and awards which had been made. It was important for the procuring entity to know which awards it was required to publish.

5. Mr. GRIFFITH (Observer for Australia) and Mr. KLEIN (Observer for the Inter-American Development Bank) supported the proposals of the previous speakers.

6. *Article 12, as amended, was approved.*

Article 13

7. Mr. HUNJA (International Trade Law Branch), responding to a question from Mr. CHATURVEDI (India), said that the point of referring, in line 4, to "any current or former officer or employee" was to try to close as many loopholes as possible. A member of the board of directors of a company, for example, was not, strictly speaking, an employee, hence the need to use both terms.

8. *Article 13 was approved.*

Article 14

9. Mr. CHATURVEDI (India) said that the expression "that create obstacles to participation" in article 14, paragraph 1, was vague and that the phrase "including obstacles based on nationality" was inappropriate since nationality was a valid criterion for selection in many countries. Furthermore, the inclusion of the words "or services" in the second sentence of paragraph 2 was inappropriate.

10. The CHAIRMAN said that, while it was true that in some countries local contractors were given advantages, the general principle stated in article 14, paragraph 1, concurred with the preference for international procurement outlined in the preamble.

11. Mr. AL-NASSER (Saudi Arabia) said that since the article dealt primarily with goods, there was no reason to include the word "services".

12. Mr. WALLACE (United States of America), supported by Mr. LEVY (Canada), said that the reference to services should be included in article 14 and that trademarks could also be used with reference to various services. The field of services was expanding exponentially and the article would certainly have application in the future.

13. Mr. CHOUKRI SBAI (Morocco) said that the issue of services did come up in areas ranging from transport to computers and that it was a concept that was continually evolving. Therefore, he agreed that the reference to services should be retained in article 14.

14. *Article 14 was approved.*

Article 15

15. The CHAIRMAN suggested that article 15 be approved as it stood.

16. *Article 15 was approved.*

17. Mr. WALLACE (United States of America) said that, although his delegation had earlier been critical of article 16, it was now convinced that there was no alternative to the current text. Even the extreme measure of providing for the procurement of goods and services under separate heads would cause other objections to be raised. He wished, nevertheless, to suggest a few drafting changes. In article 16, paragraph 2, a description of the method in question should be included in parentheses after each of the articles mentioned and, in article 16, paragraph 3, the term "procedures" should be replaced by "methods".

18. Mr. LEVY (Canada) said that after careful consideration of article 16, his delegation had concluded that in order for the model law to be acceptable to a broad spectrum of States, all the methods listed as options must be retained. The procurement methods listed were merely options and States were free to modify them.

19. With regard to the structure of the article, he was convinced that, short of drafting separate provisions on services, any attempt to restructure the article would create a new set of problems. The Commission should therefore leave well enough alone.

20. Ms. SABO (Canada) said that she could not support the suggestion made by the representative of the United States of America that the term "procedures" should be replaced by "methods". The original Model Law made a distinction between "methods" and "procedures", and the substitution of "methods" for "procedures" would give rise to unnecessary confusion.

21. Mr. WALSER (Observer for the World Bank) said that he agreed with the views which the representative of the International Bar Association had expressed on article 16 during the meeting of the Working Group held in March 1994. Services throughout the world were generally procured either through tendering procedures or through requests for proposals. Paragraph 3(b) should therefore be deleted.

22. Mr. CHOUKRI SBAI (Morocco) drew attention to a number of discrepancies between the Arabic and other language versions of the draft Model Law. The French version, for example, contained a reference to "records" which was translated in the Arabic version by a term which meant "register". He would particularly welcome clarification of the term "goods" as used in the

draft Model Law. It was important to know whether the term was used as a general concept referring to real or intellectual rights or whether it referred to movable or immovable goods.

23. Mr. CHATURVEDI (India) said that his delegation was in favour of article 16 as currently drafted and did not agree that paragraph 3(b) should be deleted.

24. Mr. JAMES (United Kingdom) said that after careful examination his delegation had concluded that article 16 as currently drafted represented the best available solution. He did not agree that paragraph 3(b) should be deleted. It must be borne in mind that enacting States would rely on the Model Law to govern all procurement, the Model Law should therefore make all methods of procurement available to the procuring authority. The sophisticated methods of procurement proposed in chapter IV *bis* would be desirable only if the procuring entities had the necessary time and money to devote to the complicated procedures which they entailed. It must also be remembered that routine services were increasingly being contracted out, much of it by tendering or by competitive negotiation.

25. As to which was the better term to use in paragraph 3, whether "methods" or "procedures", he pointed out that chapter IV *bis* described not methods but a method of procurement which had a subset of different procedures. A possible compromise would be to use the term "method" in the singular instead of "procedures".

26. Mr. WESTPHAL (Germany) pointed out that paragraph 1 described tendering as the normal method of procurement, while paragraph 3 appeared to suggest that tendering should be used only if there was good reason to do so.

27. Mr. TUVAYANOND (Thailand) said that he supported the use of the term "method" instead of "procedures" in paragraph 3, and the retention of paragraph 3(b).

28. On the subject of the Commission's method of work, members should be allowed to express their views on any subject, even if the particular subject had been considered by a working group. It must be borne in mind that not all members were represented on working groups.

29. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he supported the position adopted by the representative of the World Bank. It was his impression that the Commission did not have the expertise to adequately deal with all the complexities of the Model Law as it related to services and had therefore sought to ensure that all methods of procurement of goods would automatically be available for services. However, he cautioned that, since many of the methods were unstructured it would be necessary to provide detailed guidelines on how they should be applied.

30. Mr. SHI Zhaoyu (China) said that, while the current version of article 16 represented an improvement over the previous text, there was still room for improvement. Paragraphs 3(a) and (b) did not clearly identify specific methods of procurement of services. The draft text should first identify the methods before describing the procedures governing their use.

31. Mr. MELAIN (France) said that his delegation supported article 16 as currently drafted although it should be read in conjunction with chapter IV *bis*. He however agreed with the United Kingdom delegation that notwithstanding chapter IV *bis*, other methods of procurement could be used, particularly when handling the procurement of a small volume of services. Concerning paragraph 3 in the French version of the text, he pointed out that the reference to article 39 *bis* was no longer correct, since that article had become chapter IV *bis*.

32. Mr. LOBSIGER (Observer for Switzerland) said that article 16 was sound in that it made a distinction between goods and construction on the one hand and services on the other while respecting the pre-existing structure of the Model Law as approved by the Commission with respect to methods of procurement of goods and construction. That key provision had made it possible to limit the primary methods of procurement of services to one area. The task of reducing the number of methods could be left to national lawmakers. Such a task could be better accomplished if some additional information were provided in a commentary which would reflect the doubts of certain delegations regarding certain secondary methods of procurement and their applicability to the procurement of services.

33. Ms. SABO (Canada) said that the question of whether or not to use "method" and "procedures" could be addressed by the drafting group. Concerning the comment made by the representative of Germany, she noted that unless new methods were given a certain amount of prominence, there was a very real risk that inexperienced procurement entities might not get the best results from tendering. Therefore, article 16 should not be amended. It could be indicated in a general comment that the Working Group's work had been accomplished in the presence of representatives with great expertise in the field of procurement and that even where delegates did not particularly have the expertise they had consulted with experts in their States.

34. Mr. UEMURA (Japan) said that his delegation wished to know whether requests for proposals procedures under the Model Law fell within the meaning of tendering procedures in the General Agreement on Tariffs and Trade (GATT) Agreement.

35. The CHAIRMAN suggested that article 16 should be accepted as currently drafted, and that the suggestions put forward by the observers for the Inter-American Development Bank and the World Bank could be included in the commentary. The latter could even indicate that some States might wish to delete paragraph 3(b) when they incorporated the Model Law into their own legislation. He agreed with the representative of Germany that it might be better to reverse the order of paragraphs 3 and 2. In response to the concern voiced by the representative of Japan, he noted that while the Model Law did not follow GATT terminology, it did reflect the spirit of the GATT Agreement.

The meeting was suspended from 11.48 a.m. to 12.22 p.m.

36. Mr. HUNJA (International Trade Law Branch), replying to a question from Mr. TUVAYANONI (Thailand), said that in the original Model Law, the first part of article 16, paragraph 2, established the right of the procuring entity to use any of the methods pursuant to articles 17, 18, 19 and 20 and the second part established the obligation to keep a record of the reasons why those methods were used. In the text before the Commission, the two issues were dealt with in separate paragraphs, paragraphs (2)

and (4) respectively; the linking phrase "and, if it does" had therefore been deleted.

37. Mr. LEVY (Canada), referring to article 16, paragraph 4, said that the words "relied to justify" might cause problems in interpretation. Where something was not reviewable it seemed unfortunate to require justification, since no matter how inadequate any justification might be there was nothing that a contractor could do. The same problem arose in article 41 *series*, paragraph 1(b).

38. Mr. WALLACE (United States of America) said that the wording had been chosen quite deliberately in both instances and must stay, since it was a very important part of the Law.

39. Mr. JAMES (United Kingdom) said that he agreed with the representative of the United States. The wording of article 16 reflected a compromise between those who wanted the choice of method to be subject to review and those who felt that it should not be justiciable since it related to an administrative choice, positions which had been reconciled by agreeing that it should be in the public domain. His delegation would be most uneasy should any effort be made to upset that balance. The drafting of article 16, paragraph 4, was, perhaps, ambiguous, since it could be interpreted as imposing, in relation to services, a requirement to give reasons where the preferred method of requests for proposals for services was employed, which would be inconsistent with practice under the existing Model Law, and was surely not the intent. The wording of that paragraph should be reviewed.

40. Mr. WALSER (Observer for the World Bank) said that article 16, paragraph 4, simply meant that where a procuring entity used a method other than the normal method it should justify or explain its choice. It might have been preferable to have had a paragraph 3 stating that the normal practice was to use chapter IV *bis*, a paragraph 4 indicating exceptions in the case of services, and a paragraph 5 referring back to paragraph 4 with respect to services and to paragraph 2 in respect of goods and construction. Such drafting would be much clearer.

41. Mr. KLEIN (Observer for the Inter-American Development Bank), noted that in many States the rule enshrined in article 11 *bis* that a procuring entity need not justify its rejection of tenders was qualified by a requirement for justification once envelopes had been opened. That qualification was intended to prevent a procuring entity from rejecting all tenders if a preferred contractor had not won.

42. The CHAIRMAN said that he took it that the Commission wished to approve article 16.

43. *It was so decided.*

The meeting rose at 1.05 p.m.

Summary record of the 523rd meeting

Wednesday, 1 June 1994, at 3 p.m.

[A/CN.9/SR.523]

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*)

PROCUREMENT OF SERVICES (*continued*) (A/CN.9/392)

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (*continued*)

Article 16

1. Mr. JAMES (United Kingdom) said that he had no objection to the proposal formulated by the United States delegation. Nevertheless it was his delegation's understanding that paragraph 2 of article 16 of the UNCITRAL Model Law on Procurement of Goods and Construction authorized the procuring entity to use a method of procurement other than tendering proceedings only pursuant to articles 17, 18, 19 or 20, and only if the conditions set forth in those articles were met.

2. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve the substance of article 16 and submit it to the Drafting Group for consideration of the United States proposal.

3. *It was so decided.*

Articles 17 and 18

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve articles 17 and 18.

5. *It was so decided.*

Article 19

6. The CHAIRMAN said that, if there was no objection, he would take it that the Commission wished to approve the substance of article 19 and submit it to the drafting group to consider the possibility of avoiding the repetition of the word "provided" in the English text and the replacement of the word "prestados" in the Spanish text by a more appropriate expression.

7. *It was so decided.*

Article 20

8. Mr. WALLACE (United States of America) said that he agreed with the text of article 20. He recalled that paragraph 1(d) of the article, which authorized the procuring entity to contract with a single supplier for reasons of standardization, had been debated at great length in the Working Group. While such treatment had not caused particular difficulty in the procurement of goods, its application was much more complicated when the object of procurement was a service. For example, it could give rise to ethical problems. Accordingly, his delegation reserved the right to propose, when the commentary to the paragraph was considered, that reference should be made to the appropriateness of regulation of the matter by States under article 4.

9. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve article 20.

10. *It was so decided.*

Articles 21 to 35

11. The CHAIRMAN said that, if there was no objection, he would take it that the Commission wished to approve articles 21 to 35.

12. *It was so decided.*

Chapter IV

13. Mr. WALLACE (United States of America) said that it might be appropriate to amend slightly the title of chapter IV, "Procedures for procurement methods other than tendering", since the draft now included a chapter IV *bis* which also dealt with a procurement method other than tendering.

14. Mr. LEVY (Canada) proposed that the title should be amended to read: "Other common procurement methods".

15. The CHAIRMAN suggested that the possibility should also be considered of using the expression "alternative methods", suggested by Mr. Herrmann.

16. Mr. LEVY (Canada) endorsed Mr. Herrmann's suggestion.

17. Mr. CHOUKRI SBAI (Morocco) suggested that the title of chapter IV should be "Two-stage procurement procedures".

18. Mr. TUVAYANOND (Thailand) said that he doubted whether it was appropriate to amend the title of the chapter, which was identical to the text of the Model Law already adopted, except to the extent that it was justified by the special nature of services. To do otherwise might suggest that the subject required special treatment.

19. The CHAIRMAN agreed that, before introducing changes, every effort should be made to establish reasons for them.

Articles 37 to 41

20. The CHAIRMAN, referring to articles 37 to 41, said that the amendments to the text reflected the ideas expressed at the meetings of the Working Group, while elsewhere the text retained the original drafting of the Model Law already adopted. Accordingly, if he heard no objection, he would take it that the Commission wished to approve the articles.

21. *It was so decided.*

Chapter IV bis

22. The CHAIRMAN invited the Commission to consider chapter IV bis, which was completely new. It would probably be

necessary to begin with the matter of the title, which, at least in the Spanish version, was the same as that of article 41 *bis*.

23. Mr. WALLACE (United States of America) said that he had no objection to the title of the chapter, but thought it might be moved to become chapter III *bis*, since chapter III dealt with tendering proceedings, which were the principal procurement method for goods and construction, while chapter IV *bis* dealt with services.

24. Mr. SHI Shaoyu (China) said that chapter IV *bis* dealt with requests for proposals. In the English text, chapter III used the word "proceedings", while chapter IV spoke of "procedures"; the Chinese text, on the other hand, used the same term for both. Further, chapter IV *bis* referred to "procedures" or methods, and thus was consistent with chapter IV. For the content of chapter IV *bis* to be consistent with that of chapters III and IV, he proposed that the title of chapter IV *bis* should be amended to read "Methods for the solicitation of proposals for services".

25. Mr. TUVAYANOND (Thailand) asked for clarification as to why, in the English text, two different expressions were used, one for the title of the chapter ("Requests for proposals") and the other for the title of article 41 *bis* ("Solicitation of proposals"). The reason for the difference was not clear.

26. Mr. WESTPHAL (Germany) noted that paragraph 54 of the report of the Working Group stated: "In particular, request for proposals and competitive negotiations dealt with cases in which the procuring entity did not know the nature of the technical solution to its needs", whereas article 39 dealt with cases where the procuring entity attributed particular importance to the quality of the services supplied. He wondered whether the expression "request for proposals" should be used, since, as he had just noted, it was reserved for a specific situation. In document A/CN.9/392, in connection with article 39 *bis*, three titles were proposed, one of which, "Special procedure for procurement of services", could perhaps be used to resolve the problem.

27. Mr. LEVY (Canada) said that his delegation also had some doubts concerning the title of chapter IV *bis*, since the expression "Request for proposals", used for article 38, should not be repeated. Since, when drafting legal texts, titles were usually left to the end, he suggested that the matter could be taken up again once consideration of the chapter was concluded. As for moving the title, he recalled that the structure of the Model Law had been the subject of extensive debate to ensure that the text ultimately adopted would be more coherent, but he agreed that it could be placed following the chapter on tendering proceedings, which would then be followed by other common or alternative methods.

28. Mr. WALLACE (United States of America) said that the title of the chapter involved a substantive issue to which he would not refer since the representative of Germany had already done so. In his view, the problem resided partially in the fact that article 38 was entitled "Request for proposals". In his country and at the World Bank, so far as he knew, it was customary to refer to "RFP", or requests for proposals, the term which was normally used to designate that method of selecting services. That was what had led to the compromise solution of referring to a request for proposals for services. In order to solve the problem of the chapter title, he suggested that the title of article 41 *bis* should be changed to "Notice", which was the procedure that preceded a request for proposals, or RFP.

29. Mr. CHATURVEDI (India) agreed with the representative of China that the title of chapter IV *bis* was unclear. Apparently, the chapter dealt with special provisions on procurement of services. Thus, if the title was to be changed, as he believed it should be, it should read "Methods of procurement of services". He did not agree that the word "notice" should be used, as it would be

unclear what type of notice was involved. With reference to paragraph 1 of article 41 *bis*, which stated that "A procuring entity shall solicit proposals for services", he said that the paragraph dealt with a method of procuring services, and that it was not always necessary to solicit proposals. He did not believe that that was the implication. Moreover, there was no mention of either the suitability or the qualifications of the person or entity that was to provide the services; that should be included in article 41 *bis*.

30. Mr. JAMES (United Kingdom) said that he shared the views expressed by most of the previous speakers. It would be useful to relocate the chapter and, at the same time, to adopt the suggestion made by the Secretary of the Commission that reference should be made to "alternative methods", as that would make the ensuing provisions clearer. In addition, while he agreed that the title of the chapter should be changed, he did not believe that the Commission should devote too much time to the matter, especially if the Working Group had already discussed it extensively. In his view, the title of article 41 *bis* led to confusion, and the question should be considered by the Drafting Group. The intention was basically to reflect the sequence of events in the procurement process, which consisted of a notice seeking expression of interest in submitting a proposal, followed by the forwarding of the relevant documents. The idea was that article 41 *bis* should deal with the notice procedure; the solicitation of proposals was what was sent in response to expressions of interest. He did not agree that the article should simply be entitled "Notice", although that term could be incorporated into the title.

31. Mr. WALSER (Observer for the World Bank) raised an issue concerning the structure of the chapter. While he could accept the need for the other procurement methods referred to in article 16, paragraph 3(b), namely, two-stage tendering, request for proposals and competitive negotiation, he failed to understand why it was necessary to have two categories of requests for proposals for services, namely, the simple type referred to in article 38, which applied to goods as well as construction and services, and the more complex but, in his view, incorrect type outlined in chapter IV *bis*. He would appreciate an explanation in that regard. The two categories complicated the situation for the procuring entity, which must, in the final analysis, decide which type applied to services. In his view, the content of article 16, paragraph 3(b) notwithstanding, the category of requests for proposals envisaged in article 38 was unnecessary and should be eliminated.

32. Mr. LEVY (Canada) said that the Drafting Group should take into account the pertinent suggestion made by the Secretary of the Commission that reference should be made to "alternative procurement methods". The problem could perhaps be solved by using the expression "principal methods of procurement of services" and providing for alternative methods applicable to goods, construction and services. Article 41 *bis* could be entitled "Announcement of solicitation of proposals", although that appeared to be somewhat redundant. In reply to the statement made by the Observer for the World Bank, he said that his Government was opposed to any attempt to delete article 38, which would apply to cases in which one did not know with certainty what was required, while article 41 *bis* would be reserved for those cases in which one knew precisely what was required.

33. Mr. WALLACE (United States of America) said that the idea of relocating chapter IV *bis* was interesting, as was the Canadian suggestion that reference should be made to the "principal" or "preferable" method; the suggestion made by the Secretary of the Commission that the other methods should be termed "alternative" would then be not only logical and appropriate, but also be in keeping with the tenor of the Guide. With regard to the title of article 41 *bis*, he believed that it dealt specifically with the concept of notice; the very word was included in the provision.

34. Mr. TUVAYANOND (Thailand) supported the Canadian proposal to change the title of chapter IV *bis* to "Notice of request for proposals for services".

35. Mr. LEVY (Canada) said that, in the English version of paragraph 1 of article 41 *bis*, the word "expression" should be replaced by "expressions".

36. Mr. HUNJA (International Trade Law Branch) said that one of the selection procedures listed in article 41 *sexies* was similar to the method provided for in article 38. Moreover, under the condition envisaged in article 17, paragraph 1(a), where it was not feasible for the procuring entity to identify the characteristics of services, article 38 would presumably apply. It should be noted that the methods provided for in article 38 and in chapter IV *bis* overlapped to some extent.

37. The CHAIRMAN said that, as the Canadian delegation had noted, the procedure in article 17 would apply in cases where there were no details on the items to be procured; in cases where some information was available, the procedure in article 41 *bis* would apply.

38. Mr. WALLACE (United States of America) said that there was no way to know with certainty under what circumstances articles 38, 39 or article 41 *bis* would apply. Therefore, the article that was most appropriate, based on the various procedures provided for in each article, should be applied. Thus, article 41 *bis* established the requirement of a notice which did not appear in either article 38 or article 39. In contrast to articles 38 and 39, article 41 *ter* contained a detailed list of the information to be included in requests for proposals. In addition, the criteria listed in article 41 *quater* were very different from those listed in article 38.

39. His delegation would bow to the wishes of the Working Group and would, therefore, accept the 11 methods proposed, even though 5 of them could be eliminated in the case of services, namely, two-stage tendering, the Canadian method, competitive negotiation, restricted tendering and request for quotations.

40. Mr. CHATURVEDI (India) said that the Canadian proposal concerning the title of chapter IV *bis* appeared to be correct. The first line of paragraph 1 of article 41 *bis* should read "A procuring entity shall solicit requests for proposals for services". Paragraph 1 should also mention the award of contracts, as well as experience.

41. Mr. SHI Zhaoyu (China) said that it did not seem appropriate to use the word "notice" in the title of chapter IV *bis*, since the chapter referred to many other questions. Chapter IV *bis* referred to procedure and should include special methods for services.

42. Mr. CHATURVEDI (India) asked whether the Commission was to conclude its work before the Drafting Group met.

43. Mr. HERRMANN (Secretary of the Commission) said that the Drafting Group met during the UNCITRAL session. The Group consisted of six teams of linguists who were responsible for preparing the various language versions in the six official languages of the Organization. Each language team consisted of a reviser from the United Nations translation services and a delegate attending the UNCITRAL session who, as a member of the team, represented a language rather than a Government. The Group was concerned solely with drafting questions; if it observed that a drafting change could have substantive consequences, it brought the matter to the attention of the Commission for resolution. Thus, with the help of the Drafting Group,

UNCITRAL could examine the results of its work and adopt a final text at the close of its session.

The meeting was suspended at 4.35 p.m. and resumed at 5.05 p.m.

44. Mr. JAMES (United Kingdom) praised the representative of the United States of America for his eloquent defence of the provisions under discussion, and especially for chapter IV *bis*. That delegation should nevertheless make an effort to understand the issues raised by Mr. Hunja, which were of concern to several delegations.

45. The United States delegation had proposed the elimination of articles 38 and 39 so that the Commission might concentrate on chapter IV *bis*. In the view of the United Kingdom, however, it would be preferable to retain chapter IV *bis* and concentrate on articles 38 and 39 as well as on the criteria for their application. Although he did not wish to propose that solution, so as not to break the agreement that had been reached in the Working Group, he did wish to state the reasons that the Working Group had formulated those two opposing viewpoints. As Mr. Hunja had pointed out, the real problem presented by that text was the criteria on the basis of which the articles would be applied, which was related to article 16, which had been discussed at the previous session, and to the issues raised by articles 38 and 39 and chapter IV *bis*.

46. That question had been debated at length in the Working Group, which had considered, with respect to the Model Law, that the Group could not draft an appropriate formula by which to impose on the procuring entity the obligation to use any one procedure, but could only indicate its preference for the more detailed procedure because it offered both greater transparency and greater protection. Those principles had been established in the preamble. The United Kingdom was prepared to accept the compromise reached in the Working Group.

47. The problem was not a legal one, but rather of how to persuade States of the advantages of the provisions contained in the Model Law. It was a matter of explaining to States that, although there existed a great variety of methods of procurement, a principle must obtain that would favour transparency and openness in procurement. That should be clearly stated in the commentary and in the report.

48. Since some circumstances called for prompt action, it was advisable to follow a less demanding procedure. In such cases, the Model Law afforded the enacting State the possibility of allowing the procuring entity to use any option that might be appropriate for the individual case. It was up to the enacting State to determine to what extent the procuring entity would assume responsibility, and it should be mentioned that both the Model Law and the Guide to Enactment of UNCITRAL Model Law contained many safeguards against adoption by the enacting State of unsatisfactory procedures. Those safeguards ensured that the procedures would have the greatest possible transparency and openness. All those factors should be clearly explained to enacting States, and particularly in the Guide.

49. Mr. HERRMANN (Secretary of the Commission) said that he was greatly concerned by what had occurred in the Working Group, namely, the discrepancy between the text to be approved (the Model Law) and the content of the Guide. That problem was related to the problem of "selling" the text, or, in other words, of explaining it. If there was a marked discrepancy between the text of the Law and that of the Guide, and it was a matter of convincing States that the Law would function just as well in either case, and the Guide stated the contrary, that contradiction did not encourage acceptance of the text.

50. In that connection, reference was often made to the multiplicity of options; when the actual wording of the Law was examined, however, there was not a single reference to the options of legislators: only the options open to the procuring entities were mentioned. And yet in the Working Group reference had often been made to the options that Governments should enjoy, since all States would not, of course, adopt the Model Law in its entirety. In one of the provisions of the previous drafts, the options of legislators were explicitly stated. He suggested, therefore, that if such options were not referred to in the text of the Law itself, they should at least be mentioned in a footnote, a method used in other cases of lesser importance. What must be ruled out was reference to the options only in the Guide. His suggestion reflected the hope that States would actually adopt the text as a model, and was in keeping with the idea of transparency referred to in the preamble.

51. Mr. WESTPHAL (Germany), commenting on the point raised by the United States of America, namely, that the Model Law included 11 methods of procurement while the Agreement on Procurement under the General Agreement on Tariffs and Trade (GATT) included only 3, said that the only solution on which the members of the Working Group could agree was to establish that the legislator had a choice among the 11 methods proposed. That was not in his view, an easy process, since many countries lacked both experience and criteria in the area of procurement, and would not be in a position to choose the most appropriate method from among all those options. He doubted that UNCITRAL could set out principles in the Guide on which the legislator could base that choice, since not even the Working Group had been able to develop an acceptable approach to that problem.

52. Article 41 *bis* was too long and extremely detailed, and in one way or another sought to incorporate a special regime for services into the Model Law. Despite the fact that most delegations were opposed to drafting a separate text on the procurement of services, article 41 was a compilation of criteria relating to that question.

53. He reminded the Commission that the purpose of the Model Law was to help developing countries and countries with economies in transition to formulate their own competitive criteria for the procurement of services. It should not be forgotten, however, that although the United Nations, through UNCITRAL, might formulate a Model Law and recommend that States adopt it, they might prefer to adopt the GATT Agreement on Procurement, and to use other criteria as a model instead of those currently being prepared by UNCITRAL.

54. The Model Law was very complex, and had become more so as a result of the effort to incorporate the procurement of services. Germany therefore vigorously supported the proposal of the Secretary of the Commission that a footnote should be added to article 41 *bis* specifying that it was possible to choose among the various options offered.

55. Mr. LEVY (Canada) supported the suggestion made by the Secretary of the Commission that footnotes should be used to indicate to legislators that they could choose among the various options, and that they were not bound to adopt all of them. He also fully supported the statements of the United States of America and the United Kingdom with regard to the significance of the Model Law and the problems it raised at the current stage. Article 41 *bis* was unnecessary; the method envisaged in article 38 was relatively transparent and avoided the bureaucratic traps in article 41 *bis*. It had nevertheless been argued in the Working Group that procedures should be established that would approximate in so far as possible the tendering procedures. By way of a compromise, several delegations had requested that other methods should be included as well, and that the preferred method for the procurement of services should be indicated.

56. With regard to the concern expressed by Germany, he noted that if legislators experienced difficulties in determining the method to use, they might seek expert advice; it made no sense arbitrarily to eliminate any of the methods included in the article merely to simplify the text.

57. Mr. ABOUL ENEIN (Observer for the Regional Centre for Mercantile Arbitrage, Cairo) considered that the heading of chapter IV *bis* was unnecessary, and that two headings could be used instead under the original title of chapter IV, "Procedures for procurement methods other than tendering". The first would be "General procedures for procurement other than tendering" and would cover the procurement of goods, construction and services; the second, "Special procedures for services", would cover article 41 *bis* and the paragraphs of that article which followed.

58. Mr. WALLACE (United States of America) conceded that the members of the Working Group had perhaps split hairs somewhat in developing an acceptable text, as the representative of Germany had suggested, but pointed out that the provisions of GATT and the Model Law were very different. GATT defined what was permissible, i.e., fair or unfair, in trade policy, but did not formulate detailed operational laws. It had not, for instance, defined services. The UNCITRAL Model Law doubtless had to be brought into line with the provisions of GATT, but it was no less true that it would be difficult to achieve the objectives of the Model Law on the basis of those rules. In any case, the suggestion by the Secretary of the Commission was quite interesting, the more so since there were already footnotes in chapter V, albeit for another purpose.

59. It also went without saying that the Guide must be brought into line with the contents of the Model Law. Although the content of the Guide might appear not to be precisely the same as that of the draft Model Law, the Working Group had never intended to deviate from its provisions.

60. With regard to the comments made by the representative of Canada, it was important to recall that the Model Law represented the first time that an attempt had been made to subject the procurement of services to public regulations in such a rigorous manner. States were entering into relatively unknown territory, which meant that in some cases they would have no alternative but to turn to experts. In fact, the World Bank and the United Nations itself sent experts to various countries to assist States on such matters. Nevertheless, the Commission had a responsibility to elaborate a Model Law that was as complete as possible. While the draft under consideration might not fulfil the requirements for order, simplicity, coherence and in-depth analysis called for in a Model Law of that type, there was no doubt that, under the circumstances, the discussions had been quite useful. Finally, it must be stressed that the Commission was not advocating the use of any particular method of procurement.

61. Mr. CHATURVEDI (India), referring to the statement by the Secretary of the Commission, said that the text must clearly indicate that States could choose among the different methods of procurement set forth in the Model Law. Certainly chapter V contained footnotes, but it remained to be seen whether the problem at hand could be solved in that way. In any case, his delegation would prefer to avoid that solution, which was far from ideal. If it had accepted such a solution on previous occasions, it was only to avoid going against the majority opinion in the Commission.

62. Mr. TUVAYANOND (Thailand) said that the text under consideration struck a satisfactory balance among the interests of the various members of the Commission. To redo what had been accomplished would be a waste of time and resources. He recognized that a number of options might exist, since circumstances

were not the same in all countries. Moreover, the Commission was not empowered to impose methods of procurement on legislators. The Secretary's suggestion appeared to reflect the consensus of the Commission; it might be possible to insert a footnote to ensure that lawmakers clearly understood that they were not obliged to employ all the methods mentioned in the Model Law, but were free to choose those which were in the best interests of their own countries.

63. Mr. WALSER (Observer for the World Bank) fully endorsed the Secretary's suggestion that the Commission should provide States with a better explanation of how to proceed in choosing one or more methods of procurement. It might be appropriate to state in the text itself that States were not obliged to adopt all the methods mentioned.

64. In recent years, the World Bank had been recommending that its member States should adopt the UNCITRAL Model Law on Procurement of Goods and Construction, since it was the only such law in existence. The Bank had also provided consulting services and financial support to assist the efforts of various countries in that area. Thanks to the Bank's efforts, Poland was preparing to submit the Model Law to its Parliament for adoption, and other countries, such as Bulgaria, Estonia, Latvia and Slovakia, were considering the possibility of doing so. Nevertheless, the Bank recommended the Model Law with some reservations. For example, it suggested that the method of competitive negotiation should not be applied, and once the draft was approved, the Bank would probably also recommend against application of article 16, paragraph 3(b). In summary, the Bank gave general support to both the Model Law that had been adopted by the General Assembly and the draft Model Law before the Commission, and it intended to continue to promote the UNCITRAL model laws.

65. Mr. GRIFFITH (Observer for Australia) said that he did not know how to interpret the statement by the representative of the World Bank that his institution recommended the UNCITRAL Model Law on Procurement of Goods and Construction because it was the only such law in existence. He hoped that the Bank would adopt a more positive attitude in that regard.

66. As for the suggestion by the Secretary of the Commission, he wondered whether it might not be advisable for the Drafting Group to function as an informal working group in the preparation of the text and footnotes to be inserted into the present document. Consideration might also be given to the possibility of preparing a brief note to reflect the comments made by the representative of Thailand regarding article 12, paragraph 3. If those comments were included in the Guide to Enactment, they might go unnoticed, whereas that would not happen if they were included in a footnote.

67. The CHAIRMAN expressed his surprise at the last few statements. A model law was only a model for legislation, and lawmakers could either adopt it in its entirety or take from it what they deemed appropriate. If the Commission decided to use asterisks or footnotes, it would have to do so in every case where lawmakers had a choice. However, if the Commission did want to include such a notice, he felt that asterisks would not suffice; what was needed was a guide for legislators. Ideas regarding the drafting of such a guide could be submitted to the Secretariat.

68. He then turned to the question which several members had raised regarding conflicts between GATT and the Model Law. He had had an opportunity to study the text of GATT and the directives of the European Community concerning State procurement. The methods were the same, but they had different names. It was important to note that GATT instructed States regarding the legislation to be drafted, whereas UNCITRAL offered a model, thus perfectly complementing the prescriptive nature of GATT. The question of incompatibility did not arise. The Model Law offered one possible way of doing things, and it was up to lawmakers to decide whether to accept it entirely or in part.

69. Mr. HERRMANN (Secretary of the Commission) noted that, while it was he who had suggested the use of footnotes, he had no particular preference for that method. One might say that he had mentioned it for want of a better one. The important thing was that the Model Law was by nature optional; however, while drafting it, both the Working Group and the Commission had been aware that some cases were more optional than others. The idea was that it should be a finished document which could be promulgated as written, with only technical changes. If it offered a solution that did not satisfy legislators, they could change it, as had been done, for example, with the Model Law on International Commercial Arbitration. The present Model Law set forth a number of possible methods of procurement, and no one was suggesting that a State should accept all of them. He felt that the question of whether or not to accept the various methods indicated should be raised not in a separate guide, but in the law itself. Lastly, since the content of the note was a subject that called for more substantive discussion, the matter should be settled by the Commission rather than by the Drafting Group.

70. Mr. JAMES (United Kingdom) echoed the sentiments of the Chairman and the Secretary of the Commission. The Drafting Group should not be responsible for writing substantive portions of the document, particularly if footnotes would also need to be included elsewhere in the Model Law. In the present case, the footnote was of critical importance. He was sorry if he had given the impression that he wished to reject the compromise reached by the Working Group. He had merely wished to remind the Commission that there had been another point of view. He was among those who thought that some States might wish to make use of all of the methods presented in the Model Law, but he felt it would be difficult to indicate to States in a brief note how many or which methods they should adopt. The appropriate place to do so was in the commentary, but when the question had been considered by the Commission and the suggestion had been made that each article might be followed by a commentary, that had not been considered practical. He was opposed to the idea of adding a footnote because discussion of its content would only be a waste of the Commission's time.

71. The CHAIRMAN suggested that the asterisks might refer to the pertinent paragraphs of the Guide to Enactment. Perhaps time could be set aside to provide the Secretariat with ideas for the drafting of the Guide.

The meeting rose at 6.10 p.m.

Summary record of the 524th meeting

Thursday, 2 June 1994, at 10 a.m.

[A/CN.9/SR.524]

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 10.05 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*)

PROCUREMENT OF SERVICES (*continued*) (A/CN.9/392)

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (*continued*)

1. The CHAIRMAN said that the question had arisen of the exact title of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services, contained in the annex to the report of the Working Group on the New International Economic Order on the work of its seventeenth session (A/CN.9/392). He suggested that the final title should remain as set out in the annex, with the removal of the square brackets and the deletion of the word "draft".
2. Mr. TUVAYANOND (Thailand) said that, in view of the adoption of the UNCITRAL Model Law on Procurement of Goods and Construction, it seemed redundant to refer to goods and construction in the title of the draft Model Law now before the Commission. In fact the Commission was currently concerned only with services, the other elements having been dealt with in the earlier Model Law. Retention of the proposed title might mean that States would need to read both Model Laws in conjunction with each other.
3. Mr. CHATURVEDI (India) agreed that the Commission was dealing only with services, in which case the title of the draft Model Law should be amended accordingly. However, the Commission must guard against any tampering with the existing Model Law, which must be left well alone.
4. The CHAIRMAN noted that the text of the draft Model Law did not, in fact, deal only with services.
5. Mr. HUNJA (International Trade Law Branch) said that the Working Group had already considered the question of the title, as indicated in paragraphs 16 to 18 of its report. The understanding had been that the Commission would determine the best way to incorporate the question of services in a model law, probably in a consolidated text dealing with goods, construction and services. There would thus be two model laws, one on goods and construction, the other a consolidated text dealing with goods, construction and services. The only remaining issue was exactly how to entitle the consolidated text.
6. Mr. WESTPHAL (Germany) said that it might be simpler to entitle the draft law the UNCITRAL model law on procurement. The title of the first Model Law had been made restrictive since that text did not cover all aspects of procurement, but the text now before the Commission was broader. Nevertheless his delegation could accept the current wording of the title.
7. Mr. GRIFFITH (Observer for Australia) said that the draft Model Law should contain a note indicating that it was a consolidated text covering all three aspects and making clear the relationship between the two Model Laws. The note should be prominently placed on the first page.
8. Mr. KLEIN (Observer for the Inter-American Development Bank) said that either formulation of the title seemed acceptable. It had, however, been his impression that the first Model Law would be superseded by the Model Law now before the Commission, which would be the only one remaining in effect.
9. Mr. CHOUKRI SBAI (Morocco) said that the question of the title was extremely important. The use of a short form would leave open the question of exactly what was covered, which was, in fact, goods, construction and services.
10. Mr. TUVAYANOND (Thailand) agreed that it was misleading to use a short form referring only to procurement, since it would not be clear what aspects were covered. Once the draft Model Law was adopted there would be two Model Laws—one on goods and construction, the other on goods, construction and services—which was potentially confusing since there would be two regimes, similar but not identical, for goods and construction. The use of an explanatory note indicating the relationship between the two Model Laws would provide a satisfactory solution.
11. Mr. CHATURVEDI (India) agreed with the Observer for the Inter-American Development Bank. Unless the Commission decided otherwise the adoption of the second Model Law would implicitly repeal the first Model Law, a matter which the Commission should consider further.
12. Mr. LEVY (Canada) said that it seemed that the full title would be necessary to avoid confusion, but he agreed with the Observer for Australia that a comprehensive explanatory note, prominently placed, was appropriate.
13. Mr. AL-NASSER (Saudi Arabia) said that there were two possibilities: that there would be two Model Laws, one dealing with goods and construction, the other with goods, construction and services; or that there would be a single, uniform or standardized model law on all three. Perhaps if the title reflected some such wording confusion would be avoided.
14. Mr. WALLACE (United States of America) said that the use of a full title, while ungainly, was less misleading. The suggestion made by the Observer for Australia was most helpful. Any such note might simply state that there was an existing law on goods and construction, but that there was now a consolidated text also covering services, and that the elements dealing with goods and construction were almost identical in the two Model Laws.
15. Mr. SHI Zhaoyu (China) said that the current draft should refer to all three elements, since the current work of the Commission was to complement its earlier work by bringing services under a model law. It was important to clearly indicate the relationship between the two Model Laws. Accordingly, the current wording of the draft Model Law before the Commission should be retained, and, as suggested by other delegations, an explanatory note added.

16. Mr. GOH (Singapore) said that his delegation supported the suggestion that a note should be added to make it clear that the Commission was grafting provisions covering the procurement of services on to its earlier work.

17. Mr. KLEIN (Observer for the Inter-American Development Bank) asked why there should be two model laws, with the attendant risk of confusion.

18. Mr. HERRMANN (Secretary of the Commission) said that the Commission could repeal the original Model Law if it chose, but had so far taken the view that some States would be interested only in goods and construction and would avail themselves of the first Model Law, while others would find it useful to use a model law also including the procurement of services. Even if there were a single text, some States would not be interested in the provisions relating to services, and a need would arise for advice on how to apply only some elements of the single text. In essence the two Model Laws met different needs, and where they dealt with the same subjects, they were identical in substantive terms.

19. Mr. CHATURVEDI (India) noted that the first Model Law had already been adopted by the General Assembly and that there would be a risk of further confusion if an attempt were made to repeal it. An explanatory note should suffice to make the situation clear.

20. The CHAIRMAN said that the Commission would thus adopt the title he had suggested earlier in the meeting, with the incorporation of an explanatory note.

Article 41 bis. Solicitation of proposals

21. The CHAIRMAN introduced article 41 bis and invited Commission members to comment on it.

22. Mr. WALLACE (United States of America) suggested that since a large part of article 41 bis dealt with the subject of notice, the word "notice" should appear somewhere in its title. Secondly, the whole of chapter IV bis should be drafted in accordance with the general principle that tendering was the preferred method for the procurement of goods and construction, and a competitive and transparent method, open to international bidders. Article 41 bis required notice to be published both domestically and internationally. His delegation believed that procuring entities' preference to deal with a limited number of suppliers or contractors with whom they were familiar was an erroneous policy of the past. He therefore questioned whether paragraph (3) of article 41 bis, which provided exceptions to that general principle, should be retained. Thirdly, paragraph (4) indicated that the necessary documents should be sent to any supplier or contractor that requested them as a result of notice. If paragraph (3) and the exceptions contained therein were to be deleted, paragraph (4) would have a purpose. However, if paragraph (3) was not deleted there would be cases where notice would not occur, and paragraph (4) did not indicate how the documents would reach the contractors or suppliers in question.

23. Mr. TUVAYANOND (Thailand) said that paragraph (3) of article 41 bis should be retained; however, it should be emphasized that the methods in question were to be used only on an exceptional basis and where they were really justified. His delegation believed that the requirement to publish a notice both domestically and internationally was detrimental to the third world countries which were the recipients of the goods, construction and services to be procured. The requirement to publish the notice in a newspaper of wide international circulation added to the costs incurred by the procuring entity and favoured foreign media over domestic media. Since it was also required that the notice should be published in a language customarily used in

international trade, suppliers should endeavour to work with their embassies and consult local newspaper for notices.

24. Mr. JAMES (United Kingdom) said that although the methods set out in article 41 bis were the preferred methods for the procurement of services, they were not the only methods available in the Model Law. Thus, paragraph (3) was essential in that it reflected the grounds on which a procuring entity could engage in procurement by means of restricted tendering. He suggested that the provisions of paragraph (3) should be made subject to the same preconditions as in the case of restricted tendering, and that the words "subject to approval by a superior authority" should be inserted at the beginning of the paragraph. Furthermore, paragraph (3)(a) should indicate that the complex or specialized nature of the services meant that they were available only from a limited number of suppliers or contractors, as indicated in article 18, which dealt with conditions for use of restricted tendering. Moreover, it was dangerous to refer in paragraph (3)(a) to "suppliers or contractors that are known to the procuring entity", since doing so created an enormous loophole for the procuring entity; those words should therefore be deleted. Lastly, his delegation was in favour of deleting paragraph (3)(c).

25. Mr. WALSER (Observer for the World Bank) said that he strongly believed that paragraph (3) should be retained either as it stood or as amended by the representative of the United Kingdom. Governments should not be obliged to review dozens of complex proposals, especially when the projects concerned were relatively inexpensive. Procuring entities should make short lists of possible suppliers and contractors in an objective manner to ensure that the same firms were not used over and over again.

26. Mr. CHOUKRI SBAI (Morocco) proposed that the title of article 41 bis should be changed from "Solicitation of proposals" to "Invitation to submit proposals". He supported the proposal to delete subparagraph (3)(c).

27. Mr. LEVY (Canada) said that he supported the proposal of the representative of the United Kingdom to make the provisions of paragraph (3) subject to the approval of a higher authority and believed that paragraph (3) should be retained as amended. One of the objectives of the Model Law was to promote economy and efficiency in procurement. He opposed deleting the words "that are known to the procuring entity" from paragraph (3)(a), since to do so would put too great a burden on the procuring entity. Procuring entities should not be required to search the world for suppliers and contractors. It was the job of commercial agents and embassies to provide information to suppliers regarding which services were being sought.

28. Mr. CHATURVEDI (India) said that his delegation believed that paragraphs (2) and (3) of article 41 bis should be retained unchanged and opposed the deletion of subparagraph (3)(c). He proposed that a reference to the qualifications and experience of those who would be providing services should be included in paragraph (1).

29. Mr. LOBSIGER (Observer for Switzerland) said that he could not see how publishing a notice in a newspaper of wide international circulation would be disadvantageous. Paragraph (3) of article 41 bis was repetitive and the exceptions it contained should be deleted.

30. Mr. TUVAYANOND (Thailand) supported the proposal to make the provisions of paragraph (3) subject to the approval of a higher authority. However, he opposed the deletion of the words "that are known to the procuring entity" from paragraph (3)(a) as to do so could create a risk of infringement of the law. Lastly, he suggested that in paragraph (2) the term "wide circulation" sufficed and that the word "international" should be deleted.

31. Mr. FRIS (United States of America) supported the proposal to insert a reference to the approval of a higher authority in paragraph (3) of article 41 *bis*. He agreed that the words "that are known to the procuring entity" in subparagraph (3)(a) did create some problems. It was essential that the Model Law should not invite procuring entities to deal with only a small circle of suppliers and contractors. He suggested that a record-keeping requirement, similar to that set out in article 11, should be added to paragraph (3). Such a requirement could provide additional safeguards and might be useful to procuring entities in drawing up short lists of suppliers and contractors.

32. Mr. SHI Zhaoyu (China) said that his delegation was in favour of retaining paragraph (3) and believed that the Model Law should take into account the special circumstances developing countries faced in the procurement of services. Paragraph (3) provided the necessary flexibility and made possible a wider application of the Model Law.

33. Although the text of chapter IV *bis* as a whole represented a considerable improvement over the previous draft, it was still unsatisfactory. His delegation would state its views on chapter IV *bis* as a whole at the appropriate time.

34. Mr. WESTPHAL (Germany) said that the draft Model Law proposed a complex structure for the procurement of services. Paragraphs (3)(a) and (b), which provided for restricted tendering and for exceptions to the provisions of paragraphs (1) and (2), should not be deleted. While international publication might indeed be the best means of ensuring transparency, the resulting proliferation of publications would create a number of practical problems. Provision must therefore be made for limiting the publication requirements. On the other hand, paragraph (3)(c) concerning the nature of the services to be procured should be deleted.

The meeting was suspended at 11.45 a.m. and resumed at 12.10 p.m.

35. Mr. WALSER (Observer for the World Bank) agreed that paragraph (3)(c) could be deleted. However, he did not support the proposal that the words "that are known to the procuring entity" should be deleted from paragraph (3)(a). The removal of that restriction would create difficulties for procurement authorities, which would be forced to choose the general approach in order to avoid breaking the law.

36. He also disagreed with the observer for Switzerland that paragraph (3) was repetitive. Paragraph (2) provided for an exception to the publication requirement where participation was limited solely to domestic suppliers or contractors or where, in view of the low value of the services to be procured, the procuring entity decided that only domestic suppliers or contractors were likely to be interested in submitting proposals. The provisions of paragraph (3)(b), on the other hand, were not limited to domestic suppliers. Paragraphs (3)(a) and (b) should therefore be retained in their current form.

37. Mr. TUVAYANOND (Thailand) said that the topic under discussion was of particular interest to Thailand. National legislators were generally concerned with economy and transparency. With respect to economy or cost-effectiveness, national legislators were more interested in reducing the cost to domestic taxpayers than in promoting the business of foreign news media. In addition, the cost of publishing each procurement notice in a publication of wide international circulation would be prohibitive. And if all the States of the international community published all their notices, the sheer volume of publications would be overwhelming. The method used by the Thai authorities was to publish invitations for proposals in a local English-language

newspaper of wide circulation and to send circular notes to foreign embassies in Thailand. It would then be for the embassies to communicate the information to suppliers in the States which they represented.

38. Domestic transparency of the procurement process was more important than international transparency; in order to achieve such transparency, a national anti-corruption body had been established in Thailand to monitor the work of officials of the Thai Administration. The proposal by the representative of the United States that a record-keeping requirement should be instituted was a reasonable one and might provide an acceptable solution. On the other hand, his delegation could not support any superfluous and costly approach which would impose unfair economic burdens on national taxpayers.

39. Mr. CHOUKRI SBAI (Morocco) said that the deletion of the words "that are known to the procuring entity" from paragraph (3)(a) would create confusion. Those words should therefore be retained, especially since suppliers of services were generally known to procurement authorities.

40. Mr. JAMES (United Kingdom) noted that the use of certain expressions caused predictable reactions on the part of some members of the Commission. Use of the term "restricted tendering", for example, immediately elicited a negative reaction from certain members. He noted that the current debate was over the principles of transparency, international competition in public procurement, and openness, which had already been espoused by the Commission. The principle of international competition in public procurement, for example, had already been enshrined in the UNCITRAL Model Law on Procurement of Goods and Construction and was one of the Commission's most notable achievements in that field. Those principles should also be applicable to the model provisions on the procurement of services.

41. He would accept the deletion of paragraph (3)(c) but recalled that, in its consideration of article 16, the Commission had agreed that the method of procurement provided for in paragraph (3)(c) would be the preferred method for the provision of services. Consequently, pending the Commission's decision on article 41 *bis*, he reserved the right to revisit that question at a later stage. Moreover, if paragraph (3)(c) were to be omitted, it would be necessary to provide for an approval mechanism. One approach could be to use the language of article 18, namely, that restricted tendering could be employed where the services, by reason of their highly complex or specialized nature, were available only from a limited number of suppliers or contractors. Those conditions could then be considered as an objective test. Such an approach might satisfy the concerns raised by the representative of Thailand, particularly if paragraph (3)(a) were restructured to read: "where the services to be procured are available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors that are known to it". The procurement authority would thus be provided with a defence against charges of failure to apply the provisions of paragraphs (1) and (2).

42. Concerning the proposal by the representative of Thailand to omit from paragraph (2) the reference to publication in newspapers of international circulation, he said that that preferred method of procurement of services was meant to be as close to tendering as was practical. Moreover, that method had been agreed at the Commission's previous session and had been adopted by the General Assembly. In that connection, he referred to article 22(2), which contained exactly the same provision as article 41 *bis* (2). If the method of procurement did not take account of those principles, his delegation would have second thoughts as to whether it was indeed the preferred method of procurement for services.

43. Mr. LOBSIGER (Observer for Switzerland) said that some of the exceptions set out in paragraph (3) were already covered in paragraph (2). He agreed with the observer for the World Bank that the criterion of low value as expressed by paragraph (3)(b) could be used to justify non-publication at the international and national levels; that was not so in the case of paragraph (2). However, the scope of paragraph (3)(c) was too broad. Furthermore, paragraph (3)(a) was very vague and should be redrafted.

44. Mr. WALLACE (United States of America) said, with regard to the analysis of the representative of Thailand, that paragraph (3) was an exception to both paragraphs (2) and (1). He agreed with the United Kingdom representative's comments regarding international advertising and felt that paragraph (3)(c) was expendable. Paragraph (3)(b) would accommodate the representative of Thailand's concern over cost-effectiveness. As to the approval mechanism, it was an optional provision throughout the Model Law. He agreed with the United Kingdom representative that the expression "that are known to the procuring entity" was very ambiguous and suggested that it could be eliminated altogether. However, a record-keeping requirement would have to be incorporated somewhere in the text. The procurement of services was different from the procurement of goods, and—as the preamble showed—the overall policy purposes did not exclude services.

45. Ms. SABO (Canada) said that her delegation generally supported the comments made by the observer for the World Bank, with the exception of his proposal to delete paragraph (3)(c). Where the suggestion regarding a *chapeau* for paragraph (3) was concerned, the Commission might consider adding a subparagraph to article 11 to ensure that a record was kept of any decision made with respect to the non-publication of a notice. Concerning paragraph (3)(a), she agreed with the United Kingdom delegation's suggestion to delete the words "that are known to the procuring entity".

46. Mr. AL-NASSER (Saudi Arabia) said that the publication of notices in newspapers with wide international circulation might have economic returns in that such notices would lead to lower prices through competition. While it was true that trade attachés were responsible for reporting on tendering notices published in the State where they were assigned, the routing of the information concerned from embassies to chambers of commerce and then to business circles was tortuous. Moreover, businessmen preferred to read international publications directly. He did not see the need for the addition of a reference to approval by a higher authority in paragraph (3). Paragraph (3)(a) was too restrictive and needed to be redrafted. With regard to paragraph (3)(c), if the intention was to promote economy and efficiency then the entire paragraph should be deleted. However, if the purpose of the paragraph was to address exceptions, then it should be redrafted and begin with the phrase "if there are circumstances necessitating speed or promptness".

47. Mr. TUVAYANOND (Thailand) said that his delegation could accept the idea of making the application of paragraph (3) subject to the approval of a higher authority. However, a record-keeping requirement should be incorporated into the paragraph so as to ensure transparency and provide an excellent deterrent to corruption. He was surprised that most delegations seemed concerned about the vagueness of the words "economy and efficiency" in paragraph (3)(c) although those very words appeared in the existing Model Law. Moreover, that paragraph had two very important safeguards reflected by the words "can only be promoted" and "to ensure effective competition". The requirement for local publication should at least be included in the first two paragraphs of chapter IV *bis*. He suggested that the phrase "that are known to" could be replaced by "that are widely known" as a compromise. Moreover, a way should be found to introduce the concept of due diligence into the text, as such a concept already existed in both internal and international law.

The meeting rose at 1.05 p.m.

Summary record of the 525th meeting

Thursday, 2 June 1994, at 3 p.m.

[A/CN.9/SR.525]

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*)

PROCUREMENT OF SERVICES (*continued*) (A/CN.9/392)

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (*continued*)

Article 41 bis (*continued*)

1. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 41 bis, paragraph 3(c), should be deleted because it was dangerous to provide for a broad exception to a single method of procurement. He recalled the comments by the representative of Saudi Arabia and said that such an exception could be replaced and provision made for the specific case of an emergency. The words "that are known to the procuring entity"

were deliberately used; to avoid any possibility of abuse, it would suffice to amend the wording slightly.

2. Mr. CHATURVEDI (India) said that he was in favour of maintaining paragraphs 2 and 3 without any changes, particularly paragraph 3(c). It was not necessary to include in paragraph 3(c) a reference to approval by a higher authority, since that was usually the practice. Moreover, there was no need to discuss the phrase "the price that the procuring entity may charge" in paragraph 4, although he had no serious objections to it.

3. Mr. WALLACE (United States of America) recalled that there had been no discussion of what would happen in the absence of the notice provided for in paragraph 4.

4. Mr. TUVAYANOND (Thailand) said that the reference to "suppliers or contractors that are known to the procuring entity"

in paragraph 3(a) lent itself to possible abuses. He suggested instead the words "widely known", since those words, together with the requirement to keep a record of the procurement transaction, were sufficient guarantee against any abuse. With regard to paragraph 3(c), he saw no reason for its deletion since, if economy and efficiency were applicable to the procurement of goods and construction, they should also be applicable to services. There were already sufficient guarantees of effective competition, and it was not a question of elaborating a model law which favoured only suppliers, since it was also necessary to safeguard the interests of customers. The countries of the third world accounted for the majority of consumers of the goods and services provided by the developed countries, but had very few defenders. It was necessary to reconcile the interests of the two parties, or else the instruments adopted would remain a dead letter. As the representative of the United States of America had suggested, the requirement to publish in the local press could perhaps be included in that paragraph.

5. Mr. LEVY (Canada) wondered whether it was felt that the *chapeau* of paragraph 3 retained the requirement of approval by a higher authority, and whether the requirement to maintain a record of the procurement proceedings had to be included in article 11 and not only in the article under discussion. He shared the views so eloquently expressed by the representative of Thailand, since it was a position which he himself had reiterated on several occasions. A balance must be maintained so that the document that was ultimately elaborated would not be acceptable only to supplier countries. In his view, there was no consensus on deleting paragraph 3(c) and it would be wrong to try to impose the views of those who represented a certain sector of the world which, at a given moment, had achieved a higher level of development. It must be remembered that the document under consideration was intended more for procuring entities than for suppliers, who did not need much assistance. While some might think that paragraph 3(c) was unnecessary, from a legal point of view, that was not reason enough to delete it, since it contained valid elements, particularly those concerning "economy and efficiency" in procurement.

6. Mr. JAMES (United Kingdom) said that he was unaware of any provision in the Model Law on Procurement of Goods and Construction to which paragraph 3(c) was related. The *chapeau* of paragraph 3 reflected certain principles, namely, the emphasis on economy and efficiency, which would be applied to the new article 41 *bis* and to other provisions relating to procurement. It was important to emphasize, however, that that provision was not contained in the Model Law. More particularly, since the method under consideration was deemed to be the preferred method for the procurement of services, it should be as open and as competitive as possible.

7. Ms. SABO (Canada) said that, in preparing the provisions under consideration, the Working Group had begun by adapting article 38 to services. Later on, the Commission had considered it necessary to adapt other provisions on the whole process of tendering, on the basis of which chapter IV *bis*, whose contents were a hybrid, had been prepared. For example, article 41 *bis*, paragraph 3(c), contained a hybrid of the provisions of article 38(2) and of article 18. Paragraph 3(c) permitted the direct solicitation of proposals, provided that they were solicited from a sufficient number of suppliers or contractors to ensure effective competition. That provision did not differ significantly from article 38. The Working Group had tried to retain the content of article 38 for services even though it had amended the wording. Canada was therefore of the view that article 41 *bis*, paragraph 3(c), should be retained.

8. Mr. CHATURVEDI (India) agreed with the arguments put forward by the representative of Canada. The criteria of economy

and efficiency which were mentioned in article 41 *bis*, paragraph 3(c), could not be ignored. Paragraph 3(c) should therefore be retained, even though it did not fall within the context of the procurement of goods and construction.

9. Mr. WALLACE (United States of America) said that the wording of article 38, paragraph 2, was acceptable, primarily because the Commission had decided to accept it as an alternative to the other methods provided for in the Model Law. The Commission had considered that article 38 was not sufficient and had therefore prepared chapter IV *bis*, which was more open than that article. He agreed with the representative of Thailand that it was necessary to improve article 41 *bis*, paragraph 3(a). The text should be more objective, which would permit the Commission to move forward in its work.

10. The CHAIRMAN said that a compromise must be reached between those who favoured maintaining paragraph 3(c) of article 41 *bis* and those who believed that it should be deleted.

11. Mr. TUVAYANOND (Thailand), referring to the argument of some delegations that the terms "economy" and "efficiency" were already contained in the Model Law, said that those delegations were focusing only on those terms and not on the provision currently under consideration. If the terms were considered sufficient to prevent abuses in the procurement of goods and construction, they should also be considered appropriate with respect to services. A compromise ought to be possible in that regard.

12. It was true that the Model Law provided guidance to legislators. Nevertheless, it must reflect international public opinion, which Thailand wished to accommodate without losing sight of its own interests.

13. Mr. WALLACE (United States of America) said that the reference to paragraph 1 in the *chapeau* of paragraph 3 of article 41 *bis* could be deleted so that paragraphs 3(a), (b) and (c) would constitute exceptions to paragraph 2. In that way, all notices would be published in the official gazette.

14. Since the terms "economy" and "efficiency" were contained in the *chapeau* of article 18, his delegation would not object to their appearance in the *chapeau* of article 41 *bis*, paragraph 3.

15. Mr. SHI Zhaoyu (China) said that article 41 *bis*, paragraph 3(c), should be retained. The Commission's objective was to establish a general, uniform and detailed framework for countries for the purposes of procurement. However, that objective could only be achieved through broad application of the Model Law. Consequently, it was necessary to take a country's specific situation into account when referring to the legislative development of the norms governing procurement. If those differences were not taken into account, it would be difficult for the Law to be broadly accepted. If China adopted a law containing a provision that was consistent with article 41 *bis*, it would have to publicize its request for proposals of services in an international newspaper of wide circulation, which would be very difficult, since it had no newspaper of that kind. That meant that the notice would have to be published in a foreign newspaper, which would be contrary to the principles of economy and efficiency. It was for those reasons that China believed that article 41 *bis*, paragraph 3(c), should be retained.

16. Mr. LEVY (Canada) said that he agreed with the proposal by the United States delegation to delete the reference to paragraph 1 in the *chapeau* of article 41 *bis*, paragraph 3. However, he disagreed with that delegation's other proposal to include the terms "economy and efficiency" in the *chapeau* of paragraph 3,

since they would then also apply to subparagraphs (a) and (b). In order to solve that problem, it would be necessary to establish the criteria of previous approval by a higher authority and the preparation of records, and the requirement of publication in an international newspaper would have to be dropped.

17. Mr. UEMURA (Japan) supported the United States position, adding that the wording of paragraph 3 should track article 18 in order to maintain the logical structure of the Model Law.

18. Mr. CHATURVEDI (India) said that he was opposed to deleting the reference to paragraph 1 from paragraph 3, as the substantive questions concerned were too vital. On the other hand, he saw no problem in moving the words "economy and efficiency" to the *chapeau* of the paragraph; in fact, his delegation preferred that wording.

19. Mr. JAMES (United Kingdom) supported the compromise wording proposed by the United States delegation. He did not believe it was as impossible or as illogical as the Canadian delegation maintained for, if it was, article 18 of the Model Law, whose text the Commission had adopted in 1993, would be illogical too, and he did not believe it was. On the contrary, he believed that the right wording would capture the spirit of the norm embodied in the introductory paragraph of article 18.

20. As the representative of Japan had said, the Commission would have to look into the origin of the text of article 18. Perhaps the original draft prepared by the Secretariat had contained subparagraph (c) only and not subparagraphs (a) and (b). Perhaps it had then been pointed out that the text was neither satisfactory nor sufficiently specific and that the appropriate model was article 18 and not article 38. Thus a decision might have been taken to include the examples contained in article 18. At that point someone had probably suggested that the provisions of article 38 could not be omitted. It was thus conceivable that all of those provisions had ended up as article 41 *bis*.

21. According to the report of the deliberations of the Working Group contained in document A/CN.9/392, at no time had there been an explicit agreement to retain subparagraphs (a), (b) and (c). Perhaps that reflected a tendency—carried to the extreme—to accommodate all points of view. Since the Commission seemed to be nearing a consensus, it would be preferable to stick to the original draft of article 18 and include the reference to "economy and efficiency" in the *chapeau* of paragraph 3.

22. The CHAIRMAN said that the words "for reasons of economy and efficiency" or similar language to be determined by the drafting group would be incorporated into the *chapeau* of paragraph 3 of article 41 *bis*. That would allay the concerns of delegations which insisted on retaining subparagraph (c), basically because it afforded the procuring entity greater flexibility.

23. Ms. SABO (Canada) sought clarification of the proposal. It was her understanding that the reference to paragraph 1 would be retained and that subparagraph (c) would be deleted. What concerned her was the fact that the intent of subparagraph (c) was much broader than achieving economy and efficiency through direct solicitation. The subparagraph also provided a means of taking into account the particular nature of the services solicited. She therefore wished to know if it would be possible to retain subparagraph (c). The Working Group had made an exhaustive study of the wide range of services that could be solicited, which was too vital a factor to be omitted.

24. The CHAIRMAN pointed out that the concept of services of a particular nature which required specific proceedings was already contained, at least implicitly, in other provisions. While it

might possibly be incorporated into the *chapeau* of paragraph 3, the text might then be overloaded.

25. Mr. LEVY (Canada) said that the provision's *raison d'être* lay in the fact that the range of services was so vast and expanding so rapidly that the Working Group had felt it was impossible to foresee every contingency and attempt to describe it. It had therefore included the norm on direct solicitation so that when an unforeseen situation arose, a method more akin to tendering could be utilized—even if it was not widely publicized—which would make the other provisions of article 41 *bis* applicable in such cases.

26. Mr. HUNJA (International Trade Law Branch) recalled another question which had been raised when the Commission had considered the Model Law. In practice, there was generally a slight difference between the procurement of goods and construction and the procurement of services, with direct solicitation much more common in the latter than in the former. The Working Group had sought to recognize the fact that, while some of the practices currently followed might not be consistent with the Model Law's objectives of transparency and competitiveness, it might be useful to accept them in an area in which most States did not have broad experience and such practices were not well developed. An example of such a situation was requests for proposals for intellectual services; that practice might not be covered by paragraph 3(a) or in paragraph 3(b). Paragraph 3(c), on the other hand, would give States an opportunity to employ direct solicitation.

27. Mr. WALLACE (United States of America) said that the difficulties seemed to stem from the fact that the meaning of subparagraph (c) was not clear, since the nature of the services was not known. The practice referred to by Mr. Hunja could be interpreted as being included in subparagraph (b), and the difficulty might be resolved by combining subparagraphs (c) and (b); the two subparagraphs, however, dealt with different things. Another solution might be to make subparagraph (c) clearer by indicating that it referred to services of a professional nature, as the representative of Canada had suggested. He did not believe that the use of the words "economy and efficiency" would be sufficient to clarify the meaning of the text.

28. To improve existing practice, which Mr. Hunja had said would be desirable, the degree of arbitrariness in selecting the parties to be solicited would have to be reduced in the future by limiting the breadth of the current version of subparagraph (c).

29. Mr. LEVY (Canada) supported the view expressed by the representative of the United States that, in order to clarify the text further, an express reference to the nature of the services was essential as a matter of principle.

30. Mr. TUVAYANOND (Thailand) said that he wished to reiterate his firm support for retaining subparagraph (c) for several reasons. In the case of certain services, it was necessary to limit the number of potential bidders and employ proceedings that were completely different from tendering proceedings or requests for proposals for services. For example, Thailand currently needed to procure the services of legal advisers in order to settle border disputes. The country should therefore have the right to select advisers it deemed competent not only in terms of their knowledge but also in terms of their trustworthiness. It was not only a question of obtaining services at the lowest possible price but also of ensuring that the advisers treated such a delicate matter with the utmost discretion.

31. If subparagraph (c) was deleted from paragraph 3, the method of direct solicitation could not be utilized once the law

was adopted. On no grounds could he defend the deletion of subparagraph (c) to the Thai Parliament when it took up the question, and his delegation therefore vigorously opposed such a deletion.

32. Mr. JAMES (United Kingdom) said that there seemed to be a consensus to move the reference to "economy and efficiency" in subparagraph (c) to the *chapeau* of paragraph 3 of article 41 *bis*. There also seemed to be a consensus that, in certain cases, the nature of the services must be borne in mind and that the content of subparagraph (c) as currently drafted was too broad. Therefore, the Commission should use more precise wording. Specifically, reference should be made to "services of a specialized nature" or "complex services", and the drafting group should be instructed to be guided by article 18 when it redrafted the subparagraph.

The meeting was suspended at 4.45 p.m. and resumed at 5.20 p.m.

33. Mr. TUVAYANOND (Thailand) said that, while he could cite many examples of situations in which direct solicitation was necessary, he would mention only the case of a country which needed to hire attorneys to represent its interests. Obviously, it could not hire just any attorney but had to hire one whom it could trust sufficiently. That was an example that was not covered by the exception based on national security and which, like other examples, required confidentiality. Thus in the absence of a provision which dealt with direct solicitation, a State which employed that method and which acted with due discretion would be violating the law, a situation that was unacceptable. The Government of Thailand would have difficulty in defending in Parliament a bill based on a model which did not include direct solicitation. He was therefore of the view that the drafting group should seek a compromise formula, based on the proposal of the United Kingdom.

34. Mr. LEVY (Canada) agreed with the representative of Thailand that a compromise formula must be found and made the following proposal. In the *chapeau* of the paragraph, the reference to paragraphs 1 and 2 would be retained, the words "with the approval of . . ." would be added and reference would also be made to economy and efficiency. The article would also include a requirement to maintain records. In subparagraph (a), the wording proposed by the United Kingdom would be adopted and the word "well" would be added before the phrase "known by the procuring entity", which would end the sentence. Subparagraph (b) would be retained. Lastly, subparagraph (c) would contain no reference to economy and efficiency, but there would be a reference to the highly complex or specialized nature of the services and to direct solicitation, which would be made subject to the procuring entity's obligation to solicit proposals from a sufficient number of suppliers and contractors in order to guarantee effective competition.

35. Mr. HERRMANN (Secretary of the Commission) recalled that the proposal designed to achieve a compromise solution by moving the reference to economy and efficiency to the *chapeau* of paragraph 3 rested on the assumption that subparagraph (c) would be deleted. He wondered whether that approach made sense. For one thing, subparagraph (a) had nothing at all to do with economy and efficiency; furthermore, subparagraph (b) indicated that the number of proposals must be proportionate to the value of the services to be procured. Thus, the reference to economy and efficiency would be out of place in subparagraph (a) and redundant in subparagraph (b). Perhaps the Commission ought to reconsider the question.

36. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the solution to the problem lay in finding more appropriate wording than that used in the current version, which was too broad. The matter was critical, for the precision of the

wording used would determine which services would be excluded from the competition. Any exception must be worded very carefully. In the current instance, lack of precision would be very dangerous to countries. The Model Law must give the procuring entity guidance on the scope of the exceptions.

37. Mr. JAMES (United Kingdom) said that the Canadian proposal could not form the basis for a compromise solution, since it was satisfactory only to the delegations of Canada and Thailand. It was unfortunate that the Secretary of the Commission felt that his proposal to delete paragraph 3(c) and to move the reference to economy and efficiency to the *chapeau* of paragraph 3 made no sense. In fact, if the proposal was adopted, the wording of the paragraph would be identical to that of article 18 of the draft Model Law, which the Commission had already approved, and that of article 18 of the Model Law on Procurement of Goods and Construction, adopted by the General Assembly. The wisest course, then, might be to go back and reconsider the *chapeau* of article 18, for it was not clear that, in accepting it, delegations had realized what they were adopting. In any event, it was important to state clearly that public tendering was not being replaced by restricted tendering, but merely that the requirement of giving notice was being eliminated. In that respect, the proposal put forward by the Thai delegation was quite useful, since the discussion was in fact about international notice. In the matter of direct solicitation, two points must be considered: the exception to the requirement of giving notice (paragraph 3) and the need to specify how and to whom the documents should be sent (paragraph 4). The second point could be settled on the basis of the United States proposal.

38. Mr. FRIS (United States of America) agreed that the reference to economy and efficiency should be moved to the *chapeau* and that subparagraphs (a) and (b), with the appropriate editorial changes, and subparagraph (c), with the exception of the reference to economy and efficiency, but with a detailed reference to the more specialized nature of the services to be procured, should be retained. Perhaps the content of article 18 should not merely be repeated for the issue now was services, but a reference to the technical and confidential nature of those services added to reflect the concerns expressed in the Commission. He agreed with the proposal put forward by the representative of the United Kingdom concerning direct solicitation and notice. On the latter issue, the requirement of giving notice locally should be retained and the text should be drafted so that the provisions on exceptions referred only to the need for notice at the international level.

39. Mr. KLEIN (Observer for the Inter-American Development Bank) asked whether the existence of single-source procurement was envisaged in the case of services. If so, that would address the special case brought up by the representative of Thailand. Such cases did not involve competition, and an expert could be hired directly. That was a generally accepted practice.

40. Mr. CHATURVEDI (India) agreed that the concepts of economy and efficiency should be moved to the *chapeau* of the paragraph, but only if the reference to paragraphs 1 and 2 of the article was not deleted.

41. Mr. SHI Zhaoyu (China) said he did not believe it would be appropriate to move the concepts of economy and efficiency to the *chapeau* of paragraph 3. As the Secretary of the Commission had indicated, such a move was not consistent with the content of subparagraphs (a) and (b). Moreover, if that change was made, countries which applied subparagraph (a) would have to satisfy the requirements of economy and efficiency in addition to the requirement concerning the nature of the services, which would be in contradiction with the preceding provisions. He therefore supported the second proposal formulated by the representative of the United States.

42. Mr. CHATURVEDI (India) said that the inclusion of the concepts of economy and efficiency in the *chapeau* of paragraph 3 did not contradict the provisions of subparagraphs (a) and (b), even though those concepts were partially covered in the two subparagraphs.

43. The CHAIRMAN requested those delegations which had submitted proposals to draft a text that might help the drafting group.

44. Mr. TUVAYANOND (Thailand) asked whether that meant that the concepts of economy and efficiency should be applied also to subparagraph (a). If so, such a provision might prove difficult to implement in practice, even though article 18 had already been approved. The Secretary had put it well in stating that subparagraph (a) was an exception to the general rule. If cost-effectiveness must also be taken into account, then it was irrelevant to consider the concept of economy because exceptions must be interpreted *stricto sensu*, and he did not believe it was advisable to move concepts around. It was appropriate to include them in subparagraph (c) because all three elements should be considered in connection with services. He was inclined to accept the suggestion by the representative of the United States regarding the utilization of expressions such as "professional and confidential nature of the services", etc. He asked how the provisions should be implemented when the necessary services could be rendered only by a limited number of suppliers and the criteria of economy could not be applied.

45. Mr. LEVY (Canada) said that the reference to "economy and efficiency" could be included in the *chapeau* of paragraph 3 of article 41 *bis*, since it would be neither economical nor efficient to publish notice in a newspaper with an international circulation in the cases set forth in subparagraphs (a) and (b) of that paragraph, namely, when the services to be procured could be rendered by only a limited number of suppliers or contractors or when the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services.

46. He proposed the following text for paragraph 3(c) of article 41 *bis*: "Where the services to be procured are of a very complex, specialized, intellectual, technical or confidential nature, provided that proposals are solicited from a sufficient number of suppliers or contractors to ensure effective competition". He agreed with the representative of the United Kingdom that a reference to direct solicitation was not necessary, as it was implicit in the text.

47. Mr. TUVAYANOND (Thailand) said that reference should be made to direct solicitation as publicity should be avoided in cases where the nature of the services might be confidential. As the conditions established in paragraph 3(c) of article 41 *bis* were very strict, it would be preferable to leave the text intact.

The meeting rose at 6.05 p.m.

Summary record of the 526th meeting

Friday, 3 June 1994, at 10 a.m.

[A/CN.9/SR.526]

Chairman: Mr. MORÁN (Spain)

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

ELECTION OF OFFICERS (continued)

1. Mr. Tuvayanond (Thailand) was elected Rapporteur by acclamation.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

PROCUREMENT OF SERVICES (continued) (A/CN.9/392)

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (continued)

Article 41 bis (continued)

2. Mr. LEVY (Canada) read out the following revised version of article 41 *bis*, paragraphs (3) and (4), of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services:

"(3) (Subject to approval by . . . (the enacting State designates an organ to issue the approval),) for reasons of economy and efficiency, the procuring entity need not apply the provisions of paragraph (2) of this article when it determines:

(a) that the services to be procured are available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors; or

(b) that the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) that the nature of the services to be procured is highly complex, specialized, intellectual, technical or confidential, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.

(4) The procuring entity shall provide the request for proposals, or the prequalification documents, to suppliers or contractors in accordance with the procedures and requirements specified in the notice, or directly to the suppliers or contractors participating in the procurement pursuant to the provisions of paragraph (3). The price that the procuring entity may charge for the request for proposals or the prequalification documents shall reflect only the cost of printing and providing them to suppliers or contractors. If prequalification proceedings have been engaged in, the procuring entity shall provide the request for proposals to each supplier or contractor that has been prequalified and that pays the price charged, if any."

3. The text had been prepared by an informal drafting group on the basis of the Commission's discussions of the previous day.

The drafting group further proposed that article 11 should be amended to provide that a procuring entity should record any determination made pursuant to paragraph (3) of article 41 *bis* in the record of procurement proceedings.

4. Mr. TUVAYANOND (Thailand) said that the revised text represented a considerable improvement over the text contained in the annex to document A/CN.9/392 and went a long way towards accommodating his delegation's concerns over the question of direct solicitation. His delegation would, in principle, accept the new draft, provided that it were made available in writing for more careful scrutiny and that the ability of procurement entities to engage in direct solicitation was clearly stated in the official record of the meeting.

5. Mr. KLEIN (Observer for the Inter-American Development Bank) said that, while the revised versions of paragraphs 3(a) and 3(b) were an improvement over the previous version, paragraph 3(c) provided far too many exceptions to the rule set forth in paragraph 2. The only grounds on which an exception would be justified would be where the service being sought was of a confidential nature. Otherwise, the Model Law would be eliminating the need for international publication of notices on a wide range of services.

6. The CHAIRMAN said that it might be possible for the drafting group to cut down on the number of adjectives used in paragraph 3(c) to describe the nature of the services to be procured.

7. Mr. JAMES (United Kingdom) said that he agreed with the observer for the Inter-American Development Bank that the only appropriate adjective in revised paragraph 3(c) was "confidential". The inclusion of the provisions for the other exceptions in that subparagraph would enable procurement entities to circumvent the need for the international publication of notices in precisely those cases where notice was most necessary. Moreover, such broad exceptions were contrary to the spirit of the Commission's work over the previous five years, the aim of which was to ensure the widest possible publication. He was also concerned about the appropriateness of referring to the drafting group matters which involved substantive and not merely drafting or editorial points.

8. Mr. CHATURVEDI (India) requested that further consideration of the proposed text be deferred in order to give his delegation time to study it. The significance of the adjective "intellectual" was not clear to him and he would be interested to learn why the reference to "confidential" services had been included.

9. Turning to article 41 *bis*, paragraph (1), he noted that notices were usually published in newspapers and not in official gazettes or other official publications, adding that the entire second sentence needed to be clarified.

10. Mr. GRIFFITH (Observer for Australia) agreed with the observer for the Inter-American Development Bank that revised paragraph 3(c) created too many exceptions to the primary rule established in paragraph (2); it was also counter to the principle of transparency. He considered, finally, that the revised draft raised substantive issues which could not be resolved by the drafting group.

11. Mr. TUVAYANOND (Thailand) said that many of his delegation's concerns had not been met, adding that decisions regarding procurement of services were subject to political considerations, and that such considerations were extremely important. For *raisons d'Etat*, his Government did not wish to place contracts with hostile countries. Since no provision had been made for any escape clause it was vital that the Model Law

should provide for the possibility of direct solicitation, particularly where there was need for confidentiality and confidence in the competence of the supplier. His delegation would have great difficulties unless that concern was accommodated.

12. Mr. WESTPHAL (Germany) said that it had emerged from recent discussions that the issues facing the Commission were highly political. The members of the Commission did not all agree that competition should be the rule in procurement. Such considerations did not relate only to the procurement of services, and the Commission might well have usefully considered them when adopting the Model Law on Procurement of Goods and Construction.

13. In reality, reasons could always be found for single-source procurement where a State thought it important; in fact the draft Model Law allowed for single-source procurement under article 20. In the recent agreement on procurement in the area of services, which had been adopted in the context of the Uruguay Round, the same approach had been taken as in the case of goods and construction. In view of those developments any delay by the Commission in adopting the draft Model Law would lessen the value of its work. Indeed some eastern European countries were already devising their own regulations.

14. Mr. CHOUKRI SBAI (Morocco) recalled that his delegation had earlier requested the deletion of paragraph 3(c); the reference to ensuring effective competition should certainly be deleted, since it opened up the possibility of abuse. It would be better to reword the paragraph along the lines of:

"Where the nature of the services to be procured requires direct tendering, the tenders should come from a sufficient number of suppliers to allow for a certain balance in the competition."

15. There were some areas where only certain suppliers would be appropriate, for example, the restoration of historical monuments or of mosques. It was important to refer to the nature of the service to be procured.

16. Mr. WALLACE (United States of America) said that the Commission's debate related essentially to the nature of the procurement of services rather than to article 41 *bis per se*. Regarding the Uruguay Round, the level of specificity was very different in the case of the General Agreement on Tariffs and Trade. With respect to *raisons d'Etat*, the point had been discussed in the Working Group, when dealing with articles 1 and 2, in connection with exclusions of kinds of procurement. The question of whether whole classes should be excluded was not, however, the same as the question of whether direct solicitation should be allowed under article 41 *bis*, since there might be a desire not to exclude a category from the Model Law but merely to be exempted from the notice requirement, where, for example, there was a need for confidentiality. The concerns raised by the representative of Thailand could be addressed by excluding certain services from the scope of the draft Model Law under articles 1 and 2, and by refining article 41 *bis*, paragraph 3(c).

17. Mr. CHATURVEDI (India) said that he shared the concerns expressed by the representative of Thailand regarding nationality. The issue was not just a matter of policy, since, in his country, it could actually be illegal to trade with enemy countries. The proper place for such exclusions was, however, article 14(1), which dealt with obstacles based on nationality. With respect to the exclusions in paragraphs 3(a), (b) and (c), there was no reason to distinguish between international and domestic publication since the same rationale would apply. Clearly, with respect to paragraph 3(c), the question of the nature of the services was extremely important.

18. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he agreed with the representative of China on the need for flexibility regarding publicity in connection with services. The main question was whether paragraph 3(c) addressed an issue not covered elsewhere; if it did not, it could be deleted.

19. Mr. HUNJA (International Trade Law Branch) said that there were indications in the Commission that direct solicitation should be allowed in connection with services, but there was a problem regarding the nature of the services. The question went beyond the scope of paragraphs 1 and 2 of article 41 *bis*. If direct solicitation was allowed, there was no need to publish any notice, since the suppliers would be approached directly. If the Commission agreed that direct solicitation should be allowed for some services under paragraph 3(c), the description of the services could be left to the drafting group.

The meeting was suspended at 11.40 a.m. and resumed at 12.05 p.m.

20. Mr. TUVAYANOND (Thailand) said that members seemed to be focusing too much on the publication requirement when, in reality, the main issue was that of direct solicitation. For that reason, his delegation firmly supported the retention of paragraph 3(c). In addition to confidentiality, there were other special circumstances that required direct solicitation (considerations of national interest for example) which were not covered by the single-source procurement procedures. Therefore, his delegation believed it was essential to consider national interests and to ensure transparency in procurement to avoid any possibility of abuse of power by the authorities concerned.

21. Mr. LEVY (Canada) pointed out there were circumstances when direct solicitation was the only solution, and for that reason, it was necessary to retain paragraph 3(c). He suggested that, in addition to containing a reference to confidentiality or national interests, paragraph 3(c) should say something about the nature of the services not warranting a broad solicitation. Another possibility would be to insert parentheses after the reference to confidentiality and national interests so that States could elaborate further. In addition, he suggested that the introductory phrase of paragraph 3 be redrafted after the word "efficiency" to read "the procuring entity need not apply the provisions of paragraph 1 or 2 of this article and may solicit directly when it determines:".

22. Mr. JAMES (United Kingdom) said that if a reference to national interests was to be included in paragraph 3(c), it should be made clear that the procuring entity was not obligated to apply the provisions of paragraph 2 when it determined that it was not in the national interests to do so. To simply state that the nature of the services did not warrant a broad solicitation, as suggested by the representative of Canada, would not be acceptable as it would give a procuring entity *carte blanche* not to advertise. In fact, advertising was essential with the new method of procurement of services, unless there was advertising that method could not be considered a public one. If the Commission was to put forward for enacting States a Model Law that contained a preferred method for the procurement of services, that method should be as public and open as possible.

23. Mr. WALLACE (United States of America) said that he agreed with most of the suggestions made by the representative of Canada. Concerning paragraph 3(c), he concurred with the United Kingdom representative that as a preferred method it must be as public as possible and that the phrase suggested by the representative of Canada merely restated the problem. The Canadian representative's amendment could be reformulated to read: "that the services to be procured involve (confidentiality, national interest, high professional services, or whatever categories the legislature wishes to specify) provided that it solicits proposals from a

sufficient number of suppliers . . .". As it was very clear that solutions would differ from country to country, the best possible compromise would be to put illustrations in parentheses or to indicate that the legislature would prescribe the guidelines.

24. Mr. CHATURVEDI (India) supported the proposal made by the Canadian delegation. If he had understood him correctly, the *chapeau* to paragraph (3) would contain a reference to paragraphs (1) and (2) and paragraph (3) would say something about the nature of services not warranting a broad solicitation. In that connection, the United Kingdom delegation's proposal to shift the burden of proof would not be acceptable. The text proposed by the United States delegation was a very sound idea.

25. Mr. TUVAYANOND (Thailand) said that the proposals made by the representatives of Canada and the United States fully accommodated his delegation's concerns. As far as shifting the burden of proof was concerned, the Government was answerable to Parliament for its mistakes as it ultimately decided what was good for the country.

26. Mr. SHI Zhaoyu (China) said that paragraph 3(c) should be retained. Rather than getting bogged down in endless discussions about the adjectives to be used to qualify the nature of services, the Commission could just use the original wording "because of the nature of the services" which, in his delegation's opinion, might make it easier to reach agreement. Like the representative of Thailand, his delegation was concerned not only about the nature of services but also about retaining the message of direct solicitation in the paragraph.

27. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he agreed with the amendment proposed by the United Kingdom delegation as the inclusion of the notion of confidentiality and national interests made the paragraph more restrictive; merely referring to the nature of services would leave the door open for exceptions which would then lead to all the abuses which the principles of the Model Law were meant to control.

28. Mr. AL-NASSER (Saudi Arabia), referring to paragraph 3(c), said that the insertion of the phrase "if conditions exist which would require procurement through direct solicitation" before the particular rule concerning the nature of the services to be procured should cover the notion of confidentiality and national interests as well.

29. Mr. HERRMANN (Secretary of the Commission) said that delegations should focus more on the particular circumstances than on the nature of services. He did not quite understand why there seemed to be a controversy over the burden of proof. Paragraph (3) offered an exception to the requirements of paragraphs (1) and (2) and it was therefore much more appropriate to indicate what was meant by burden of proof. Given that a number of delegations had stressed the need to ensure that procurement should be as public as possible, it was perhaps not a good idea to encourage Governments to add all kinds of reasons for not using the procedure set out in paragraphs (1) and (2).

30. Mr. SHI Zhaoyu (China) said that the Working Group had agreed in previous discussions that it was up to the various States that adopted the Model Law to decide on its scope of application and on the nature of services to be included because it was impossible to draw up an exhaustive list of all the services to which the Model Law was or was not applicable. That principle also applied to paragraph 3(c). Such an approach would make it easier to reach agreement.

The meeting rose at 1.05 p.m.

Summary record of the 527th meeting

Friday, 3 June 1994, at 3 p.m.

[A/CN.9/SR.527]

Chairman: Mr. MORÁN (Spain)

*The meeting was called to order at 3.10 p.m.*NEW INTERNATIONAL ECONOMIC ORDER:
PROCUREMENT (*continued*)PROCUREMENT OF SERVICES (*continued*) (A/CN.9/392)Consideration of draft UNCITRAL Model Law on
Procurement of Goods, Construction and Services
(*continued*)Article 41 bis (*continued*)

1. The CHAIRMAN said it seemed that the problem posed by paragraph 3(c) might be resolved in accordance with the suggestions of the United States and Canada by incorporating in the text the idea that direct solicitation of proposals could be employed where confidentiality or the national interest so warranted. The drafting group would prepare a text that reflected that idea.

2. Ms. SABO (Canada) said that the drafting group would have to be given clear instructions about paragraph 3(c). She also wondered whether the *chapeau* of paragraph 3 would still include a reference to paragraph 1 and whether there was a consensus in that regard. She also wondered whether the *chapeau* of paragraph 3 would include a reference to direct solicitation.

3. The CHAIRMAN said that if he heard no objections he would take it that the Commission wished to refer article 41 bis to the drafting group.

4. *It was so decided.*

Article 41 ter

5. The CHAIRMAN stressed the importance of the *chapeau* of the article, which specified that the request for proposals should include, at a minimum, certain information. That meant that the procuring entity could add other requirements and States could do the same when they incorporated that provision in their national legislation.

6. Mr. WALLACE (United States of America) said that he approved of the text of subparagraphs (j) and (k) of article 41 ter, which were similar in content to article 25, except that they referred to services. Article 41 *sexies* contained references to the so-called two-envelope method, in which one envelope contained technical and quality data and the other contained price data. The two envelopes could be examined at the same time or one after the other, depending on the method used. In that regard, the request for proposals for services should indicate the procedure for evaluating proposals that stated the price and those that did not. Article 41 *sexies* set out four procedures for evaluating such proposals (in paragraphs 2(b)(i), 2(b)(ii), 3 and 4).

7. The CHAIRMAN said that paragraph 1 of article 41 ter might help solve the problem raised by the representative of the United States.

8. Mr. CHATURVEDI (India) said that article 41 ter contained superfluous elements that did not refer specifically to services. A

case in point was subparagraph (d), given that the right to reject proposals already appeared in other articles. Subparagraph (e) should be deleted because the criteria and procedures mentioned did not have to be specified in the case of services. Subparagraphs (j) and (k) should be reworded because both stipulated "if referred to price as a relevant criterion". In subparagraph (k) the phrase "including a statement as to whether the price is to cover elements of even the cost of services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes" should be deleted. Such information should be provided by the supplier, not by the procuring entity. Subparagraph (r) should be deleted because it referred to the terms and conditions of contracts in general, whereas article 41 *ter* dealt specifically with services. Subparagraph (s) should also be deleted because it was up to the supplier to find out about any pertinent laws. Subparagraph (t) was superfluous because there was no need to notify the supplier that it had the right to appeal for review provided for in article 42.

9. The CHAIRMAN said that, while a supplier might be expected to be familiar with the legislation in force, it might perhaps be unaware of some of the lesser administrative regulations. It would therefore be helpful to let subparagraphs (r) and (s) stand. Moreover, since almost all solicitation notices included a mention of the right of review, it would be appropriate to retain subparagraph (t). With regard to subparagraph (d), the right to reject proposals also appeared in article 11 bis. The wording used in the latter article, however, was "if so specified in the solicitation documents", so that there was a difference between the two provisions. Moreover, the Working Group felt that there was majority agreement on those points, which should be taken as a minimum.

10. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 41 ter was perfectly adequate and contained alternative proposals that could serve as safeguards in the tendering process in the event that some of the methods specified were eliminated. With regard to subparagraphs (j) and (k), it would be very helpful if the Guide to Enactment indicated when price should be considered a relevant criterion and when it should not. Price should not be a relevant criterion when the services entailed a high degree of technical complexity or might have a substantial impact on the final product.

11. Mr. HUNJA (International Trade Law Branch) said that some delegations were concerned that subparagraphs (j) and (k) began with the phrase "if price is a relevant criterion" because it could be interpreted to mean that in most cases it was not. He therefore suggested that the two subparagraphs should be reworded to read: "information shall be provided as to the currency or currencies in which the proposal price is to be expressed and the manner in which the proposal price is to be expressed, unless price is not a relevant criterion".

12. Mr. JAMES (United Kingdom) added that, since the method described in article 41 ter was the most appropriate method for the procurement of services, it was fitting that it should incorporate the principles of openness and transparency characteristic of public tendering, which were reflected in the procuring entity's obligation to provide as much information as

possible at the earliest possible stage of the tendering process. He was also convinced that the procedure that was specified in the Model Law on Procurement of Goods and Construction should also be applied to services.

13. Mr. LEVY (Canada) urged that the wording of article 41 *ter* should be left as it was.

14. Mr. TUVAYANOND (Thailand) said that while he had no problem with the article, he wished to have clarification of two of its provisions. First, with regard to subparagraph (n), he pointed out that wide fluctuations in exchange rates were the norm, which made that subparagraph unnecessary. Secondly, with regard to subparagraph (t), if one assumed that everyone knew the law, the subparagraph seemed superfluous, particularly since article 42 did provide for the possibility of filing an appeal for review.

15. The CHAIRMAN said that fluctuations in exchange rates were precisely why subparagraph (n) had been included. Proposals should indicate not only the currency in which the price should be expressed, but also the exchange rate that would be used to convert it; failing that, reference should be made to an exchange rate published by a financial institution—a bank, for example—on a specified date. With regard to subparagraph (t), he pointed out that, at least under legal systems based on Roman law, in any public solicitation held pursuant to law, a public authority was required to indicate what recourse was available to the parties involved in the solicitation process or what exemptions they were entitled to under the law.

16. Mr. LEVY (Canada) reminded the Commission that the Working Group's intention was to ensure that suppliers and contractors had alternative ways of setting their prices, whether they involved exchange rates, with reference to World Bank special drawing rights (SDRs) or European Currency Units (ECUs) of the European Community, or a statement that the rate of exchange set by a bank or financial institution on a given date would be applied. The purpose of subparagraph (t), meanwhile, was to ensure transparency by facilitating the procurement process and making it unnecessary for suppliers or contractors to have to find out for themselves what recourse was available to them.

17. Mr. CHATURVEDI (India) agreed that information on the right of review provided by law was highly important, but he was not clear which party should bear the burden of providing or obtaining such information. According to subparagraph (s), the procuring entity was not liable if it omitted the references to the relevant laws or regulations, yet that entity was certainly in the best position to know what regulations were applicable.

18. With respect to subparagraph (j), he wondered if there were any situations in which price was not a relevant criterion. He had serious misgivings about the wording of that paragraph.

19. With regard to subparagraph (k), he believed that it was up to the supplier or contractor and not the procuring entity to state whether items other than the cost of the services were to be included in the price. He also pointed out that, according to the chapeau of article 41 *ter*, the request for proposals should include "at a minimum" the information listed in that article, which consisted of no less than 22 subparagraphs. The minimum requirements could be covered by subparagraphs (a), (b), (c) and a few others; otherwise there were too many superfluous paragraphs, which placed an undue burden on one of the parties.

20. With reference to the observation by the representative of Thailand regarding ignorance of the law, he felt that it was up to the supplier or contractor to find out what laws applied.

21. With regard to subparagraph (n), currency conversion was always an option and it was not necessary to mention it explicitly. What should not be done was to require the supplier to set a rate of exchange that would fluctuate widely; he could only accept establishing in principle that an exchange rate set by a particular financial institution should be used.

22. The CHAIRMAN said that there did not appear to be a consensus within the Commission to delete so many subparagraphs; consequently, if he heard no objections, he would take it that the Commission wished to approve article 41 *ter* in so far as substance was concerned and to refer it to the drafting group for consideration of the proposed changes.

23. *It was so decided.*

Article 41 quater

24. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the word "only" in paragraph 1 was too restrictive; it was conceivable that some other important criteria might have been left out. He suggested that the *chapeau* should conclude with the words "and may concern principally the following".

25. He then pointed out that there were three basic criteria for the evaluation of proposals. The first was the qualifications and experience of the particular supplying or contracting firm; the second was the methodology that the company intended to employ in the assignment; and the third and most important, because it was given greater weight, was the professional competence of the personnel the company intended to assign to the project. He therefore suggested that paragraph 1(a) should be changed to read:

"(a) The qualifications, experience in the field of assignment, reputation, reliability and professional and managerial competence of the supplier or contractor and of the key personnel which the supplier or contractor proposes to employ in the assignment;"

26. With reference to paragraph 1(c) and to the comments made previously by the representative of India with respect to the relevance of price as a criterion, he noted that the World Bank had compiled statistics on proposals for which price was not a relevant criterion, either because the projects were too complex or because the quality of the final product was critical, and had found that they constituted 35 to 40 per cent of all such projects. He also noted that in paragraph 1 the word "may" was used, a term that did not imply an obligation. Subparagraph (c) would be improved if it began with the words "the proposal price, if it is to be a criterion, and the manner in which it is to be taken into account"; the rest would remain the same.

27. Mr. WALLACE (United States of America) agreed with the suggestions made by the previous speaker regarding subparagraphs (a) and (c). The reference to personnel in subparagraph (a) could be made even more explicit if the adjective "relevant" was inserted in front of the word "qualifications".

28. The comments of the observer from the Inter-American Development Bank concerning subparagraph (c) applied also to what the representative of the Secretariat had said concerning subparagraphs (j) and (k) of article 41 *ter*. It was certainly true that subparagraph (c) had to be worded very carefully, given that price was not a very important criterion for many categories of services that were the object of procurement. In any event, the wording of the subparagraph was acceptable, since it was to be read in conjunction with paragraph 1, which not only used the term "may" but also included the phrase "and the manner in which they are to be applied".

29. He did not agree, however, with the suggestion that the word "only" should be replaced by "principally" in paragraph 1. He recalled that the Working Group had deliberately used that wording to maintain the parallelism with the wording of article 32, paragraph 4(c), even while recognizing that the latter referred to a different procedure, the intention being to make the practice of procurement as systematic and uniform as possible. On the other hand, subparagraph (e) provided greater flexibility in the use of social policy criteria by using the language "national defence and security considerations".

30. Mr. JAMES (United Kingdom) said that the Working Group had in fact debated at length the question of whether the use of any or all of the evaluation criteria listed in the Model Law should be mandatory or optional (A/CN.9/392, para. 67). The word "may" had been considered necessary to give the procuring entity discretion in choosing the criteria it wished to employ. On the other hand, it had been felt that, in keeping with the spirit and provisions of the Model Law, certain limits had to be placed on the criteria that the procuring entity could take into account in the case of tendering, the preferred method for the procurement of goods and construction, and in the case of a request for proposals, the preferred method for the procurement of services.

31. The purpose of the Model Law was to establish norms that would serve as guidelines for framers of national legislation on the subject. In his view, then, the criteria included in article 41 *quater* were appropriate, and the procuring entity was free to use them to whatever extent it wished.

32. Mr. CHATURVEDI (India) said that he disagreed with the content of the second sentence of paragraph 1 for three reasons. In the first place, it would be impractical for the procuring entity to act in the manner described there in cases where it only needed to procure the services of one or two persons. In the second place, he did not see why the procuring entity should have to notify the suppliers and contractors of the evaluation criteria in every case. In the third place, according to the end of the sentence, those criteria could "concern only" matters that did not include the criteria of confidentiality and national interest, discussed in connection with the previous article, or technology transfer and export promotion, two criteria of vital importance to developing countries that ought to have been included in paragraph 1(d).

33. The CHAIRMAN observed that confidentiality bore no relation to the article in question and that technology transfer and export promotion were implicitly included in paragraph 1(d). Furthermore, that paragraph authorized the procuring entity to establish its own evaluation criteria, so that if a State ascribed importance to the above-mentioned issues, it was free to state that it would take them into account when reaching a decision. The paragraph could not be interpreted to mean that the criteria could relate to any subject whatsoever, since there would then be no point in including the article in the draft.

34. Mr. KLEIN (Observer for the Inter-American Development Bank) said that the article ignored one important technical aspect of the question. While he was not opposed to a listing of basic evaluation criteria, he felt it was essential that they should be able to be applied with flexibility and adapted to specific situations, given the very nature of services, especially highly specialized services.

35. Mr. WALLACE (United States of America) supported the Chairman's view that the text of article 41 *quater* accommodated the concern of the representative of India, since it recognized that the procuring entity was free to evaluate proposals according to the criteria that it considered appropriate; that was clear from paragraph 68 of document A/CN.9/392, from the words in brackets at the end of paragraph 1(d) of article 41 *quater*, and from

paragraph 1(b) of the same article. India was correct in observing that that provision was not appropriate in cases where a limited number of persons were to be hired. In such cases, the method of solicitation of quotations might be used.

36. However, he did not agree with the remark made by the observer for the Inter-American Development Bank. Subparagraphs (a), (b) and (c) were important, particularly the first two. The procuring entity would explain as specifically as possible the requirements suppliers and contractors were expected to meet and how it would apply the evaluation criteria, which would be adapted when the request for proposals was drawn up. The request could accommodate whatever variations circumstances required. In other words, the subparagraphs were worded so as to give ample room for flexibility while avoiding arbitrariness in the evaluation of proposals.

37. Mr. TUVAYANOND (Thailand) said that while the article provided some flexibility, it was also restrictive. He wished to know whether environmental issues, primarily pollution, were covered. If not, changes would need to be made to include them. The article must also take into account the fact that certain countries applied exchange controls, which sometimes made it impossible to repatriate the entire agreed price at one time, particularly in cases where the services had been rendered in the territory of the procuring State.

38. Mr. LEVY (Canada), supported by Mr. WESTPHAL (Germany), said that environmental questions could be addressed in the description of services provided for in article 41 *ter*, subparagraph (g), and that proposals from suppliers and contractors could also be evaluated from that perspective under article 41 *quater*, paragraph 1(d). Questions relating to currency exchange were already dealt with, for example, in article 41 *ter*, subparagraph (s).

39. Mr. CHATURVEDI (India) said that it was currently impossible to undertake a major procurement project without the approval of the environmental protection authorities and that, in view of the importance of the issue, it should be included in article 41 *quater*, paragraph 1(d). He also agreed with the United States representative that the transfer of technology and export promotion could be dealt with in that paragraph. Nevertheless, it would have been preferable to make a specific reference to those criteria. He therefore proposed that the word "only" should be deleted from the *chapeau* of paragraph 1. As for the suggestion by the representative of the United States to add the word "relevant" to paragraph 1(a), he did not feel that that term should be used to qualify the reputation and reliability of the supplier or contractor.

40. The CHAIRMAN said that although environmental issues were becoming increasingly important, there were few cases in which the rendering of specific services was likely to have an impact on the environment. In any case, the procuring entity could include that factor in the evaluation criteria under article 41 *quater*, paragraph 1(d), or article 41 *ter*, where the minimum contents of requests for proposals for services was discussed.

The meeting was suspended at 4.40 p.m. and resumed at 5 p.m.

41. Mr. WALLACE (United States of America), supported by Mr. JAMES (United Kingdom), said that the need to ensure that the draft law reflected concern for environmental protection must be borne in mind. At the same time, the list of criteria in paragraph 1(d) could not be endless. If the environment was to be mentioned, it would also be necessary to refer to the effects of services on income distribution, health, science and technology and many other factors. There must be a limit to the list of criteria, particularly since effects on the environment were many and

varied. There was no doubt that that impact would be far more significant in the case of goods and construction than in that of services. In any event, the draft left ample room in which to deal with that issue, since both article 32, paragraph 4(c)(iii), and article 41 *quater*, paragraph 1(d), specified that "the enacting State may expand subparagraph (d) by including additional criteria". Furthermore, from the standpoint of the structure and wording of the draft law, it would be inappropriate to include anything in article 41 *quater*, paragraph 1(d), that did not appear in article 32.

42. Mr. LOBSIGER (Observer for Switzerland) said that environmental considerations should not lead to the adoption of more protectionist practices than did the other criteria mentioned in paragraph 1(d). In any case, the environmental impact of a service must certainly be mentioned, and the place to do so was in article 41 *ter* rather than article 41 *quater*.

43. Mr. TUVAYANOND (Thailand) noted that his country had already applied environmental criteria in a case of procurement involving a proposal for services, and had opted for a more expensive proposal because it entailed less risk of pollution. Paragraph 1(d) already gave Member States an opportunity to take that criterion into account, which might be decisive in the evaluation of proposals.

44. Mr. CHOUKRI SBAI (Morocco) noted that the Arabic version of the *chapeau* of article 41 *quater* did not contain the word "only". The French version read "*ne peuvent concerner que*", which was equivalent to a negative construction, whereas the Arabic used a positive construction which seemed to leave room for discretion, in deciding whether or not to inform suppliers and contractors of the criteria.

45. Mr. CHATURVEDI (India) said that it would be inappropriate to take a decision on the use of a positive or a negative construction, since that would imply that one text was more authentic than the other. As for the question of whether or not to include a provision relating to the environment in the text, he noted that the article referred primarily to services, although not exclusively, since it could also be applied to goods and construction. The term "services" was very broad, and there were cases where the question of the environment did not arise. Moreover, legal instruments containing obligatory and detailed provisions on the environment had already been adopted and were entering into force. There was therefore no need to refer to the environment in the Model Law.

46. Mr. GOH (Singapore) suggested that, in order to meet the concerns raised by the representative of Thailand, the words "may concern only" should be replaced by the words "shall include the following", which would give the procuring entity flexibility.

47. The CHAIRMAN reminded the Committee that most delegations had preferred the word "only".

48. Mr. KLEIN (Observer for the Inter-American Development Bank), speaking on behalf of the World Bank and of his own institution, raised the issue of margin of preference. While the hiring of national consultants should be encouraged, the best way of doing so would be to refer to the real advantages of such recruitment, such as the consultants' familiarity with the local setting or language, for example. Such a reference could be added to the Model Law so as to allow or require foreign companies to work with national companies, provided that mandatory quotas or percentages were not set and that there was no requirement to work with specific companies. That was a much more effective solution than assigning national companies a certain weight merely because they belonged to the country procuring the service. What actually happened when services were sold was that knowledge was sold, and if the quality of the services declined everyone lost.

Finally, the introduction of a margin of preference, which was uncommon in the case of services, could result in double counting, since a certain number of points was being awarded for familiarity with the milieu or the language on the one hand while preference was being given to nationality on the other. Although the objective was, clearly, to assist national consultants, care must be taken to ensure it was done in the manner that was most beneficial to all the parties concerned.

49. The CHAIRMAN said that the question raised was particularly appropriate for inclusion in the Guide to Enactment, since the latter could indicate the problems that were coming up in most countries. In the system of joint ventures or temporary partnerships, the challenge was to provide a service by identifying the most suitable national contractor. That method was far better than fixing percentages. It would be useful if the Guide referred to the need to resolve those questions.

50. Mr. CHATURVEDI (India) said that his country was not in favour of placing any limit, even indirectly, on the percentage of the margin of preference for companies and national consultants. On the contrary, that practice should be encouraged.

51. The CHAIRMAN agreed with that position; it was necessary to respect a tradition that was not only observed in a number of countries and legislations but which was also set forth in the General Agreement on Tariffs and Trade (GATT). One way to promote development was to provide for a margin of preference for national contractors. In the light of the comments made, however, the draft text could be referred to the drafting group.

52. *It was so decided.*

Article 41 *quinquies*

53. Mr. TUVAYANOND (Thailand) said that he would prefer to delete from paragraph 1 the requirement that the procuring entity should communicate the clarification to all suppliers or contractors, since some of them would probably not need such clarification and the requirement merely placed an additional burden on the procuring entity. Clarifications should be communicated only to those who requested them. The same comment applied to paragraph 3, since not all suppliers or contractors might be interested in the minutes of the meeting containing the requests for clarification and the responses to those requests. In particular, the Model Law did not need to specify how the information should be used and thus should not say "so as to enable".

54. The CHAIRMAN said that all contractors had an equal right to know what response had been given to a request for clarification which might throw light on the contract or on the inclinations of the procuring entity. What was important was for the supplier to have that information in order to prevent any irregularities when the contract was awarded.

55. If he heard no objections, he would take it that the Commission wished to approve article 41 *quinquies* as currently worded.

56. *It was so decided.*

Article 41 *sexies*

57. Mr. WALLACE (United States of America) said that he was in general agreement with the wording of the article but would welcome clarification of a few minor points. With regard to paragraph 3(a), he wished to know what the criteria were for rejecting proposals and whether those criteria were related to the threshold level referred to in paragraph 2(a). In paragraph 3(c), the word "normally" could be inserted before the words "be considered". As for paragraph 1(c), the commentary should indicate

whether the impartial panel of experts would provide advisory services or whether it could also take decisions.

58. The Guide should indicate when the criteria set out in paragraphs 2(b)(i), 2(b)(ii), or 4 should be used. It should also explain how each of those methods should be applied, since the Model Law said nothing on that subject.

59. Mr. WESTPHAL (Germany), referring to paragraph 2(a), said he agreed with the idea of rating each of the proposals. However, he wished to know what the threshold level was and what criteria were used in determining it.

60. Mr. LOBSIGER (Observer for Switzerland) said that paragraph 1(c) was missing from the French version.

61. Mr. HUNJA (International Trade Law Branch) said that paragraph 2 did not give the procuring entity any guidelines for determining the threshold level; at the previous session of the

Commission, the representative of the United States of America had suggested in relation to another matter that guidelines should be included in the Model Law. However, the Working Group had been somewhat reluctant to do so, and it had expressly decided that it would not be appropriate to include such guidelines in the Model Law, although they might perhaps be included in the Guide.

62. In order to clarify the meaning of paragraph 2, a basic procedure for establishing the threshold could be the following: in the case of the procurement of intellectual services, for example, the procuring entity would decide that, with respect to the technical, or non-price, aspects of the proposal, it would establish a rating system based on a set scale, and it would do the same to rate the competence of project personnel and the time spent in providing such services.

The meeting rose at 6.05 p.m.

Summary record of the 528th meeting

Monday, 6 June 1994, at 10 a.m.

[A/CN.9/SR.528]

Chairman: Mr. MORÁN (Spain)

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

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*)

PROCUREMENT OF SERVICES (*continued*) (A/CN.9/392)

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (*continued*)

Article 41 *sexies* (*continued*)

1. Mr. WALLACE (United States of America) said that his delegation was generally satisfied with the wording of article 41 *sexies*, but believed that it might be useful to add subheadings to indicate the diversity of selection procedures and facilitate the reading of what was a complex article. It might also be advisable to specify in paragraph 1(c) that the impartial panel of experts had only an advisory role. In paragraph 4, the concepts of "threshold" and "rating" should also be clarified.

2. Mr. UEMURA (Japan) said that the Commission should consider the possibility of providing for tender securities.

3. Mr. CHOUKRI SBAI (Morocco), returning to article 41 *bis*, paragraph 3, proposed adding a paragraph, which he read out.

4. The CHAIRMAN recalled that the Commission had already considered that point and said that since the proposed wording was very close to the current text, he would refer the proposal to the drafting group.

5. Mr. LEVY (Canada), returning to article 41 *sexies*, said that he, too, was concerned that the article was too complex and wished to make it easier to read, for example, by adding subheadings for paragraphs 2, 3 and 4. He suggested also inserting a

footnote at the beginning of the draft Model Law, specifying that in addition to the two main methods for the procurement of services, the Model Law proposed several other methods which States had the option of not including in their legislation. The footnote could make a reference to the Guide to Enactment.

6. The CHAIRMAN said that at some point it would be necessary to reconsider the format of the draft Model Law, particularly with regard to the insertion of footnotes. He pointed out that paragraphs 2, 3 and 4 of article 41 *sexies* corresponded to the three main selection procedures: without negotiations, with simultaneous negotiations and with consecutive negotiations.

7. Mr. WALSER (Observer for the World Bank) said that paragraphs 2 and 4 accurately reflected the selection methods generally used by procuring entities in procuring consultancy services, with paragraph 2 describing the procedure in which price was a main criterion for evaluating offers, and paragraph 4 the procedure in which price was not a deciding factor. If subheadings were inserted they could note that distinction. Paragraph 3 should be deleted, since the procedure it described was not used in practice; paragraph 3(d) was particularly vague. Responding to the comment made by the representative of Japan, he said that there were generally no tender securities in the procurement of consultancy services, and the World Bank always recommended that government should not require them. Lastly, the Bank was not in favour of the margin of preference provided for in article 41 *quater* and believed it was dangerous to include that concept in the Model Law.

8. Mr. LOBSIGER (Observer for Switzerland) said that the Commission should specify the duties and authority of the panel of experts referred to in paragraph 1(c) of article 41 *sexies*. Panels played a purely advisory role and gave opinions only on the aesthetic, artistic or technical aspects of a project; it was up to the

procuring entity to supervise the panel's activities, and it alone made the decision to award a contract. If the Commission wished to add a clarification regarding the panel's advisory role, it could do so in the Guide to Enactment. The provisions, however, should be kept flexible in order to reflect the different practices in use. On the other hand, it would be useful to spell out the procuring entity's responsibility as the State authority in supervising the application of the general principles enunciated in the preamble of the Model Law.

9. The CHAIRMAN said it seemed clear from article 41 *sexies* that the panel of experts had only an advisory role.

10. Mr. TUVAYANOND (Thailand) said that, given the length and complexity of the article, his delegation was not opposed to clarifying it in footnotes or in the Guide to Enactment so that Governments could find their way through the provisions. Unlike some, he did not believe that paragraph 3 should be deleted. While it might not be of interest to the developed countries, it was of particular interest to the developing countries, who often used the services of consultants in certain highly technical fields, such as nuclear energy. Thailand itself used the method described in that paragraph. Moreover, it was unacceptable to delete an entire paragraph, since one of the purposes of the Model Law was to harmonize legislation in order to promote international trade. Perhaps it could be stated in a footnote or in the Guide that the fact that several methods were being proposed was meant to reflect the practices used in various countries. Finally, if the idea of using paragraph headings was accepted, it should be applied uniformly so that all paragraphs had headings.

11. Mr. CHATURVEDI (India) said that article 41 *sexies* was detailed, unduly complicated and led to confusion. It would be better to reduce it to one or two paragraphs. If, however, it was decided to retain the text as it stood, subheadings should be inserted. The proposal to insert a footnote explaining the various selection procedures should be retained, but such explanations should appear in the Model Law, not in the Guide to Enactment. The establishment of a threshold referred to in paragraph 2 was not feasible for developing countries. Paragraph 3(a) was also impracticable, particularly in the case of services. In fact, the procuring entity was not usually prepared to negotiate with suppliers or contractors which had submitted proposals that came close to meeting the requirements it had set, and one could not require it to negotiate with "all" of them. Paragraph 3(c) should be deleted, since price considerations could not be dissociated from technical evaluations.

12. Mr. WALLACE (United States of America) endorsed the proposal made by Canada and supported by Thailand and India to insert a footnote or commentary in the Guide to Enactment, particularly if the proposal to place chapter IV *bis* after chapter III, which dealt with tendering proceedings, and before chapter IV, which dealt with other methods, was adopted. Paragraph 3 of article 41 *sexies* should be retained. It dealt not only with consultancy services but also with other categories of services which Governments might use. That was particularly important since the paragraph was subject to all the securities provided for in articles 41 *bis* to 41 *quinquies*. With regard to the comment by the observer for the World Bank concerning the margin of preference provided for in article 41 *quater*, in which he had expressed a concern shared by other delegations, it would be recalled that the Commission had decided to provide such explanations in the Guide to Enactment.

13. The representative of India had asked whether the procuring entity had to consult with all suppliers and contractors. While it was true that provision had been made for a threshold, it was perhaps necessary to go back to article 41 *bis* and add a fifth paragraph stipulating that in cases where notification was not

required and where only direct solicitation or selection could be used, or in cases where a notice had been published and where several suppliers and contractors had responded, the entity was not obligated to consult other suppliers or contractors. Under the terms of paragraphs 2 and 3 of article 41 *bis*, the procuring entity was authorized to limit the number of suppliers and contractors from whom it solicited technical proposals.

14. Mr. WALSER (Observer for the World Bank) noted that some delegations thought that the panel of experts provided for in paragraph 1(c) would evaluate only the artistic or aesthetic aspects of proposals submitted. In the view of the World Bank, chapter IV *bis* dealt primarily with consultancy services, and in order to evaluate proposals involving those services, a panel was essential. In fact, an objective and mathematical evaluation was impossible in such cases. A whole range of criteria was involved, including the experience of the company and its personnel, their knowledge of local conditions, and previous projects, and only a panel of experts could evaluate the technical merits of each proposal in the light of those criteria. It was evident that the experts did not make any decisions. Whether price considerations played a role or not, it was up to the procuring entity to decide to whom it would award the contract and with whom it would negotiate. In many cases it was impossible to function without such a panel, which offered the sole means of evaluating proposals.

15. Mr. LEVY (Canada) suggested that article 41 *sexies* should be divided into four separate articles whose titles would indicate the method of selection dealt with in each one. The title of article 41 *sexies* would remain "Selection procedures" and the following articles—paragraphs 2, 3 and 4—might be called, for example, "Selection with establishment of a threshold level", "Selection with negotiations" and "Selection with a threshold level and negotiations". He agreed with the proposal made by the representative of the United States to place chapter IV *bis* after chapter III, which dealt with tendering proceedings, and before chapter IV, which dealt with other methods.

16. Mr. CHOUKRI SBAI (Morocco) said that the selection of an impartial panel of experts was certainly not required of the procuring entity. The text of the Model Law should make it clear that the procuring entity would have the final say. Since using a "group" of experts could prove very expensive, as Morocco had learned by experience, it was important to give the procuring entity complete freedom of choice. It must have the freedom to request the opinion of a single expert.

17. Mr. MELAIN (France) said it was clear from the text as drafted that the possibility of using a group of experts or an independent panel represented a choice and not an obligation for the procuring entity. It was nevertheless important to stress the experts' independence and impartiality, particularly in relation to the competition itself. It was obviously essential that the experts should have no direct relationship to the competing suppliers.

18. Mr. TUVAYANOND (Thailand) said that his delegation could accept paragraph 1 of article 41 *sexies* as it stood but wondered whether paragraph 1(c) could not be deleted, since it went without saying that the procuring entity could resort to a group of experts.

19. Mr. CHATURVEDI (India) said that, on the contrary, paragraph 1(c) was appropriate and should not be modified. The paragraph set out one of the options available to the procuring entity. Moreover, when speaking about the use of outside bodies to obtain an opinion, it was important to bear in mind the point made by the representative of Morocco regarding the cost of groups of consultants. In paragraph 1(a), the phrase "that has been notified to suppliers or contractors in the request for proposals" was somewhat problematic, for it was usually impossible to indicate in a

request for proposals which procedure would be adopted since it was not known at the outset whether there would be any negotiations and which of the methods specified in paragraphs 2, 3 and 4 would be used. He also agreed with the United States proposal to limit the choice of suppliers in article 41 *bis*.

20. Mr. WALLACE (United States of America) said that paragraph 1(c) was justified since it dealt with a panel of experts that came from outside the procuring entity and not from one of its own offices that normally evaluated tenders. In the present case, judgements would be based on criteria other than the lowest price, the criterion normally used by the procuring entity, which was important when the transaction had an artistic or aesthetic component. Naturally, the two were not mutually exclusive, and it was possible to use both the procuring entity's own staff and an external panel of experts.

21. Mr. WALSER (Observer for the World Bank) thanked the representative of the United States for his explanation and said that since he had been unable to participate in the previous session of the Working Group, it had been his understanding that paragraph 1(c) referred to the internal group of experts in any ministry whose purpose was to evaluate suppliers' proposals in terms of their technical quality. He therefore felt that if paragraph 1(c) referred to an external panel, that paragraph and paragraphs 2 and 4 must specifically say so.

22. Mr. CHATURVEDI (India), citing the various titles which the representative of Canada had proposed for the different paragraphs of article 41 *sexies*, pointed out that the procedures in question were linked: for example, once a threshold had been established, negotiations could not be excluded. It was therefore impossible to indicate at the outset which method would be used, as was stated in paragraph 1(a).

23. Mr. LOBSIGER (Observer for Switzerland), replying to the question raised by the representative of Thailand as to why the provision dealing with panels of experts had been included in paragraph 1 of article 41 *sexies*, pointed out that while paragraph 1(a) set forth the principle that the three selection methods were exclusive, paragraph 1(c) nevertheless sought to indicate that that exclusivity did not prevent the procuring entity from resorting to a panel of experts. It was perhaps unfortunate that the logical connection between paragraphs 1(a) and 1(c) had been broken.

24. The CHAIRMAN said that the Commission had concluded its consideration of paragraph 1 and suggested that the Working Group should attempt to clarify the rule set out in paragraph 1(c). The view expressed by the representative of India was not shared by other delegations, since the current wording of paragraph 1(c) seemed generally acceptable.

25. Mr. CHATURVEDI (India) proposed that paragraph 1(c) should be left unchanged.

The meeting was suspended at 11.45 a.m. and resumed at 12.10 p.m.

Paragraph 2

26. The CHAIRMAN said that, as proposed, the Working Group would consider the possibility of making paragraphs 2, 3 and 4 separate articles and giving each an appropriate heading.

27. Mr. FRIS (United States of America), said that, with regard to the threshold concept used in paragraph 2, the practice for evaluating the technical merits of proposals could vary from country to country and from organization to organization. He believed that the expression "establish a threshold level" derived from the practice of the World Bank and other organizations

which was to establish, at the time the request for proposal was made, a quantitative norm on the basis of which the proposals would be evaluated. Other countries, including the United States, did not specify a threshold level in the solicitation documents, since it was understood that the technical merits of proposals would be evaluated in order to rank them. It would be useful to refer in the Guide to Enactment to practices other than those described in paragraph 2.

28. Mr. WESTPHAL (Germany), supporting the remarks made by the preceding speaker, said that Germany did not use the threshold method, but that the rest of the procedure described in paragraph 2(a) was widely used. It seemed excessive to require the procuring entity to establish a threshold level and he did not feel that it would be useful to do so in the Model Law. However, if the Commission wished to retain the threshold concept, it should make it clearer, for example by adding a sentence to the text.

29. Mr. CHATURVEDI (India) said that, after listening to the representatives of the United States and Germany, his doubts regarding the value of paragraph 2 and subparagraph (a) had increased. Moreover, the paragraph was of no value for developing countries. He therefore suggested that it should be deleted.

30. Mr. WALSER (Observer for the World Bank) said he thought it was essential to provide for a threshold level in paragraph 2, although he did not care what term was used. For example, reference could be made to "minimum technical requirements", or other wording could be found. It was less important to provide for a threshold level in paragraph 4 that could be used to determine the best proposal from the technical standpoint so that the price could then be negotiated with the author. However, a threshold level was absolutely necessary in paragraph 2(b)(ii), in order to ensure that proposals that were mediocre from the technical standpoint were not selected on the basis of price alone. That precaution, which was particularly important for developing countries, offered the best guarantee in selecting qualified consultants.

31. The CHAIRMAN said that the Commission seemed to be in favour of retaining paragraph 2 as it stood; the Working Group ought to be able to find wording that would clarify the idea contained in the paragraph.

32. Mr. AL-NASSER (Saudi Arabia) said that his delegation had already expressed reservations at the previous session about the provision under consideration. The concept of a threshold level was not used in procurement proceedings in Saudi Arabia. In any event his delegation would see what the drafting group did with that provision before taking a final position.

33. Mr. CHATURVEDI (India) said that the words "as set out in the request for proposals" in paragraph 2(a) should be deleted and the rest of the paragraph reworded.

34. Mr. JAMES (United Kingdom) said that those words referred to the criteria set out in article 41 *quater*, which the Commission had already considered. While there was some merit in the argument put forward by the representatives of Germany and the United States that it was not always possible to establish a threshold level or a range in a request for proposals, it was necessary to include in a request the criteria referred to in article 41 *quater*. It seemed that the Commission felt that reference to a threshold level was sufficient and that the concept could be developed in the Guide to Enactment rather than in the text of the Model Law itself.

35. Mr. WALSER (Observer for the World Bank) said it was essential that the threshold level should be indicated in the request

for proposals, since that was the line which separated the suppliers who were selected from the rest. In the absence of a threshold level, the latter might feel that they were the victims of an injustice. That concept must therefore be preserved in the interests of transparency and free competition.

36. Mr. YOUSIF (Sudan) said that in the article under consideration and in the rest of the text, the Arabic translation of the word "proposal" was incorrect. He requested the Secretariat to take the necessary steps to correct the translation.

37. Mr. SHIMIZU (Japan), reverting to the question of tender securities, requested the representative of the World Bank to explain why such securities were not desirable for the procurement of consultancy services.

Paragraph 3

38. Mr. FRIS (United States of America) said that he felt that the observer from the World Bank was using the term "consultancy services" in a very broad sense, applying it to all services that would not be covered by tendering proceedings. However, there could be justification, in some cases, for having tender securities.

39. He had two comments about the last sentence of paragraph 3(a). First, where it stated that all suppliers or contractors that had submitted proposals should have an opportunity to participate in the negotiations, no reference was made to proposals that had not been solicited but had been submitted by suppliers who had heard about the procurement procedures and wished to participate in them. That situation was not really covered in the provision. Second, in the reference to proposals which "have not been rejected", there was no indication as to what criteria were applied to select or reject such proposals. It should be specified whether the concept of a threshold level in paragraph 2 applied also in paragraph 3.

40. As to subparagraph (c), even if one did not like the procedure described in paragraph 3, one had to recognize that it was widely used, *a fortiori* if services were defined very broadly. Clearly, factors other than price should be separated from price; that was what was referred to in practice as the two-envelope method, with one envelope for technical aspects and the other for price. If that was what was meant, subparagraph (c) was sufficient, but that should perhaps be made clear in the request for proposals and, consequently, specified in article 41 *ter*.

41. Mr. JAMES (United Kingdom) said that paragraph 3 should be retained, since otherwise the procuring entity would have to resort to the method of competitive negotiations, which was even less structured. The method envisaged in paragraph 3 was widely used by States, particularly developing countries, and could not be disregarded when drawing up a model law.

42. With regard to the observation made by the representative of the United States of America, the Working Group had taken up the question, as could be seen from paragraph 79 of its report (A/CN.9/392). The Working Group had felt that the words "have not been rejected" were of value. Strictly speaking, they did not imply a threshold level in the sense that the term was used in paragraphs 2 and 4, but rather the procuring entity's ability to reject proposals which were clearly inadequate before beginning negotiations. That was perhaps not clear from the text, but if the Commission

accepted the principle, the drafting group could try to develop more explicit wording.

43. The question of the envelope system had also been considered in the Working Group. It seemed that it was not desirable to include that method, which had developed in practice, in the Model Law itself. It would be preferable to leave the text as it stood but to provide explanations in the Guide to Enactment.

44. Mr. TUVAYANOND (Thailand) said that, with regard to the words "have not been rejected" at the end of subparagraph (a), the rejection of proposals was not arbitrary; there were criteria which applied. It was simply a matter of enabling the procuring entity to reject proposals that were clearly inadequate or came from unqualified contractors. As to the question of the two-envelope method, he supported the comments made by the representative of the United Kingdom and agreed that the term should not be taken literally and ought not to be included in the Model Law itself. Subparagraph (c) was acceptable as it stood.

45. Mr. CHATURVEDI (India) suggested that subparagraphs (b) and (c) should be deleted. Subparagraph (b) was unnecessary because the procuring entity which negotiated the procurement of services should not have to negotiate with "all" suppliers or ask them for their "best and final offer". As to subparagraph (c), it did not take into account the fact that it was not always possible to separate the price of an offer completely from its technical aspects.

46. Mr. WALSER (Observer for the World Bank) agreed with the representative of the United States of America that chapter IV *bis* concerned all services for which a tendering procedure was impossible. As to the words "have not been rejected" at the end of paragraph 3(a), they were necessary and referred to the threshold principle set out in paragraphs 2 and 4. In any event, that was how he understood them.

47. With regard to the two-envelope system, it was not the term that mattered; however, the World Bank felt that, when price was a criterion, the procuring entity should not know the price when it was considering the technical aspects of proposals, so as not to be influenced by it. It must therefore be indicated very clearly in paragraph 3 that the price should not be known until the technical evaluation was completed. That was not necessary in paragraph 4 since, according to the method provided for in that paragraph, the evaluation would be made first on strictly technical grounds, after which the procuring entity would engage in negotiations on price. If paragraph 3 was retained—and the World Bank felt that it should not be—the price should be submitted with the "best and final offer" so as to maintain a certain degree of transparency in a method which was in any case complex, perhaps even dangerous.

48. Mr. LEVY (Canada) endorsed the comments made by the representative of the United Kingdom regarding paragraph 3; if the drafting group reworded subparagraph (a) it might wish to consider the following wording:

"Where the procuring entity uses the procedure provided for in this paragraph, it shall engage in negotiations with suppliers or contractors that have submitted acceptable proposals and may seek or permit revisions of such proposals, provided that the opportunity to participate in negotiations is extended to all such suppliers or contractors"

The meeting rose at 1.05 p.m.

Summary record of the 529th meeting

Monday, 6 June 1994, at 3 p.m.

[A/CN.9/SR.529]

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*)

PROCUREMENT OF SERVICES (*continued*) (A/CN.9/392)

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (*continued*)

Article 41 *sexies* (*continued*)

1. Mr. CHATURVEDI (India) said that he did not agree with the proposal made by the representative of Canada to delete the words "and whose proposals have not been rejected" from paragraph 3(a).
2. Mr. WALSER (Observer for the World Bank) said that, even though he favoured the deletion of paragraph 3, he recognized that most members supported its retention, in which case he sought a number of clarifications with respect to procedure. The provisions of subparagraphs (a), (b) and (c) were satisfactory, but subparagraph (d) did not clearly set out the manner in which the final evaluation should be made. The norm referred to the proposal which "best meets the needs of the procuring entity", which was correct in principle but lacked the clarity that ought to characterize procurement transactions. He wondered, in fact, whether the procedure provided for in subparagraph (d) was not the same as the one provided for in paragraph 2; he therefore proposed that it should simply state that, upon receipt of the suppliers' best and final offers, the offers would be evaluated in accordance with the procedures established in paragraph 2.
3. The CHAIRMAN said that the text of subparagraph (d) was sufficiently clear, if account was taken of the fact that article 41 *quater* gave the procuring entity the right to determine which proposal was best suited to its needs. He was therefore in favour of retaining the current wording of subparagraph (d), a view which most delegations appeared to share.
4. Mr. CHATURVEDI (India) said that he, too, was in favour of retaining the current wording of paragraph 3(d).
5. Mr. WALLACE (United States of America) said that, with regard to the comments made by the observer for the World Bank, the wording of subparagraph (d) was identical to that of article 38. Moreover, if it was correctly applied, the wording of subparagraph (d) would be satisfactory, since it mentioned the relative weight and the manner of application of those criteria, although it was true that the criteria were not rigorous.
6. In the wording of paragraph 3(a) proposed by the representative of Canada at the previous meeting, the words "acceptable proposals" had been suggested to replace "and whose proposals have not been rejected". In the practice of the United States, the words "technically acceptable" were used to make it clear that criteria other than price were also taken into account. That was crucial, since in the area of services, price was considered in second place or not at all. If the Commission decided to use that term, not only in paragraph 3(a) but also in paragraphs 2 and 4,

it would clarify the question of a "threshold", since otherwise it would seem that the procedures were the same, which was probably not the Commission's intention. As the representative of the United Kingdom had noted, citing the relevant report (A/CN.9/392), the Working Group had not compared that procedure to the use of a threshold. However, he wondered whether it would not be better to make such a comparison, since the procedures were very similar. In essence, what was meant was that certain proposals would fail to meet the minimum requirements and would therefore be rejected; there would be no negotiations with such suppliers under paragraphs 3 and 4 and they could not be declared winners under paragraph 2, even though they might have offered the lowest bid. The concepts were identical, although they could be applied in different ways. Thus, if the wording proposed by Canada was further refined, it might be possible to bring all those norms into line with one another.

7. The CHAIRMAN agreed that the insertion of the word "technically" could make the article easier to understand.

8. Mr. AL-NASSER (Saudi Arabia), requesting clarification of paragraphs 2, 3 and 4, asked which norms would apply if the procuring entity did not use the procedures provided for in those paragraphs. It appeared that if the procuring entity did not use any of the three methods, there would be a legal vacuum.

9. The CHAIRMAN said that, in his view, the use of the conditional phrase "If . . ." at the beginning of paragraphs 2, 3 and 4 was in keeping with the very structure of the provision, which allowed any of those three methods to be used, as indicated in paragraph 1(a). It was a factual assumption of a conditional nature which had an objective legal effect.

10. Mr. WALLACE (United States of America), supported by Mr. WALSER (Observer for the World Bank), said that norms provided a coherent system. In accordance with article 16, chapter IV set out the preferred (although not necessarily the only) method to be used in the procurement of services. Consequently, if it was decided to use the commonly preferred method, reference would have to be made to chapter IV *bis*, in which case article 41 *sexies* would definitely have to be applied in the context of that chapter, given that paragraph 1(a) of that article stipulated that the procuring entity would use the procedure provided for in paragraphs 2, 3 or 4 that had been notified in the request for proposals. Thus, the request for proposals would have indicated which of the three procedures was to be used by the procuring entity. Depending on the method selected, the entity must proceed in accordance with the provisions of the relevant paragraph.

11. The CHAIRMAN said that, if he heard no objection, he would take it the Commission wished to refer article 41 *sexies*, paragraph 3, to the drafting group.

12. *It was so decided.*

13. Mr. WALLACE (United States of America), referring to paragraph 4(d), wondered whether it might not be useful to include that notion in the other methods (paragraphs 2 and 3) as

well. He noted that subparagraph (e) referred to "face-to-face" negotiations. Under that method, if negotiations with the supplier that had made the best offer did not lead to an agreement on price, the procuring entity would move on to the next supplier and so on. If no agreement had been concluded by the time the final supplier was reached, the temptation to resume negotiations with the first supplier might arise. Some members of the Working Group had firmly rejected that option, since it would be tantamount to making the procedure into an auction. In the case of services for which tendering was not possible, a balance must be struck between quality and price, since none of the procedures provided for, not even the procedure set out in paragraph 2(b)(i), allowed the procuring entity simply to choose the lowest price, since the offer had to be technically acceptable. Consequently, it must be made clear that the procuring entity could not resume negotiations with the best supplier in an attempt to obtain a better price.

14. Mr. WALSER (Observer for the World Bank) said that, at the World Bank, engineers preferred the procedure set out in paragraph 4 because they considered that the selection should be made solely on the basis of the proposal's technical merits, without considering the price, and that afterwards the procuring entity must negotiate an acceptable price with the best supplier. The World Bank had always proceeded in that way. Nevertheless, he himself and other staff of the World Bank firmly believed that price must be taken into account, which was why they preferred the wording of paragraph 2. He recognized, however, that the World Bank accepted the method contained in paragraph 4 and that it currently used both the procedure in paragraph 2 and the procedure in paragraph 4. The problem posed by paragraph 4 was how to determine, in accordance with subparagraph (e), that negotiations would not result in a contract. Although the Bank had experience with what might constitute an acceptable price for specific types of engineering projects or management services, it was still not clear where the line should be drawn. The norm did not give the procuring entity clear guidelines for determining that the fees demanded by the best supplier were outrageous and that, consequently, it was time to reject that offer and move on to the next supplier. Greater clarity was needed on that point; once the first supplier had been rejected and negotiations begun with the second, it should not be possible to go back.

15. The CHAIRMAN said that, with respect to paragraph 4(d), the Commission had to choose between promoting transparency, in which case the obligation set out in that paragraph must also be reflected in paragraphs 2 and 3, and ensuring that the procuring entity was not overwhelmed, in which case subparagraph (b) should be deleted.

16. Mr. CHATURVEDI (India) said that paragraph 4 was acceptable, with the exception of subparagraph (e), which should be deleted in order for the text to be consistent.

17. Mr. LEVY (Canada) said that no other provision of the draft Model Law contained the obligation provided for in paragraph 4(d). Moreover, it should be borne in mind that the procurement method provided for in chapter IV *bis* was not the same as the others. For example, the question did not arise in respect of tendering, since the draft Model Law provided that the parties should be present when the proposals were opened. Further, paragraph 4(d) was not analogous to chapter IV, article 35, paragraph 6, in that the latter dealt with the duty of the procuring authority to give notice of entry into force of the contract with one tenderer to the others. In any event paragraph 4(d) was acceptable.

18. The CHAIRMAN said that article 11 *ter* included an obligation similar to that provided for in paragraph 4(d).

19. Mr. WALLACE (United States of America) agreed that paragraph 4(d) imposed a responsibility on the procuring entity, but saw nothing wrong with that. In fact the aim of the draft Model Law was to promote transparency, competition and fairness and to encourage enacting States to modify their procurement practices. In other words, the paragraph imposed a responsibility on procuring entities, but the responsibility was useful and could even be expanded by, for example, also indicating that the procuring entity must explain to suppliers why they had not attained the required threshold level. In any event, the obligation provided for in the paragraph should also be included in paragraphs 2 and 3.

20. With respect to paragraph 4(e), he agreed that it would be useful to explain to the procuring entity the procedure for determining when it was appropriate to discard the proposal from the supplier or contractor with the highest rating and consider the proposal in second or third place. Under no circumstances must the procuring entity reconsider a proposal which it had already discarded, since that would result in a kind of competitive tendering process which did not correspond to the spirit of the strict method provided for in chapter IV *bis*.

21. Mr. JAMES (United Kingdom) said that the Working Group had included paragraph 4 in the draft since it had been convinced that it was important to inform suppliers or contractors that they were above the threshold level. That consideration was less important in the cases covered under paragraphs 2 and 3. In any event, the aim of the draft Model Law was to promote fairness and justice and ensure that the parties concerned were aware of what had happened to their tenders or proposals. It might thus be appropriate to indicate in article 11 that a register should be kept of all suppliers or contractors whose proposals were above the required threshold level. Such a solution would promote transparency without imposing an excessive burden on the procuring entity.

22. Mr. LEVY (Canada) said that he had no substantive reservations with respect to paragraph 4(d), although it could be merged with paragraph 4(c). In any event he agreed that paragraph 4 was not analogous to paragraphs 2 and 3.

23. With regard to paragraph 4(e), he agreed that it must be made clear that once a procuring entity had discarded one or more proposals it must not subsequently reconsider them. It was also important, however, to avoid formulas that were so strict that they deprived the procuring entity of the discretion necessary for it to act in accordance with the national interest.

24. Mr. WALLACE (United States of America), supported by Mr. CHATURVEDI (India), endorsed the proposal to resolve the question of paragraph 4(d) by rewording article 11 along the lines proposed by the representative of the United Kingdom, as well as the comments of the representative of Canada on paragraph 4(e), the current wording of which could be retained.

25. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve article 41 *sexies* as currently worded, subject to the reservation that the drafting group might reconsider paragraph 4(d), should it deem it necessary.

26. *It was so decided.*

Article 41 septies

27. Mr. CHATURVEDI (India) said that he did not agree with the first sentence of article 41 *septies*, by which the procuring entity must not disclose the contents of proposals to competing suppliers or contractors. Article 40 provided for the holding of

negotiations, during which it might be useful to reveal the contents of proposals.

28. Mr. HUNJA (International Trade Law Branch) recalled that the Working Group had thought it important to maintain confidentiality, particularly where there were negotiations between suppliers and the procuring entity to discuss aspects of the proposals. The aim was to maintain the integrity of the procurement proceedings and to protect any trade or other secrets contained in the proposal that suppliers or contractors would not wish to have disclosed to their competitors. The procuring entity could discuss any details of a proposal with the supplier or contractor that had submitted it and could seek clarification, but must avoid discussion of the terms of each proposal with other suppliers or contractors. Article 39, paragraph 3, contained a similar provision, and the drafting group might consider whether the provision under consideration was clear.

29. Mr. CHATURVEDI (India) said that, if the point was to protect trade secrets, it would have to be made clear that the matter could be discussed with the party submitting the proposal. It was understandable that the contents of a proposal should not be made known to other parties in tendering proceedings, but in the case of services there should be no limitation on negotiation by the procuring entity of the price or other relevant factors.

30. Mr. WALLACE (United States of America) said that the question was extremely delicate, and it would be preferable for the report not to reflect the existence of doubts on the matter. The provision was taken from article 38, paragraph 6, relating to requests for proposals, which provided for confidentiality. It was true that article 38, paragraph 5, provided for the possibility of modification or clarification, but in that case negotiations would take place with various suppliers simultaneously and there would be no question of setting some against others. Article 39, paragraph 3, also stated that negotiations should be confidential, and paragraph 2 referred to clarifications. The structure of the Model Law was thus coherent.

31. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve article 41 *septies*.

32. *It was so decided.*

33. Mr. SHI Zhaoyu (China) said he wished to raise three points in connection with the structure of chapter IV *bis*. Firstly, in his view, the title was inappropriate; it should clearly reflect the aim of the chapter as well as its relationship to other chapters and provisions of the Model Law. The drafting group should make the necessary changes in that regard. Secondly, the chapter contained only one article, and it should be divided so that its provisions were clearer. Lastly, under article 16, the procuring entity, with certain specific exceptions, was supposed to apply chapter IV *bis*, but that provision also indicated that, in similar circumstances, the methods provided for in articles 17 to 20 could be applied. Article 17 dealt with two-stage tendering, requests for proposals or competitive negotiation, whereas article 38 contained specific rules relating to requests for proposals. Actually, in the procurement of services the provisions of chapter IV *bis* and of article 38 were not identical, but both used the criterion of a threshold. He asked what the relationship was between chapter IV *bis* and article 38, and reserved the right to speak again on chapter IV *bis*.

34. Mr. GRIFFITH (Observer for Australia) said that the time had come to review what had been done so far in connection with the text modifying the Model Law on Procurement of Goods and Construction. Chapter IV *bis* was supposed to be the principal text in connection with services, but it contained elements and procedures that referred not only to tendering but also to other methods

of procurement. The draft added a series of options on the procurement of goods and construction and of services, and it was not always easy to understand the relationship between them or their differences. The most radical means of simplifying the text would be simply to delete chapter IV *bis* entirely, adopt the text on goods and construction and add appropriate provisions on the procurement of services, particularly in connection with the principal method. In any event, he wished to suggest three other possibilities. The first would be to delete article 16, paragraph 3(b), so that articles 17 to 20 would not be considered part of the text relating to services, thereby emphasizing that chapter IV *bis* was the basic provision relating to the procurement of services. The second would be to delete article 16, paragraph 3(b), but indicate in a footnote that a State party so wishing could adopt provisions similar to those set forth in the paragraph, with the consequent amendments to articles 17 to 20. Lastly, article 16, paragraph 3(b), could remain in brackets, with the consequent amendments to articles 17 to 20, but with the addition of a note to the effect that States that did not wish to have so many options could refrain from enacting the provisions in brackets. In view of the importance of the matter, the Commission must anticipate the criticisms that States might reasonably formulate later on.

The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.

35. Mr. WALLACE (United States of America), referring to the proposal made by the representative of China, said that it would be necessary to change not only the title of chapter IV *bis*, but also its place, so that it came after chapter III, which dealt with tendering. The new title could be "Preferred method for services". The title of the current chapter IV could also be changed to "Alternatives".

36. Although his delegation would accept any of the proposals made by the observer for Australia, the references in articles 19 and 20 to quotations and to single-source procurement should not be deleted.

37. The CHAIRMAN recalled that the drafting group had already decided to leave chapter IV *bis* after the chapter on tendering proceedings.

38. Mr. JAMES (United Kingdom) said that he agreed with China and Australia on the need to simplify and streamline the text of the Model Law. However, if chapter IV *bis* was deleted, it would be necessary to make the wording of article 16 more specific, since it was possible to use tendering as a method of procurement for many services. It would also be necessary to specify which methods should be used in cases in which tendering was not appropriate.

39. To solve those problems, either chapter IV *bis* or article 17 should be bracketed. In any case, the references in articles 19 and 20 to request for quotations and to single-source procurement should not be deleted. There was broad acceptance of the method of request for quotations in the procurement of services on a small scale.

40. The Model Law represented a compromise solution; while not ideal, it was acceptable and, rather than introducing substantive changes, its contents should be clarified in the commentary.

41. Mr. LEVY (Canada) said that the question raised by China had been resolved by the Working Group and that the solution proposed by Australia was simplistic. As he had indicated, it was necessary to provide for a system of request for quotations and single-source procurement of services. However, not all systems of procurement had been covered in chapter IV *bis*. He did not share the view that articles 38 and 39 were unnecessary because

they were covered in chapter IV *bis*. Rather, they provided for methods that were much simpler than those in chapter IV *bis* and should therefore be retained. His delegation would not accept the Model Law if articles 38 and 39 were deleted.

42. In order to avoid any confusion that might arise if chapter IV *bis* was left in its current place after chapter III, the necessary clarifications should be given and a footnote inserted to explain that the principal methods of procurement were tendering, in the case of goods and construction, and requests for proposals, in the case of services. It could also be noted that other methods existed which States could use at their discretion.

43. Paragraph 3(b) of article 16 should not be made into a footnote. If it was, all of chapter IV *bis* would have to be bracketed and an asterisk would also probably be required after the title of the chapter to explain that States could choose not to incorporate the corresponding articles into their domestic legislation. As the representative of the United Kingdom had said, it would be better to make as few changes as possible to the text under consideration.

44. Mr. WALSER (Observer for the World Bank) said that he agreed with the three solutions proposed by Australia. Moreover, articles 38 and 39 were unnecessary, since they were covered under chapter IV *bis*, which was well drafted, particularly paragraph 2 of article 41 *series*, which described the best method of procuring services outside of tendering.

45. Mr. CHATURVEDI (India) said that he could accept any of the methods proposed by Australia, although the best solution would be to place article 16, paragraph 3(b), in brackets.

46. Mr. LOBSIGER (Observer for Switzerland) agreed that chapter IV *bis* should retain its position after chapter III in order to regulate in succession the two principal methods—tendering (in respect of goods and construction) and requests for proposals (in respect of services). The text of article 16, paragraph 3(b), should not prevent national legislation from considering other methods. The legislation which countries adopted should be simple and easy for officials to implement; consequently, it would be counterproductive to resort to placing brackets and asterisks in article 16. He supported the proposals of Australia concerning the principal methods, which should be retained.

47. Mr. MELAIN (France) said that, although the text of the Model Law was complicated and should be simplified, the Commission should not go to the extreme of deleting chapter IV *bis*. The important thing was to try to overcome the problems in dealing with the many procedures provided for in the Model Law. In his delegation's view, it was essential to have recourse to the methods for the procurement of services set out in article 17 and the articles that followed even though chapter IV *bis* provided for other procedures. In some cases, that chapter contained the preferred method used in the market for services. He would have no objection if article 16, paragraph 3(b), was made into a footnote, although it was essential to retain the current wording. He did not question the need to provide guidelines or to assist those countries that wished to adopt the Model Law, but it seemed unlikely that a way could be found to simplify the various methods available to the procuring entity. He was not in favour of reducing the scope of article 16, but supported the proposal of the United Kingdom and Canada to place chapter IV *bis* in brackets.

48. Mr. WESTPHAL (Germany) said that the Model Law was very complex and offered the procuring entity too many options. Many members had spoken in favour of deleting chapter IV *bis*, but in the light of the recent discussion, it seemed unlikely that such a solution would be adopted. He agreed with the representative of France that the possibility of using the traditional method,

single-source procurement, should be kept open, yet he wondered whether chapter IV *bis* was not sufficiently complex to fulfil all needs and whether it might not be adequate by itself. As a compromise solution, he would be inclined to retain chapter IV *bis* and to exclude other methods for the procurement of services.

49. Mr. TUVAYANOND (Thailand) said that he was firmly opposed to the deletion of chapter IV *bis* and to a reopening of the debate on issues on which agreement had already been reached. At the same time, he wished to reiterate his position that the draft Model Law should clearly indicate, either in footnotes in the text or in the Guide to Enactment, that a State was free to use those methods of procurement that were best suited to its situation, circumstances and particularities. Finally, the wording of article 16, paragraph 3(d), should appear in the text and not in a footnote.

50. Mr. WALLACE (United States of America) said that he was prepared to accept the use of footnotes and brackets in the text, for which there were precedents. Most members of the Commission were of the view that article 16, paragraph 3(b), should be placed in brackets rather than chapter IV *bis*, since the Commission was required not only to set forth existing law, but also to harmonize it, unify it and even perfect it. As indicated in paragraphs 11 and 14 of its report (A/CN.9/392), the Working Group had carefully considered the matter and had decided that the draft should include a chapter along the lines of chapter IV *bis*. Moreover, the range of services which could be procured was very broad and many of them could not be dealt with by means of tendering.

51. The CHAIRMAN said that the Commission seemed to prefer the inclusion of a note in the text, probably in article 16, to indicate to States that, on the basis of that provision, the draft was presenting a set of options. However complicated the draft might be, it must be borne in mind that complexity was inevitable, since the text needed to reflect the administrative and regulatory traditions and practices of the entire world.

52. Mr. GRIFFITH (Observer for Australia) said that in formulating his proposal he had never dreamed it would cause such controversy. He nevertheless believed that there was a consensus that the drafting group should be requested to settle the issue by drafting a note, which would probably be inserted in article 16, stating that the enacting State could limit the number of methods for the procurement of services by limiting the application of article 16, paragraph 3(b), exclusively to certain of articles 17 to 20. The necessary amendments would have to be made to the articles that were excluded.

53. Mr. SHI Zhaoyu (China) said it was not his intention that chapter IV *bis* should be deleted, since it had been the result of lengthy negotiations, nor should any of the provisions on which agreement had been reached be deleted; he was not seeking to undermine the structure of the Model Law. The Model Law should be clearer so that the procuring entity and suppliers and contractors would have better guidelines for the provisions to be applied to the different areas. As to how the structure of the Model Law might be improved, he agreed in principle with the suggestion by Australia, although the deletion of article 16, paragraph 3(b), would pose a number of problems. Naturally, under article 16, the procedures provided for in articles 17 and 20 were not applicable to services, despite the reference to them, and ought to be. However, it was not clear how those articles could be applied to the procurement of services; thus if article 16, paragraph 3(b), was deleted, it would also be necessary to change the proceedings governing the procurement of services in articles 17 to 20 and to make a number of changes in article 38.

Summary record of the 530th meeting

Tuesday, 7 June 1994, at 10 a.m.

[A/CN.9/SR.530]

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 10.05 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*)

PROCUREMENT OF SERVICES (*continued*) (A/CN.9/392)

Consideration of draft UNCITRAL Model Law on Procurement of Goods, Construction and Services (*continued*)

Chapter II. *Methods of procurement and their conditions for use*

Article 16

1. Mr. LEVY (Canada), recalling the wording of the proposal he had made at the previous meeting for a footnote to article 16, paragraph 3(b), said that it was more neutral than the proposal made by the observer for Australia at that meeting.
2. Mr. GRIFFITH (Observer for Australia) said that he had no objection to the wording of the Canadian proposal; however, in view of the adoption of the text of chapter IV *bis*, only a limited number of options for the procurement of services should be authorized. States adopting the Model Law should be allowed to limit the number of potential methods by limiting the scope of paragraph 3(b) to some of the methods set out in articles 17 to 20. Acceptance of the Canadian proposals to include the procurement of goods and construction in the footnote would affect the original text of the draft, whereas only additional questions raised by the inclusion of procurement of services in the draft should be treated. His proposal offered a choice of restrictions with regard to services that took into account chapter IV *bis*, which remained the primary method for the procurement of services.
3. Mr. WALLACE (United States of America) and Mr. CHATURVEDI (India) supported the draft footnote proposed by the representative of Canada.
4. Mr. GRIFFITH (Observer for Australia) supported the Canadian proposal but thought that the commentary should include an additional paragraph on services and the adoption of chapter IV *bis*. It was important to know whether articles 17 to 20 were going to be retained or whether article 20 would be adequate by itself in view of the mechanisms provided for elsewhere. Should any of articles 17 to 20 be deleted, the final text would have to be amended to delete any references to services.
5. Mr. LEVY (Canada) said that it should be stressed in the Guide to Enactment or in the commentary that if articles 19 and 20 were deleted, there could be no recourse to single-source procurement or to emergency tendering.
6. Mr. CHATURVEDI (India) said that the last sentence of the Canadian proposal was quite clear. It did not mean that preference must be given to one particular method.
7. Mr. TUVAYANOND (Thailand) said that the Australian proposal to retain only article 20 was not acceptable because, where services were concerned, single-source procurement was not enough; other methods would be necessary.

Chapter V. *Review*

Articles 42 to 47

8. Mr. CHATURVEDI (India) said that any supplier or contractor who actually suffered loss or injury could not invoke paragraph 1 of article 42. The words "that claims to have suffered" should be deleted. Concerning the phrase "a breach of a duty imposed on the procuring entity", it could be objected that the word "duty" was a legal term which implied the notion of rights. There was no duty without rights. However, neither suppliers nor contractors had any rights until a contract was signed. The use of the word "duty" was therefore inappropriate in the paragraph. The wording of paragraph 2 of article 42 seemed acceptable as it stood. However, the review by the procuring entity provided for in article 43 was a duplication of the administrative review provided for in article 44. Should article 44 be retained, the footnote thereto would also have to be retained. In article 47, the name of the court or courts should not be indicated by the procuring entity. It was up to the parties concerned to choose the appropriate court. Only local law and the procedures of the competent court were applicable. In article 46, the seven-day period provided for the suspension of procurement proceedings left everything in the hands of the procuring entity with regard to the procurement proceedings. Suspension should not be automatic.
9. Mr. TUVAYANOND (Thailand) agreed with the representative of India that the words "that claims to have suffered" in article 42, paragraph 1, should be deleted; however, since they were included in the previously adopted text, it might be advisable to include a brief commentary on that subject in the Guide to Enactment. Any declaration of loss or injury should be duly substantiated for article 42 to be applicable. In paragraph 2(a) *bis* of that article, it would be preferable for the sake of consistency to use the words "the selection procedure" rather than "the selection of the evaluation procedure". Lastly, he wished to know what safeguards had been anticipated to prevent abuses of the right to review.
10. Mr. CHOUKRI SBAI (Morocco) shared the views of the representative of India concerning the phrase "that claims to have suffered, or that may suffer" in article 42, paragraph 1. Furthermore, the paragraph should also indicate that within a period of 20 days, the supplier or contractor must submit a statement of the circumstances or, better still, the "causes"—a legal term—of the loss or injury which would give him the right to stop providing the articles he was supposed to deliver.
11. The deadlines specified in article 43, paragraphs 2 and 4, were too long. The period should run from the time the causes that had led to a change in circumstances became apparent. As soon as the supplier learned that circumstances had changed as a result of specific causes, he should so notify the procuring entity. In paragraph 4, the 30-day period provided for the submission of complaints was too generous: it should be reduced to 10 days. Complaint should in fact be submitted promptly. In addition, each country should be allowed to set its own deadlines for the submission of complaints by the supplier or contractor as well as the written decision by the procuring entity.

12. Mr. WALLACE (United States of America) recalled that the Commission had agreed not to change the general provisions of chapters I, II and V except where the inclusion of procurement of services so warranted; he therefore found the arguments of the representative of Thailand with respect to article 42, paragraph 2(a) *bis*, well founded: the provision did not appear to have been properly worded. That reservation aside, he thought that the text of chapter V should remain as it stood. With regard to the observations of the representative of India concerning article 47, he wished to point out that the article did not in fact give the procuring entity the option of deciding what court should have jurisdiction for judicial review. It was up to the lawmakers to specify the competent court.

13. The CHAIRMAN said he thought that article 42 was clear and adequately defined the cases eligible for review.

14. Mr. CHATURVEDI (India) noted that several issues remained controversial and said that the argument that the text had already been adopted did not hold, since the text was being re-examined from the standpoint of including services within the scope of the Model Law. He accepted the underlined portions of article 42, paragraphs 2(a) *bis* and 2(c). Article 45, on the other hand, was poorly worded; it was not all suppliers or contractors participating in the procurement proceedings who were to be advised, but only those who had submitted a complaint. In paragraph 2, only a supplier or contractor whose interests were actually affected had the right to participate in the review proceedings. In paragraph 3, "a copy of the decision of the head of the procuring entity" should be furnished only to the supplier or contractor submitting the complaint, not to all the others, and it should definitely not be "made available to the general public". In other words, his objections covered nearly all of the text of article 45.

15. With respect to article 46, his delegation's earlier reservation concerning the first paragraph, on suspension of procurement proceedings when a complaint was submitted, a measure of dubious value, also applied to the second paragraph. Moreover, the "public interest" did not have to be "certified". It was the validity of the corresponding ministerial decision that required verification. The concept of "urgent public interest considerations" was unclear; it was only the "public interest that mattered". At the end of the paragraph, the inclusion of the words "except judicial review" was not justified, since in India, and doubtless in many other countries as well, decisions that had bearing on the public interest were not subject to review by the courts once a decision had been taken by the competent administrative authority. The provision should therefore be changed.

16. The CHAIRMAN said that most delegations approved of the current wording of chapter V. There was a good reason for that, namely that the General Assembly had adopted the draft Model Law as it stood and had recommended it to Member States. It would not be appropriate, therefore, for the Commission to go back on its previous decisions. That would necessitate a meeting of the Sixth Committee. He therefore felt that UNCITRAL had completed its consideration of the draft amendments to the Model Law. Moreover, the Guide to Enactment (A/CN.9/393) provided sufficient explanations. Accordingly, the Commission would soon take up the draft amendments to the Guide (A/CN.9/394, annex), which were intended to reflect the inclusion of procurement of services within the scope of the Model Law.

17. Mr. CHATURVEDI (India) said that during the second phase of the debate the Commission should rethink the title of the Model Law and consider whether it even ought to include the word "services". Instead of changing the text of the Model Law to include that word, it might be better to deal with services in a

protocol, on the understanding that the Model Law already adopted by the General Assembly could still be used by Member States.

18. The CHAIRMAN said that the Commission had concluded the first part of the discussion on the topic since it had made suggestions to the drafting group on the text of the Model Law. Once members had all the documents, the Commission could examine them together with the question of the title. He himself thought that chapter V should be left essentially as it stood.

19. Mr. CHATURVEDI (India) reiterated his objections, which had to do with India's national legislation, and said that there could be no talk of a consensus for that reason. Although he was aware that the wording of chapter V could not be changed, he wished to place his objections on record.

20. The CHAIRMAN assured the representative of India that his objections would be duly recorded.

Consideration of draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393 and A/CN.9/394)

21. Mr. WALLACE (United States of America) said that he wished to comment on the approach to be taken by the Commission. The Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393) was a descriptive rather than a prescriptive text and should not depart from the spirit of the Model Law. It was therefore important to avoid disparities between the two texts and to make sure that the amendments were compatible with the text of the Model Law.

22. The CHAIRMAN said that the Secretariat had put a great deal of work into compiling the draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction, contained in the annex to document A/CN.9/394, which was well thought out and detailed, especially in view of the wealth of material covered.

23. Mr. WALLACE (United States of America) said that he would prefer to replace the word "commodities", which suggested a tangible rather than an intangible object, with the word "item", even though the latter was not entirely satisfactory. With regard to paragraph 5, which referred to a new article 14 *bis* to the Guide, he proposed several corrections that would more precisely define and differentiate the various selection methods.

24. Mr. SHIMIZU (Japan) recalled that early in the session his delegation had proposed eliminating the word "construction", a suggestion that had been immediately rejected by other delegations. Modern construction methods had many intellectual aspects that made them comparable to services. It would thus make sense to treat procurement of construction and procurement of services in similar fashion. That had not been done in the text as it stood. He therefore hoped that the Guide to Enactment would include an explanation of the ways in which chapter IV *bis* of the draft Model Law could be applied to construction.

25. Mr. CHATURVEDI (India) said he did not think it was advisable to make amendments at present to the Guide, a lengthy and very fine document that had been carefully elaborated over the course of two sessions of the drafting group; any amendments that might ultimately be made could be compiled in an addendum. That would be the moment to make changes, if any, in the title of the draft.

26. The CHAIRMAN pointed out that the General Assembly had already approved the text of the Model Law and recommended it to Member States. The Guide to Enactment was a

companion to that text. The Commission was examining the proposed amendments to be made to the Guide to adapt it in the light of the inclusion of services in the scope of the Model Law.

27. Mr. CHATURVEDI (India) said that since the Working Group had not been mandated to amend the Guide to Enactment, his delegation wished to dissociate itself from discussions on the issue, which were not binding on the Commission in any case.

28. Mr. HERRMANN (Secretary of the Commission) said he feared that the title which had been given to document A/CN.9/394 by the Secretariat, modelled on the title of the document on the amendments to be made to the Model Law, was creating confusion. The draft amendments to the Model Law were intended to create a second Model Law, more complete than the first, dealing not only with goods and construction, but also with services. The plan was to draw up a guide to accompany each of the two Model Laws; consequently, the Commission was not engaged in amending retroactively the Guide to Enactment that had been issued as document A/CN.9/393 and pertained to the first Model Law.

29. Mr. CHATURVEDI (India) said that he was satisfied with the Secretary's explanation and thought it would be helpful to change the current title of document A/CN.9/394 to read: "[Draft Amendments] to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services".

30. The CHAIRMAN suggested that the Commission should consider section II of the annex to document A/CN.9/394, entitled "Article-by-article remarks".

Chapter I. General provisions

31. Mr. WALLACE (United States of America), referring to point 16, said he was not sure that the passage in quotation marks was correct. During the debate in the Commission, members had been thinking of cases in which, for one reason or another, the price had not been revealed to the procuring entity. With regard to article 12, paragraph 3, of the Model Law, the members of the Commission had indicated that a minimum price should perhaps be set in a regulation rather than in the Model Law. That idea, to which the representative of Thailand in particular had referred, should doubtless be reflected in the commentary.

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

32. Mr. JAMES (United Kingdom) recalled that the question of defining services had been raised in the Commission on several occasions, as had the question of distinguishing between technical services and services rendered by professionals. Moreover, that distinction was made in article 16, paragraph 3(a), of the Model Law. The European Union itself made a distinction between those services which lent themselves to tendering and other services. It might be useful to include one or two brief examples in the Guide to Enactment, under the definition of services or in the section on article 16.

33. As the definition of services had been considerably broadened to include services which were not considered as such by all States, it might be appropriate to consider whether the procurement methods described in the Model Law ought to apply, for example, to the acquisition of real property.

34. Mr. CHATURVEDI (India) said that if the Committee decided to change the title of document A/CN.9/394, it must also ensure that it was changed in the annex. Furthermore, paragraph 1 bis of the document gave the impression that the Committee had modified the Model Law on Procurement of Goods and

Construction at its current session, whereas it had actually adopted a Model Law on Procurement of Goods, Construction and Services. The paragraph should therefore be modified.

35. Mr. WALLACE (United States of America) drew attention to article 4 of the Model Law, entitled "Procurement regulations", and said that more thought should perhaps be given to the scope of the regulations, since States might wish to be able to rely on established principles and procedures in cases where there was a risk of conflict of interest, for example, when a firm was invited to participate in the design and then execution of a project.

36. He wished to raise the question of functions inherent to the State, which Governments might prefer not to entrust to firms under contract. That question should also be listed in the Guide to Enactment as one of the issues States might wish to address by means of national regulations.

Chapter II. Methods of procurement and their conditions for use

37. Mr. WALLACE (United States of America) said that the verb "should" in the comment on article 16, paragraph 4, ought to be replaced by a more imperative verb, in keeping with the Model Law, which used the word "shall".

38. Mr. JAMES (United Kingdom) recalled that the proposed text was intended to replace the existing one and that it was important not to change the content of the Guide. He felt that the sentence in paragraph 18(1) which read "For those exceptional cases of procurement of goods or construction in which tendering, even if feasible, is not judged by the procuring entity to be the method most apt . . ." went a bit farther than the Guide and should probably be slightly modified to correspond more closely to the wording of the original Guide.

Chapter IV bis. Request for proposals for services

39. Mr. WALLACE (United States of America) felt that the comment on article 41 bis in point 21, paragraph 2, of the draft amendments put forward some ideas which were certainly interesting, such as the concept of "value threshold", but which were not covered by the Model Law. He would like the text of the draft amendments to reflect that of the Model Law as closely as possible.

40. As for paragraph 2 of the comments on article 41 *sexies*, the idea that in the case of services in which the personal skill and expertise of the supplier or contractor were a crucial consideration, the procuring entity might wish to use one of the methods described in article 41 *sexies*, paragraphs 3 and 4, did not seem to correspond to the important distinction between paragraphs 2(b)(i) and 2(b)(ii) on the one hand and paragraphs 3 and 4 on the other. Technically speaking, all those paragraphs must be acceptable; at issue in the present case were services which could not be procured through tendering. One could not make such a distinction among paragraphs 2, 3 and 4, however. In addition, the final phrase, "since they, like tendering, permit . . .", needed clarification. The obligation to inform providers whose proposals had not been accepted, set out in article 41 *sexies*, paragraph 4(b), should doubtless also be made clearer in the Guide.

41. Lastly, for the sake of consistency with the Model Law, the Commission ought to delete the sentence in paragraph 5 of the comment on article 41 *sexies* which seemed to lament the fact that the procuring entity was not permitted to reopen negotiations with suppliers with whom it had already terminated negotiations because of the high price of their proposals.

42. Mr. LOBSIGER (Observer for Switzerland), referring to the second sentence of paragraph 1 of the comment on article

41 *quater*, said that it would be useful to identify the specific sections of the Model Law in which those criteria were listed, as had been done in the case of article 41 *ter*, for example.

43. Mr. TUVAYANOND (Thailand) asked whether the explanation of the threshold would be contained in the Working Group's report, in a footnote or in the Guide to Enactment.

44. The CHAIRMAN said that the drafting group had agreed to replace the word "threshold" with the expression "minimum level", although the Commission would have to vote on that decision when it considered the group's report. The explanation in question would indeed be included in the Guide to Enactment.

45. Mr. GRIFFITH (Observer for Australia) asked where and when the Commission planned to add a note to the Guide to reflect the footnote which had been drafted at the suggestion of

the representative of Canada to indicate that it was now possible to limit the number of options available for the procurement of goods and construction and to state, in a separate paragraph, that since article 41 *bis* was intended to set out the principal method for procurement of services, it might be desirable to limit the application of article 16, paragraph 3(b) in terms of paragraphs 19 or 20 alone, rather than paragraphs 17 to 20.

46. The CHAIRMAN said he thought it would be best to add that note to the section dealing with article 16 in the Guide to Enactment and to chapter I of the Model Law, which dealt with the principal characteristics of that instrument. He took it that the Committee had concluded its consideration of the agenda item before it.

The meeting rose at 12.55 p.m.

Summary record of the 531st meeting

Tuesday, 7 June 1994, at 3 p.m.

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.20 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (A/CN.9/396/Add.1)

1. Mr. SEKOLEC (International Trade Law Branch) recalled that the item had been included in the agenda of the Commission's twenty-sixth session. On that occasion, it had been noted that the rules governing arbitral proceedings should be flexible so that they could be adapted to the particular circumstances of each dispute and should allow for the fact that the legal and cultural traditions of the parties and the arbitrators were often different, particularly in the case of international arbitration. Yet flexibility could be synonymous with uncertainty and unpredictability. It had therefore been recommended that guidelines should be prepared to avoid the negative consequences of flexibility.

2. The document before the Commission (A/CN.9/396/Add.1) was intended not to modify but to reaffirm the principles underlying arbitration, especially flexibility and discretion; it outlined and highlighted various aspects of arbitration practice, particularly with regard to the planning and coordination of arbitral proceedings. The secretariat had borne in mind the Commission's instructions to avoid guidelines that were overly complex or entailed overly detailed rules and to avoid any wording that might make the arbitration seem like judicial proceedings.

3. The secretariat had met with several experts, who had expressed great interest in the draft, although they had noted that its scope would have to be broadened to include, for example, planning meetings at the outset of the proceedings. The Commission could accept that suggestion without making any substantive changes in the draft and might wish to consider the possibility of changing the title to "Guidelines for the Preparation of Arbitral Proceedings".

4. Mr. HERRMANN (Secretary of the Commission) said that once the Committee had examined the draft Guidelines, it could consider what course of action to follow. Specifically, the Committee would have to decide whether to adopt the Guidelines at

the current session or leave their adoption for later. If the Commission did the former, it could take into account the results of the Congress of the Internal Council for Commercial Arbitration to be held at Vienna in November, at which the Guidelines would be considered in depth. If the Commission did not adopt the Guidelines at the current session, it would have to decide whether or not to transmit them to a working group, in which case there would be no need to devote much time to their consideration at the next session, whose full agenda was posing problems for some delegations. That was particularly true for those from small countries, especially when the three working groups each held two-week sessions. Moreover, the secretariat did not feel it was essential for a working group to review the draft Guidelines. In any case, even if work on the draft could not be completed at the current session, it would still be possible to transmit the text to a meeting of experts.

5. Mr. LEVY (Canada) said that his delegation had discussed the draft Guidelines with the Canadian centres for international commercial arbitration in Vancouver and Quebec and with experts on arbitration, who had unanimously praised the work done by the secretariat.

6. The preparatory conferences afforded an excellent opportunity for the parties to avoid the cost and delays of appeals. Under the British Columbian Commercial Arbitration Act (article 34), once arbitration had been initiated, the parties could agree in writing to rule out recourse to a higher court. That could be done only if authorized by the legislation in force, but it should in any case be mentioned in the Guidelines.

7. Similarly, in international commercial arbitration, preparatory conferences could allow the parties to agree on stipulations with regard to questions covered by articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration, which provided the basis for applications for setting aside or suspending an arbitral award. Such stipulations could give the parties a greater sense of security with regard to the enforceable nature of the award.

8. Another question was how to deal with the disclosure of confidential or privileged information in the context of the lawyer-client relationship. The disclosure of confidential or privileged information was always a sensitive issue, particularly because, under some legal systems, once a disclosure took place, the right to confidentiality was lost forever. The Guidelines should therefore state that the parties could agree on a procedure to prevent that possibility.

9. Given that it was incumbent on the parties to set the parameters of the dispute and that, in the absence of any agreement, the arbitrator would set them, a preparatory conference could be risky if conducted by an inexperienced arbitrator. Nor should such a preparatory conference be held without an arbitrator. It must also be ascertained that the Guidelines corresponded to the rules actually applied when the arbitration took place in arbitral institutions that had their own rules.

10. Lastly, there must be a list of possible topics for preparatory conferences, and the Commission ought to consider the possibility of preparing a pamphlet to accompany the Guidelines that would highlight procedural problems with which the participants in any type of arbitration should be familiar.

11. Mr. CHOUKRI SBAI (Morocco) said that the draft Guidelines were very important because they favoured the institutional settlement of a dispute, whether by free or regulated arbitration, and made it possible to save time by so doing.

12. The draft Guidelines reaffirmed the basic principle of arbitration, which was to find a solution through conciliation of the parties. However, more specific reference should be made to some important questions, such as free arbitration, the death or illness of an arbitrator, or a changing of arbitrators, for which preparatory conferences might lead to different solutions.

13. Mr. OLIVENCIA (Spain) said that in dealing with the item under consideration the Commission had to adopt a new approach to arbitration; it was not a question of formulating norms for legislators to adopt, nor of rules or a model law, but of a non-binding manual whose contents were essentially expository and intended for arbitrators, practitioners of arbitration, attorneys and the parties to an arbitration.

14. The draft should also serve to promote arbitration and help the user solve any questions that might arise in the preparatory conferences. In particular, the preparatory conferences should demonstrate the basic advantage of arbitral proceedings over judicial proceedings: direct contact between the arbitrator, the parties and the proceedings. A judge was remote, intervening only to render a verdict. In judicial proceedings there was no direct contact with the parties, the proceedings or the admission or use of evidence.

15. Referring to the title of document A/CN.9/396/Add.1, he said that the word "Guide" should be used instead of "Guidelines" and that the word "meetings" and not "meeting" should be used in the Spanish text, as the number of preparatory conferences was not fixed. It was in fact useful to hold a number of preparatory conferences, although that would depend on the nature of the arbitration or its subject, among other things. According to the draft (A/CN.9/396/Add.1, para. 31), "in exceptional cases", i.e. in complex arbitrations, more than one preparatory conference might be held; however, in his opinion the holding of additional conferences should not be exceptional and could help define the issue to be resolved, outline the areas of agreement, bring the positions of the parties closer and define the area of dispute.

16. The preparatory conference before the hearing was of the greatest importance, as it served to establish the procedure and

might be followed by other conferences dealing with the use of evidence, the timetable, the means of proof and/or the elements of fact or law on which the parties were agreed. The holding of an adequate preparatory conference could result in considerable savings of time, money and complications. With regard to the fear expressed by the representative of Canada, the risk was not that the preparatory conferences would be directed by an inexperienced arbitrator but that he would make an arbitral award.

17. The current session should constitute a good preparatory conference for the adoption process, and from that point of view he favoured establishing a working group so that the text could be adopted at the next session.

18. Mr. GILL (India) said that the draft Guidelines should help ensure that arbitral proceedings, in particular international arbitral proceedings, were conducted quickly and expeditiously. The document contained guidelines intended to reduce the scope of disputes, establish the facts not in dispute, analyse areas on which the parties could agree, determine the questions to be decided and fix the dates by which the parties must fulfil the obligations imposed by the arbitration. In that connection, it should be noted that the arbitration rules of India's Arbitration Council had been amended in 1993 in order to include some provisions similar to those which were being considered by the Commission. In particular, it should be noted that article 42 of those rules provided for optional conciliation before the hearing and article 43 established the rules for summary arbitration.

19. He agreed that it would be useful to have a list of topics for the preparatory conference, which should be the subject of detailed examination.

20. Mr. ABASCAL ZAMORA (Mexico) said that the Guidelines were of great educational and practical value as they clarified many doubts the commercial parties might have in entering on arbitral proceedings.

21. He pointed out that in the Spanish text of the draft Guidelines the arbitral tribunal was sometimes referred to only as "the tribunal", which might lead to confusing it with an ordinary judicial body. Moreover, the title referred to a preparatory conference although, according to paragraph 31, more than one ought to be held—something that should be made clear from the beginning of the document. It should also be made clear that it was not always necessary to hold preparatory conferences, as in the case of simple arbitral proceedings. A guide explaining how to plan arbitral proceedings might accordingly be prepared in the future.

22. Mr. ZHANG Qikun (China) said that it was only necessary to hold preparatory conferences in very complex cases and it was the arbitral tribunal that should decide when it was necessary to hold them. Preparatory conferences were very useful, as they made it possible to establish what facts were in dispute and thus to save time and money. Some of the subjects which, according to the draft Guidelines, should be taken up in the preparatory conference could also be considered by the arbitral tribunal.

23. It was necessary to examine carefully the items to be taken up in the preparatory conferences in order to avoid the danger of any prejudging of the question by the arbitrators; he also favoured substituting the word "Guide" for the word "Guidelines", as only recommendations were involved.

The meeting was suspended at 4.45 p.m. and resumed at 5.10 p.m.

24. Mr. FOUCHARD (France) said that although the draft Guidelines were clear and specific, he was against establishing

the systematic holding of preparatory conferences as a principle. Such meetings were not necessary in most arbitration cases—for example, when matters were taken up which could be resolved easily or when the interests at stake were not very large; nor were they necessary when it was clear that the case would be difficult and complex. In the latter case, given the tension between the parties, preparatory conferences would not serve to bring the respective positions closer but would harden them, which would make concessions more difficult.

25. In reality, the draft Guidelines dealt not only with preparatory conferences but with the whole arbitration process. In that connection, it should be noted that it was the arbitrators who generally established timetables and discussed with the parties' legal counsel the question of hearing witnesses. In important arbitrations, it was impossible to persuade the attorneys to renounce in advance the submission of certain kinds of evidence, as they would be betraying the confidence of their clients if they did so.

26. The UNCITRAL Arbitration Rules provided an excellent text that had been used in every possible framework since 1976, had not created any difficulties and was compatible with all legal systems. Accordingly, it had to be asked why the Commission wished, 18 years later, to burden and complicate it by creating additional procedures for which no need had appeared to date. The advantage of arbitration was its flexibility, its speed and its reduced cost, and he was afraid that the preparatory conference or conferences, as the possibility of holding more than one had been referred to, would create an excessive burden. It was better to allow the arbitrators and the parties in each case to establish, on the basis of the rules, the basic texts and applicable laws.

27. Ms. VERRALL (United Kingdom) said it was very important to bear in mind that the draft Guidelines were not intended to be either prescriptive or prohibitive, nor to change existing rules or introduce new ones. They were simply a reaffirmation of existing principles intended to help the parties and arbitrators solve some problems before the formal proceedings began.

28. After noting that the text prepared by the secretariat was excellent, she said that she had no objection to broadening the Guidelines to cover all kinds of planning meetings, whether they were called "pre-hearing conferences" or anything else; that could be done simply by changing the title of the draft. Nor would she object to waiting until 1995 to adopt the text formally; in fact, it might be well to take the opportunity provided by the Congress of the International Council for Commercial Arbitration to be held in November. However, as most of the items had already been well covered and set out in the draft, she did not think it would be necessary to establish a working group but simply to deal briefly at the 1995 session of the Commission with the additional points raised by the Congress.

29. Mr. HOLTZMANN (United States of America) said that the secretariat document provided a very useful framework for the discussion and established a firm foundation for the instrument which the Commission would adopt in due course.

30. Preparatory conferences would make a substantial contribution towards improving international arbitration practice. Although it was true that the UNCITRAL Arbitration Rules had been working well, it also was true that they left the arbitrators great flexibility in certain aspects of the procedure. Article 15 of the Rules stipulated that the Arbitral Tribunal could conduct arbitration in such manner as it considered appropriate, provided that the parties were treated with equality and that the other provisions of the Rules were observed. That very flexibility created the possibility of surprise, and it was for that reason that pre-hearing

conferences had been so widely held. Such hearings were particularly useful when, as happened in so many international arbitrations, there were two or three legal systems represented among the parties and among the arbitrators. When those persons came from different cultural and legal backgrounds, pre-hearing conferences helped to clarify views and enable the arbitration to move along without misunderstandings. He agreed with the representatives of Spain, Mexico and China that it should be possible to hold more than one pre-hearing conference. The arbitral tribunal should have the option to determine, in the light of the particular circumstances of the particular case before it, whether it wished to hold any pre-hearing conference at all or whether it wished to hold more than one conference, as well as their timing. The tribunal also should be able to determine whether the parties should be given advance notice of the subjects to be discussed at the conferences or whether that was unnecessary because the parties came from similar legal backgrounds, the same region or the same trade.

31. His delegation planned to suggest slight drafting changes to some of the draft provisions in order to make it clear that a flexible process was involved, that preparatory conferences were not mandatory and that the timing and number of the conferences would be left to the discretion of the arbitral tribunal in the light of the circumstances of the case and the comments of the parties. The text should also make it clear that the agreement of both parties was not required to establish procedures which were within the power of the arbitrators to establish, subject only to the rules which the parties might have agreed upon and the governing law of the place of the arbitration, or the procedural law that governed the arbitration.

32. The format selected by the secretariat was useful; first, an agenda, which he would prefer to call a "check-list", was established, and remarks then followed. The remarks should be explanatory and should be limited to those strictly necessary for an understanding of the agenda item. It would therefore be desirable to delete the remarks in square brackets, so that the text could be as simple and "user-friendly" as possible and in order to remove a number of items which might be contentious and give rise to different views in different parts of the world. As many of the provisions in brackets were extremely interesting and it would be unfortunate if they were lost, they might perhaps be the subject of a future work. The Commission might in the future also consider preparing a series of guidelines on the presentation of evidence or on certain ethical problems that at times arose in the course of arbitration and were touched upon peripherally in some of the bracketed material.

33. With regard to the comments made by the representative of Canada, he said that the idea of a "brochure" was very interesting; it should be a brief document of three to four pages which would simply include the agenda items constituting the check-list.

34. Lastly, he hoped that UNCITRAL would be able to conclude its work on the item during the 1995 session.

35. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that the document prepared by the secretariat was an excellent starting point to which the arbitration community would undoubtedly attach considerable importance; it also gave the Commission an opportunity to have a real impact on the harmonization of arbitral procedure. At a recent conference in Budapest organized by the London Court of International Arbitration, it had been pointed out that there was a significant groundswell of opinion that considered the draft to be much broader in scope than its relatively modest title would suggest, since it referred not only to pre-hearing conferences but also to arbitral procedures in a much broader context. The conclusion had emerged that it would be preferable for the title of the draft to

reflect that broader scope and, for the document to focus not only on the preparatory conferences, but also on a broader issue, such as the planning of arbitral procedures. For those same reasons, he agreed with those who believed that the word "Guide" would be more appropriate than "Guidelines". It would also be best not to complete the draft until after the Congress of the International Council for Commercial Arbitration had met in Vienna. The Commission would benefit from observations originating outside UNCITRAL, and the arbitration community would also feel that it had had a valuable opportunity to contribute to the Commission's work.

36. The Representative of Canada had suggested that the draft should be more specific and, while he endorsed that idea in principle, he advised caution in that regard, since in the sphere of arbitration there was no single right way of doing anything but, rather, many different roads which led to the same result; if the language was too specific, there was a danger that the document would sound too mandatory.

37. With regard to the comment that preparatory conferences might provide an opportunity to examine questions of substance regarding the matters in dispute, he believed that it was necessary to proceed very cautiously, for when questions of substance, as opposed to procedural questions, were discussed, all the requirements of due process and the other elements required in a hearing were brought into play.

38. Mr. DUCHEK (Austria) commended the secretariat for its excellent work in preparing the draft and said that when the final version was prepared it should be borne in mind that most of the proposals it contained would be ideal solutions if the topic in question was the only one in the world and bore no relation to national procedural rules; obviously, that was not the case. That point did not seem to have been taken adequately into account in the draft. It often happened that in the arbitration clause or arbitration agreement, or at the first meeting of the tribunal, the parties agreed on specific national procedural law which should be the procedural law for the arbitration. One reason for that might be that, in some national jurisdictions, the law applicable to the procedure was decisive with respect to the competence of the tribunal that was competent to overrule the final arbitral award. Once the parties had agreed on the applicable procedural law, the question arose as to what the relationship was between that agreement and some of the provisions mentioned in the Guidelines, such as those concerning the submission of evidence, a matter generally governed by the procedural law of each country. A discrepancy might then exist between the agreement by the parties to apply the procedural law of a particular country and the procedures established by the arbitral provisions, with attendant undesirable consequences. Reference should therefore be made to such relationships with national procedural regimes, since the common goal was to simplify the system and make it more flexible.

39. Mr. GOH (Singapore) said that preparatory conferences were useful since they shortened the arbitral procedure and reduced its costs. Nevertheless, the Guidelines should clearly state that such conferences were not mandatory. He endorsed the suggestion by the representative of Canada that a check-list should be drawn up to assist the tribunal in determining the topics to be

dealt with at such conferences. He also agreed that the Commission should adopt the Guidelines at its current or next session, without submitting them to a working group.

40. Mr. GRIFFITH (Observer for Australia) agreed that the Guidelines should be as simple and brief as possible and easy to implement, and that a user's guide was needed. Furthermore, it might be desirable for the Guidelines and the Guide to leave room for the parties to request the arbitrator to consider, before beginning the arbitration process, whether an effort should be made to resolve the dispute through mediation or conciliation, which were common methods of settling disputes. In his country, for example, it had been demonstrated that 90 per cent of all cases could be resolved by having a judge intervene informally. There was every reason to believe that, in most arbitration situations—except those in which the arbitrator had to personally inspect certain goods in order to determine whether their characteristics matched those listed in the contract—preparatory conferences would be held, and therefore the draft under consideration was useful.

41. It should be possible to complete the draft Guidelines at the Commission's next session without transmitting them to a working group. Accordingly, he agreed with the observer for the International Council for Commercial Arbitration that the secretariat should take into account the discussion at the Congress of the International Council for Commercial Arbitration, at which the secretariat probably would be represented by an observer.

42. The CHAIRMAN invited the Commission to begin its consideration of the draft Guidelines and said that, if there was no objection, he would take it that the Commission wished to adopt the suggestion that the introduction to the Guidelines should contain a short history of the work on the Guidelines and a resolution which the Commission could adopt in finalizing the Guidelines.

43. *It was so decided.*

44. Mr. HOLTZMANN (United States of America) noted that paragraph 2 of the draft referred to two limits on the principle of flexibility and discretion. It might also be desirable, in that paragraph and in other relevant paragraphs, to mention a third source of limits in that regard, namely, the practice by parties of reaching other agreements on the subject. Such agreements usually appeared both in arbitration clauses dealing with the applicable rules of law and in arbitration agreements which made no reference to them. He also proposed the deletion of the phrase "to conduct the case in the procedural style preferred by the parties and the arbitrators" in paragraph 3 and in other passages of the draft, since it implied that the parties and the arbitrator must agree in that regard, which was not the case in many arbitration rules, including the UNCITRAL Rules (article 15). Such rules allowed the arbitrator ample discretion in determining the procedural rules, the only limitations being those proceeding from rules agreed upon by the parties or agreements reached by them. In any event, the draft should clearly indicate that the agreement of both parties was not needed to determine the procedural rules.

The meeting rose at 6.05 p.m.

Summary record of the 532nd meeting

Wednesday, 8 June 1994, at 10 a.m.

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 10.20 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (*continued*) (A/CN.9/396/Add.1)

1. Mr. ABASCAL ZAMORA (Mexico), referring to paragraph 6 of the draft Guidelines for Preparatory Conferences in Arbitral Proceedings (A/CN.9/396/Add.1) said that there would not necessarily be only one preparatory conference; it was conceivable that several conferences might be held in succession. Therefore, it was necessary to modify paragraph 6, and possibly paragraph 31, accordingly.

2. Mr. OLIVENCIA (Spain), referring to the wording of paragraphs 1 and 2, said that while the intent of the drafters had been correct, the text appeared to establish the precedence of an arbitration agreement between the parties over national arbitration legislation. In the case of a conflict, however, it was clearly national arbitration legislation, which was an element of positive law, that ought to take precedence over an arbitration agreement, which was purely contractual in nature. It might be useful to spell out that point in the text. He agreed with the representative of Mexico with regard to paragraph 6. As to the issues that should be taken up at the preparatory conference or conferences, it might be dangerous to discuss substantive issues, since they would be decided by the arbitral tribunal. The wording of paragraph 33 was thus somewhat ambiguous. With regard to paragraph 6, it was up to the arbitral tribunal to determine the advisability of holding a pre-conference hearing in the light of the specifics of each case; a preparatory conference was not always necessary and, as the representatives of China and France had already noted, it was a practice that should not be made general.

3. Mr. LOBSIGER (Observer for Switzerland) said he was particularly pleased with the quality of the documents prepared by the secretariat—given that Zurich and Geneva were two cities that had many arbitral tribunals; Switzerland was thus following the matter closely. The “annotated check-list” (A/CN.9/396/Add.1, chap. III) might be quite useful at all stages of arbitral proceedings, even later on in the process. The issue of whether the preparatory conference should be limited to questions pertaining to format or the organization of negotiations was a very real one: how were the parties to be prevented from discussing issues of substance, particularly if they were present at the preparatory conference? Furthermore, as already noted, there was a risk that the arbitral proceedings might be in conflict with national legislation.

4. Mr. HERRMANN (Secretary of the Commission) noted that Switzerland had made a significant contribution to the preparation of the documents, since a Swiss arbitration specialist had taken part in that effort.

5. Ms. VERRALL (United Kingdom) sought clarification from the representative of Spain as to whether he thought that the convening of preparatory conferences prior to arbitral proceedings should be encouraged.

6. Mr. OLIVENCIA (Spain) said that a preparatory conference was in no way compulsory. While it might be useful for the parties to hold preparatory conferences, that practice should not be encouraged or made general, since it was up to the arbitral

tribunal to determine the advisability and usefulness of such conferences in each specific case.

7. Mr. WANG Dianguo (China) said he did not believe that paragraph 4 of the draft Guidelines was the place to discuss the planning of proceedings by the arbitral tribunal. Preparatory conferences should be conducive to a harmonious understanding between the parties, the lawyers and the members of the tribunal, and if proceedings were not well planned, the consequences could only be negative. In the absence of adequate planning, arbitral proceedings were not very likely to produce the desired outcome.

8. Mr. CHATURVEDI (India) said that document A/CN.9/396/Add.1 should draw the attention of the parties and the arbitrator to certain substantive questions that had to be discussed before a dispute was settled through arbitration. It would be more appropriate to refer to “preparatory meetings”, since the word “conference” evoked a gathering of several participants. As the observer for Switzerland had noted, the check-list in chapter III would highlight fundamental questions and indicate when they should be considered.

9. Mr. SEKOLEC (International Trade Law Branch) said that the expression “preparatory conferences” had been chosen instead of “preparatory meetings” because it had been thought that the word “meeting” conveyed the idea of a physical gathering, with the parties and the arbitrators coming in person to a meeting place. However, the draft Guidelines indicated that such consultations could also take place via telecommunications, a concept which the word “meeting” seemed unable to convey.

10. Mr. CHATURVEDI (India) said that the word “conference” did not exclude the use of telecommunications and had exactly the same connotation as the word “meeting”, namely “physical encounter”.

11. Mr. CHOUKRI SBAI (Morocco) said that, as its title indicated, the document under consideration consisted of draft guidelines. Guidelines were neither compulsory nor binding, nor was recourse to a preparatory conference which was why he considered the document to be useful and approved of it entirely. In fact, it could be used not only in international arbitral proceedings, but also in national proceedings. Morocco had made arbitration part of its legislation and used it in both commercial and other civil cases. Preparatory conferences or meetings were very useful. Arbitration was in fact an altogether different area from the legal sphere. In a trial, lawyers or attorneys attempted to convince not only judges but also their clients of their professional abilities and competence. They had, to a certain extent, something to sell. Arbitration, on the other hand, was a secret and confidential procedure in which one could better express one's ideas and avoid any tension. Furthermore, recourse to arbitration was completely optional. While his delegation did have some reservations regarding certain aspects of the document under consideration, it was not as pessimistic as the French delegation and fully supported all the guidelines contained therein. Indeed, the document made it possible to assist the parties without imposing any solutions or procedures on them.

12. Mr. TUVAYANOND (Thailand) said that his delegation greatly appreciated the work done by the secretariat in preparing

a set of highly useful guidelines. While the principle of preparatory conferences was justified, it should not be compulsory. A conference should be held only when necessary and when the advantages it offered justified the cost and time involved. Instead of the word "conference", his delegation preferred the word "consultations", which could easily be applied to electronic mail communications. As stated in paragraph 20 of the draft Guidelines, a preparatory conference was often convened on the initiative of the arbitral tribunal or the presiding arbitrator. In Thailand's view, the arbitrator could not convene a conference or meeting without good reason, and would not do so if the parties did not believe such a conference would be useful. His delegation did not see how a conference could be convened in disregard of the parties' reservations or objections. Arbitral proceedings depended on the ability of the parties to agree on the rules of those proceedings or even to let the arbitrators determine them. In other words, the parties had complete control; it was up to them to determine the procedure that would be followed and even to authorize arbitrators to rule on the basis of equity and not solely on the basis of legal precepts. The two parties could make use of the preparatory or preliminary consultations to raise their reservations and objections and provide the necessary clarifications to the arbitral tribunal or presiding arbitrator.

13. Mr. HOLTZMANN (United States of America), referring to the comments made by the representative of the secretariat, said that his delegation was in favour of using the word "conference" in the draft text submitted by the secretariat. In his delegation's view the word "conference" also suggested the possibility of negotiations and compromise. The agenda items proposed in chapter III frequently used the expressions "enquire whether the parties" or "seek opinion from the parties". The word "conference" was preferable to "consultations", because the latter term could lead to the conclusion, which had in fact been drawn by the representative of Thailand, that the two parties must agree to the holding of a meeting and to the ensuing procedural arrangements. It should be possible to hold such conferences if the tribunal so desired, and no party should be able to prevent them from being held because it wished to disrupt the proceedings and resort to delaying tactics, as often happened in arbitral proceedings. The two parties would naturally have the ability to prevent an arbitral tribunal from holding a hearing. Article 15 of the UNCITRAL Arbitration Rules provided that the arbitral tribunal might conduct the arbitration in such manner as it considered appropriate, which seemed to indicate that the parties could not prevent a hearing from being held prior to a preparatory conference. On the other hand, it must be remembered that article 1 of the UNCITRAL Rules preserved the right of the parties to modify those Rules in order to prevent arbitrators from holding a preparatory conference. Only in that way could the parties prevent the holding of a conference, although that would be an exceptional situation that did not need to be dealt with in the commentary.

14. Mr. SHIMIZU (Japan) said that he, too, wished to thank the secretariat for its excellent work. He would welcome clarification of the use of the expressions "procedural law" at the end of paragraph 2 and "law applicable to the arbitration" in paragraph 18 of the draft Guidelines. He wondered whether that difference in terminology was deliberate and, if so, what its significance was.

15. Mr. HERRMANN (Secretary of the Commission) said that the secretariat did not see the two terms as referring to different concepts. The term "procedural law" should not be confused with the term "law on procedure", the rules of procedure applicable to hearings or trials, in other words, to the code of civil procedure. Some delegations had suggested that the term "law applicable to the arbitration" might also cover substantive questions. It would be wrong to interpret that expression as referring to the law

applicable to the substance of the litigation that was the subject of the arbitration. Indeed, the intention was to refer throughout the text of the draft Guidelines to the procedure that governed the arbitration, a notion which could be rendered, for example, by a term such as "arbitration law".

16. Mr. FOUCHARD (France) said that he shared many of the views expressed by the representatives of Spain, China and Thailand. He was pleased to note that the secretariat's understanding of the term "conference" covered cases in which there would be no physical meeting. It was clear that consultations by means of telecommunications were not only still possible, but inevitable. It was difficult to understand how an arbitral tribunal could conduct a proceeding without communicating with the parties' legal counsel as to its organization. If the Commission could be satisfied with the term "consultations", there would be no need for further discussion, and it would simply have to draft a guide or some kind of user's manual, as the representative of the United States of America had suggested, which might include the "check-list" of topics to be considered by the tribunal. Unfortunately that was not the case and there was still a strong tendency, if not to impose, at least strongly to suggest that, conferences or physical meetings should be held at the outset of the proceedings.

17. With regard to the discussion on section A of chapter I, one had to wonder, as the representative of Thailand had noted, what would happen if one party refused to participate immediately in a conference. The representative of the United States of America had said that the arbitral tribunal could disregard that refusal, since it had the power to do so in general under the terms of the UNCITRAL Arbitration Rules. Such an attitude would hardly be desirable. It was possible that the refusal to participate in a preliminary conference at the outset of the proceedings might be justified by a party's fear of having to "show its hand" right away while the other side's case and position were still unknown, or simply by its wish to buy some time for reflection. Nevertheless, the conference would take place by default. The position of the two parties—generally that of the respondent—would thus be hardened into an attitude of refusal which would jeopardize all subsequent cooperation. The problem was a serious one, and even if the opinion of the representative of the United States of America was justified in law, it could be dangerous in practice.

18. On the question of whether preliminary conferences were widespread, paragraph 8 indicated that they would be more frequent when the parties assumed a high degree of procedural initiative. It was clear that the focus was on procedures derived from common law and from the production of evidence in common law, more specifically the procedure known as discovery. That procedure often imposed on State jurisdictions methods of pre-trial discovery which, while not without merit, were nevertheless cumbersome and complex. He did not mean to criticize such procedures but merely to suggest that it might be dangerous to try to generalize them or to apply them to international arbitration. It was important to note that two major rules of two major arbitration institutions, the American Arbitration Association, in its rules governing international arbitration, and the London Court of International Arbitration, also in its international rules, had been careful not to mandate preliminary conferences or a preliminary hearing on evidence or an obligation to produce evidence. That had been done so as not to exclude parties from other legal cultures. The Guidelines before the Commission stated that the aim of UNCITRAL was harmonization. He wondered whether it was really advisable to impose on practitioners of arbitration from Europe, Africa, Latin America and many Asian countries—in other words, practitioners who represented the cultures of a large number of civil law countries—the discussion of evidence which was central to the check-list of possible topics for preparatory conferences contained in chapter III. Hearings on evidence did not exist in European practice, and it was to be feared that, by

seeking, under the pretext of harmonizing, to impose a solution which was neither the one provided for in the UNCITRAL Arbitration Rules nor the one in the American and British rules on international arbitration, serious difficulties might be created instead. Article 15 of the UNCITRAL Arbitration Rules gave the arbitral tribunal the power to conduct the proceedings as it considered appropriate. Article 25 stated that the tribunal was empowered to rule on evidence and its admissibility. Introducing, through such preliminary conferences, a hearing and initial arrangements—or even initial arguments—concerning evidence would run counter to the objective of harmonization.

19. Mr. GOH (Singapore) said that, like the representative of the United States of America, he preferred the word "conference" to "meeting". Several international arbitral rulings had been rendered in Singapore in recent years, and it was not uncommon for the defendant to do all he could to delay the outcome of the proceedings for as long as possible.

20. Mr. ABASCAL ZAMORA (Mexico) noted that, in the Spanish version of document A/CN.9/396/Add.1, the English word "conference" should be rendered by "*conferencia*" and not "*reunión*". It was important to note that arbitrators could communicate long-distance and that it was not essential for them to meet. The guidelines clearly stipulated that preliminary conferences should respect the arbitration rules agreed upon by the parties as well as the laws applicable to arbitration and the will of the parties. The parties could object to the holding of a preparatory conference, but it was the arbitrators who made the final decision while ensuring, in conformity with article 15 of the UNCITRAL Arbitration Rules, that the parties were treated with equality and that they were given every opportunity to assert their rights and to propose their methods.

21. Mr. TUVAYANOND (Thailand) said that once an agreement had been reached, it would be necessary to prevent delaying tactics. Taking a decision by default, however, would mean imposing one party's point of view on the other party and unilaterally modifying the arbitration rules, in violation of international law. Moreover, since preparatory conferences were supposed to deal only with questions of procedure, and given that their cost was too high for the poorest countries and that they might result in a loss of time, they should be held only if they were really justified. If a conference did take place, refusal to participate should be considered as proof of bad faith in order to discourage delaying tactics.

22. Mr. AL-NASSER (Saudi Arabia) said that the only concern of the authors of the draft Guidelines was to improve the arbitration procedure and to make it more effective. They considered, however, that preparatory conferences were indispensable. Such conferences, which sought only to clarify procedure, were a common practice in Saudi Arabia and in international litigations to which Saudi Arabia was directly or indirectly a party. Moreover, the parties would always be free to accept or refuse a preparatory conference. As for the term that should be used to designate them, that was a matter of secondary importance.

*The meeting was suspended at 11.40 a.m.
and resumed at 12.15 p.m.*

23. Mr. CHATURVEDI (India), returning to the question raised by the representative of Japan concerning the terms used in the last sentence of paragraph 2 and in paragraph 18, said that the texts would be clearer if in paragraph 2 the term "procedural law" was replaced by "procedural rules". He also wondered whether there was not a contradiction between paragraph 3 and the first point raised in paragraph 2.

24. Mr. CHOUKRI SBAI (Morocco) said that, in his country, the words "meeting" and "session" implied the presence of the parties, while the word "conference" was used for cultural, political or scientific gatherings. It would therefore be best to use the word "deliberation". That term would be well suited to long-distance communications, which did in fact save time and money.

25. Paragraph 21 offered a satisfactory response to the question of what should be done when one party objected to the holding of a preparatory conference. However, the following paragraph suggested that a preparatory conference might take place despite the objections of one of the parties, which was contrary to the rules of arbitration. It should be made clear at the end of paragraph 22 that a preparatory conference could be held despite the reservations or objections of a party, provided that it was not prejudicial to the interests of that party, that it did not deal with questions of substance and that it respected the procedure or compromise agreed upon by the parties. In any case, the matter deserved further consideration.

26. Mr. TUVAYANOND (Thailand) said that preparatory conferences should be held only in exceptional cases and where they were genuinely useful, in other words indispensable for the proper conduct of the arbitration proceedings. Questions of substance should not be addressed in preparatory conferences, especially if one of the parties was absent, since such conferences did not give the parties a full opportunity of presenting their case. It was conceivable, however, that a decision might be taken on the substance, with the agreement of all the parties. Moreover, if the parties reached agreement on any point, that agreement must be mentioned in the document.

27. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said he shared the view of the representative of France that, broadly speaking, the current international arbitration rules did not make specific provision for the holding of preparatory conferences. Nevertheless, recourse was often had to that type of conference when arbitration proceedings were conducted under the arbitration rules of the International Council for International Arbitration, the London Court of International Arbitration, UNCITRAL or the American Arbitration Association, regardless of whether the tribunal or its presiding arbitrator operated under the common law system or under Roman law.

28. The fears expressed by some delegations that such conferences might result in higher costs were unwarranted, since the aim of the conferences was precisely to reduce some of the costs incurred by any arbitration proceedings. Naturally, it would be for all the parties to the proceedings to exercise close control over costs and to refrain from holding a conference if the costs were not justified. Moreover, experience had shown that most arbitration proceedings for which a conference had been carefully and effectively prepared had lower costs.

29. Mr. LEVY (Canada), referring to the notion of a preparatory conference in the context of an arbitration agreement, said that arbitration generally resulted from the provisions of a commercial agreement between the parties which frequently stipulated only that any dispute would be settled by arbitration, without establishing any type of procedure and certainly without providing for a preparatory conference. It was therefore dangerous to proceed as if the parties always agreed to settle questions of all kinds and perhaps to render a preparatory conference useless. It must be specified, then, that in certain cases, where the parties had recourse to arbitration, they did so solely on the basis of a contractual arrangement which stipulated that all litigation must be submitted to arbitration. Those hypotheses were therefore arguments in favour of the holding of preparatory conferences.

30. Mr. TUVAYANOND (Thailand) reiterated his view that there were actual cases in which the arbitration agreement was silent on the procedure, so that the parties were forced to have recourse to preparatory conferences under the auspices of an arbitral tribunal. It was still often necessary to establish that a conference of that type was essential. To do otherwise would be inconsistent with the purpose of arbitration, which was to accelerate the search for a solution to the dispute, since both the workload and the cost of the proceedings would be increased.

31. Ms. VERRALL (United Kingdom) supported the views expressed by the observer for the International Council for Commercial Arbitration; in fact, the purpose of preparatory conferences was to accelerate the arbitral proceedings and reduce costs. The requirement suggested by the representative of Thailand was therefore lacking in logic.

32. Mr. SEKOLEC (International Trade Law Branch) said he was surprised that the current draft Guidelines should have given the false impression that preparatory conferences were the only or the best method of settling questions of procedure during arbitration; in fact, the text suggested that there were other options (consultations between the arbitrators by themselves, no meetings at all between the parties when, for example, they had reached agreement on the approach to follow and the questions to put to the arbitral tribunal, etc.). There was no doubt that, like all human activities, arbitration benefited from being well prepared, and preparatory conferences could be the mechanism that was best suited to that purpose and, consequently, the preferred mechanism; but they represented only one of many modalities for preparing the proceedings. Moreover, problems of terminology could be resolved and the expression "preparatory meeting" used, for example, to designate any meeting in which the parties participated in person, while "preparatory conference" or "preparatory consultations" could be used as a generic term.

33. Mr. CHOUKRI SBAI (Morocco) suggested that, for reasons of consistency, the expression "preparatory deliberations" should be used to refer both to meetings at which the parties were physically present and to consultations, communications and telecommunications; all references to meetings or consultations would thus be avoided.

34. Mr. HOLTZMANN (United States of America) observed that the term "deliberations" had a very precise meaning, especially in the field of international arbitration. It referred to the

discussions which the arbitrators held among themselves with a view to reaching a decision and was therefore inappropriate in the context of preparatory conferences.

35. Mr. OLIVENCIA (Spain) suggested that consideration should be given to the proposals made by the secretariat in paragraphs 10 and 11 of the draft with regard to the term "preparatory conference".

36. Mr. ABASCAL ZAMORA (Mexico) said that, in addition to the different terms used, it might be useful to define the concept of "preparatory conference" to make it clear that it referred to a meeting which could be held after the constitution of the arbitral tribunal and whose purpose was to prepare the arbitral proceedings.

37. Mr. OLIVENCIA (Spain) said that he shared the view of the representative of Mexico. He also suggested that the Spanish version, which used the term "preparatory meeting", should be brought into line with the English and French versions, which referred to "preparatory conferences". Furthermore, in so far as the term did not always refer to a meeting of persons in the proper sense, his delegation was ready to agree to the use of the term "preparatory conference", which had a much broader sense in the context of arbitration. The term "deliberations", on the other hand, which referred to an intellectual exchange between the arbitrators aimed at reaching a decision, was obviously unsuitable in that context. The best expression was clearly "conference".

38. Mr. TUVAYANOND (Thailand) said that, in light of the statement made by the representative of Canada, the adjective "preparatory" would be more appropriate than the adjective "preliminary" or the expression "pre-hearing". He therefore supported the use of the term "preparatory conference".

39. Replying to the representative of the United Kingdom, he said that if the preparatory conference was not essential, it would in fact be tantamount to adding another phase to the arbitral proceeding and thus to delaying those proceedings and multiplying their cost.

40. Mr. GRIFFITH (Observer for Australia) said he agreed with the representative of Spain that section B could be entitled "Terminology—preparatory conference" in order to reflect the content of paragraphs 10 and 11 more accurately.

The meeting rose at 1 p.m.

Summary record of the 533rd meeting

Wednesday, 8 June 1994, at 3 p.m.

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.15 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter I, section C

1. Mr. OLIVENCIA (Spain), referring to paragraph 12, said that the Spanish version of the draft guidelines must refer to preparatory conferences in the plural.

2. Paragraph 13 should clearly indicate that harmonized international guidelines helped in determining whether or not to hold a preparatory conference, how such a conference should be prepared and the topics to be dealt with. The Spanish version of the text, which, unlike the other language versions, used the imperative, must be corrected. Indeed, the use of the indicative in the words "*estas directrices explican cuáles deben ser los objetivos de una reunión preparatoria y... los temas que deben considerarse en esas reuniones*" was unsuitable in a text on guidelines.

3. According to paragraph 14, the Guidelines would contribute to the dissemination of knowledge about arbitration and foster better understanding and harmonization of arbitration procedures. They could also contribute to the dissemination of the advantages of arbitration as a procedure different from judicial procedures.

Section D

4. Mr. HOLTZMANN (United States of America) said that chapter I, section D, was the first section containing texts in square brackets, which meant that the deletion of the bracketed portions would not adversely affect the aim of the guidelines.

5. Paragraph 17 seemed to suggest that the parties had to be asked at the beginning of the arbitral proceedings whether they wished to add to or modify the agreed rules. He wondered why an arbitrator would again raise an issue that had already been settled if the parties themselves did not do so and there were no specific reasons for doing so. That would complicate the proceedings, and the task of modifying the rules entailed time, effort and money. The secretariat had rightly noted in paragraph 17 how difficult and dangerous it was to modify rules. Consequently, his delegation proposed that paragraph 17 and the final sentence of paragraph 16 should be deleted.

6. His initial reaction to paragraph 18 was that it repeated ideas that were already set out in paragraph 2. If its aim was to take substantive issues as well as procedural issues into consideration, then it might be useful. However, in view of the fact that his delegation had reservations regarding the inclusion of issues relating to the substance or merits of the dispute, it preferred to leave it to the secretariat to determine the matter based on how the discussions evolved.

7. Mr. LEVY (Canada) said that he agreed almost entirely with the previous speaker concerning the problems raised by paragraphs 16 and 17 and that the second sentence of paragraph 16 and paragraph 17 as a whole should be deleted. One idea in paragraph 17 should be retained, although not in its current form, since it raised the prospect of unnecessary activities at a preparatory conference.

8. The need to ensure that the Guidelines did not conflict with arbitration rules, particularly those of the arbitral institutions which had their own rules, could be met by retaining paragraph 18, to which the words "or the rules of the arbitral institution where the arbitration takes place" should be added.

9. Mr. ABASCAL ZAMORA (Mexico) said that in paragraph 15 of the Spanish text the words "*conforme al reglamento de arbitraje*" should be replaced by the words "*dentro de los límites del reglamento de arbitraje*".

10. While he agreed with the representative of the United States of America where paragraph 17 was concerned, he felt that the idea of recommending to the arbitrators and the parties not to make modifications to the arbitration rules should be retained. Otherwise counsel with more zeal than experience might create problems.

11. Mr. GRIFFITH (Observer for Australia) said that much of what was contained in the Guidelines could be described as discursive elucidation as opposed to a direct statement of principles. For the sake of users, it would be advisable to adopt a uniform style for all paragraphs that would begin with a statement of the applicable principle. Thus, paragraph 15 might begin with the sentence "A preparatory conference is to be carried out within the limits of the arbitration rules", adding afterwards that that was because the Guidelines were not binding and should not in principle violate the agreed rules. Similarly, paragraph 18 ought

to start with the principle "The preparatory conference should not take any decisions that violate the provisions of the law applicable to the arbitration".

12. He agreed that it was not a good idea to invite the parties to make modifications and therefore supported the proposal to delete paragraph 17. The issue of taking decisions that entailed modifications or additions should also be borne in mind; the best solution there would be for the parties to work out an agreement in writing.

13. Mr. ZHANG Qikun (China) agreed with the representatives of Canada and the United States of America that the purpose of preparatory conferences was to speed up arbitral proceedings; that would be incompatible with the idea of allowing the parties to modify issues already agreed upon.

14. Mr. DUCHEK (Austria) shared the view that paragraph 17 had more drawbacks than advantages. However, instead of deleting it, a sentence should be added to caution the parties that any decisions they took pursuant to the Guidelines must be compatible with the procedural rules they had agreed to follow in the arbitration. In paragraph 18, the words "should not violate" should be replaced by the words "must not violate".

15. Mr. TUVAYANOND (Thailand) said that while he agreed in principle with the previous speakers, the principle of free will dictated that the parties could not be prevented from modifying any decision they had agreed on if they felt it was in their interest to do so. It would be incompatible with that principle for an arbitral institution, when administering an arbitration, to reserve the right not to accept any proposed modification of the rules. A possible exception might be found in the case of arbitration rules, which must be binding on the parties. He agreed that the words "should not violate" in paragraph 18, should be replaced by "must not violate". In paragraph 17, which had useful elements, the words "The parties should be mindful . . ." at the beginning of the fifth sentence, should be followed by a provision to prevent any stalling tactics, as unnecessary delays should be avoided.

16. Mr. CHOUKRI SBAI (Morocco) said that he favoured retaining only the last sentence of paragraph 17, which could be inserted somewhere else. Whenever a modification of procedure was desired, such modification should be made in consultation with the arbitral tribunal. He also favoured merging paragraphs 16 and 18, since both of them were aimed at preventing a modification of the arbitration rules agreed by the parties. The provisions of paragraph 18 should not be incompatible with the law applicable to the arbitration. That would ensure the observance of both arbitration rules and applicable laws.

17. Mr. GRIFFITH (Observer for Australia) supported the suggestion to merge paragraphs 16 and 18.

18. Mr. SHIMIZU (Japan) said that the preparatory conference should not be organized solely within the confines of law applicable to the arbitration but also in accordance with established practice concerning the application of that law. He therefore suggested adding in paragraph 15 wording to the effect that the draft Guidelines were not meant to replace current practice.

19. Mr. LEVY (Canada) agreed that paragraphs 16 and 18 should be merged provided that the last two sentences of paragraph 16 were deleted. The text would then read: "The decision to use the Guidelines does not imply any modification of the arbitration rules that the parties may have agreed upon. It should be borne in mind that whatever decisions are taken as a result of the preparatory conference, they should not violate provisions of the law applicable to the arbitration that cannot be derogated from."

20. Mr. HOLTZMANN (United States of America) said that he had some reservations concerning the suggestion by the representative of Japan to refer to current practice. There was a consensus that whatever took place at a preparatory conference had to be in conformity with the rules and other agreements reached by the parties, while the term "practice" evoked uncharted territory.

Chapter II

21. Mr. GRIFFITH (Observer for Australia) proposed that the square brackets in paragraph 23 should be deleted. It was very important for the parties, witnesses and experts to participate in the arbitration, and while the presence at the preparatory conference of legal counsel ought to suffice, the possibility of letting the parties, experts and witnesses participate should be left open. He also suggested that the word "procedural" after the word "tribunal" in the second sentence of paragraph 22 should be deleted.

22. Mr. ABASCAL ZAMORA (Mexico), referring to the Spanish text, said that the end of third line in paragraph 19 should read "*flexibilidad y discrecionalidad*". As the secretariat had noted, the reference in paragraph 20 first to "*la norma procesal*" and then to "*el derecho procesal*" gave rise to confusion. The words "*normas de igualdad*" in the fifth sentence of paragraph 22 should be replaced by "*normas de equidad*". In paragraphs 21 and 22, which dealt with cases in which one party objected to the holding of a preparatory conference or failed to participate in the conference, it would be preferable for the text to dissuade parties from objecting to or failing to attend preparatory conferences. Those paragraphs should stress that the Tribunal was empowered to rule on procedural issues provided that the parties were treated equally and were given a full opportunity to express their views. As it was, the current text gave the parties a great deal of latitude to object to the work of the tribunal or to obstruct it. The third sentence of paragraph 22 in particular even allowed the tribunal to suspend the conference, which would occasion additional expenditure or delays for the parties. A party must have well founded reasons for objecting to the holding of a preparatory conference, let alone failing to attend it.

23. Mr. LEVY (Canada) said that one of the reasons why alternate methods of dispute resolution such as arbitration were often used was to avoid the courts and the hard positions that were taken there. In the commercial world, the advantage of resolving a dispute by amicable means lay not only in savings of time and money but also in a possible continuation of the business relationship between the parties, whereas when the parties decided to turn to a court of law to resolve their differences, that probably meant the end of what might have been a good commercial relationship. For those reasons, it might be possible to expand paragraph 23, since the preparatory conference could afford the parties with an opportunity for settling their differences, given that it was frequently the first time that they met to discuss the dispute. In such cases, the arbitrators should not be present or involved in any way, because if they participated and the settlement talks failed, their position could be seriously compromised. It was impossible to be a mediator or conciliator and an arbitrator at the same time. It would therefore be useful if some way could be found to mention in paragraph 23 that if the parties were present at the preparatory conference, which was not always the case, they had an opportunity to settle their differences even before the arbitration proceedings began.

24. The wording of paragraph 24 seemed to imply that the need to hold preparatory conferences depended on the number of procedural issues to be resolved or their complexity. The decision to hold a face-to-face meeting was not necessarily based on those factors but rather on many others, such as the dynamics between the parties. Apart from face-to-face meetings, paragraph 24 should

also mention that preparatory meetings could take other forms including conference calls, teleconferencing and facsimile communications.

25. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that paragraph 23 was an example of material in square brackets which was clearly useful even though not absolutely necessary. As to its content, it should be reordered so as to indicate that when the parties were represented by legal counsel or by agents it was usual for those representatives to be present at a preparatory conference; it should then be noted that on some occasions it might also be useful for the parties to be present, especially where the legal representatives needed to be given immediate instructions so that decisions could be taken during the conference. In the case of the second sentence, he was somewhat doubtful that the arbitral tribunal should indicate in the invitation to the conference that only legal counsel might be present, as that was for the parties to decide.

26. Mr. HOLTZMANN (United States of America) said, with respect to paragraph 23, that it would be unwise for arbitrators or UNCITRAL to consider telling the parties whom to bring to a hearing. If parties wanted to come without legal counsel, it was not for UNCITRAL to tell them that they should have brought their lawyer or to tell them that they should not come but only send their lawyers. That having been said, there seemed little left in paragraph 23. He therefore thought that the paragraph was unnecessary and took the Commission into areas it need not enter. However, if the secretariat felt that there was something valuable to be salvaged from paragraph 23, he would consider a new draft with interest.

27. The last sentence of paragraph 21, which said that "a negative attitude might indicate that a preparatory conference should not be held since it may not fully meet its objectives", should be deleted. The fact that one of the parties might object to the conference should not deny the arbitral tribunal or the other party the benefit of planning an efficient procedure. A preparatory conference could be especially important when one of the parties failed to appear because it was then that the arbitral tribunal needed all the help it could get, and it could only get that help from one of the parties. As one party could not stop an arbitration, there was an obligation on the arbitral tribunal to be particularly fair in such circumstances.

28. Mr. TUVAYANOND (Thailand) said that paragraph 23 might be useful, but the phrase "the arbitral tribunal may indicate in the invitation to the conference that" should be deleted, so that the sentence would read: "Sometimes, however, in view of the types of questions to be discussed, it would satisfy the objectives of the conference if only the legal counsel are present". The rest of the paragraph would remain unchanged and the brackets should be deleted.

29. As drafted, paragraph 22 could be dangerous. It would be strange for the arbitrators not to listen to the parties, because the power of the arbitrators came from the consent of the parties. If a party had a reservation or objection to a conference, whether justified or not, any decisions the arbitrators might make in the pre-hearing phase should be limited only to procedural matters; otherwise the principle that each party should be given a full opportunity to present its case would be violated. The preparatory conference should accordingly be limited to the preparation of the arbitration and not deal with the settlement of the dispute. Decisions on questions of substance should not be permitted in the preparatory conference, which could be convened, if need be, solely for the purpose of deciding procedural matters.

30. Mr. CHOUKRI SBAI (Morocco) said he agreed with the representatives of Canada, the United States of America and other countries that the part of paragraph 23 referring to exceptions

should be deleted. The arbitral tribunal could make that point clear during the proceedings. In his opinion, not only was the presence of the parties useful but their absence might prejudice their right to defend themselves. The parties had a right to be present, and it was they who should bear the burden of time and money involved in the arbitral proceedings. He therefore proposed that the drafting group should delete the brackets and leave only a single sentence in paragraph 23 reading: "The parties themselves, their legal counsel and any other representatives of the parties may participate in the preparatory conference".

31. Mr. OLIVENCIA (Spain) said that paragraph 19 took a negative approach in saying that the arbitral tribunal should "take care that the holding of a preparatory conference does not add unnecessarily to the costs of the proceedings or prove to be an administrative burden"; it should be reworded positively to emphasize the benefits of a preparatory conference. Preparatory conferences were acceptable only if they were or could be beneficial, and that decision was for the tribunal to make. Preparatory conferences were not essential, as no provision was made for them in arbitration rules and laws, but they could be useful, and it was that positive aspect of preparatory conferences on which guidelines for them should be based.

32. Paragraph 20 dealt with existing arbitration rules and laws. In addition to reflecting current reality, it would also be helpful to add that a preparatory conference should be convened after consulting the parties.

33. He shared the view that paragraph 23 should be retained but reordered. It was usual for legal counsel to participate in the conference, especially when they represented the parties, but the participation of the parties themselves or their representatives should not be ruled out. The question of who should participate in the conference could be decided on the basis of the subject-matter to be discussed.

34. As to whether the parties ought to participate in the first conference, where the issues to be discussed were determined, a question arose for which no uniform standard of judgement existed, that of whether questions relating to the substantive issues to be arbitrated could be discussed. In his view, such points could be dealt with and in practice were. That helped to bring the positions of the parties closer and eliminate questions in dispute, so that the conference became a useful means of mediation.

35. Mr. ZHANG Qikun (China) said that paragraph 23 should be kept. In order to remove the brackets, the portion of it relating to the subject of the conference should be redrafted to indicate the types of questions to be discussed so that the parties could decide who should represent them in the conference.

Section A

36. Mr. TUVAYANOND (Thailand) said that paragraph 25 expressed his delegation's view that a preparatory conference should be convened only when it was necessary, such as when, for example, a tribunal was uncertain of its mandate, and he therefore favoured keeping the paragraph in its present form.

37. In paragraph 27 reference was made to the possibility that the parties might not have a clear idea as to the manner of proceeding. That was strange, as the parties usually studied the arbitration rules before deciding which to apply and learned about the advantages and disadvantages of the various arbitral tribunals in existence before resorting to one of them. Moreover, it was usually the parties who decided for the tribunal the scope and contents of the tribunal's mandate and not the other way round.

38. Mr. SEKOLEC (International Trade Law Branch) explained that that provision, which was mentioned in the introduction to the draft Guidelines, was based on the assumption that

there would be no doubt as to the mandate of the arbitral tribunal; the purpose of the consultations mentioned was to give the parties some guidance regarding the form the proceedings would take, in order to avoid any surprises. Arbitral rules frequently conferred broad discretionary powers on the tribunal as to the form the proceedings could take. Furthermore, the parties might have different expectations in that regard, especially if they came from different geographical regions with different legal traditions. Arbitral actions could take many forms, which was why the tribunal must tell the parties as precisely as possible how it was going to proceed, so that they could know what to expect and could better prepare for the actual arbitration.

39. Mr. GRIFFITH (Observer for Australia) noted that paragraph 25, which mentioned the possibility that convening a preparatory conference might not be a necessity, was contradictory to the title of section A ("Cases in which preparatory conference may be useful") and should be moved, perhaps following paragraph 11.

40. Mr. ABASCAL ZAMORA (Mexico) said that some arbitration rules referred to different techniques that made it possible to avoid the convening of a preparatory conference, such as sending questionnaires to the parties concerning their procedural expectations or requesting them to inform the tribunal in writing of their views on the particulars. He suggested that those techniques should be mentioned in section A.

Section B

41. Mr. OLIVENCIA (Spain) said that the title should be changed to read "Preparatory conferences", and the reference in any case should be to "a" and not "the" preparatory conference. It would also be appropriate to indicate in that section that the purpose of the conference always related to planning but not always to procedure. Moreover, in the Spanish text, the word "*procedimiento*" should be used rather than "*proceso*". Finally, he did not agree with the wording of the first sentence of paragraph 31, since the holding of more than one conference was not exceptional.

Section C

42. Mr. TUVAYANOND (Thailand) said that paragraph 33 was acceptable where it referred to decisions on questions of procedure; only the tribunal, however, could take decisions concerning the substance of the dispute, with the agreement of all the interested parties. In order to be able to remove the brackets, then, the paragraph should be redrafted in order to reflect that principle.

43. It would be appropriate to combine the two approaches mentioned in paragraph 34. In other words, decisions would be taken in consultation with the parties and, if they were related to the questions that should be added to the document previously signed by the parties, another agreement could be concluded that would become an integral part of the original agreement.

44. Mr. HOLTZMANN (United States of America) also favoured the deletion of paragraph 33, since the substance of the dispute should not be discussed at the preparatory conferences. If it was retained, the word "merits" should be used instead of "substance" in the English text. The latter expression was ambiguous and might cause problems, since lawyers did not always agree on where to draw the line between questions that dealt with procedure and those that did not.

45. In paragraph 35, the second sentence undermined the principle that the arbitral tribunal enjoyed much latitude in determining procedure, and it should therefore be reworded in

accordance with that principle. Specifically, it should indicate that the tribunal could take decisions at the conference without any need for agreement between the two parties. Finally, he had consulted the American Arbitration Association with regard to the second sentence of paragraph 36, about which he had some reservations. In fact, that sentence did run counter to the general purpose of preparatory conferences, which was to prevent the flexibility of the arbitral process from resulting in unpredictability. Furthermore, the preparations for an arbitral proceeding eventually reached a stage where the parties should know for certain what procedure would be followed. Consequently, firm decisions had to be taken on the matter at that stage, so that the parties could prepare for the proceeding. Naturally, the tribunal had the right to change its decisions if circumstances changed. Therefore, if a reference was to be made to that right, it should be in the introduction to paragraph 36 and not in the second sentence, which should emphasize the need for the tribunal to take specific decisions on matters of procedure.

46. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that paragraph 33 was neither necessary nor particularly useful and could be deleted. If it was retained, it should be amended as suggested by the United States of America, bearing in mind the reservations expressed by Thailand concerning the determination of disputed issues. The distinction between a meeting between the parties and the arbitrators and a hearing or trial was that the latter gave each party a formal opportunity to formulate its allegations.

47. Mr. OLIVENCIA (Spain) favoured amending paragraph 33 rather than deleting it. If the text was amended in accordance with the suggestions made by the representative of the United States of America and the observer for the International Council for Commercial Arbitration, there would be no need to refer to decisions on matters of substance. Rather, the possibility that the conference could address matters that were not strictly procedural but

referred to the *materia decidendi* and the petitions of the parties should be mentioned.

48. It was important that controversial issues and undisputed questions of fact or law should be defined at the preparatory conference, as provided for in sections D and E of the check-list of possible topics for the conference; the point was to delineate what must be decided and what must be proven, but not to take decisions on the substance of the matter.

49. Mr. AL-NASSER (Saudi Arabia), referring first to paragraph 33, supported the comments of the United States of America and the International Council for Commercial Arbitration and suggested that, if the paragraph was retained, the phrase "if these questions are not defined by the parties to the dispute" should be added.

50. The last sentence of paragraph 34 should be deleted, since preparatory conferences should concern themselves with matters of procedure.

51. The text of paragraph 35 gave the impression that it was in contradiction with paragraph 34, because it raised the possibility of an arbitral tribunal adopting a decision without taking into account the parties to the dispute.

52. Mr. LEVY (Canada) said that the section under consideration could make reference to the possibility of the parties deciding at a preparatory conference to refuse the recourse of appeal to a tribunal when authorized by the applicable legislation. The question of the recognition or enforcement of arbitral judgements should also be borne in mind; articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration referred to that matter.

The meeting rose at 6.05 p.m.

Summary record of the 534th meeting

Thursday, 9 June 1994, at 10 a.m.

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section A

1. Mr. LEVY (Canada) said that it was at the outset of the arbitral process, though not necessarily at the first preparatory conference, when the parties were still prompted by good intentions, that they should agree on the procedure to be followed. Generally, it was the party that was dissatisfied with the award which resorted to delaying tactics in order to impede its enforcement. He described a case in which the award had been decided in London and was to have been enforced in Canada, and where the dissatisfied party had gone so far as to question the constitutionality of Canadian federal legislation and had even attempted to appeal the case before the Supreme Court of Canada in order not to pay the award to the other party. In order to prevent such problems from arising at the close of proceedings, the Guidelines should include provisions that would make it possible to reduce to

a minimum delays and costs incurred by the abuse of judicial process and to guarantee the finality of the arbitral award by prohibiting appeals and facilitating enforcement.

2. In most States which had adopted the UNCITRAL Model Law, intervention by courts was limited to specific cases, such as interim measures, appointment of arbitrators in certain circumstances, challenge and dismissal of arbitrators or challenge of their competence and application to set aside an award on specific grounds. In some jurisdictions, including Canada, the powers of a court of law could not be curtailed in the absence of specific legislation. In others, the parties could explicitly agree to limit their right to appeal in a court of law. In that instance, the limitations provided for in the UNCITRAL Model Law constituted a good basis. In some cases, however, a written agreement would have little effect, in particular in the common law countries, where even a "privative clause" did not constitute effective protection when a court was determined to intervene. However, an agreement between the parties could be of some use.

3. Perhaps the best way to guarantee the finality of the award was to adopt a law that limited court appeals aimed at setting aside the arbitral award. Thus, the Act relating to commercial arbitration in Canada had incorporated the UNCITRAL Model Law into Canadian legislation. He read out article 34 of that Act, which echoed article 34 of the Model Law and stipulated that an arbitral award could be set aside by the court only if the party making the application furnished proof that it was under some incapacity or that it had not been given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

4. For such instances, the Guidelines could provide for a form of estoppel—a written stipulation in which the parties would state that they waived any right to appeal, thereby preventing the dissatisfied party from attempting to delay the arbitral procedure or enforcement of the award. A stipulation of that sort would have good chances of being valid, even in the absence of legislation governing the question.

5. Mr. GRIFFITH (Observer for Australia) recalled that article 1 of the UNCITRAL Arbitration Rules stipulated that disputes were to be settled in accordance with those Rules subject to such modifications as the parties might agree to in writing. If the parties explicitly accepted the decisions adopted during preparatory conferences and confirmed that agreement in writing, that could constitute a sort of waiver with respect to any future objection and prevent subsequent disputes. He proposed that a sentence should be inserted in paragraph 34 of the draft Guidelines to the effect that, since the purpose of preparatory conferences was to establish certainty, the parties should explicitly accept the decisions adopted during the preparatory conferences and sign a document recording their agreement.

6. Mr. TUVAYANOND (Thailand), responding to an observation made by the representative of the United States of America with regard to paragraph 36, proposed that the word "fundamental" should be added at the end of the last sentence of that paragraph, which would then read: "... as a result of a fundamental change in circumstances".

7. Mr. HOLTZMANN (United States of America), referring to the statement made by the representative of Canada, agreed that the courts should respect the arbitral process and that their opportunities for intervention should be reduced to a minimum. It was with some envy that he recognized that Canadian law authorized parties to waive their right to recourse or to appeal in advance. However, he did not believe that such a waiver could be applied during a preparatory conference. Such conferences were called by arbitrators for the sole purpose of spelling out exactly what procedures would be adopted, and it would be highly inappropriate for the arbitrators to ask the parties at that stage to waive their right to challenge their decisions or even to ask questions regarding the enforcement of the award. It should be assumed that at that stage the parties were acting in good faith and ready to abide by the award. It might be in one party's interest to waive its right, but not in the other's. The party that chose to refuse to waive its right would then find itself in the uncomfortable position of having either to reject the proposal or invitation of the arbitrators, no matter how harmless it was, or to accept for fear of arousing the hostility of the very same individuals who were responsible for settling the dispute. Therefore, while the principle had some merits, it did not appear to be applicable to a preparatory conference.

8. The observer for Australia had rightly noted that if decisions were taken during a preparatory conference and the parties agreed to them, it was wise to record that agreement. However, one must be careful in drafting a provision to that effect not to undermine

the principle which held that the agreement of the parties was not necessary to establish procedures, a task which fell to the arbitrators alone.

9. Mr. ZHANG Qikun (China) said that he agreed with the representatives of Thailand and the United States of America that the reference to the "substance of the dispute" in paragraph 33 should be deleted. The decisions taken at preparatory conferences could relate only to procedure. It was inconceivable that a decision on a substantive question could be taken at a preparatory conference in the absence of one of the parties. Once that reference was eliminated, the square brackets could be removed.

10. Mr. CHATURVEDI (India) said that he agreed with the views of the representative of the United States of America regarding the Canadian proposal to exclude various questions from the jurisdiction of the courts. It was not the purpose of preparatory conferences to settle such questions. They should be settled by the parties themselves or within the framework of the applicable international conventions. Like other countries, India applied certain procedures for the submission of cases to court and also the provisions of international conventions, in particular the 1958 New York Convention, which were very useful for the enforcement of awards. Those questions should be resolved within the framework of domestic law; in any case, courts would never agree to give up their prerogatives. It was therefore inappropriate to include renunciation of the right of appeal among the questions which could be taken up at preparatory conferences.

11. With regard to the Australian proposal concerning paragraph 33, he agreed with the representative of China that the purpose of preparatory conferences was to consider purely procedural questions and certainly not substantive questions, particularly if for any reason one of the parties was absent at the time a decision was taken. Only procedural questions which the parties had not previously taken up could be considered in that context. The consent of the parties was the very underpinning of all arbitral proceedings.

12. Mr. CHOUKRI SBAI (Morocco) said that the problem of the right of appeal was complex. The approach to that question differed from one legal system to another. In Morocco, there was a model law based on respect for the regime of arbitration. Decisions of arbitrators could not be contested, either by means of an objection or through the appeals procedure. There were only three exceptions. First, the decision could be reviewed in the event that new evidence or new documents were produced, or if the arbitration had been based on documents that were false, invalid, or had lapsed. That possibility of review was also highly restricted in common law. Second, a third party not involved in the dispute could contest the decision if it affected his interests. Third, an arbitral award could not be enforced automatically; the common law judge had to be asked to enforce it. It was that decision of the common law judge that was subject to appeal. The judge never had the right to decide on substance. He had to ensure that the arbitrators' decision was not contrary to public order, that it was not null and void from the standpoint of the law to which it referred and that the rights of the defence had been fundamentally respected. He could not amend the arbitrators' decision. Morocco had ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards. Thus, the question of appeal was a thorny one: the solution varied from one country to another, and reference must also be made to the New York Convention in enforcing foreign decisions.

13. Mr. OLIVENCIA (Spain) said that the questions that could be taken up at preparatory conferences, which were a planning mechanism, should not relate to the substance of the dispute. However, there was another danger, and that was that it would be possible to take up only procedural questions. Delegations had

different views on that subject. Contrary to what had been said by representatives of the United States of America and China, some controversial questions such as the definition of issues to be taken up—what had to be proved, what the parties agreed on—were not solely procedural matters. Even if they did not constitute the substance of a case, they were linked to it, and certain aspects had to be established. That problem had a direct bearing on the question of the possibility of settlement (sect. III C) and defining questions and the order of deciding them (sect. III D). The question of what should be accepted by the parties—for example, that documents were authentic and valid—was not a procedural question but was important for the settlement of a dispute, and was the first thing on which the Commission must clearly define its position.

14. The difficult question of renouncing the right of appeal should not be taken up in the Guidelines. The Guidelines should be very clear for all legal systems within the limits authorized by domestic law. The representative of Morocco had made very pertinent comments in that respect. In Spain, it was a question which related to the most fundamental aspects of the rights of the defence and law and order. It was an extremely delicate question for Spain, and therefore his delegation was not in favour of including it in the text of the Guidelines.

15. Mr. CHATURVEDI (India) questioned whether the last sentence of paragraph 36 was really useful; he wondered why the adjectives "detailed" and "specific" had been used together.

16. Mr. TUVAYANOND (Thailand) said that his delegation did not entirely rule out the possibility of taking up substantive questions or even the question of the merits of the application at the preparatory conference, in so far as agreement on those questions could sometimes make it possible to accelerate the procedure or lead to a settlement of a dispute even before the arbitral proceedings began; however, all parties had to be present. Regarding renunciation of the right of appeal, he stressed that the parties always had the option of appealing in exceptional cases of *ultra vires*. Lastly, he felt that it would be useful to specify, at the end of paragraph 36, that a decision might have to be modified as a result of a "fundamental" change in circumstances.

17. Mr. ABASCAL ZAMORA (Mexico) said it was unrealistic to maintain that preparatory conferences should focus solely on form, because it was very difficult to determine where procedure ended and where substance began. The solution would be to delete paragraph 33 and to refer to the check-list, bearing in mind that that list was not exhaustive. In any event, questions relating to the substance or merits of a case should be handled very carefully.

18. Mr. GOH (Singapore) said that he would prefer it if section C included an indication that at a preparatory conference, the parties should, specifically decide to renounce their right of appeal. Arbitration was a choice made by the parties and they should abide by it, particularly since recourse procedures before courts involved expenses in addition to the already heavy costs of arbitration.

19. The CHAIRMAN, replying to the representative of Singapore, said that that was a delicate question because legal systems varied in different countries. He suggested that the Commission should take up paragraphs 37 to 39 and section A (Rules governing arbitral procedure) of chapter III (Annotated check-list of possible topics for a preparatory conference).

20. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said it was inconceivable that all the aspects in the check-list could be properly considered at the same

stage and at the same conference. Items A (Rules governing arbitral procedure), B (Jurisdiction and composition of arbitral tribunal), J (Arrangements concerning written submissions), M (Language of proceedings) and P (Place of arbitration), for example, should be taken up at the very beginning of the procedure, while items E (Undisputed facts or issues) and L (Hearings) should be taken up at a much later stage. The various questions included under item L could be taken up only at a pre-hearing conference in the strict sense of the term. In order to guide inexperienced arbitrators, the Guidelines should contain information, either in the introduction to chapter III, or in the notes on each topic, or in both, concerning the stage at which the different items on the check-list should be taken up.

21. Mr. HOLTZMANN (United States of America) said that he supported the general comment made by the observer for the International Council for Commercial Arbitration without being as pessimistic. With regard to item A on the check-list, he felt that that subject should not be included in the agenda of a preparatory conference. His first objection was similar to that raised during the consideration of paragraphs 16 and 17 regarding modification of the arbitration rules agreed between the parties. The adoption of arbitration rules at that stage would necessarily mean applying some surgery to those rules, if only with respect to the modalities of the constitution of the arbitral tribunal, since the latter would have already been constituted. Moreover, where the parties had not agreed on arbitration rules, it might be assumed that they had done so on purpose, leaving it to the arbitral tribunal to establish the rules of procedure within the framework of the procedural law applicable to arbitration. It would also be difficult at that stage to adopt the arbitration rules of a particular institution, mainly because of the question of fees. Lastly, if it became clear that the parties could not agree on a set of arbitration rules, it would be very difficult for the arbitral tribunal to discontinue the discussion, as the secretariat proposed in the last sentence of paragraph 2, and it would not do so, for fear of creating dissensions between the parties or of appearing to be too authoritarian, unless the breakdown was complete, which meant risking the loss of a great deal of time.

22. Mr. OLIVENCIA (Spain), referring to paragraphs 37 to 39, said that the Guidelines ought to recommend that the agenda should be drawn up prior to the preparatory conference, that it should be the subject of prior consultations between the parties and that, except in special circumstances, the parties should adhere strictly to the agenda during the preparatory conference.

23. With regard to paragraph 39, his delegation reserved the right to speak on each of the topics covered in sections A to T when those topics were considered. For the time being, he wished to emphasize that the check-list of topics to be considered at the preparatory conference could only be indicative: the topics would depend on the specific circumstances of the case, and more particularly on the phase of the proceedings in which the preparatory conference would be held. The Guidelines should clearly indicate to the parties that the choice of topics to be considered was subject to what was authorized by the applicable national law or by the arbitration rules which they had agreed to follow.

24. Mr. TUVAYANOND (Thailand) said that he agreed with the representative of Spain concerning the agenda. The agenda should be prepared in consultation with the parties, and no topic that was not on the agenda should be considered without the consent of all interested parties, even under the heading "Other matters".

25. Mr. ABASCAL ZAMORA (Mexico) proposed that the designation of an authority responsible for appointing the arbitrators should be added to the check-list of topics in paragraph 39.

Even though the arbitral tribunal might already have been constituted at the time of the preparatory conference, it might become necessary to replace an arbitrator, and it was preferable to have decided beforehand how the replacement would be appointed. The UNCITRAL Arbitration Rules, which were widely used, also provided that such an authority could make a decision where an arbitrator withdrew and could be consulted on questions of costs. The authority could therefore play a major role in ad hoc arbitrations, particularly those carried out in accordance with the UNCITRAL Arbitration Rules.

26. The section on the choice of rules governing the arbitral procedure, on the other hand, did not appear to be indispensable. It was clear that where the parties had not agreed on such rules, it would be for the arbitral tribunal to decide which rules to apply. One argument, however, could be used to support the retention of that section: the fact that the Guidelines were mainly intended for parties and counsel who were unfamiliar with the issue that was being arbitrated.

27. Mr. LEVY (Canada) said that he shared the views expressed by the representative of the United States of America concerning the risks of raising with the parties themselves the question of the rules governing the arbitral proceedings. The Guidelines should contain no reference to the rules of other institutions.

28. Mr. CHATURVEDI (India) reminded the Commission that his delegation had suggested previously that the term "preparatory conference" should be replaced by "preparatory meeting". Similarly, he wished to suggest that the word "agenda" should be replaced by the word "topics".

29. In section A, the square brackets should be removed and the entire text retained. On the question of fees for the use of arbitration rules, which had been mentioned by the representative of the United States of America, the matter did not arise in the case of published rules, such as the UNCITRAL Arbitration Rules, which could be freely utilized and amended. The only rule which could be laid down was that the parties must be consulted beforehand on the topics to be considered during the preparatory conference. It should be for the arbitrators to make that decision. Similarly, the topics which had not been included in the check-list could not be excluded if the circumstances of the case required that they should be considered, or if the parties or the arbitrators wished to consider them. At the end of section A, paragraph 2, the words "applicable procedural law" should be replaced by "applicable procedural law and rules". Finally, his delegation did not believe that the Guidelines should include the question of the designation of an authority responsible for appointing arbitrators, as the representative of Mexico had suggested.

*The meeting was suspended at 11.40 a.m.
and resumed at 12.10 p.m.*

30. Mr. CHOUKRI SBAI (Morocco) said that he fully supported the views expressed by the representatives of Spain and Thailand concerning paragraphs 37 and 38. The agenda should be the object of preliminary consultations during which the arbitrators would also have the right to express their point of view and would permit the parties to express their views, thereby facilitating the arbitration process and saving time. Given the flexibility of that approach, the last sentence of paragraph 38 could be deleted. If it was decided to retain the sentence, however, then the phrase "if the arbitral tribunal considers it appropriate" should be deleted. The parties must decide for themselves which topics they wished to consider.

31. Mr. HUNTER (Observer for the International Council for Commercial Arbitration) said that, for the reasons already given

by the representative of the United States of America, he was in favour of deleting section A of the check-list.

32. Mr. LOBSIGER (Observer for Switzerland) said that, while he understood the objections of the representative of the United States of America concerning section A, he nevertheless felt that the arbitrators should seek to determine whether the parties were still unable at that stage to agree on a set of arbitration rules. Consequently, section A should not be deleted in its entirety. The comments of the representative of the United States of America must, however, be taken into account.

33. If there was no agreement on procedural rules, it might be difficult to reach agreement on the other sections of the check-list, particularly section F, concerning documentary evidence.

34. Mr. TUVAYANOND (Thailand) said that, in his country at least, it was virtually inconceivable that an arbitration agreement would not specify the applicable arbitration rules. If it did contain such a gap, however, it was essential for the parties to agree on the rules to be applied. That was why his delegation did not favour deleting section A, which it would prefer to see amended to indicate not that the arbitrators should try to determine whether the parties wished to agree on a set of arbitration rules but that the parties should agree on such rules.

35. Mr. AL-NASSER (Saudi Arabia) suggested that the wording of paragraph 37 should be amended by adding to the end of the second sentence the words "after consultation with the parties to the arbitration on the topics to be included in the agenda" and by deleting the last sentence. His delegation supported the proposal by the representative of Morocco to delete the phrase "if the arbitral tribunal considers it appropriate" in paragraph 38. With regard to section A, he was inclined to think, like the representative of the United States of America, that it should be deleted. He would not object to its retention, however, if the section contained a reference to general principles of law.

36. Mr. BONELL (Italy) said that section A should be retained, subject to minor modification. Indeed, it was appropriate at the preparatory conference stage to draw the attention of parties to the fact that if they had not already done so, they would soon have to identify, at the very least, the rules that would govern the arbitral proceedings and to define various other rules of procedure and substantive rules, and that failure to do so would result in such decisions being taken by the arbitrators.

37. However, as the parties seemed still to be outside any framework of institutional arbitration, it would be useless to select a set of arbitration rules of an institutional arbitration mechanism. Yet there were other rules, including the UNCITRAL Arbitration Rules, which could be extremely useful at the current stage. In that connection, paragraph 2 of section A should probably be amended so as not to give the impression that the parties had to engage in possibly lengthy discussions in order to agree on a set of arbitration rules. The terminology should also be amended to make it clear that regardless of the current situation, all existing binding provisions would apply as usual, since the task at hand was not the choosing of the *lex arbitra* but rather the defining of rules similar to the UNCITRAL Arbitration Rules, for example.

38. Mr. OLIVENCIA (Spain) said that he, too, favoured retaining section A for several reasons. Firstly, it was clear that the section dealt with a hypothetical case in which the parties had not agreed on arbitration rules. Therein lay the usefulness of the Guidelines. It was unrealistic to think that the parties had overlooked that aspect of arbitration; neglecting to spell out in the arbitration agreement what set of arbitration rules would govern the arbitral proceedings was not the result of an oversight.

39. Secondly, the problem of the applicable law had yet to be resolved, for even if the parties referred to a national law in their arbitration clause or agreement, the national law might not require the parties to mention any specific rules of procedure in the arbitration clause or agreement. For instance, Spanish law only required parties to agree in the arbitration agreement to submit their disputes to one or more arbitrators and to enforce whatever arbitral award was decided. It stopped short of providing for procedures. However, the parties were well advised to plan the arbitral proceedings from the outset and to settle in particular such issues as deadlines and the order in which memorandums and counter-memorandums would be filed, and so forth, in the absence of arbitration rules even though they had strictly adhered to the provisions of the arbitration clause or agreement requiring them to specify the applicable law.

40. Mr. GRIFFITH (Observer for Australia), referring to paragraph 39, said that there was a contradiction between the idea in the second sentence that the check-list was intended to be complete and the comment in the penultimate sentence that the list was not exhaustive. He nevertheless hoped that that would not prevent the Commission from considering the merits of any additions to the check-list that he might propose.

41. If the suggestion of the observer for the International Council for Commercial Arbitration to retain section A was accepted, it must be clearly stated either in a chapeau that would be part of paragraph 38 or paragraph 39 or, preferably, in a separate paragraph, that matters included in the check-list were for illustrative purposes only and not mandatory.

42. Mr. CHOUKRI SBAI (Morocco) agreed with the representatives of Saudi Arabia and the United States of America and noted that the primary function of the arbitral tribunal was to review arbitration agreements before turning to the settlement of disputes. It must determine the scope of its powers concerning procedural matters, the law applicable to disputes, and so forth.

43. Section A should be retained because it provided for an exceptional situation in which the parties had forgotten to spell out the procedure to be followed during arbitration, thus giving rise to various problems, since each arbitral tribunal tended to adopt its own approach to a specific case. For example, if the parties did not make any express provisions on the matter, certain arbitral tribunals applied the law of the host country while others applied the law of the chief arbitrator.

44. As far as the applicable law was concerned, some arbitration rules stipulated that disputes would be settled in accordance with the arbitration agreement concluded by the two parties and with the provisions of the law specifically or implicitly selected by them. However, there might well be cases in which the parties, when concluding the arbitration agreement, were unable to agree on the procedure to be followed, the substantive nature of the dispute, etc. In such cases, they could hold consultations in order to agree on methodology, in other words, to select the applicable law or request a body to settle the dispute in accordance with the

principles of justice, or else to agree on a settlement. That was why section A should be retained.

45. Mr. LOBSIGER (Observer for Switzerland) agreed that in certain cases, despite the existence of a legitimate arbitration agreement, the parties were unable to agree on the rules governing the arbitral proceedings. Sometimes the choice of the parties was not clearly expressed, while in other instances the validity of the choice of the parties could not be challenged. Under those circumstances, a preparatory conference ought to be able to settle the question of whether the selection of the parties was valid and possibly other questions as well; sufficient time should be set aside for that purpose. Accordingly, the first part of the first sentence under section A, which read "If the parties have not agreed on arbitration rules", should be retained.

46. Mr. HOLTZMANN (United States of America) said that adopting a set of rules was easier to talk about than to do. He would hesitate to recommend to the parties to a dispute that they should adopt the UNCITRAL Arbitration Rules during the preparatory conference in the event that they had not concluded an arbitration agreement because of the enormous difficulties inherent in extracting from those Rules the only provisions likely to be applicable at that stage.

Chapter III, section B

47. Mr. ZHANG Qikun (China) said that preparatory conferences afforded an opportunity to ask the parties whether they had divergent views regarding the jurisdiction and composition of the arbitral tribunal. Even when such conferences were not necessary, the arbitrators were supposed to inquire whether the parties, especially the defending parties, had any objections as to the jurisdiction or composition of the tribunal.

48. It should also be established as quickly as possible that there were no challenges to the jurisdiction and composition of the tribunal in order to prevent either party from raising such issues later as a ploy to delay the enforcement of the arbitral award.

49. Therefore, his delegation proposed deleting the square brackets in section B and considering the jurisdiction and composition of the arbitral tribunal as issues that had to be included in the agenda of the preparatory conference.

50. Mr. TUVAYANOND (Thailand) said that while he agreed with the representative of China that section B was useful, he would prefer to speak of the "mandate" rather than the "jurisdiction" of the tribunal because the questions of the applicable substantive law and whether or not the arbitral tribunal would be empowered to invoke equity, all of which were linked more to the tribunal's mandate rather than to its jurisdiction, had yet to be settled. Nevertheless, section B was necessary because it allowed either party to call attention, for example, to any irregularities it believed had occurred in the selection of arbitrators.

The meeting rose at 1.05 p.m.

Summary record of the 535th meeting

Thursday, 9 June 1994, at 3 p.m.

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.10 p.m.

ELECTION OF OFFICERS (continued)

1. The CHAIRMAN announced that Mr. Choukri Shai (Morocco), Mr. Abascal Zamora (Mexico) and Mr. Glatz (Hungary) had been elected Vice-Chairmen of the Commission, representing the African, Latin American and Eastern European States respectively.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392; A/CN.9/XXVII/CRP.2 and Add.1-3)

UNCITRAL Model Law on Procurement of Goods and Construction and Guide to Enactment of that Law (continued)

Procurement of services (continued)

2. The CHAIRMAN submitted to the Commission for adoption the text of the UNCITRAL Model Law on Procurement of Goods, Construction and Services as amended by the drafting group on the basis of suggestions put forward during the deliberations (A/CN.9/XXVII/CRP.2 and Add.1-3).

A/CN.9/XXVII/CRP.2

Preamble and chapter I

3. The CHAIRMAN explained that the text of the preamble and articles 1 to 5, 7 to 13 and 15 as contained in document A/CN.9/392 had not been amended. Article 6 contained some changes and articles 11 *bis* and 11 *ter* would be renumbered once the Commission had adopted the text in full. Article 14 had been slightly modified in order to bring it into conformity with what the scope of the Model Law would be after procurement of services was incorporated.

4. Mr. CHATURVEDI (India) noted that the reference to subparagraph (f) of article 41 *ter* had been omitted from article 7, paragraph 3 (b)(ii).

5. Mr. LEVY (Canada) recalled that the Commission had agreed that the question was not one of substance but rather of editing, as the same text was contained in subparagraph (a)(iii) of that same paragraph.

6. Mr. WALLACE (United States of America) observed that, according to the draft report, the question had been referred to the drafting group.

7. Mr. CHATURVEDI (India) insisted that there had been no reason to delete that text.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the preamble and chapter I.

9. *It was so decided.*

Chapter II

10. Mr. GRIFFITH (Observer for Australia) said that, in his view, the footnote which had been added following the consideration of article 16 appeared to undermine the principle that

the text which now covered services should in no way affect the application of the original text on procurement of goods and construction. It might even dissuade States from adopting the whole menu of options available for the procurement of services. As a compromise solution, he suggested deleting the first two sentences of the footnote and simply stating: "States may choose not to incorporate all of those methods into their national legislation". A reference should then be made to the relevant paragraphs of the Guide to Enactment. He hoped that a special paragraph would be added to the Guide on procurement of goods and construction, indicating that chapter III *bis* could also be used in the case of services.

11. Ms. VERRALL (United Kingdom) expressed support for including a footnote on article 16 in order to stress that States were not obligated to promulgate the whole menu. In no case should the text already adopted be affected or amended. Any remaining doubts should be dispelled by deleting the first two sentences and perhaps even the entire footnote. If that was done, perhaps a simple, direct footnote could be included, referring promulgating States to those paragraphs of the Guide which dealt with the question in greater detail.

12. Mr. WALLACE (United States of America) said that it would be a shame to delete the footnote, which was the fruit of painstaking deliberations. If the text of the Model Law was moved to the Guide, the Commission would never see the final text, which was not a satisfactory method. He therefore requested that, at least on that question, the Commission should have before it those paragraphs of the Guide which contained the text that had been deleted from the cover page of the Model Law.

13. Mr. LEVY (Canada) said that he had suggested including the footnote in order to clarify a question of concern to a number of delegations. From the outset, Canada had pointed out that the text of the Model Law offered a wide range of options and that States were not obligated to incorporate all of them. In any case, the footnote was not part of the Law and so had no legal value. He therefore agreed to its deletion, despite the fact that it provided a useful explanation for the parties, who would surely not read the Guide immediately. If the footnote was included, he would wish to retain the last two sentences of the current footnote and add: "States may choose not to incorporate all of those methods into their national legislation. On this question, see paragraphs — to — of the Guide to Enactment".

14. Mr. CHATURVEDI (India) said he felt that a footnote should simply convey the idea, which had been accepted by the Commission, that States were not obligated to incorporate all the methods of procurement set out in the Model Law into their national legislation. The last sentence of the footnote on the cover page of document A/CN.9/XXVII/CRP.2/Add.3 would also have to be deleted, for no reference whatsoever should be made to the Guide to Enactment, which was a separate document.

15. Mr. TUVAYANOND (Thailand) said that the footnote agreed to by the Commission should be retained in order to suggest to Governments that they did not need to incorporate all methods of procurement into their national legislation. Each State should choose those methods best suited to its specific situation. If the wording could be changed to reflect that, there would be no problem in leaving the text as it was.

16. Mr. LOBSIGER (Observer for Switzerland) expressed a preference for retaining the footnote, whose formulation by the drafting group was adequate. It would also be useful to the reader of the text.

17. Mr. MELAIN (France) said that he was in favour of retaining the footnote, if only for purposes of information, and that it should explain why States were given the option of not incorporating all methods of procurement, rather than simply referring to the Guide. He suggested deleting the first two sentences and retaining the last two so that it would be clear that States could choose not to incorporate all methods.

18. Mr. WALLACE (United States of America) agreed with the representative of France that the penultimate sentence of the footnote should state exactly why States were being advised that they could choose not to incorporate all methods of procurement in their national legislation.

19. Mr. TUVAYANOND (Thailand) said that the footnote should be retained so that the text of the Model Law itself would include a clear reference to the Commission's intention. It was not sufficient to refer to the Guide, which was a separate document and might not be accessible to everyone who read the Model Law.

20. Mr. GRIFFITH (Observer for Australia) agreed with the representative of Thailand, adding that, during the current session, the Commission ought to consider the part of the Guide that dealt with the question under discussion.

21. The CHAIRMAN said that the secretariat would make every effort to circulate the relevant portion of the Guide in the days that followed.

22. Mr. CHATURVEDI (India) said that a reference to the Guide should not be included since the Commission had not reviewed it.

23. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to retain the reference to the Guide, provided that the text of the relevant part of that document was distributed before the end of the current session.

24. *It was so decided.*

25. The CHAIRMAN said that articles 17 to 20, which had been expanded to include services, presented no great problems. The same was true of chapter III, "Tendering proceedings" (arts. 21 to 35), and chapter IV, "Procedures for procurement methods other than tendering" (arts. 36 to 41), although those paragraphs might have to be renumbered when the Commission took up the inclusion of the additional chapter it had already agreed on. If he heard no objection, he would take it that the Commission wished to adopt the first report of the drafting group (A/CN.9/XXVII/CRP.2).

26. *It was so decided.*

A/CN.9/XXVII/CRP.2/Add.1

27. Mr. TUVAYANOND (Thailand) said that, without prejudice to the adoption of the report contained in document A/CN.9/XXVII/CRP.2, the title of the Model Law, which referred to "procurement of goods, construction and services", should perhaps be changed as there was already an almost identical model law on procurement of goods and construction, which might give rise to the belief that a State could incorporate the latter into its national legislation without taking the former into account. He suggested that the draft Model Law before the Commission should be limited to the procurement of services, which would make it clear

that the first model law applied to the procurement of goods and construction. That procedure was similar to the one adopted with respect to the law of treaties, in which treaties between States and treaties between international organizations or between international organizations and States were dealt with in separate conventions. There, too, the texts were very similar, although not identical.

28. Mr. WALLACE (United States of America) said that that suggestion might be taken up in the text of the footnote and pointed out that the adoption of document A/CN.9/XXVII/CRP.2 did not mean that the title of chapter IV had also been adopted.

29. The CHAIRMAN agreed with the representative of the United States of America that the new title of chapter IV should be considered separately.

30. Mr. GOH (Singapore), supported by Mr. LEVY (Canada), said that in order to avoid the possible confusion pointed out by the representative of Thailand, reference should be made to the year of adoption of the Model Law. Its title would then become "UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994".

31. Mr. HERRMANN (Secretary of the Commission) pointed out that if the year of adoption was included in the title of the Model Law it might be thought that it replaced the UNCITRAL Model Law on Procurement of Goods and Construction of 1993.

32. Mr. GOH (Singapore) suggested that reference should be made to the year of adoption; in order to solve the problem raised by the Secretary, it should be explained in the footnote on the first page of document A/CN.9/XXVII/CRP.2/Add.1 that the new Model Law did not replace the Model Law of 1993.

33. Mr. CHATURVEDI (India) said that the Secretary of the Commission was right. In any case, however, whenever the Model Law was referred to, the year of its adoption would be included, whether or not it appeared in the title. He proposed that a new sentence should be added before the last sentence of the footnote, to read: "The Model Law on Procurement of Goods, Construction and Services of 1994 does not amend that of 1993." He also wondered whether the note should not read "adopted by the General Assembly" rather than "adopted by the Commission".

34. Mr. LEVY (Canada) agreed with the representative of India with respect to the title but suggested that the last part of the proposed sentence should read "but is not intended to supersede it".

35. Mr. HERRMANN (Secretary of the Commission) said that the footnote should not refer to adoption of the Model Law by the General Assembly, as the Assembly did not usually adopt texts prepared by the Commission but simply congratulated it on completing its preparation of a text and, in the case of a draft convention, recommended that a plenipotentiary conference should be convened to sign it or, in the case of a model law, recommended its adoption by Member States.

36. Mr. WALLACE (United States of America) said that it would be better to delete the words "which has now been expanded to include procurement of services" in the second sentence of the footnote and add a new sentence reading "This Model Law on Procurement of . . . adds provisions on the procurement of services." That wording would also avoid the problem raised by the Secretary of the Commission.

37. Mr. LEVY (Canada) said it should be explicitly stated in the footnote that the new Model Law did not replace that of 1993.

38. Mr. CHATURVEDI (India) said that he could accept either the United States or the Canadian proposal provided that the phrase "but does not amend the UNCITRAL Model Law on Procurement of Goods and Construction for those States which wish to adopt it" was added to either wording.

39. Mr. AL-NASSER (Saudi Arabia) proposed that the title should read "Model Law adopted by UNCITRAL after inclusion of the procurement of services in the UNCITRAL Model Law on Procurement of Goods and Construction pursuant to a decision taken by the Commission at its twenty-sixth session."

40. The CHAIRMAN said that if he heard no objections he would take it that the Commission wished to refer the drafting of the footnote to the drafting group.

41. *It was so decided.*

Article 11 (i) ter

42. The CHAIRMAN said that if he heard no objections he would take it that the Commission wished to adopt article 11 (i) *ter*.

43. *It was so decided.*

Chapter III bis, article 41 bis

44. Mr. WALLACE (United States of America), referring to paragraph 3 of article 41 *bis*, said that it would be useful to explain briefly in the Guide what was meant by direct solicitation, as the Commission had not considered that question. Moreover, the article did not specify that suppliers or contractors were to be excluded when the method of direct solicitation or notice was used or what the procuring entity should do if the services were offered by suppliers or contractors which had been informed of the solicitation or notice but had not responded to it. It might be useful for the Guide to include some direction for that case.

45. Mr. SHI Zhaoyu (China) said that the title of chapter III *bis* still did not state clearly the purpose of the articles contained in it, as it suggested that there was one standard method of procurement and that another special method was adopted when the first could not be applied, instead of making it clear that the method indicated in the chapter was to be given preference.

46. Mr. CHATURVEDI (India) agreed that the Guide should explain what was meant by "direct solicitation of proposals".

47. Mr. TUVAYANOND (Thailand) said that it appeared from the title that chapter III *bis* referred to a special method for procurement of services which was used only in special circumstances while the usual method would be tendering.

Article 41 ter

48. Mr. WALLACE (United States of America) said that article 41 *ter*, subparagraph (1), only referred to article 41 *sexies*, paragraph 1(a), whereas it ought to say whether the method chosen was that of the lowest price, set out in article 41 *sexies bis*, paragraph 2(a), or that of the best proposal in terms of criteria other than price, set out in article 41 *sexies bis*, paragraph 2(b).

Article 41 quater

49. Mr. CHATURVEDI (India) proposed that the words "of local people" should be added after the words "the development of managerial, scientific and operational skills" in paragraph 1(d).

50. Mr. LEVY (Canada) said that the word "local" was confusing as it was unclear whether it referred to a city, a county, a state or a country.

51. Mr. CHATURVEDI (India) said that if the expression "local people" posed a problem, the expression "local experts" could be used.

52. The CHAIRMAN pointed out that it was not for the Commission to introduce substantive changes to the Model Law. If he heard no objections, he would take it that the Commission wished to adopt the second report of the drafting group (A/CN.9/XXVII/CRP.2/Add.1).

53. *It was so decided.*

A/CN.9/XXVII/CRP.2/Add.2

Article 41 sexies

54. Mr. CHATURVEDI (India) said that in paragraph (3) the word "external" had been added before the word "experts"; that constituted a modification of the text initially approved.

55. The CHAIRMAN explained that the drafting group had agreed to include the word "external" to solve the problems that the text posed for the World Bank.

56. Mr. WALLACE (United States of America) said that, for the World Bank, the independence of the experts had to do with the contracting process, not with whether they were citizens of another country. The drafting group should bear that in mind.

Article 41 sexies ter

57. Mr. WALLACE (United States of America) noted that it was stated in the fourth line of paragraph 1 that the proposals had to be "acceptable"; he did not recall the Commission having agreed to that term. Other articles contained references to a "minimum level", an expression which seemed much more useful.

58. Mr. LEVY (Canada) said he had proposed the word "acceptable" thinking that it had more positive connotations than the expression "which have not been rejected". Also, the expression "minimum level" referred to the proposals, not to those who formulated them. Even if a proposal attained a given level, it was possible to have no confidence in the person who had made it.

59. Mr. WALLACE (United States of America) said that, according to article 41 *sexies bis*, paragraph 1, the procuring entity would establish a minimum level with respect to quality and technical aspects. According to article 41 *sexies quater*, subparagraph (a), the procuring entity would establish a minimum level in accordance with article 41 *sexies bis*, paragraph 1. In other words, the minimum level referred to quality and technical aspects. Therefore, if that concept was valid for article 41 *sexies bis*, it would also be valid for article 41 *sexies quater* and article 41 *sexies ter*. If that expression was used in all those articles, the text would be coherent.

*The meeting was suspended at 5.10 p.m.
and resumed at 5.40 p.m.*

60. The CHAIRMAN, referring to the problem which had arisen because of the replacement in the text prepared by the drafting group of the term "threshold" by the expression "minimum level", said that some delegations had thought that the level to be fixed would be too low. He did not share that view, since in his opinion the minimum level would be established by the procuring entity. The problem had been resolved to a certain extent by the provision establishing the conditions to be met by proposals submitted to the procuring entity.

61. Mr. GRIFFITH (Observer for Australia), supported by Mr. CHATURVEDI (India), pointed out that if there were

currently difficulties in reconciling different positions, it would be best to leave the text as it was.

62. Mr. WALLACE (United States of America) said that, although he could accept Australia's suggestion, he had been referring to article 41 *sexies ter*, paragraph 1, which meant that the question was a substantive one. He suggested getting around the problem by rewording the paragraph to which he had referred to read "The procuring entity shall engage in negotiations with suppliers or contractors that have submitted proposals which attain a minimum level with respect to quality and technical aspects."

63. Mr. LEVY (Canada) said that the wording proposed by the representative of the United States of America entailed a substantive question, since the threshold concept was being introduced into a provision in which it had not been present. If there was any disagreement, it would be best to keep to the text contained in document A/CN.9/XXVII/CRP.2/Add.2, which was the one prepared by the drafting group.

64. Mr. CHATURVEDI (India) supported the suggestion made by the representative of the United States of America, which he considered logical since article 41 *sexies bis*, paragraph 1, already contained the expression "minimum level".

65. Mr. GOH (Singapore) also supported the United States proposal and recalled that, originally, the concept of a threshold with respect to quality and technical aspects had been used in article 41 *sexies*.

66. Mr. BONELL (Italy) also thought that the question was a substantive one. The history of article 41 *sexies ter*, paragraph 1, indicated that the draft had originally referred to proposals which had not been rejected. That situation was different from the one in article 41 *sexies bis* and *sexies quater*, which expressly recognized that a minimum level must be established. That was why it was subsequently stated that, having chosen the procedure, the procuring entity must establish that minimum level, but that did not appear in article 41 *sexies ter*. Thus, if the present wording was changed, it would be necessary to restructure the whole paragraph and make it consistent with the other procedure.

67. Mr. TUVAYANOND (Thailand) said the text should refer to the proposals which had not been rejected, since it would be meaningless to open negotiations on proposals which had already been rejected.

68. The CHAIRMAN suggested retaining the original text of document A/CN.9/XXVII/CRP.2/Add.2 and including an article entitling the procuring entity to determine the characteristics of the proposals that merited consideration.

69. Mr. WALLACE (United States of America) said that the choice between referring to a minimum level and referring to acceptable proposals or to those which had not been rejected was a substantive question which his delegation had been right to bring up. He also pointed out that the word "threshold", which had been used initially, stated the concept they were trying to express more precisely.

The meeting rose at 6.05 p.m.

Summary record of the 536th meeting

Friday, 10 June 1994, at 10 a.m.

Chairman: MR. MORÁN (Spain)

The meeting was called to order at 10.15 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/XXVII/CRP.2 and Add.1-3)

1. The CHAIRMAN invited the members of the Commission to continue with the adoption of the report of the drafting group and to inform him whether they agreed to the proposal to replace the expression "minimum level" in articles 41 *sexies bis* and 41 *sexies quater* (A/CN.9/XXVII/CRP.2/Add.2) with the word "threshold".

2. Mr. JAMES (United Kingdom) said that his delegation was ready to accept that proposal and, with the exception of that modification, was in favour of retaining articles 41 *sexies bis*, 41 *sexies ter* and 41 *sexies quater* as contained in document A/CN.9/XXVII/CRP.2/Add.2.

3. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt document A/CN.9/XXVII/CRP.2/Add.2, the only modification being the replacement of the words "minimum level" by "threshold".

4. Mr. HERRMANN (Secretary of the Commission) suggested replacing the title of chapter III *bis* as contained in document A/CN.9/XXVII/CRP.2/Add.1 ("Special method for procurement of services") with "Principal method for procurement of services". That change would make it clearer that what was meant by "procedures for alternative methods of procurement" (chap. IV) was

methods other than the principal method, i.e., in the procurement of goods and construction, alternatives to tendering (chap. III) and, in the procurement of services, alternatives to the method referred to in chapter III *bis*.

5. Mr. JAMES (United Kingdom), Mr. LEVY (Canada), Mr. CHATURVEDI (India), Mr. GRIFFITH (Observer for Australia), Mr. GOH (Singapore) and Mr. SHI Zhaoyu (China) supported the Secretary's proposal.

6. The CHAIRMAN invited the Commission to turn to document A/CN.9/XXVII/CRP.2/Add.3, which contained a footnote concerning article 16, on methods of procurement, and chapter V, which dealt with review.

7. Mr. LEVY (Canada) said that his delegation fully endorsed the document. He wished to know whether, in the version of the Model Law that would appear in the Commission's report, articles would be renumbered in order to avoid the use of *bis*, *ter*, *quater*, *quinques* and so forth.

8. Mr. HERRMANN (Secretary of the Commission) said that that would be the case. He also wished to inform delegations that the final version which would appear in the Commission's report would be an edited version for all six languages. In the future, then, they should therefore refer to that version and not to the texts that would be distributed to them at the end of the session.

9. Mr. CHATURVEDI (India) noted that his delegation had expressed reservations on a number of clauses during the debate on chapter V. He hoped that they would be reflected in the report. Since the *Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services* was not ready for publication, he wished to know whether a footnote referring to that fact could be inserted.

10. Mr. GRIFFITH (Observer for Australia) asked whether, in the final version, chapter III *bis* would be retained, so that the numbering of the other chapters would correspond to the chapters of the Model Law on Procurement of Goods and Construction, or whether the chapters would be renumbered beginning with chapter III. He would favour the second option.

11. The CHAIRMAN replied that it would be preferable to renumber the chapters. If there were no other remarks, he would take it that the Commission wished to adopt document A/CN.9/XXVII/CRP.2/Add.3.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section B (continued)

12. Mr. HOLTZMANN (United States of America), referring to section B of the annotated check-list (A/CN.9/396/Add.1, chap. III), said that, while it was important that any objections as to the jurisdiction or composition of the arbitral tribunal should be raised as soon as possible, before the proceedings had gone too far, it would not be advisable to raise those two matters at a preparatory conference for several reasons, of which the most important was incompatibility with the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration.

13. With regard to objections to the composition of the arbitral tribunal, both the Regulations and the Model Law specified that any party that wished to challenge an arbitrator must do so within 15 days after becoming aware of any grounds for challenge. If the party had been aware of the grounds prior to the preparatory conference, it could not then wait until the conference to act unless that took place within the 15 days, which would be purely coincidental. On the other hand, a party which at the preparatory conference waived its right to make a challenge and which subsequently discovered grounds for challenge should not be deprived of its right to take advantage of the 15-day period provided for in the Arbitration Rules and the Model Law, or of any other period of time provided for under other rules or national law.

14. With regard to objections as to the jurisdiction of the arbitral tribunal, under the UNCITRAL Arbitration Rules the delivery to the respondent of a simple notice of arbitration sufficed for the arbitral proceedings to be deemed to have commenced, and the statement of claim could be delivered to the respondent within a period of time—several weeks or even several months—determined by the arbitral tribunal, which also determines the period of time within which the respondent must deliver his statement of defence. In practice, however, those time periods were often determined in consultation with the parties during the preparatory conference. It would therefore be entirely inappropriate to ask whether a party had an objection as to the jurisdiction of the arbitral tribunal even before that party was in possession of the statement of claim itself and the complete file. Moreover, under the Arbitration Rules and the Model Law, a plea that the arbitral tribunal did not have jurisdiction must be raised not later than in the statement of defence. To ask the parties at the preparatory conference whether they had any objection as to jurisdiction would thus be tantamount not only to asking them to take

a decision before they had all the necessary information, but also to shortening the time-limits for arbitration established by UNCITRAL itself.

15. Mr. BONELL (Italy) said that he fully endorsed the remarks by the representative of the United States of America. Like the representative of Thailand, he believed that the question of the tribunal's jurisdiction should not be taken up in the context under discussion, and he recalled that article 16, paragraph 2, of the Model Law provided that "a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings". The matter therefore could be raised either early in the proceedings or later on, depending on the particulars of the case. The role that preparatory conferences could play must not be overestimated. They were definitely not the appropriate forum for a discussion of the applicable law or of the value of arbitration *ex aequo et bono*.

16. Mr. ABASCAL ZAMORA (Mexico) said that he agreed with the arguments advanced by the representative of Italy; the check-list should cover situations in which a party challenged the jurisdiction of an arbitrator and requested that he should decline to hear the case. A party might introduce such a challenge when preparing its defence, which was why the question should be included in the check-list of topics for discussion. The decision to do so should be left to the parties and not to the members of the arbitral tribunal, even in consultation with the parties, in order to prevent a counter-claim.

17. Mr. CHATURVEDI (India) agreed that the question of jurisdiction should not be included in the check-list. The parties, and not the arbitrators, should raise the question, and they could do so at any point in the proceedings.

18. Mr. TUVAYANOND (Thailand) said that under articles 12 and 13 of the Model Law, the parties were free to challenge the composition of the arbitral tribunal at any time, and not only during a period of 15 days. The 15-day period began only once the grounds for challenge were known. Once the parties were aware of those reasons, whether at the time of the tribunal's constitution of the tribunal or in the course of the arbitral proceedings, they were free to raise objections. There was no reason to deny them the opportunity to do so during a preparatory conference. Although the Guidelines stipulated that any problems arising in that regard should be addressed early in the proceedings, the question of the tribunal's "mandate" required clarification. A preparatory conference provided an opportunity to raise objections to an interpretation that supposedly ran counter to the arbitrators' mandate as understood by the parties. The concept of jurisdiction was only vaguely dealt with in the Guidelines. The jurisdiction of the arbitral tribunal should be clearly spelt out in the arbitration agreement. The matter should not be dealt with in the part of the text under discussion.

19. Mr. HERRMANN (Secretary of the Commission) said that the distinction drawn by the representative of Thailand between "mandate" and "jurisdiction" was more a matter of terminology than of substance. Under the UNCITRAL Model Law and Arbitration Rules, the jurisdiction of the arbitrators to settle the dispute derived directly from the arbitration agreement. The arbitration agreement must apply to the dispute before the tribunal and that explained how the "mandate", which was covered by the notion of "competence", came into play. The objective of section B, in his view, was simply to determine whether the arbitrators were in fact arbitrators and not merely three persons who were not involved in the dispute, i.e. whether the arbitrators had been selected by the parties to settle the dispute. A second aspect of the notion of "mandate" had been alluded to by the representative of Italy when he had quoted article 16, paragraph 2, of the Model Law. If

at a later stage in the proceedings a party believed that a matter raised during the discussion fell outside the scope of the arbitration agreement and that the tribunal therefore lacked jurisdiction, or was not mandated, to rule on the matter, it would be perfectly normal for that party to challenge the jurisdiction of the arbitrators. In general, however, such situations arose only very late in proceedings and there was therefore no need to deal with them at preparatory conferences. A number of speakers, including the representative of Thailand, had stated that the parties should not be prevented from taking up certain topics during preparatory conferences. However, those were topics which the arbitral tribunal might automatically raise, and it was inconceivable that the tribunal would challenge its own jurisdiction. Accordingly, he believed that, while it was not necessary to include the topic in the agenda, that did not prevent the parties from raising it. To prohibit a topic from being raised on the grounds that it was not on the agenda seemed an excessively formal approach.

20. The notion of an objection to the composition of the arbitral tribunal had nothing to do with the concept of challenge proceedings. Section B was concerned with the method of appointing the arbitrator and definitely not with the arbitrator's impartiality or jurisdiction. The objective was to determine whether the arbitrator had in fact been designated by the competent authority and whether all the formal requirements had been met. The intent definitely was not to take up matters dealt with in articles 12 to 14 of the Model Law.

21. Mr. TUVAYANOND (Thailand) said that the mandate—or jurisdiction—of the arbitral tribunal normally was set out in the arbitration agreement. It was difficult to understand why a party would oppose a provision it had itself accepted. It would, of course, be useful to raise any issue that might arise with respect to the jurisdiction or mandate of the arbitral tribunal, but only for purposes of clarification and not by way of objection. To authorize one party to raise an issue that was not included in the agenda was unfair to the party that, caught unawares, would be obliged to improvise while the other would have had time to prepare its case. In the case of the appointment of the arbitrators, while an objection could be raised if irregularities had occurred, it was also possible to challenge the arbitrators themselves at any time after their appointment, provided that no more than 15 days had passed since the grounds for the objection had become known.

22. Mr. CHOUKRI SBAI (Morocco) said that arbitration rules customarily dealt with the concept of mandate or jurisdiction and with the means for determining the composition of the arbitral tribunal. The arbitration agreement defined that mandate. Section B should be drafted in more neutral language, indicating, for example, that a party might have good reasons to raise the issue of the tribunal's composition if it had doubts or objections in that regard. It was important to avoid making a value judgement by stating that an objection was likely to cause delays or cast doubt on the tribunal's jurisdiction.

23. Mr. HERRMANN (Secretary of the Commission) said that delegations appeared to be labouring under a misapprehension which was the result of poor drafting. The first sentence under "Remarks" in section B ("... may not always be desirable") applied to the arbitral tribunal. It definitely did not apply to the behaviour of either party, about whom no value judgement was made. The section was simply intended to draw attention to the advantages or disadvantages of a particular method, as had been done throughout the Guidelines.

24. Mr. GOH (Singapore) agreed with the representative of the United States of America: the question of objections should not be included in the annotated check-list. Arbitration began when the parties designated the arbitrators. By the time a preparatory conference was convened the proceedings had already been under

way for some time, and any objection as to the jurisdiction of an arbitrator should already have been raised.

25. Mr. GRIFFITH (Observer for Australia) said that he, too, believed it would be best to delete section B or to use much less precise language—indicating, for example, that the tribunal should inquire whether both parties accepted its composition. Arbitration Rules included procedures for challenging the Tribunal's composition and the parties should not be encouraged to raise objections in that regard.

26. Mr. JONKMAN (Observer for the Permanent Court of Arbitration) said that the framework of the discussion should be clarified. If the Commission was dealing with guidelines whose purpose was to offer suggestions to the parties so that they could plan the arbitration as efficiently as possible, then it really would be best not to include the matter in the agenda or deal with it at all in the document. However, if what was intended was a simple memorandum, a list of questions that might eventually arise, then it might be useful to retain that matter.

27. Mr. HERRMANN (Secretary of the Commission) said that it was his understanding that the purpose of the check-list was not to present a neutral list of all situations that might arise but rather to indicate the advantages and disadvantages of a given course of action and the risks it might entail. In that sense, the annotations it contained were guidelines.

28. Mr. HOLTZMANN (United States of America) said that the distinction between "mandate" and "jurisdiction" was artificial. In one possible scenario, for example, if the arbitration clause stipulated that an arbitral tribunal must settle the dispute on the basis of the domestic law of a particular country, any attempt to invoke the law of another country would be considered to be outside its "mandate". However, it might just as easily be asserted that it was outside the tribunal's jurisdiction to rule on the basis of the law of another country.

29. The notion of objections to the composition of the arbitral tribunal had not been intended to cover the notion of challenge. The problem could be resolved by not using the word "composition" or by clarifying its meaning. Clearly, if an arbitral tribunal was improperly constituted, i.e. if the persons serving as arbitrators had not been so designated in the arbitration agreement, then the question of the tribunal's jurisdiction arose. However, objections as to jurisdiction would be more appropriately considered under section D of the check-list, on defining issues and order of deciding them, rather than under section B. Lastly, the fact that a matter was not raised at the exact moment envisaged in the Guidelines should not prevent it from being raised at some other time pursuant to the arbitration rules or the applicable law. The point was to protect the parties from their own mistakes and to prevent disputes as to the jurisdiction or composition of the tribunal from arising at a later stage.

30. Mr. HERRMANN (Secretary of the Commission) said that his point had not been whether the fact that a party had not raised an objection at a preparatory conference would prevent him from doing so at a later stage, but simply whether a party would be prevented at a preparatory conference from raising a matter which was not on the agenda of the conference.

*The meeting was suspended at 11.45 a.m.
and resumed at 12.15 p.m.*

31. Mr. DUCHEK (Austria) said that it would be best to delete section B. As to whether the question of the applicable substantive law could be considered at the preparatory conference, he noted that the parties might raise the issue at that stage, when defining the points at issue (section D (i) of the check-list) or

agreeing on undisputed facts or issues (section E), since in some situations facts might be relevant under the legislation of one country but not under the legislation of another. The question of the applicable law might arise when procedures were planned, and it might be helpful if the parties agreed on that point during the preparatory conference. The Guidelines should provide for that situation.

32. Mr. CHATURVEDI (India) said that it was the Commission's duty to draw up guidelines and not merely an indicative list; it should therefore proceed cautiously when considering a given section or deciding to retain it. With regard to section B of the check-list, the parties were free to decide whether they wished to take up the matter of the jurisdiction and composition of the arbitral tribunal, and they could do so at any time. However, it was in their interest to do so as early as possible in order to save time and money. On the other hand, it was not the task of the arbitrators to determine whether or not the question of the Tribunal's jurisdiction and composition should be raised. To prevent them from taking that initiative, it would be preferable to delete section B or amend it.

33. Mr. TUVAYANOND (Thailand) said that section B served a useful purpose and that the solution might be to rephrase it using the words "accept" or "approve". The arbitral tribunal must be able to seek clarifications concerning its mandate. With regard to the applicable substantive law, for example, even where the parties had selected a particular national law and there was thus no question of any objection to the applicable law, the arbitrators still might need to clarify for themselves whether they were dealing with the law in its current form or as it had stood on a particular date. His delegation would agree to the deletion of section B provided that the questions of jurisdiction and the applicable law were covered under section D. The tribunal must be able to seek clarifications at the preparatory conference in order to avoid stalling tactics later on, which were costly for everyone.

34. Mr. SEKOLEC (International Trade Law Branch) said that the practitioners consulted by the secretariat believed that the question of the applicable substantive law could be dealt with under section D (i), but only for the purpose of deciding whether it should be considered at a later stage. Defining the applicable law and ascertaining whether there was agreement on the law to be applied were two different things. Furthermore, the issue was one on which the parties might wish to provide written submissions, a situation which could not be anticipated at a preparatory conference, which was concerned with procedure.

35. Mr. SHI Zhaoyu (China) said that section B should be retained and, if necessary, amended to reflect the views of delegations. The annotated check-list of possible topics for preparatory conferences should be as long as possible. The arbitral tribunal should also, where appropriate, be able to hear very early in the proceedings any objections by the parties as to its jurisdiction and composition. The parties, for their part, should be able to raise the question when they deemed it appropriate to do so.

36. Mr. OLIVENCIA (Spain) said that, however important it might be, the question of the arbitral tribunal's jurisdiction and composition should not be included in the agenda of a preparatory conference. Once an agenda had been drawn up listing the topics for discussion, there was no reason to address questions that were not on that agenda, and the tribunal itself should not propose an agenda that included the question as to whether the parties challenged its jurisdiction or composition.

37. A preparatory conference convened at the outset of the proceedings might be the appropriate time to determine whether the parties objected to the tribunal's jurisdiction or composition, but that initiative should be left to the parties. In so far as those

were the issues that had to be settled first, the question of possible objections to them should be raised on a preliminary basis at a preparatory conference convened very early in the proceedings and, if there were no objections, that fact should be noted; the question should not, however, be specifically included in the agenda of the preparatory conference. Accordingly, his delegation proposed that section B should be amended to avoid giving the impression that the matter was an agenda item introduced by the arbitral tribunal.

38. His delegation viewed the Guidelines under discussion as a guide, along the lines of the UNCITRAL Legal Guide, the purpose of which was to provide and analyse information, describe the matter under consideration, record possible problems, weigh the pros and cons of different approaches, propose various options and, finally, recommend prudent courses of action. The Guidelines should be viewed as a tool for arbitrators, albeit one that was not binding and did not prejudice any given issue.

39. As to their scope, the Guidelines were clearly not intended to be used solely in the context of the UNCITRAL Arbitration Rules, international arbitration or the rules of arbitral institutions; they should be general in nature, although that did not preclude the possibility that, where the UNCITRAL Arbitration Rules were applied, the proceedings in question would be governed by specific provisions of those Rules.

40. His delegation therefore proposed that a working group should be established after the conference of the International Council for Commercial Arbitration to allow more time for a more thorough exchange of views on the draft guidelines.

41. Mr. BONELL (Italy) asked the Chairman to summarize the discussion as it had evolved.

42. The CHAIRMAN said that since the discussion was intended to be an exchange of views on the document prepared by the secretariat for the purpose of eliciting the opinions of delegations so that a more complete document could be submitted to the working group whose establishment had been proposed, the secretariat would be in a better position to summarize the discussion or, if necessary, to highlight those issues on which clarifications should be sought from delegations.

Chapter III, section C

43. Mr. LEVY (Canada) agreed that it would be useful to establish a working group, but wondered whether the fact that the Commission would have considered the document at its twenty-seventh session and stated its position on the matter might not hamper the working group's efforts.

44. His delegation had certain reservations regarding section C, for it encouraged an inexperienced arbitrator to assume the role of mediator, thereby running the risk of leading the parties into an unforeseen process or outcome. An arbitrator should not get involved in settlement matters. Accordingly, the section should state that the arbitrator should be kept informed of all the settlement proceedings but should not participate in them. It was inappropriate to raise the issue of settlement during the preparatory conference. However, since the continental European States took a different approach to the issue than did the United States of America, the United Kingdom, Canada and the Commonwealth countries, for example, short of simply deleting all the provisions in square brackets, the best solution would be, at the very least, to issue a stern warning against the dangers of that practice.

45. Mr. ABASCAL ZAMORA (Mexico) said that he agreed with the representative of Canada, pointing out that an arbitrator's

role was different from that of a mediator. An arbitrator had the task of determining the truth, the content of the agreement between the parties and their behaviour and then of handing down the decision by which they must abide. The role of a mediator, on the other hand, was to try to understand the positions of the two parties and to get them to agree to a solution to their dispute. When an arbitrator became a mediator, he risked losing his impartiality and acquiring prejudices during the conciliation process, thereby compromising any future settlement.

46. Clearly, the best way for an arbitrator to encourage conciliation was to do his job as an arbitrator in such a way that the parties, recognizing that he was acting reasonably in his search for a solution, would be motivated to do likewise. In any event, while it must be acknowledged that the practice whereby arbitrators assumed the role of conciliators existed in many countries, it was necessary to warn of the dangers inherent in that practice.

The meeting rose at 1 p.m.

Summary of the 537th meeting

Friday, 10 June 1994, at 3 p.m.

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.10 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section B (continued)

1. Mr. GRIFFITH (Observer for Australia) said he felt that the time had come for the Commission to take some basic decisions, such as on whether or not to delete section B. It seemed that a majority of members of the Commission were in favour of deleting it, although some delegations had supported his own delegation's proposal to reword the section heading and redraft the remarks so as to make them more positive. His delegation was prepared to accept either of those two options but believed that, for the purposes of the conference which the International Council for Commercial Arbitration was to hold in November, it should be made clear whether the Commission had reached agreement on deleting the section.

Chapter III, section C

2. Mr. TUVAYANOND (Thailand) said that he was not in favour of deleting section C; it would be sufficient to make slight drafting changes, which could be entrusted to the Commission secretariat. It must be made clear that the function of the arbitral tribunal should not be confused with that of a mediator or a conciliator. However, the arbitral tribunal should be aware of the existence of discussions taking place outside the framework of the arbitration and should be informed of the results.

3. Mr. ANDERSEN (Denmark) said that the Commission should take a decision at the current session on the check-list of possible topics for preparatory conferences; there was no justification for convening a working group for that purpose.

4. Section C should remain unchanged. It was difficult to see what connection there was between having the arbitral tribunal inquire whether it was possible for the parties to settle a dispute and attributing to the arbitral tribunal the role of conciliator or mediator. The remarks concerning a possible confusion of functions actually referred to a different topic and should be deleted, or, in any event, included in a separate section. It should be borne in mind that not all countries had the same legal traditions or the same number of lawyers. Arbitral proceedings were costly and the parties might wish to avoid them in so far as possible.

5. Mr. BONELL (Italy) said that section C, paragraphs 1 and 2, should be substantially amended or deleted. In particular, the second sentence of paragraph 1 and all of paragraph 2 should be

deleted. He disagreed with the representative of Denmark, since in Italy a clear distinction was made between the function of an arbitrator and that of a conciliator or mediator. It was not desirable to confuse the two functions. The situation was different from that in which a court was asked to monitor the implementation of an agreement between the parties, because in the current case the court would be operating parallel to the arbitration and to the conciliation or mediation.

6. Mr. SHIMIZU (Japan) said that he was opposed to deleting paragraphs 1 and 2 which, like the rest of the Guidelines, contained useful information for the lawyers who would be involved in arbitral proceedings and must be informed of the existence of divergent views on that question. However, those paragraphs could be moved to a different place.

7. Mr. ANDERSEN (Denmark) said that in Denmark, too, a distinction was drawn between the function of arbitration and that of conciliation and mediation. However, just as the courts tried to bring about a settlement between the parties at the first hearing, an arbitration tribunal, after reading all the documents submitted by the parties, could inquire whether they wished to seek a settlement. That procedure could be useful, especially when one of the parties was a government institution which would otherwise have more difficulty in reaching a settlement.

8. Mr. HOLTZMANN (United States of America) said that the fact that paragraphs 1 and 2 were in brackets meant that the purpose of the Guidelines could be fulfilled without them. The question had been considered by the International Arbitration Committee, a group of consultants belonging to the American Arbitration Association, which had decided that paragraphs 1 and 2 should be deleted because, among other reasons, they were not germane to the topic.

9. The drafting group should also be requested to change the title of section C. The preparatory conference should only determine whether any situations existed which might affect the scheduling of the arbitral proceedings, such as the fact that the parties were prepared to reach a settlement or the likelihood that discussions would be held for that purpose. The preparatory conference should not take up the terms of a possible settlement or initiate a conciliation process unless the parties requested it. Yet the title of section C, "Possibility of settlement", suggested intervention by the arbitral tribunal.

10. The reason for not including paragraphs 1 and 2 was that there were very different opinions as to whether it was appropriate

for an arbitrator also to act as a conciliator. Practice also varied widely in different parts of the world, and even within different branches of commercial activity in the same country, as in the case of the United States of America. Norms and practice in respect of the function of tribunals also varied in some countries, as the representative of Denmark had pointed out. It might be worth taking into account the ethical standards established some years previously by the American Arbitration Association and the American Bar Association, which held that, while arbitrators should not in principle act as conciliators, they were ethically qualified to do so if both parties requested them to assume that function. That was quite different from coming forward and offering those services.

11. Mr. LEVY (Canada) said that, although he was not opposed to the establishment of working groups when they could carry out a useful function, he felt that if that was done after the Commission itself had expressed its views on the various items, the working group's deliberations would be too restricted.

12. Mr. ZHANG Qikun (China) said that section C should be retained and its application should be left to the discretion of arbitrators in individual countries, since different countries had different judicial systems. In China, the function of arbitrator was combined with that of conciliator, and experience in that area had been satisfactory. In arbitral proceedings the parties were asked whether they wished to attempt conciliation, and if they agreed, the arbitrator could act as a conciliator. If no solution was reached after that, the same arbitrator who had acted as conciliator could resume the role of arbitrator. In his view, it was appropriate for the arbitrators to perform the role of conciliators and not to invite third parties to intervene, since that would also increase the costs. Conciliation offered many advantages, including speed.

13. Mr. TUVAYANOND (Thailand) said that he was in favour of retaining section C, which was useful to avoid the high costs of arbitral proceedings. It was not necessary to go into too much detail; it was sufficient for the arbitral tribunal to ask the parties whether they had held discussions with a view to reaching a settlement and what the result had been.

14. The CHAIRMAN said that the discussion seemed to indicate that section C should be retained; that the drafting of paragraph 1 should be improved while paragraph 2, in brackets, could be deleted; and that there were no problems with paragraph 3.

15. Mr. BURMAN (United States of America) said that at the current meeting there had not been a majority in favour of maintaining section C; at least half the speakers had wanted to delete it. Moreover, his delegation had suggested that, if anything was retained from that section, the title should be changed to give the subject a different focus.

Chapter III, section D, paragraph (i)

16. The CHAIRMAN said that item (i) was one of the most sensitive and important topics on the list, since it was concerned with how to define the points at issue, the possibility of excluding some of them and concentrating on others, and the order in which the issues should be decided.

17. Mr. TUVAYANOND (Thailand) said that in the title of item (i) it would be more appropriate to use the word "identify" than the word "define", in line with paragraph 1 of the remarks. There would be no difficulty in keeping the word "define" in item (ii).

18. The CHAIRMAN said that, considering the stage in the proceedings at which the question arose, it was perhaps more appropriate to use the word "define", as in the document, rather than the word "identify".

19. Mr. HOLTZMANN (United States of America) proposed deleting the final sentence of paragraph 1. He was particularly concerned by the wording "if, however, the facts are largely undisputed and the issues concern law, it might be possible [for the arbitral tribunal] to request that the proceedings be conducted on the basis of documents only". In the early stage of the proceedings, during the preparatory conference—before statements of claim and defence and, for example, before briefs—it would be impossible for the tribunal to know which facts were largely undisputed or whether the points at issue concerning law were more important than the facts in dispute.

20. Moreover, it would not be proper for an arbitral tribunal to request that hearings should be conducted solely on the basis of documents in cases where the issues were predominantly legal, since arguments on legal issues could be extremely important. The Commission should not support the idea that arguments on legal issues should be handled through written submissions, taking into account, in particular, article 15, paragraph 2, of the Arbitration Rules, which stated: "If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral arguments". It was no accident that the phrase "oral arguments" was included, for 20 years earlier, during the debate on the UNCITRAL Rules, the point had been made that either party ought to be able to request oral argument, which meant oral argument on a legal point, and not only presentation of evidence.

21. Mr. LEVY (Canada) supported the United States proposal. Oral argument, even on strict questions of law, sometimes elucidated or brought out points which had not been mentioned in the written arguments of either party, and the courts always found that very useful. Oral arguments also afforded the arbitrators the opportunity to ask questions about aspects which were unclear.

22. Mr. BONELL (Italy) said that, in view of the considerable differences in that area between the common law and Roman law systems, he could accept a rewording of the final sentence of paragraph 1 so that it would read "If, however, the facts are largely undisputed and the issues concern law, it might be possible to request that the proceedings be conducted prevailingly or predominantly on the basis of documents only".

23. Mr. HOLTZMANN (United States of America) said that he felt as if he was reliving the discussion which had taken place 20 years earlier, when the Commission had decided by consensus that there should not be any bias whatsoever against hearings, on issues of either fact or law, in the event that one party chose such a hearing. It should be borne in mind that the Commission had already stated its position in that regard, both in its Arbitration Rules and in the Model Law. It would therefore have to proceed with extreme caution in introducing drafting changes, and it was not clear that that was ultimately the best solution.

24. Mr. ANDERSEN (Denmark) said he was not sure that the representative of the United States of America was correct in interpreting the provision to mean that the arbitrators were the ones who could request that the proceedings should be conducted on the basis of documents only. Perhaps the parties should be the ones to make that request. In his view, section D was not consistent with the proposal to override article 15 of the Arbitration Rules, which stated that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate". That was the basic rule in any tribunal. If the final sentence of paragraph 1 was interpreted as meaning that the parties could request that the proceedings should be conducted on the basis of documents only, he would not be opposed to retaining it.

25. Mr. BONELL (Italy) suggested stating that, at the request of the parties, the proceedings could be conducted predominantly on the basis of documents.

26. Mr. TUVAYANOND (Thailand) said that item (i) served to define the points at issue between the parties. The reference to the best procedures for resolving the issues, which was a procedural question, was therefore superfluous. And if the current text of paragraph 1 was retained, some sort of safety clause would have to be included to prevent the use of stalling tactics.

27. Mr. SEKOLEC (International Trade Law Branch) said that the provision was aimed at ensuring that the parties focused on the disputed points, without wasting time on methods that were not in dispute or on which agreement could be reached. That was explained in the first two sentences of paragraph 1. The rest of the paragraph was explanatory in nature and, strictly speaking, unnecessary.

28. Mr. ANDERSEN (Denmark) said that the meaning of paragraph 1 would have to be clarified. According to Italy and Denmark, it was the parties that should request that the proceedings should be conducted on the basis of documents only, while the United States construed the text to mean that the arbitral tribunal should ask the parties if they wished the proceedings to be conducted in that manner.

29. Mr. TUVAYANOND (Thailand) said that the arbitral tribunal was supposed to ask the parties whether or not they wished the proceedings to be conducted on the basis of documents only.

30. Mr. SEKOLEC (International Trade Law Branch) said that the parties should be the ones to decide whether a trial should be held or whether the proceedings should be conducted on the basis of documents. Nevertheless, paragraph 1 gave the arbitral tribunal the option of asking the parties if they wished to forgo a trial.

31. Mr. CHOUKRI SBAI (Morocco) said that he was not opposed to the United States proposal to delete the final sentence of paragraph 1. It would, however, be preferable to reword it to indicate that the arbitral tribunal could ask the parties if they wished the proceedings to be conducted on the basis of documents only.

32. Mr. HOLTZMANN (United States of America) said that the Moroccan suggestion could resolve one of the problems which had arisen, as it removed any distinction between issues of fact and issues of law. The current wording of the last sentence of paragraph 1 implied that trials were more necessary in the case of factual issues than of legal issues.

33. However, another problem remained: the fact that the tribunal could ask the parties whether they wished to forego a trial was somewhat prejudicial to them. That could have major consequences if both parties said that they did not wish to hold a trial but the arbitrators wished to interrogate the witnesses or ask questions on issues of law.

*The meeting was suspended at 4.35 p.m.
and resumed at 5.05 p.m.*

Chapter IV, section D, item (ii)

34. Mr. ABASCAL ZAMORA (Mexico) said that paragraphs 6 and 7 should be deleted as they merely offered advice to the parties and bore no relation to the content of the preparatory conference.

35. Mr. BONELL (Italy) said that paragraphs 6 and 7 were superfluous, and risky as well.

36. Mr. CHATURVEDI (India) expressed a preference for retaining the last sentence of paragraph 6.

37. Mr. TUVAYANOND (Thailand) said that paragraph 6 was of some use in that a more specific definition of the relief or remedy sought was necessary.

38. Mr. HOLTZMANN (United States of America) said that whether or not the second sentence of paragraph 6 was applicable depended on when the preparatory conference took place. It would not be applicable if the meeting took place before the presentation of statements of claim and defence. Even if the conference was held at a later stage, it would not be correct to state that the claimant might be uncertain as to the extent of its rights under the applicable law. There was a danger that, under some national legislation, the award could be *ultra vires* if it exceeded the remedy being sought.

39. Mr. TUVAYANOND (Thailand) said he did not understand how the points at issue could be defined before the statement of claims had been submitted. As to the concept of *ultra vires*, before knowing what recourse was available, the claimant had to know its rights under the law; paragraph 6 therefore appeared useful.

40. Mr. CHOUKRI SBAI (Morocco) was also in favour of deleting paragraphs 6 and 7. Under Moroccan law, tribunals could rule only on those matters that were brought before them, and it was therefore normal that the statement should specify what the claims were. Allowing the arbitrators to decide what was being sought would contradict a fundamental legal norm. A preparatory conference was the only way for the parties to know what they could do and how they should do it.

41. Mr. TUVAYANOND (Thailand) said that he would not insist on retaining paragraphs 6 and 7, since paragraph 8 was clear.

Chapter III, section D, item (iii)

42. Mr. LEVY (Canada) said that he did not agree at all with the current wording of item (iii). Above all, the first sentence of paragraph 9 touched on a very sensitive issue, in that if the arbitrators expressed an opinion regarding the order in which the issues were to be taken up, the parties might think that they had already formed an opinion on the issue being disputed. For that reason, he wondered whether a sentence warning them of that danger could not be added.

43. Mr. GRIFFITH (Observer for Australia) said that it was inappropriate to refer to the "partial", "interim" or "interlocutory" awards in paragraphs 10 and 11 because those paragraphs dealt solely with determining the order in which the points at issue were to be decided.

44. Mr. ABASCAL ZAMORA (Mexico) said that it was normal in a preparatory conference for the arbitral tribunal to be able to determine the order in which awards should be made. For example, if an arbitral tribunal agreed to follow a certain order and make an award on a question of jurisdiction within a certain period of time, it could run into problems and not have enough time to rule on the main issue.

45. Mr. CHATURVEDI (India) was in favour of retaining paragraph 9, except for the last sentence, which had nothing to do with determining the order in which the points at issue were to be taken up. The first sentence actually had to do with item (i). In fact, a separate paragraph was probably unnecessary since the tribunal would have to decide the order in which the points at issue should be taken up once they had been determined. The problem of paragraphs 10 and 11 was that the award had to be unique and final, while the rest would be partial, interim and interlocutory orders. Accordingly, the idea of limiting the award seemed inadequate.

46. Mr. TUVAYANOND (Thailand) said that regardless of how important it might be to determine the order in which the points at issue were taken up, paragraphs 10 and 11 seemed unnecessary to him; granting the arbitrators the power foreseen in them could even be dangerous.

47. Mr. BONELL (Italy) was in favour of retaining paragraphs 9, 10 and 11, although perhaps with some modifications. He believed that one of the principal objectives of a preparatory conference was to establish the order in which the points at issue should be taken up when they did not all have to be decided together, and to inform the parties of that order, at least to the extent that the tribunal considered appropriate.

48. Mr. HOLTZMANN (United States of America) said that, in his opinion, determining the order in which the points at issue should be taken up was related to whether some issues should be considered preliminary, such as jurisdiction or the applicable law, for example. Indicating the order in which non-preliminary issues should be taken up could suggest that the tribunal would tell the parties how they ought to defend their case. It was incumbent upon the tribunal to show extreme caution and not to influence the judgement of the claimant's attorney. As to the text of paragraphs 10 and 11, it was not enough to instruct or advise the arbitrators what to do if they felt an issue was preliminary. Regarding the disagreement about whether or not there were partial, interim or interlocutory awards, he recalled that paragraph 1 of article 32 of the UNCITRAL Arbitration Rules used the same terminology.

49. Mr. TUVAYANOND (Thailand) said that it was not simply a matter of determining whether one question was preliminary to another, since it could also be useful to establish an order of priority for the other issues, separating the main ones from those that were secondary. If the arbitral tribunal resolved the main issues, the parties might decide not to proceed with those remaining, for reasons of time or economy. Consequently, the tribunal had to be allowed to determine, in consultation with the parties, the order of priority of the various issues.

Chapter III, section E

50. Mr. HERRMANN (Secretary of the Commission), supported by Mr. BONELL (Italy), recalled that, according to the intro-

duction to the draft Guidelines (para. 39), the list of topics contained in sections A to T was intended to be as complete as possible, in order to cover all the points that an arbitral tribunal could include in the agenda of a preparatory conference. As a preparatory conference did not have to be held at the same stage of the arbitral proceedings (para. 29), and the stage at which it was held would influence the scope of its agenda (para. 30), it could not, generally speaking, be premature to consider certain kinds of questions at a preparatory conference, nor should that lead to a deletion or modification of the content of the draft Guidelines. It would be sufficient to state, with reference to all the topics included in the draft, that the tribunal should determine in each case whether at a given stage in the arbitral proceedings for which the preparatory conference was being held it was inappropriate or impractical to consider a specific topic.

51. Mr. HOLTZMANN (United States of America), supported by Mr. CHATURVEDI (India), said that paragraph 3 of section E should be deleted, inasmuch as it could be viewed as constituting a threat to the parties that the arbitral tribunal might say in the preparatory conference that the refusal without reason by one of them to admit a fact advanced by the other would be taken into account in apportioning the costs of the arbitration. While the tribunal was not precluded from taking the fact into account later on, announcing that beforehand would amount to coercion.

52. As to the suggestion made by the Secretary of the Commission, the considerations the latter had raised could be worded not only in a general way, but also in relation to specific items.

53. Mr. GRIFFITH (Observer for Australia) concurred with the view that paragraph 3 should be deleted or, in any case, revised in such a way as to remind the parties of the arbitral tribunal's authority in respect of the costs of arbitration and to indicate that such authority could be exercised if it was determined that the refusal to admit specific facts had been unreasonable.

The meeting rose at 6.05 p.m.

Summary record of the 538th meeting

Monday, 13 June 1994, at 10 a.m.

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (*continued*) (A/CN.9/396 and Add.1)

Chapter III

Section E (continued)

1. The CHAIRMAN, replying to a question raised by the representative of Thailand, said that paragraph 3, in brackets, was highly controversial and would therefore probably be deleted.

Section F

2. Mr. GRIFFITH (Observer for Australia) said that a basic principle of common law held that, in judicial proceedings, documentary evidence produced by the parties during the "discovery" process should enjoy a certain degree of confidentiality in that it

could only be used in the case at hand and could not be divulged. However, according to a decision rendered in a recent case in Australia, such protection did not extend to evidence submitted in arbitral proceedings. Many arbitration rules, including those of UNCITRAL, did not address the issue of confidentiality of evidence or testimony. Bearing in mind that it was precisely the confidential character of arbitration that was often a determining factor in the choice of that procedure, it would therefore be desirable for the Guidelines to deal, either in section F of the checklist or elsewhere, with the question of confidentiality.

3. Mr. HERRMANN (Secretary of the Commission) said that the secretariat had already anticipated that point. There was growing interest in the question of confidentiality, as the conclusions drawn during the preparation of the new World Intellectual Property Organization arbitration rules showed. It remained to be seen how the question should be addressed in the Guidelines. Suggestions from delegations on that topic would be welcome, even after the session.

4. Mrs. VERDON (Canada) said that during the consultations that had taken place in Canada regarding the Guidelines it had been pointed out that the question of disclosing confidential information was always a sensitive one, particularly since, under the laws of certain countries, confidentiality could no longer be invoked once information had been disclosed. It would thus be appropriate to include the question in the Guidelines, preferably in section F.

5. Mr. HOLTZMANN (United States of America) also felt that the check-list should include an item that would allow the parties to obtain information on the extent of confidentiality. A good example in that respect was article 20 of the UNCITRAL Arbitration Rules. It would also be better to use a word like "arrangement" in paragraphs 4 and 5 to avoid having to deal with matters of simple and irrefutable presumptions.

6. The penultimate sentence of paragraph 11 should be deleted, as it gave the impression that the Commission was not in favour of disclosing purely internal documents. Actually, internal documents such as the minutes of a meeting of a board of directors on a specific contract or lists of shareholders in cases where a person's shareholder status was being contested could be extremely important. The party that did not have access to them would have to be able to find out about them, which frequently would not be facilitated by their transmission to a third party. Finally, he saw a need to revise the final phrase in paragraph 13, which alluded to the risk of self-incrimination, a concept which by definition dealt with criminal rather than civil law.

7. Mr. SEKOLEC (International Trade Law Branch) explained that the conditions listed in paragraph 11 had been largely inspired by the International Bar Association's rules on production of evidence, which had been drawn up taking the standard practices of various legal systems into account. In that text, the condition concerning internal documents was imperative, barring all requests for communication of such documents, where paragraph 11 allowed for the possibility of leaving the decision up to the arbitral tribunal.

8. The CHAIRMAN felt that the text represented a happy medium and took into account the rules in effect in different systems regarding disclosure.

Section G

9. Mr. HOLTZMANN (United States of America) said he hoped that the secretariat would revise the final sentence of paragraph 3, as it was not clear whether it implied that employees could be heard as witnesses during an inspection.

Section H

10. Mr. HOLTZMANN (United States of America) said that the final sentence of paragraph 3, perhaps also inspired by the International Bar Association's rules of evidence, which were very flexible on that point if taken as a whole, strongly resembled a recommendation. The decision to take oral evidence must be left entirely to the parties. The Commission had to be absolutely neutral on that point, the best course being not to mention it at all. However, it could be prominently included in future guidelines on submission of evidence. In other words, either the topic should be discussed in greater detail or the sentence should be deleted entirely.

11. Mr. RENGGER (Germany) sought further clarification of paragraph 6, and especially on the various possible solutions.

12. Mr. SEKOLEC (International Trade Law Branch) explained that the solution mentioned in paragraph 6 was the simplest, since it stayed within the framework of arbitral proceedings. The other

solutions were based on certified written statements and thus required the involvement of external institutions.

13. Mr. CHOUKRI SBAI (Morocco) stressed that the solution mentioned in the last sentence of paragraph 6 was unknown in certain legal systems. In his country, for example, the oath was a *sine qua non* of evidence and could be dispensed with only in very exceptional cases. The sentence should therefore be reworded to say, for example, that the parties would agree to have the witnesses sign a written statement certifying the veracity of their testimony, or that the arbitral tribunal could propose that solution to the parties.

14. Mr. HOLTZMANN (United States of America) said that the representative of Morocco had put his finger on a problem that had to be taken into account in the Guidelines, i.e. the great diversity from one country to another of procedures for authenticating written statements, certifying signatures and taking oaths. It was therefore important that the arbitrators should be certain at the preparatory conference stage that the parties knew exactly what formalities had to be observed when written statements were submitted. It would also be useful to have more information about the way oath-taking was administered in connection with oral testimony by witnesses.

Section H

15. Mr. HOLTZMANN (United States of America) said that the secretariat had made a commendable effort under item (ii) to provide an overview of the rules for the production of evidence around the world. It was, however, an overly ambitious task that threatened to create more problems than it solved. For the purposes of the check-list, it was enough to try to decide how the parties and the arbitrators intended to take oral evidence from witnesses instead of proposing six or seven different methods. Paragraphs 8 to 12 could therefore be dispensed with.

16. Mr. BONELL (Italy) agreed in part with the representative of the United States of America, but thought that he went too far. Only paragraphs 8 and 9 needed to be deleted, as paragraphs 10 to 12 had their own practical importance.

17. Mr. HOLTZMANN (United States of America), referring to the first sentence of paragraph 15, noted that in many legal systems, particularly in the United States, the persons involved in the settlement of a dispute were treated in exactly the same way as any other witnesses. He suggested, therefore, that the phrase "it is widely held that" should be deleted, unless there was another way to restore the necessary balance to the paragraph.

Section I

18. The CHAIRMAN said that, in the absence of any comments on that section, he would take it that the Commission wished to approve it.

Section J

19. Mr. HOLTZMANN (United States of America), referring to paragraph 2 under item (i), said that while it was appropriate to ask the parties what materials they intended to submit and when, it was not appropriate to address the content of those submissions, as mentioned in the paragraph. The UNCITRAL Arbitration Rules, along with nearly all others, left that issue to the discretion of the parties. The only rules that went into detail even to the slightest degree, those of the International Centre for Settlement of Investment Disputes, did not go nearly as far as paragraph 2.

20. The Guidelines also should not discuss the advantages and disadvantages of simultaneous or consecutive submission of materials, as mentioned in paragraph 5, under item (iii). Everything

depended on the circumstances of the case, and it was better to allow the arbitral tribunal to decide for itself.

Section K

21. Mr. GRIFFITH (Observer for Australia) said that the remarks in that section appeared to be included under the heading "Agenda". The actual remark itself was of no interest and should be deleted. All that should be retained under the "Agenda" heading was: "Consider some practical details concerning writings and exhibits". The rest of the text would appear under the "Remarks" heading.

22. Mr. HERRMANN (Secretary of the Commission) explained that the section entitled "Agenda" had been considerably expanded because a proposal had been made to issue a separate brochure containing only the agenda items. "Consider some practical details concerning writings and exhibits" would thus be inadequate. If the proposal to issue such a brochure was not retained, there would be no problem in proceeding as the observer for Australia had suggested.

23. Mr. GRIFFITH (Observer for Australia) said he believed that it would indeed be wise to present separately the contents of the Guidelines, meaning the items themselves and some remarks directly related to them, along with the comments of a more general nature which were currently scattered throughout the text.

24. Mr. HERRMANN (Secretary of the Commission) said that what he had described was not exactly what the observer for Australia had in mind. The case he had mentioned would involve retaining the Guidelines in their current form and issuing a separate brochure several pages long containing a brief introduction and the items appearing under the heading "Agenda". Both that idea and that of the observer for Australia deserved further consideration.

25. Mr. GRIFFITH (Observer for Australia) said that the two proposals actually sought to address the same concern: that the essentials should be collected and presented clearly. His own proposal led him to withdraw his remark concerning section K. Perhaps it would be better to expand the "Agenda" headings in order to give an overview of the content of the Guidelines.

Section L

26. Mr. GRIFFITH (Observer for Australia) drew the attention of the secretariat to the fact that the issue of confidentiality, which had been raised in connection with submissions, applied also to hearings.

27. Mr. ABASCAL ZAMORA (Mexico), referring to paragraph 2, in brackets, said that his delegation found the paragraph acceptable with the exception of the second sentence, which invited the arbitrators to indicate to the parties at the hearing the strengths and weaknesses of their respective cases. That was very dangerous advice, and the sentence should be deleted.

28. Mr. HOLTZMANN (United States of America) also believed that it would be entirely premature for the arbitrators to give their opinion as to the strengths and weaknesses of the parties' cases at the hearing stage, except perhaps when the three arbitrators agreed that the presentation of an argument which was irrelevant, in their view, would be a waste of time. Such a scenario was highly improbable, of course, because the arbitrators would not have an opportunity to consult among themselves during the hearing, and it would be completely inappropriate for them to consult before having heard the parties. At any rate, that question had not been addressed in the Guidelines, which were supposed to offer recommendations on what to do at a preparatory

conference and not at a hearing. That comment applied not only to the second sentence but to all of paragraph 2, which should be deleted along with paragraph 5 for the same reasons.

29. In paragraph 7, the Guidelines recommended that the dates of hearings should not be fixed until the written submissions had been received. While that was probably justified in some situations, in others it could be important to fix the dates so that the parties could organize themselves accordingly. There again, it was evident that it would be preferable for the Guidelines to limit themselves to the essentials without trying to tell the arbitrators how they ought to conduct the arbitral proceeding. The fewer issues raised that could lend themselves to controversy in practice, the greater the chances that the Guidelines would be widely accepted.

*The meeting was suspended at 11.40 a.m.
and resumed at 12.25 p.m.*

30. Mr. CHATURVEDI (India) agreed with the representative of the United States of America that the issues raised under items (i), (ii) and (iii) were premature. No answer could be given to the first two unless the proceedings ran their course and it was deemed necessary to impose such deadlines. As for knowing the order in which the parties would make their oral presentations (item (iii)), paragraph 11 rightly stipulated that it was for the claimant to make his opening statement, after which the defendant was called upon to present his rebuttal.

31. His delegation also did not agree with the second sentence of paragraph 2, which stated that the hearing offered the arbitral tribunal an opportunity to indicate to the parties, in a fair and impartial manner what, in the view of the tribunal, were the strengths and weaknesses of their cases, because that was not one of the duties of an arbitral tribunal, any more than was the idea, expressed in the last sentence of paragraph 5, that the arbitral tribunal could assist in the narrowing of issues by giving the parties its assessment of the argued issues.

32. Mr. KOUVSHINOV (Russian Federation) said that, although he did not doubt that the Guidelines under consideration would be of great practical use, especially in the arbitration of particularly complex matters, on reading them, he had the impression that they were intended for proceedings of a legal nature. Commercial arbitration should be a flexible procedure that could be adapted to the settlement of various types of disputes. He feared that the Guidelines might lead to a kind of legal formalism.

33. Mr. HOLTZMANN (United States of America) was pleased that paragraph 13 noted that the examples given were in no way obligatory or exhaustive. He questioned the usefulness of paragraphs 11 and 12, however, which, in his view, were neither necessary nor strictly accurate. The purpose of the Guidelines was to point out to parties that it was desirable to establish the order of the various phases of the proceedings, not to tell the arbitrators how they were supposed to exercise their discretionary power, because many factors entered into such a decision. It should therefore be left to the arbitral tribunal, after consultation with the parties, to choose the procedural pattern to be followed, without spelling out in detail the various steps that the arbitral tribunal and the parties might wish to take.

34. His delegation's doubts as to some of the examples contained in paragraphs 11 and 12 had to do with the fact that one of the reasons often given for not enforcing awards made under the New York Convention and various domestic laws was that the defendant had not been allowed to present its arguments. Care should be taken, then, when speaking of hearings and witnesses, not to cite the current Guidelines in enforcement proceedings in support of the notion that one party had not been given an opportunity to present its defence.

35. Mr. CHATURVEDI (India) said that he favoured retaining paragraph 11, which he considered to be appropriate. The idea of considering whether hearings should be held, stated in the chapeau to section L, was unfounded, since hearings were almost inevitable. The chapeau should therefore be reworded.

36. Mr. ABASCAL ZAMORA (Mexico) said he fully agreed with the representative of the United States of America that paragraphs 11 and 12 were misleading and appeared to reflect the opposite of the flexibility arbitral proceedings were supposed to have, not to mention the fact that they could compromise the enforcement of an arbitral award by giving the impression that one of the parties had not been given an opportunity to present its arguments.

37. Mr. KOUVSHINOV (Russian Federation) said that, while he agreed with the representative of India that arbitral proceedings must involve hearings, he thought that the arbitral tribunal could be flexible; one could not exclude the possibility that the parties might reach an amicable settlement before the proceedings actually began. There would then be no need for hearings, and the arbitrators would simply be informed that the parties had reached an agreement.

38. Mr. HOLTZMANN (United States of America) said that paragraphs 14 and 15 (item (v)) were somewhat problematic in view of the wide range of practice that existed in the submission of notes to the arbitral tribunal. Although it was possible under certain legal systems for the parties to submit to the tribunal, either at the outset or at the end of their oral statements, notes summarizing their arguments and listing in detail the cases cited by the party concerned, such notes occasionally went so far as to cite cases which had not been mentioned or heard during the hearing or which the other party was hearing about for the first time.

39. That led him to wonder whether the parties ought to be allowed to submit such notes, particularly at the end of a hearing, since the other party was thus deprived of an opportunity to comment thereon, giving rise to the problem of unequal treatment of the parties.

40. What was more, the notion that such notes could be submitted after the hearing seemed to contradict article 29 of the UNCITRAL Arbitration Rules, which stipulated that the arbitral tribunal could, after ascertaining that the parties had no further submissions to make, declare the hearing closed. However, the closing of the hearing in itself posed the problem of its reopening as well as a whole series of related questions.

41. For that reason his delegation proposed that the wording of paragraphs 14 and 15 should be simplified.

42. Mr. CHATURVEDI (India) said that he fully endorsed paragraph 11, since the submission of notes seemed to him to be a means of facilitating the work of the arbitrators, and it was in any case permissible for the other party at the hearing to submit a *réplique*. In paragraph 15, the word "speeches" should be replaced by the word "arguments", which was more accurate.

43. As to the proposed wording of the third sentence of paragraph 17, under item (vi), which indicated that the presiding arbitrator could also consecutively dictate to a typist a summary of oral statements, his delegation questioned the practicality of such an arrangement, since in practice typists attended the hearings and took notes throughout.

44. Mr. KOUVSHINOV (Russian Federation), recalling that the Commission was still dealing with the preparatory conference phase, said that the essence of item (vi) was not so much determining whether notes could be submitted as it was determining

whether it was permissible to analyse the arguments and transcripts produced. In his view, the Commission should limit itself at present to the checking of transcripts.

Section M

45. Mr. ABASCAL ZAMORA (Mexico) said that he had found a major translation error in the Spanish text, which referred to the language or languages to be used in the hearings, whereas the English version, for example, correctly referred to the language or languages to be used in the proceedings. In addition, his delegation did not agree at all with the idea expressed in the first sentence of paragraph 2 that it might be useful to consider at the preparatory conference the extent to which the agreement of the parties or the determination by the arbitral tribunal was to be applied. In fact, the language of the proceedings was determined either jointly by the parties or, failing that, by the arbitral tribunal, which was empowered to conduct the arbitral proceedings as it deemed appropriate, provided that the principle of equality of the parties was respected and both parties were given an opportunity to present their arguments.

46. Mr. HOLTZMANN (United States of America) wondered whether, in the light of the statement by the representative of Mexico, the meaning of paragraph 2 had been accurately rendered in the English text as well. That paragraph stated that, apart from the manner in which the choice of language was made, emphasis should be placed on the scope or extent of the agreement—in other words, on whether or not all the documents submitted must be in the language of the proceedings and the agreement. Consequently, the English text should also be made more specific.

47. Mr. BONELL (Italy), pursuing the idea raised by the representative of the United States of America, said that the whole text should be improved since the provision was an important one which often gave rise to many problems.

48. Mr. ILLESCAS (Spain) agreed with the representative of Mexico that the Spanish text wrongly limited the scope of the agreement to the language of the hearings. The text should state clearly that what had to be done was, first, to settle the matter of the language to be used in the proceedings as a whole and, subsequently, to determine who should make that choice, something that was clearly not apparent from paragraphs 1 and 2 of the Spanish text and even less from the English text. That part of section M could thus stand to be reviewed. Also, paragraphs 1 and 2 had too didactic a tone which was out of place in a text intended for experts. In any case, those paragraphs were unnecessary.

49. Lastly, in addition to the relevant example of one specific problem in paragraph 2, the main problem raised was determining whether the language of the proceedings had to be decided at the outset and who was to take that decision.

50. Mr. AL-NASSER (Saudi Arabia) pointed out that the language of the proceedings was of particular importance given that the weaker party in a dispute was likely to be placed at a disadvantage by his poor command of the language of the proceedings. His delegation would prefer that the language of the proceedings should be that of the dispute, unless the parties agreed otherwise. The point of departure should be the language of the disputed transaction or, failing that, a language chosen by the parties.

51. The CHAIRMAN asked the representative of Saudi Arabia to clarify what he meant by the language of the dispute.

52. Mr. AL-NASSER (Saudi Arabia) replied that he meant the language in which the contract that was the subject of the dispute between the parties had been drafted.

The meeting rose at 1.05 p.m.

Summary record of the 539th meeting

Monday, 13 June 1994, at 3 p.m.

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 3.15 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section M

1. Mr. HOLTZMANN (United States of America), supported by Mr. GOH (Singapore), recalled that during the drafting of the Arbitration Rules, UNCITRAL had fully discussed the question of the language of arbitral proceedings, and that the appropriate guidelines were set out in article 17 of the Rules. The secretariat might therefore wish to bear the provisions of article 17 in mind when that section of the draft was revised.

2. Another source of concern for his delegation was the order of certain topics on the list. In the UNCITRAL Arbitration Rules and Model Law, the order of topics was somewhat different from the one followed in the check-list of possible topics for preparatory conferences. Language, for example, was a topic which appeared much earlier in the Rules, well before such topics as witnesses, hearings and written submissions. In the interest of clarity and to facilitate the search for rules, the secretariat might consider following the same general order as that of previous UNCITRAL documents.

Chapter III, section N

3. Mr. HOLTZMANN (United States of America) suggested that in preparing the revised version of the draft, the secretariat might mention the fact that administrative support was often provided by arbitral institutions. There was a broad network of such institutions throughout the world, and it must be recognized that they operated not only independently, but in cooperation with one another.

Chapter III, section O

4. Mr. KOUVSHINOV (Russian Federation) said that some legal systems had another office in addition to that of secretary or registrar, called *rapporteur* in Russian. That person played an active role in keeping the arbitrators informed of the substance of the matters under consideration.

5. The CHAIRMAN suggested that the representative of the Russian Federation should tell the secretariat which term he considered most appropriate or what the duties of the person occupying the position to which he had referred were.

Chapter III, section P

6. The CHAIRMAN noted that paragraph 2 was in square brackets, which indicated that the secretariat had left it to the Commission to determine whether it should be included in the document.

7. Mr. HOLTZMANN (United States of America) said that the purpose of paragraph 2 was to provide the arbitral tribunal with instructions concerning the factors which it should take into account. It was not necessarily a topic for the preparatory conference, but sought to inform the arbitral tribunal of what it ought to do or of considerations it might take into account after

a preparatory conference or as the result of one. Such general instructions were unnecessary in the document under consideration. Furthermore, the order in which factors were listed, from (a) to (g), seemed to suggest that some were more important than others. For example, the question relating to the enforcement of awards was mentioned last, perhaps because enforcement was the last stage in the chronology of events; in any case, that placement tended to give the impression that there was an order of importance. The simplest solution was to delete paragraph 2 entirely.

Chapter III, section Q

8. Mr. BONELL (Italy) proposed that the section should be deleted from the check-list. In the first place, he did not see the purpose of paragraphs 1 to 3 under item (i). If the arbitral tribunal sought the views of the parties, which would be surprising at such an early stage, either both parties might refuse to reply, which would make the arbitrators feel uncomfortable, or else they might begin to argue. He also wondered what would happen if one of the parties gave incorrect information or refused to disclose certain information.

9. Although he did not reject point (ii) quite so categorically, he did believe it was a question which the arbitrators should decide or, as was the case under the legal system of some countries, it might be something that should be left entirely to the discretion of a particular party. He would therefore prefer that item Q should not be included in the check-list.

10. Mr. ABASCAL ZAMORA (Mexico) suggested that section Q should be deleted from the check-list. Mandatory provisions did exist, and it was up to the arbitrators to obtain knowledge of and interpret them. The task referred to in item (ii) was the responsibility of the parties. The mandate of the arbitrators terminated when they made an award, and it generally was the responsibility of the parties to file the award in places where such a requirement existed. To suggest otherwise might encourage inexperienced arbitrators to take that step, when in reality those responsibilities did not arise until after the award was made.

11. Mr. HOLTZMANN (United States of America) said that he, too, had reservations regarding the paragraphs under item (i) and would not object to their deletion, although he would prefer to retain item (ii). In some countries the arbitral tribunal itself was required to register the award. Accordingly, if arbitrators from other countries were involved in arbitral proceedings in a place where the requirement existed, it was important to think about what would happen if those arbitrators were not told about it; would they be allowed to hire lawyers to find out such information, and who would pay the costs of registering the award or of translating it if a translation was required for registration purposes? Those were questions which would be very difficult to resolve at the end of the proceedings and which therefore should be clarified at the outset. To sum up, his delegation favoured retaining (ii) in section Q, which would require amending the title of the section, a task that could be left to the secretariat.

Chapter III, section R

12. Mr. ABASCAL ZAMORA (Mexico) suggested that it might be better if section R formed a separate chapter of the draft

Guidelines—chapter IV, for example—and contained information along the lines of that contained in the current section, which should be borne in mind in multi-party arbitration.

13. Mr. HOLTZMANN (United States of America) said that multi-party arbitration was an extremely complex issue, and he commended the secretariat for having handled it quite well. However, some parts in which the arbitrators were told how to proceed should be deleted, since those issues ought to be resolved in accordance with the circumstances of individual cases and deferred until there was greater consensus in the arbitration community as to how such cases should be handled.

14. In paragraph 4, the first sentence should be retained and the remainder of the paragraph deleted. In addition to creating problems similar to those already indicated, paragraph 6 seemed to suggest in its final sentence that a party did not have to be present at some of the hearings. When an arbitration involved more than two parties, UNCITRAL should avoid any suggestion that it was not entirely up to the parties to decide whether they wished to be present or not. In summary, subject to those two deletions, his delegation approved section R.

15. Mr. GRIFFITH (Observer for Australia) said that it might be better to include paragraphs 1, 2 and 3, which were helpful in defining the main characteristics of a multi-party arbitration, in the introduction to the draft Guidelines. He also suggested that the secretariat should consider the impact which multi-party arbitration might have on other parts of the document, such as section F, on documentary evidence.

Chapter III, section T

16. Mr. ABASCAL ZAMORA (Mexico) said that there was something missing in the draft Guidelines, since no reference was made to the admissibility or evidentiary effect of instruments transmitted by means of electronic data interchange (EDI) or other similar methods. That issue would arise with increasing frequency in international arbitration, given the growing use of EDI. The secretariat should take into account the results of the work of the Working Group on Electronic Data Interchange in order to incorporate them in the Guidelines where appropriate.

17. Mr. HOLTZMANN (United States of America) said that he fully agreed with the representative of Mexico regarding the need to take into account the impact of electronic data interchange. Another matter which should perhaps be included in the Guidelines had to do with communication between the parties and the arbitral tribunal. The parties might be uncertain as to the most appropriate ways of communicating with the tribunal, particularly in cases involving special arbitration or where the arbitral institution did not have an established procedure. It would be helpful if one of the topics of the preparatory conference that the arbitrators and the parties could jointly discuss was the most appropriate way of communicating with one another.

18. Mr. CHOUKRI SBAI (Morocco) brought up an issue which arose in the legislation of his country, namely, situations in which the death, withdrawal or illness of an arbitrator terminated an arbitration unless the agreement between the parties provided otherwise or they agreed that it should continue.

19. Mr. SEKOLEC (International Trade Law Branch) said that the matter normally was resolved by the arbitration rules being applied; it was therefore unnecessary to include it in the draft Guidelines.

20. Mr. JONKMAN (Observer for the Permanent Court of Arbitration) said that he would recommend to his organization and to arbitrators that they should use the Guidelines as soon as

they were issued. He felt that they could prove quite useful, not only because the provisions governing an arbitration were usually inadequate, but also because arbitrators generally were not very experienced with international arbitration.

21. The CHAIRMAN said that before moving on to the next item on the Commission's agenda he wished to know the Commission's views on how to proceed in the future with regard to the draft Guidelines. It had already been agreed that the secretariat would compile the results of the initial discussion and consolidate them later on with those of the Congress of the International Council for Commercial Arbitration (ICCA) to be held in Vienna in November 1994. The Commission might wish to decide at the current stage whether those results should be reviewed by a working group or perhaps by a group of experts which would meet during the first quarter of 1995, before they were submitted to UNCITRAL at its twenty-eighth session, which would probably be held in Vienna in May 1995.

22. Mr. BURMAN (United States of America) said that in view of the positive outcome of the current debate, his delegation had changed its mind and believed that it might be useful to convene a working group to consider the draft Guidelines prior to the Commission's twenty-eighth session in order to help UNCITRAL complete its consideration of the item. However, before a decision was taken, it must be borne in mind that UNCITRAL might have before it at its next session two documents which required priority attention, one relating to independent guarantees and the other to electronic data interchange. Consequently, the best course of action would seem to be for the secretariat to consolidate the results of the current debate with those of the forthcoming ICCA Congress, perhaps with the help of a group of experts, and for the Commission to decide in 1995, in the light of its workload, whether to convene a working group to accelerate consideration of the draft Guidelines.

23. Ms. VERRALL (United Kingdom) endorsed the United States proposal, since she did not feel it was necessary to convene a working group before the Commission's twenty-eighth session. The secretariat could convene a working group immediately following the November Congress of the International Council for Commercial Arbitration and consolidate the results in a document which it would transmit to delegations sufficiently in advance for them to be able to consider it thoroughly before the twenty-eighth session.

24. The CHAIRMAN suggested that, after considering the document to be prepared by the secretariat, delegations should send their written observations to facilitate its later work, particularly with regard to the various language versions of the text.

25. Mr. BONELL (Italy) said it was unfortunate that only a few delegations, including his own, wanted the Commission to take a decision on the procedure to be followed in the future regarding the draft Guidelines. He disagreed that it was not the right time to take a decision, and he did not think that the future of the text should be made contingent on the results of the work of other forums, such as ICCA, perhaps consolidating them through an informal working group. It would be far more appropriate for the Commission itself to take a decision on the matter.

26. Mr. RENGGER (Germany) said that the Commission should not spend additional time on a second review of the Guidelines or try to turn itself into a drafting group, since it was not drawing up a legal instrument. Agreement had already been reached on the principles, and the Commission should be able to conclude its consideration of the item at its next session.

27. Mr. CHOUKRI SBAI (Morocco) said he was pleased that ideas and opinions from different legal systems had been expressed in the Commission. Since it was not a legislative body,

the Commission should endeavour to reach compromises, which would benefit those who used arbitration.

28. The CHAIRMAN said that it was up to the secretariat to decide whether to convene a group of experts in order to facilitate

and expedite the Commission's work at its next session. He added that the Commission had concluded its consideration of the agenda item.

The meeting rose at 4.25 p.m.

Summary record of the 540th meeting

Wednesday, 15 June 1994 at 10 a.m.

Chairman: Mr. MORÁN (Spain)

The meeting was called to order at 10.15 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (*continued*) (A/CN.9/XXVII/CRP.2/Add.4, CRP.3 and CRP.5)

Report of the drafting group (continued) (A/CN.9/XXVII/CRP.2/Add.4)

1. Mr. CHATURVEDI (India) said that the footnote on the first page of document A/CN.9/XXVII/CRP.2/Add.1 reflected his delegation's position more accurately than the one on the first page of document A/CN.9/XXVII/CRP.2/Add.4. The wording "without thereby superseding the UNCITRAL Model Law on Procurement of Goods and Construction" was especially regrettable, since neither UNCITRAL nor the drafting group had a mandate to supersede the Model Law adopted at the previous session. He regretted that his proposal to insert a sentence indicating that the previous Model Law would remain intact had not been adopted. He also expressed surprise that the last sentence of that footnote referred to a *Guide to Enactment*, which was as yet only a draft amendment to the old *Guide to Enactment* of the UNCITRAL Model Law on Procurement of Goods and Construction (A/CN.9/393).

2. Mr. HUNJA (International Trade Law Branch) said that the wording cited by the representative of India was intended precisely to clarify the relationship between the two Model Laws and that the phrase "without thereby superseding" made it clear that the new Model Law including services left did not alter the text of the UNCITRAL Model Law on procurement of Goods and Construction adopted at the twenty-sixth session. The guide referred to in the last sentence was the full text which the secretariat would produce by amalgamating documents A/CN.9/393 and A/CN.9/394 in order to incorporate the draft amendments adopted at the current session into the earlier *Guide*. The footnote did not therefore refer only to the draft amendments, but to the new guide, which would include the amendments to the earlier *Guide* adopted by UNCITRAL.

3. Mr. WALLACE (United States of America) endorsed the remarks by the representative of the secretariat and proposed that the secretariat should prepare a concordance between the articles of the earlier Model Law and those of the new one. As those articles had been renumbered and put in very different order, that would make things much easier for representatives and legislators.

4. Mr. GOH (Singapore) suggested that the words "and Services" in the first sentence of the footnote should be underlined to draw a clear distinction between the titles of the two Model Laws.

5. Mr. CHATURVEDI (India) insisted that it should have been made clear that the first Model Law would remain "intact" rather than using the word "replace" since there had never been any question of replacing it. The reference to the *Guide* was inappropriate,

since it had been agreed only to discuss the additions which would be made to the old Model Law in order to include the procurement of services.

6. Mr. GRIFFITH (Observer for Australia) said that he accepted the proposed text in the light of the explanations provided by the representative of the secretariat. The text was unambiguous as worded and did in fact meet the concerns expressed by the representative of India.

7. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt the text of the footnote on the first page of document A/CN.9/XXVII/CRP.2/Add.4, as it stood.

8. *It was so decided.*

9. The CHAIRMAN said that the footnote referring to the title of article 16, the title of chapter III *bis*, article 41 *ter* and article 41 *quater* had all been reworded to meet the wishes of delegations and that those texts should not give rise to any objections.

10. Mr. CHATURVEDI (India) wondered why, in the changes proposed to article 41 *quater*, the expression "suppliers and contractors" had been replaced by the expression "suppliers or contractors".

11. Mr. HUNJA (International Trade Law Branch) said that the drafting group had sought to bring the text of article 41 *quater* into line with the provisions relating to tendering and evaluation of tenders.

12. The CHAIRMAN said that the changes made to article 41 *sexies*, 41 *sexies bis* and 41 *sexies quater* were purely formal. If he heard no objection, he would take it that the Commission wished to adopt document A/CN.9/XXII/CRP.2/Add.4.

13. *It was so decided.*

Adoption of the Model Law and recommendation (A/CN.9/XXVII/CRP.5)

14. Mr. BURMAN (United States of America) proposed that in paragraph 2 of the draft resolution contained in document A/CN.9/XXVII/CRP.5, the phrase "interested bodies" should be replaced by a reference to international lending organizations and to regional development finance institutions. Those two groups of international agencies were among the main users of the Model Law, which was why it seemed useful to mention them in that context, provided that they did not conflict with standard practice in respect of United Nations resolutions.

15. Mr. CHATURVEDI (India) asked whether the second preambular paragraph of the preamble was a statement of fact. He

thought that in the fourth preambular paragraph it would be preferable to say "at the present session" rather than "at that session", in order to avoid any possible ambiguity.

16. Mr. HERRMANN (Secretary of the Commission) said that the wording of the second preambular paragraph had been used in the draft resolution adopted at the previous session of the Commission and that the General Assembly had endorsed it. As far as he knew, nothing had changed in that respect.

17. With regard to the proposal made by the representative of the United States of America, he did not think there was any rule forbidding the mention of financing or loan institutions in United Nations resolutions. That possibility was left to the discretion of UNCITRAL, but it seemed preferable to leave the text as it was and to refer to "Governments and other interested bodies" without being more precise.

18. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt the draft resolution contained in document A/CN.9/XXVII/CRP.5.

19. *It was so decided.*

Draft paragraphs for the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/XXVII/CRP.3)

20. Mr. BURMAN (United States of America) commended the secretariat for its prompt editing of the text, which should replace the footnote to the Model Law, whose substance had been preserved.

21. Mr. JAMES (United Kingdom) joined the representative of the United States of America in commending the secretariat. With regard to the text in question, he had only minor reservations of an editorial nature. At the end of paragraph 13, the phrase "not appropriate or feasible" echoed the words that had been used to refer to tendering in the earlier *Guide*. The word "appropriate" had in fact been used in the Model Law to refer to procurement of services. Under what had become article 16, States could choose the method of tendering if it was more appropriate than the principal method. The wording of article 13 *bis* could perhaps be a little less prescriptive towards those States which adopted the Model Law. In the last sentence of article 13 *bis*, the words "are in many respects similar" would benefit from being made more precise. It might be useful to explain under what circumstances States might wish to choose methods other than those specified in article 17, especially since the principal method for the procurement of services involved a certain number of obligatory stages which were spelt out in the Model Law, while other methods were much more flexible.

22. Mr. GRIFFITH (Observer for Australia) said that in the phrase "in many respects similar", the word "similar" did not mean "identical", and he could not support the statement made by the representative of the United Kingdom.

23. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt document A/CN.9/XXVII/CRP.3.

24. *It was so decided.*

The discussion covered in the summary record ended at 11 a.m.

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CONTENTS

	Page
I. GENERAL	421
II. INTERNATIONAL SALE OF GOODS	422
III. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION ..	426
IV. INTERNATIONAL TRANSPORT	429
V. INTERNATIONAL PAYMENTS	430
VI. INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT ...	431
VII. PROCUREMENT	431
VIII. CROSS-BORDER INSOLVENCY	432
<i>Annex.</i> Check-list of short titles of UNCITRAL legal texts as cited in the annotations to this bibliography and their equivalents in full	432

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Wallace, D., Jr. UNCITRAL Model Law on Procurement of Goods, Construction and Services: the addition of services. *Public procurement law review* (London, United Kingdom) 6: CS 218-219, 1994.

This is a short presentation of the new UNCITRAL Model Procurement Law (1994).

— The changing world of national procurement systems: global reformation. *Public procurement law review* (London, United Kingdom) 2:57-62, 1995.

Reprint.

Westring, G. Multilateral and unilateral procurement regimes — to which camp does the UNCITRAL Model Law on Procurement belong? *Public procurement law review* (London, United Kingdom) 4:142-151, 1994.

VIII. Cross-border insolvency

Colloquium on Cross-Border Insolvency (17-19 April 1994, Vienna, Austria)

Colloquium on Cross-Border Insolvency / J. F. Fletcher, ed. *International insolvency review*: International Association of Insolvency Practitioners; INSOL (London, United Kingdom) 4:1-115, 1995.

Special conference issue.

ANNEX

Check-list of short titles of UNCITRAL legal texts as cited in the annotations to this bibliography and their equivalents in full

Short title	Full title
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods (New York, 1974, as amended by Vienna 1980 Protocol)
Terminal Operators Convention (1991)	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)
—	UNCITRAL Arbitration Rules (1976)
—	UNCITRAL Conciliation Rules (1980)
UNCITRAL Credit Transfer Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992)
UNCITRAL Model Arbitration Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985)
UNCITRAL Model Procurement Law (1994)	UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)

V. CHECK-LIST OF UNCITRAL DOCUMENTS

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A. List of documents before the Commission at its twenty-seventh session		
<i>1. General series</i>		
A/CN.9/383	Provisional agenda	Not reproduced
A/CN.9/384	International payments: UNCITRAL Model Law on International Credit Transfers	Part two, VI, A
A/CN.9/385	Liability of operators of transport terminals: United Nations Convention on the Liability of Operators of Transport Terminals in International Trade	Part two, VII
A/CN.9/386	International payments: United Nations Convention on International Bills of Exchange and International Promissory Notes	Part two, VI, B
A/CN.9/387	Electronic data interchange: report of the Working Group on Electronic Data Interchange on the work of its twenty-sixth session	Part two, III, A
A/CN.9/388	International contract practices: report of the Working Group on International Contract Practices on the Work of its twentieth session	Part two, II, A
A/CN.9/389	Procurement: report of the Working Group on the New International Economic Order on the work of its sixteenth session	Part two, I, A
A/CN.9/390	Electronic data interchange: report of the Working Group on Electronic data interchange on the work of its twenty-seventh session	Part two, III, C
A/CN.9/391	International contract practices: report of the Working Group on International Contract Practices on the Work of its twenty-first session	Part two, II, C
A/CN.9/392	Procurement: report of the Working Group on the New International Economic Order on the work of its seventeenth session	Part two, I, C
A/CN.9/394	Procurement: draft amendments to the Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction	Part two, I, E
A/CN.9/395	Coordination of work: Uniform Customs and Practice for Documentary Credits	Part two, VIII
A/CN.9/396 and Add.1	International commercial arbitration: draft guidelines for preparatory conferences in arbitral proceedings	Part two, IV
A/CN.9/397	Possible future work: legal aspects of receivables financing	Part two, V, A
A/CN.9/398	Possible future work: cross-border insolvency: report on UNCITRAL—INSOL Colloquium on Cross-Border Insolvency	Part two, V, B

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/399	Possible future work: build-operate-transfer projects	Part two, V, C
A/CN.9/400	Training and assistance: training and technical assistance	Part two, X
A/CN.9/401	Status of UNCITRAL texts: status of Conventions	Part two, IX, A
A/CN.9/401/Add.1	Status of UNCITRAL texts: status of the Hamburg Rules	Part two, IX, B
A/CN.9/403	Guide to enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services	Part three, II
A/CN.9/41	Bibliography of recent writings related to the work of UNCITRAL	Part three, IV

2. Restricted series

A/CN.9/XXVII/CRP.1 and Add.1-13	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session	Not reproduced
A/CN.9/XXVII/CRP.2	Report of the drafting group	Not reproduced
A/CN.9/XXVII/CRP.3	Draft paragraphs for the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services	Not reproduced
A/CN.9/XXVII/CRP.4	ICC Uniform Customs and Practice for Documentary Credits (UCP 500)	Not reproduced
A/CN.9/XXVII/CRP.5	Adoption of the Model Law and recommendation: draft resolution	Not reproduced

3. Information series

A/CN.9/XXVII/INF.1/Rev.1	List of participants	Not reproduced
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B. List of documents before the Working Group on the New International Economic Order at its sixteenth session

1. Working papers

A/CN.9/WG.V/WP.37	Provisional agenda	Not reproduced
A/CN.9/WG.V/WP.38	Draft model legislative provisions on procurement of services	Part two, I, B

2. Restricted series

A/CN.9/WG.V/XVI/CRP.1 and Add.1-6	Draft report of the Working Group on the New International Economic Order on the work of its sixteenth session	Not reproduced
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3. Information series

A/CN.9/WG.V/XVI/INF.1	List of participants	Not reproduced
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C. List of documents before the Working Group on the New International Economic Order at its seventeenth session

1. Working papers

A/CN.9/WG.V/WP.39	Provisional agenda	Not reproduced
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<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/WG.V/WP.40	Draft amendments to the UNCITRAL Model Law on Procurement of Goods and Construction to incorporate procurement of services	Part two, I, D
2. Restricted series		
A/CN.9/WG.V/XVII/CRP.1 and Add.1-7	Draft report of the Working Group on the New International Economic Order on the work of its seventeenth session	Not reproduced
A/CN.9/WG.V/XVII/CRP.2 and Add.1-4	Report of the drafting group on UNCITRAL Model Law on Procurement of Goods, Construction and Services	Not reproduced
3. Information series		
A/CN.9/WG.V/XVII/INF.1	List of participants	Not reproduced
D. List of documents before the Working Group on the International Contract Practices at its twentieth session		
1. Working papers		
A/CN.9/WG.II/WP.79	Provisional agenda	Not reproduced
A/CN.9/WG.II/WP.80	Further revision of draft Convention: articles 1 to 17	Part two, II, B
2. Restricted series		
A/CN.9/WG.II/XX/CRP.1 and Add.1-6	Draft report of the Working Group on International Contract Practices on the work of its twentieth session	Not reproduced
3. Information series		
A/CN.9/WG.II/XX/INF.1	List of participants	Not reproduced
E. List of documents before the Working Group on Electronic Data Interchange at its twenty-sixth session		
1. Working papers		
A/CN.9/WG.IV/WP.56	Provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.57	Draft uniform rules on the legal aspects of electronic data interchange (EDI) and related means of trade data communication	Part two, III, B, 1
A/CN.9/WG.IV/WP.58	Proposal by the United Kingdom of Great Britain and Northern Ireland	Part two, III, B, 2
2. Restricted series		
A/CN.9/WG.IV/XXVI/CRP.1 and Add.1-11	Draft report of the Working Group on Electronic Data Interchange on the work of its twenty-sixth session	Not reproduced
3. Information series		
A/CN.9/WG.IV/XXVI/INF.1	List of participants	Not reproduced

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
F. List of documents before the Working Group on Electronic Data Interchange at its twenty-seventh session		
1. Working papers		
A/CN.9/WG.IV/WP.59	Provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.60	Revised articles of draft uniform rules on the legal aspects of electronic data interchange and related means of data communication	Part two, III, D
2. Restricted series		
A/CN.9/WG.IV/XXVII/CRP.1 and Add.1-10	Draft report of the Working Group on Electronic Data Interchange on the work of its twenty-seventh session	Not reproduced
A/CN.9/WG.IV/XXVII/CRP.2	Proposal by the French delegation	Not reproduced
3. Information series		
A/CN.9/WG.II/XXVII/INF.1	List of participants	Not reproduced

VI. LIST OF UNCITRAL DOCUMENTS REPRODUCED IN THE PREVIOUS VOLUMES OF THE YEARBOOK

This list indicates the particular volume, year, part, chapter and page where documents relating to the work of the Commission were reproduced in previous volumes of the *Yearbook*; documents that are not listed 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);
 - (b) Working Group II: International Sale of Goods (1968 to 1978: first to eleventh session; International Contract Practices (1981 to 1989: fourteenth and subsequent sessions)
 - (c) Working Group III: International Legislation on Shipping
 - (d) Working Group IV: International Negotiable Instruments (1974 to 1987: seventh to twentieth session); International Payments (1988 to 1992: twenty-first to twenty-fourth session); Electronic Data Interchange (1993: twenty-fifth and subsequent sessions)
 - (e) Working Group V: New International Economic Order
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.

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
1. Reports on the annual sessions of the Commission			
A/7216 (first session)	Volume I: 1968-1970	Part two, I, A	71
A/7618 (second session)	Volume I: 1968-1970	Part two, II, A	94
A/8017 (third session)	Volume I: 1968-1970	Part two, III, A	129
A/8417 (fourth session)	Volume II: 1971	Part one, II, A	9
A/8717 (fifth session)	Volume III: 1972	Part one, II, A	9
A/9017 (sixth session)	Volume IV: 1973	Part one, II, A	11
A/9617 (seventh session)	Volume V: 1974	Part one, II, A	13
A/10017 (eighth session)	Volume VI: 1975	Part one, II, A	9
A/31/17 (ninth session)	Volume VII: 1976	Part one, II, A	9
A/32/17 (tenth session)	Volume VIII: 1977	Part one, II, A	11
A/33/17 (eleventh session)	Volume IX: 1978	Part one, II, A	11
A/34/17 (twelfth session)	Volume X: 1979	Part one, II, A	11
A/35/17 (thirteenth session)	Volume XI: 1980	Part one, II, A	7
A/36/17 (fourteenth session)	Volume XII: 1981	Part one, A	3
A/37/17 and Corr.1 (fifteenth session)	Volume XIII: 1982	Part one, A	3
A/38/17 (sixteenth session)	Volume XIV: 1983	Part one, A	3
A/39/17 (seventeenth session)	Volume XV: 1984	Part one, A	3
A/40/17 (eighteenth session)	Volume XVI: 1985	Part one, A	3
A/41/17 (nineteenth session)	Volume XVII: 1986	Part one, A	3
A/42/17 (twentieth session)	Volume XVIII: 1987	Part one, A	3
A/43/17 (twenty-first session)	Volume XIX: 1988	Part one, A	3
A/44/17 (twenty-second session)	Volume XX: 1989	Part one, A	3
A/45/17 (twenty-third session)	Volume XXI: 1990	Part one, A	3

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/46/17 (twenty-fourth session)	Volume XXII: 1991	Part one, A	3
A/47/17 (twenty-fifth session)	Volume XXIII: 1992	Part one, A	3
A/48/17 (twenty-sixth session)	Volume XXIV: 1993	Part one, A	3

2. Resolutions of the General Assembly

2102 (XX)	Volume I: 1968-1970	Part one, II, A	18
2205 (XXI)	Volume I: 1968-1970	Part one, II, E	65
2421 (XXIII)	Volume I: 1968-1970	Part two, I, B, 3	92
2502 (XXIV)	Volume I: 1968-1970	Part two, II, B, 3	127
2635 (XXV)	Volume II: 1971	Part one, I, C	7
2766 (XXVI)	Volume III: 1972	Part one, I, C	7
2928 (XXVII)	Volume IV: 1973	Part one, I, C	8
2929 (XXVII)	Volume IV: 1973	Part one, I, C	8
3104 (XXVIII)	Volume V: 1974	Part one, I, C	10
3108 (XXVIII)	Volume V: 1974	Part one, I, C	10
3316 (XXIX)	Volume VI: 1975	Part one, I, C	6
3317 (XXIX)	Volume VI: 1975	Part three, I, B	297
3494 (XXX)	Volume VII: 1976	Part one, I, C	7
31/98	Volume VIII: 1977	Part one, I, C	7
31/99	Volume VIII: 1977	Part one, I, C	7
31/100	Volume XIII: 1977	Part one, I, C	7
32/145	Volume IX: 1978	Part one, I, C	8
32/438	Volume IX: 1978	Part one, I, C	8
33/92	Volume X: 1979	Part one, I, B	8
33/93	Volume X: 1979	Part one, I, C	8
34/142	Volume XI: 1980	Part one, I, C	4
34/143	Volume XI: 1980	Part one, I, C	4
34/150	Volume XI: 1980	Part three, III	166
35/166	Volume XI: 1980	Part three, III	166
35/51	Volume XI: 1980	Part one, II, D	31
35/52	Volume XI: 1980	Part one, II, D	31
36/32	Volume XII: 1981	Part one, D	20
36/107	Volume XII: 1981	Part three, I	269
36/111	Volume XII: 1981	Part three, II	270
37/103	Volume XIII: 1982	Part three, III	425
37/106	Volume XIII: 1982	Part one, D	21
37/107	Volume XIII: 1982	Part one, D	21
38/128	Volume XIV: 1983	Part three, III	275
38/134	Volume XIV: 1983	Part one, D	21
38/135	Volume XIV: 1983	Part one, D	21
39/82	Volume XV: 1984	Part one, D	23
40/71	Volume XVI: 1985	Part one, D	47
40/72	Volume XVI: 1985	Part one, D	47
41/77	Volume XVII: 1986	Part one, D	37
42/152	Volume XVIII: 1987	Part one, D	41
42/153	Volume XVIII: 1987	Part one, E	43
43/165 and annex	Volume XIX: 1988	Part one, D	19
43/166	Volume XIX: 1988	Part one, E	20
44/33	Volume XX: 1989	Part one, E	37
45/42	Volume XXI: 1990	Part one, D	18
46/56	Volume XXII: 1991	Part one, D	47
47/34	Volume XXIII: 1992	Part one, D	25
48/32	Volume XXIV: 1993	Part one, D	39
48/33	Volume XXIV: 1993	Part one, D	40
48/34	Volume XXIV: 1993	Part one, D	40

3. Reports of the Sixth Committee

A/5728	Volume I: 1968-1970	Part one, I, A	5
A/6396	Volume I: 1968-1970	Part one, II, B	18
A/6594	Volume I: 1968-1970	Part one, II, D	58
A/7408	Volume I: 1968-1970	Part two, I, B, 2	88
A/7747	Volume I: 1968-1970	Part two, II, B, 2	121
A/8146	Volume II: 1971	Part one, I, B	3
A/8506	Volume III: 1972	Part one, I, B	3
A/8896	Volume IV: 1973	Part one, I, B	3

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/9408	Volume V: 1974	Part one, I, B	3
A/9920	Volume VI: 1975	Part one, I, B	3
A/9711	Volume VI: 1975	Part three, I, A	297
A/10420	Volume VII: 1976	Part one, I, B	3
A/31/390	Volume VIII: 1977	Part one, I, B	3
A/32/402	Volume IX: 1978	Part one, I, B	3
A/33/349	Volume X: 1979	Part one, I, B	3
A/34/780	Volume XI: 1980	Part one, I, B	4
A/35/627	Volume XI: 1980	Part one, II, C	30
A/36/669	Volume XII: 1981	Part one, C	20
A/37/620	Volume XIII: 1982	Part one, C	20
A/38/667	Volume XIV: 1983	Part one, C	20
A/39/698	Volume XV: 1984	Part one, C	22
A/40/935	Volume XVI: 1985	Part one, C	46
A/41/861	Volume XVII: 1986	Part one, C	37
A/42/836	Volume XVIII: 1987	Part one, C	40
A/43/820	Volume XIX: 1988	Part one, C	18
A/C.6/43/L.2	Volume XIX: 1988	Part three, II, A	187
A/43/405 and Add.1-3	Volume XIX: 1988	Part three, II, B	188
A/44/453 and Add.1	Volume XX: 1989	Part one, C	34
A/44/723	Volume XX: 1989	Part one, D	36
A/45/736	Volume XXI: 1990	Part one, C	18
A/46/688	Volume XXII: 1991	Part one, C	46
A/47/586	Volume XXIII: 1992	Part one, C	25
A/48/613	Volume XXIV: 1993	Part one, C	38

4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development

A/7214	Volume I: 1968-1970	Part two, I, B, 1	86
A/7616	Volume I: 1968-1970	Part two, II, B, 1	121
A/8015/Rev.1	Volume II: 1971	Part one, I, A	3
TD/B/C.4/86, annex I	Volume II: 1971	Part two, IV	137
A/8415/Rev.1	Volume III: 1972	Part one, I, A	3
A/8715/Rev.1	Volume IV: 1973	Part one, I, A	3
A/9015/Rev.1	Volume V: 1974	Part one, I, A	3
A/9615/Rev.1	Volume VI: 1975	Part one, I, A	3
A/10015/Rev.1	Volume VII: 1976	Part one, I, A	3
TD/B/617	Volume VIII: 1977	Part one, I, A	3
TD/B/664	Volume IX: 1978	Part one, I, A	3
A/33/15/Vol.II	Volume X: 1979	Part one, I, A	3
A/34/15/Vol.II	Volume XI: 1980	Part one, I, A	3
A/35/15/Vol.II	Volume XI: 1980	Part one, II, B	30
A/36/15/Vol.II	Volume XII: 1981	Part one, B	19
TD/B/930	Volume XIII: 1982	Part one, B	20
TD/B/973	Volume XIV: 1983	Part one, B	20
TD/B/1026	Volume XV: 1984	Part one, B	22
TD/B/1077	Volume XVI: 1985	Part one, B	46
TD/B/L.810/Add.9	Volume XVII: 1986	Part one, B	36
A/42/15	Volume XVIII: 1987	Part one, B	40
TD/B/1193	Volume XIX: 1988	Part one, B	18
TD/B/1234/Vol.II	Volume XX: 1989	Part one, B	33
TD/B/1277/Vol.II	Volume XXI: 1990	Part one, B	18
TD/B/1309/Vol.II	Volume XXII: 1991	Part one, B	46
TD/B/39(1)/15	Volume XXIII: 1992	Part one, B	24
TD/B/40(1)/14 (Vol.I)	Volume XXIV: 1993	Part one, B	37

5. Documents submitted to the Commission (including reports of the meetings of working groups)

A/C.6/L.571	Volume I: 1968-1970	Part one, I, B	5
A/C.6/L.572	Volume I: 1968-1970	Part one, I, C	13
A/CN.9/15 and Add.1	Volume I: 1968-1970	Part three, III, B	256
A/CN.9/18	Volume I: 1968-1970	Part three, I, C, 1	207
A/CN.9/19	Volume I: 1968-1970	Part three, III, A, 1	239
A/CN.9/21 and Corr.1	Volume I: 1968-1970	Part three, IV, A	260
A/CN.9/30	Volume I: 1968-1970	Part three, I, D	218

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/31	Volume I: 1968-1970	Part three, I, A, 1	159
A/CN.9/33	Volume I: 1968-1970	Part three, I, B	202
A/CN.9/34	Volume I: 1968-1970	Part three, I, C, 2	216
A/CN.9/35	Volume I: 1968-1970	Part three, I, A, 2	176
A/CN.9/38	Volume I: 1968-1970	Part three, II, A, 2	243
A/CN.9/L.19	Volume I: 1968-1970	Part three, V, A	285
A/CN.9/38/Add.1	Volume II: 1971	Part two, II, 1	113
A/CN.9/41	Volume I: 1968-1970	Part three, II, A	233
A/CN.9/48	Volume II: 1971	Part two, II, 2	114
A/CN.9/50 and annex I-IV	Volume II: 1971	Part two, I, C, 2	87
A/CN.9/52	Volume II: 1971	Part two, I, A, 2	50
A/CN.9/54	Volume II: 1971	Part two, I, B, 1	66
A/CN.9/55	Volume II: 1971	Part two, III	133
A/CN.9/60	Volume II: 1971	Part two, IV	139
A/CN.9/62 and Add.1 and 2	Volume III: 1972	Part two, I, A, 5	77
A/CN.9/63 and Add.1	Volume III: 1972	Part two, IV	251
A/CN.9/64	Volume III: 1972	Part two, III	193
A/CN.9/67	Volume III: 1972	Part two, II, 1	145
A/CN.9/70 and Add.2	Volume III: 1972	Part two, I, B, 1	96
A/CN.9/73	Volume III: 1972	Part two, II, B, 3	115
A/CN.9/74 and annex I	Volume IV: 1973	Part two, IV, 1	137
A/CN.9/75	Volume IV: 1973	Part two, I, A, 3	61
A/CN.9/76 and Add.1	Volume IV: 1973	Part two, IV, 4 and 5	159, 200
A/CN.9/77	Volume IV: 1973	Part two, II, 1	101
A/CN.9/78	Volume IV: 1973	Part two, I, B	80
A/CN.9/79	Volume IV: 1973	Part two, III, 1	129
A/CN.9/82	Volume IV: 1973	Part two, V	217
A/CN.9/86	Volume V: 1974	Part two, II, 1	97
A/CN.9/87	Volume V: 1974	Part two, I, 1	29
A/CN.9/87, annex I-IV	Volume V: 1974	Part two, I, 2-5	51
A/CN.9/88 and Add.1	Volume V: 1974	Part two, III, 1 and 2	113
A/CN.9/91	Volume V: 1974	Part two, IV	191
A/CN.9/94 and Add.1 and 2	Volume V: 1974	Part two, V	195
A/CN.9/96 and Add.1	Volume VI: 1975	Part two, IV, 1 and 2	187
A/CN.9/97 and Add.1-4	Volume VI: 1975	Part two, III	163
A/CN.9/98	Volume VI: 1975	Part two, I, 6	114
A/CN.9/99	Volume VI: 1975	Part two, II, 1	121
A/CN.9/100, annex I-IV	Volume VI: 1975	Part two, I, 1-5	49
A/CN.9/101 and Add.1	Volume VI: 1975	Part two, II, 3 and 4	137
A/CN.9/102	Volume VI: 1975	Part two, II, 5	159
A/CN.9/103	Volume VI: 1975	Part two, V	255
A/CN.9/104	Volume VI: 1975	Part two, VI	273
A/CN.9/105	Volume VI: 1975	Part two, IV, 3	222
A/CN.9/105, annex	Volume VI: 1975	Part two, IV, 4	246
A/CN.9/106	Volume VI: 1975	Part two, VIII	283
A/CN.9/107	Volume VI: 1975	Part two, VII	279
A/CN.9/109 and Add.1 and 2	Volume VII: 1976	Part two, IV, 1-3	193
A/CN.9/110	Volume VII: 1976	Part two, IV, 4	263
A/CN.9/112 and Add.1	Volume VII: 1976	Part two, III, 1-2	157
A/CN.9/113	Volume VII: 1976	Part two, III, 3	181
A/CN.9/114	Volume VII: 1976	Part two, III, 4	190
A/CN.9/115	Volume VII: 1976	Part two, IV, 5	299
A/CN.9/116 and annex I and II	Volume VII: 1976	Part two, I, 1-3	87
A/CN.9/117	Volume VII: 1976	Part two, II, 1	143
A/CN.9/119	Volume VII: 1976	Part two, VI	305
A/CN.9/121	Volume VII: 1976	Part two, V	303
A/CN.9/125 and Add.1-3	Volume VIII: 1977	Part two, I, D	109
A/CN.9/126	Volume VIII: 1977	Part two, I, E	142
A/CN.9/127	Volume VIII: 1977	Part two, III	233
A/CN.9/128 and annex I and II	Volume VIII: 1977	Part two, I, A-C	73
A/CN.9/129 and Add.1	Volume VIII: 1977	Part two, VI, A and B	291
A/CN.9/131	Volume VIII: 1977	Part two, II, A	171
A/CN.9/132	Volume VIII: 1977	Part two, II, B	222
A/CN.9/133	Volume VIII: 1977	Part two, IV, A	235
A/CN.9/135	Volume VIII: 1977	Part two, I, F	164
A/CN.9/137	Volume VIII: 1977	Part two, V	289
A/CN.9/139	Volume VIII: 1977	Part two, IV, B	269
A/CN.9/141	Volume IX: 1978	Part two, II, A	147

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/142	Volume IX: 1978	Part two, I, A	61
A/CN.9/143	Volume IX: 1978	Part two, I, C	105
A/CN.9/144	Volume IX: 1978	Part two, I, D	106
A/CN.9/145	Volume IX: 1978	Part two, I, E	121
A/CN.9/146 and Add.1-4	Volume IX: 1978	Part two, I, F	127
A/CN.9/147	Volume IX: 1978	Part two, II, B	160
A/CN.9/148	Volume IX: 1978	Part two, III	179
A/CN.9/149 and Corr.1 and 2	Volume IX: 1978	Part two, IV, A	181
A/CN.9/151	Volume IX: 1978	Part two, V	197
A/CN.9/155	Volume IX: 1978	Part two, IV, B	195
A/CN.9/156	Volume IX: 1978	Part two, IV, C	196
A/CN.9/157	Volume X: 1979	Part two, II, A	61
A/CN.9/159	Volume X: 1979	Part two, I, A	37
A/CN.9/160	Volume X: 1979	Part two, I, B	39
A/CN.9/161	Volume X: 1979	Part two, I, C	40
A/CN.9/163	Volume X: 1979	Part two, II, B	78
A/CN.9/164	Volume X: 1979	Part two, I, D	48
A/CN.9/165	Volume X: 1979	Part two, II, C	81
A/CN.9/166	Volume X: 1979	Part two, III, A	89
A/CN.9/167	Volume X: 1979	Part two, III, B	92
A/CN.9/168	Volume X: 1979	Part two, III, C	100
A/CN.9/169	Volume X: 1979	Part two, III, D	108
A/CN.9/170	Volume X: 1979	Part two, III, E	109
A/CN.9/171	Volume X: 1979	Part two, IV	113
A/CN.9/172	Volume X: 1979	Part two, V	123
A/CN.9/175	Volume X: 1979	Part two, VI	131
A/CN.9/176	Volume XI: 1980	Part two, V, A	117
A/CN.9/177	Volume XI: 1980	Part two, II	39
A/CN.9/178	Volume XI: 1980	Part two, III, A	43
A/CN.9/179	Volume XI: 1980	Part two, IV, A	97
A/CN.9/180	Volume XI: 1980	Part two, IV, B	100
A/CN.9/181 and annex	Volume XI: 1980	Part two, III, B, C	53
A/CN.9/183	Volume XI: 1980	Part two, I	37
A/CN.9/186	Volume XI: 1980	Part two, III, D	89
A/CN.9/187 and Add.1-3	Volume XI: 1980	Part two, IV, C	108
A/CN.9/189	Volume XI: 1980	Part two, IV, D	114
A/CN.9/191	Volume XI: 1980	Part two, V, B	121
A/CN.9/192 and Add.1 and 2	Volume XI: 1980	Part two, VI	137
A/CN.9/193	Volume XI: 1980	Part two, V, C	135
A/CN.9/194	Volume XI: 1980	Part two, V, D	136
A/CN.9/196	Volume XII: 1981	Part two, II, A	49
A/CN.9/197	Volume XII: 1981	Part two, I, A	25
A/CN.9/198	Volume XII: 1981	Part two, IV, A	93
A/CN.9/199	Volume XII: 1981	Part two, II, B	70
A/CN.9/200	Volume XII: 1981	Part two, II, C	70
A/CN.9/201	Volume XII: 1981	Part two, I, C	46
A/CN.9/202 and Add.1-4	Volume XII: 1981	Part two, V, A	191
A/CN.9/203	Volume XII: 1981	Part two, V, B	237
A/CN.9/204	Volume XII: 1981	Part two, VIII	263
A/CN.9/205/Rev.1	Volume XII: 1981	Part two, VI	257
A/CN.9/206	Volume XII: 1981	Part two, VII	259
A/CN.9/207	Volume XII: 1981	Part two, III	75
A/CN.9/208	Volume XII: 1981	Part two, V, C	255
A/CN.9/210	Volume XIII: 1982	Part two, II, A, 1	43
A/CN.9/211	Volume XIII: 1982	Part two, II, A, 3	109
A/CN.9/212	Volume XIII: 1982	Part two, II, A, 5	186
A/CN.9/213	Volume XIII: 1982	Part two, II, A, 4	122
A/CN.9/214	Volume XIII: 1982	Part two, II, A, 6	197
A/CN.9/215	Volume XIII: 1982	Part two, II, B, 1	252
A/CN.9/216	Volume XIII: 1982	Part two, III, A	287
A/CN.9/217	Volume XIII: 1982	Part two, IV, A	315
A/CN.9/218	Volume XIII: 1982	Part two, I, A	27
A/CN.9/219 and Add.1 (F-Corr.1)	Volume XIII: 1982	Part two, I, B	34
A/CN.9/220	Volume XIII: 1982	Part two, II, B, 3	270
A/CN.9/221	Volume XIII: 1982	Part two, II, C	272
A/CN.9/222	Volume XIII: 1982	Part two, III, C	311
A/CN.9/223	Volume XIII: 1982	Part two, II, A, 7	251
A/CN.9/224	Volume XIII: 1982	Part two, V	391

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/225	Volume XIII: 1982	Part two, VI, B	399
A/CN.9/226	Volume XIII: 1982	Part two, VI, A	397
A/CN.9/227	Volume XIII: 1982	Part two, VII	413
A/CN.9/228	Volume XIII: 1982	Part two, VIII	415
A/CN.9/229	Volume XIII: 1982	Part two, VI, C	409
A/CN.9/232	Volume XIV: 1983	Part two, III, A	33
A/CN.9/233	Volume XIV: 1983	Part two, III, C	60
A/CN.9/234	Volume XIV: 1983	Part two, IV, A	95
A/CN.9/235	Volume XIV: 1983	Part two, I	27
A/CN.9/236	Volume XIV: 1983	Part two, V, C	168
A/CN.9/237 and Add.1-3	Volume XIV: 1983	Part two, V, B	134
A/CN.9/238	Volume XIV: 1983	Part two, V, D	174
A/CN.9/239	Volume XIV: 1983	Part two, V, A	132
A/CN.9/240	Volume XIV: 1983	Part two, VII	192
A/CN.9/241	Volume XIV: 1983	Part two, VI	189
A/CN.9/242	Volume XIV: 1983	Part two, II	32
A/CN.9/245	Volume XV: 1984	Part two, II, A, 1	155
A/CN.9/246 and annex	Volume XV: 1984	Part two, II, B, 1 and 2	189
A/CN.9/247	Volume XV: 1984	Part two, III, A	235
A/CN.9/248	Volume XV: 1984	Part two, I, A, 1	27
A/CN.9/249 and Add.1	Volume XV: 1984	Part two, I, A, 2	106
A/CN.9/250 and Add.1-4	Volume XV: 1984	Part two, I, B	115
A/CN.9/251	Volume XV: 1984	Part two, V, B	315
A/CN.9/252 and annex I and II	Volume XV: 1984	Part two, IV, A and B	287
A/CN.9/253	Volume XV: 1984	Part two, V, C	324
A/CN.9/254	Volume XV: 1984	Part two, V, D	328
A/CN.9/255	Volume XV: 1984	Part two, V, A	313
A/CN.9/256	Volume XV: 1984	Part two, VII	335
A/CN.9/257	Volume XV: 1984	Part two, VI	333
A/CN.9/259	Volume XVI: 1985	Part two, III, A, 1	199
A/CN.9/260	Volume XVI: 1985	Part two, IV, A	327
A/CN.9/261	Volume XVI: 1985	Part two, II, A	143
A/CN.9/262	Volume XVI: 1985	Part two, III, B, 1	250
A/CN.9/263 and Add.1-3	Volume XVI: 1985	Part two, I, A	53
A/CN.9/264	Volume XVI: 1985	Part two, I, B	104
A/CN.9/265	Volume XVI: 1985	Part two, V	351
A/CN.9/266 and Add.1 and 2	Volume XVI: 1985	Part two, II, B	152
A/CN.9/267	Volume XVI: 1985	Part two, IX	387
A/CN.9/268	Volume XVI: 1985	Part two, III, C	325
A/CN.9/269	Volume XVI: 1985	Part two, VI	367
A/CN.9/270	Volume XVI: 1985	Part two, VIII	385
A/CN.9/271	Volume XVI: 1985	Part two, VII	381
A/CN.9/273	Volume XVII: 1986	Part two, I, A, 1	41
A/CN.9/274	Volume XVII: 1986	Part two, I, A, 2	58
A/CN.9/275	Volume XVII: 1986	Part two, III, A	179
A/CN.9/276	Volume XVII: 1986	Part two, II, A	85
A/CN.9/277	Volume XVII: 1986	Part two, II, C	165
A/CN.9/278	Volume XVII: 1986	Part two, I, B	81
A/CN.9/279	Volume XVII: 1986	Part two, V	237
A/CN.9/280	Volume XVII: 1986	Part two, IV	221
A/CN.9/281	Volume XVII: 1986	Part two, VI	251
A/CN.9/282	Volume XVII: 1986	Part two, VIII	297
A/CN.9/283	Volume XVII: 1986	Part two, VII	291
A/CN.9/285	Volume XVII: 1986	Part two, I, A, 4	78
A/CN.9/287	Volume XVIII: 1987	Part two, III, A	111
A/CN.9/288	Volume XVIII: 1987	Part two, I, 1	47
A/CN.9/289	Volume XVIII: 1987	Part two, II, A, 1	101
A/CN.9/290	Volume XVIII: 1987	Part two, II, A, 4	107
A/CN.9/291	Volume XVIII: 1987	Part two, II, B	108
A/CN.9/292	Volume XVIII: 1987	Part two, IV	135
A/CN.9/293	Volume XVIII: 1987	Part two, VI	145
A/CN.9/294	Volume XVIII: 1987	Part two, V	139
A/CN.9/297	Volume XIX: 1988	Part two, I, A, 1	25
A/CN.9/298	Volume XIX: 1988	Part two, II, A	63
A/CN.9/299	Volume XIX: 1988	Part two, X, B	165
A/CN.9/300	Volume XIX: 1988	Part two, X, A	163
A/CN.9/301	Volume XIX: 1988	Part two, I, B	46
A/CN.9/302	Volume XIX: 1988	Part two, III	87

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/303	Volume XIX: 1988	Part two, IX	149
A/CN.9/304	Volume XIX: 1988	Part two, VII, A	125
A/CN.9/305	Volume XIX: 1988	Part two, VII, B	130
A/CN.9/306	Volume XIX: 1988	Part two, IV	103
A/CN.9/307	Volume XIX: 1988	Part two, V, A	109
A/CN.9/308	Volume XIX: 1988	Part two, V, B	113
A/CN.9/309	Volume XIX: 1988	Part two, VI	117
A/CN.9/310	Volume XIX: 1988	Part two, VII, D	140
A/CN.9/311	Volume XIX: 1988	Part two, VIII	143
A/CN.9/312	Volume XIX: 1988	Part two, VII, C	136
A/CN.9/315	Volume XX: 1989	Part two, II, A	103
A/CN.9/316	Volume XX: 1989	Part two, IV, A	183
A/CN.9/317	Volume XX: 1989	Part two, I, A	41
A/CN.9/318	Volume XX: 1989	Part two, I, C	69
A/CN.9/319 and Add.1-5	Volume XX: 1989	Part two, III, A	151
A/CN.9/320	Volume XX: 1989	Part two, III, B	176
A/CN.9/321	Volume XX: 1989	Part two, III, C	181
A/CN.9/322	Volume XX: 1989	Part two, V	207
A/CN.9/323	Volume XX: 1989	Part two, VIII	249
A/CN.9/324	Volume XX: 1989	Part two, VI	217
A/CN.9/325	Volume XX: 1989	Part two, VII	243
A/CN.9/328	Volume XXI: 1990	Part two, I, A	23
A/CN.9/329	Volume XXI: 1990	Part two, I, D	70
A/CN.9/330	Volume XXI: 1990	Part two, IV, A	227
A/CN.9/331	Volume XXI: 1990	Part two, II, A	117
A/CN.9/332 and Add.1-7	Volume XXI: 1990	Part two, III	185
A/CN.9/333	Volume XXI: 1990	Part two, V	253
A/CN.9/334	Volume XXI: 1990	Part two, VI	267
A/CN.9/335	Volume XXI: 1990	Part two, IX	297
A/CN.9/336	Volume XXI: 1990	Part two, VII	269
A/CN.9/337	Volume XXI: 1990	Part two, VIII	291
A/CN.9/338	Volume XXI: 1990	Part two, X	301
A/CN.9/341	Volume XXII: 1991	Part two, I, C	144
A/CN.9/342	Volume XXII: 1991	Part two, III, A	311
A/CN.9/343	Volume XXII: 1991	Part two, II, A	261
A/CN.9/344	Volume XXII: 1991	Part two, I, E	195
A/CN.9/345	Volume XXII: 1991	Part two, III, C	340
A/CN.9/346	Volume XXII: 1991	Part two, I, A	51
A/CN.9/347 and Add.1	Volume XXII: 1991	Part two, I, B	102
A/CN.9/348	Volume XXII: 1991	Part two, V, B	399
A/CN.9/349	Volume XXII: 1991	Part two, VIII	447
A/CN.9/350	Volume XXII: 1991	Part two, IV	381
A/CN.9/351	Volume XXII: 1991	Part two, VII	443
A/CN.9/352	Volume XXII: 1991	Part two, V, A	399
A/CN.9/353	Volume XXII: 1991	Part two, VI	435
A/CN.9/356	Volume XXIII: 1992	Part two, III, A	197
A/CN.9/357	Volume XXIII: 1992	Part two, II, A	37
A/CN.9/358	Volume XXIII: 1992	Part two, IV, A	291
A/CN.9/359	Volume XXIII: 1992	Part two, III, C	247
A/CN.9/360	Volume XXIII: 1992	Part two, V, A	347
A/CN.9/361	Volume XXIII: 1992	Part two, IV, C	327
A/CN.9/362 and Add.1-17	Volume XXIII: 1992	Part two, II, C	91
A/CN.9/363	Volume XXIII: 1992	Part two, VIII	395
A/CN.9/364	Volume XXIII: 1992	Part two, VI, A	383
A/CN.9/367	Volume XXIII: 1992	Part two, I, A	29
A/CN.9/368	Volume XXIII: 1992	Part two, VII	387
A/CN.9/371	Volume XXIV: 1993	Part two, I, A	43
A/CN.9/372	Volume XXIV: 1993	Part two, II, A	139
A/CN.9/373	Volume XXIV: 1993	Part two, III, A	191
A/CN.9/374 and Corr.1	Volume XXIV: 1993	Part two, II, C	175
A/CN.9/375	Volume XXIV: 1993	Part two, I, C	102
A/CN.9/376 and Add.1 and 2	Volume XXIV: 1993	Part two, I, D	120
A/CN.9/377	Volume XXIV: 1993	Part two, I, E	136
A/CN.9/378 and Add.1-5	Volume XXIV: 1993	Part two, IV, A to F	227
A/CN.9/379	Volume XXIV: 1993	Part two, VII	293
A/CN.9/380	Volume XXIV: 1993	Part two, V	261
A/CN.9/381	Volume XXIV: 1993	Part two, VI	285
A/CN.9/393	Volume XXIV: 1993	Part three, II	321

Document symbol	Volume, year	Part, chapter	Page
-----------------	--------------	---------------	------

6. Documents submitted to Working Groups

(a) Working Group I: Time-limits and Limitation (Prescription)

A/CN.9/WG.1/WP.9	Volume II: 1971	Part two, I, C, 1	74
------------------	-----------------	-------------------	----

(b) Working Group II

(i) International Sale of Goods

A/CN.9/WG.2/WP.1	Volume I: 1968-1979	Part three, I, A, 2	188
A/CN.9/WG.2/WP.6	Volume II: 1971	Part two, I, A, 1	37
A/CN.9/WG.2/WP.8	Volume III: 1972	Part two, I, A, 1	31
A/CN.9/WG.2/WP.9	Volume III: 1972	Part two, I, A, 2	41
A/CN.9/WG.2/WP.10	Volume III: 1972	Part two, I, A, 3	54
A/CN.9/WG.2/WP.11	Volume III: 1972	Part two, I, A, 4	69
A/CN.9/WG.2/WP.15	Volume IV: 1973	Part two, I, A, 1	31
A/CN.9/WG.2/WP.16	Volume IV: 1973	Part two, I, A, 2	36
A/CN.9/WG.2/WP.15/Add.1	Volume V: 1974	Part two, I, 3	60
A/CN.9/WG.2/WP.17/Add.1	Volume V: 1974	Part two, I, 4	65
A/CN.9/WG.2/WP.17/Add.2	Volume V: 1974	Part two, I, 4	65
A/CN.9/WG.2/WP.20	Volume VI: 1975	Part two, I, 4	88
A/CN.9/WG.2/WP.21 and Add.1 and 2	Volume VI: 1975	Part two, I, 3	70
A/CN.9/WG.2/WP.26 and Add.1 and appendix I	Volume VIII: 1977	Part two, I, C	90
A/CN.9/WG.2/WP.27	Volume IX: 1978	Part two, I, B	85
A/CN.9/WG.2/WP.28	Volume IX: 1978	Part two, I, B	85

(ii) International Contract Practices

A/CN.9/WG.II/WP.33 and Add.1	Volume XII: 1981	Part two, I, B, 1 and 2	30
A/CN.9/WG.II/WP.35	Volume XIII: 1982	Part two, III, B	302
A/CN.9/WG.II/WP.37	Volume XIV: 1983	Part two, III, B, 1	51
A/CN.9/WG.II/WP.38	Volume XIV: 1983	Part two, III, B, 2	56
A/CN.9/WG.II/WP.40	Volume XIV: 1983	Part two, III, D, 1	78
A/CN.9/WG.II/WP.41	Volume XIV: 1983	Part two, III, D, 2	85
A/CN.9/WG.II/WP.42	Volume XIV: 1983	Part two, III, D, 3	91
A/CN.9/WG.II/WP.44	Volume XV: 1984	Part two, II, A, 2(a)	179
A/CN.9/WG.II/WP.45	Volume XV: 1984	Part two, II, A, 2(b)	183
A/CN.9/WG.II/WP.46	Volume XV: 1984	Part two, II, A, 2(c)	187
A/CN.9/WG.II/WP.48	Volume XV: 1984	Part two, II, B, 3(a)	218
A/CN.9/WG.II/WP.49	Volume XV: 1984	Part two, II, B, 3(b)	227
A/CN.9/WG.II/WP.50	Volume XV: 1984	Part two, II, B, 3(c)	230
A/CN.9/WG.II/WP.52 and Add.1	Volume XVI: 1985	Part two, IV, B, 1	340
A/CN.9/WG.II/WP.53	Volume XVI: 1985	Part two, IV, B, 3	347
A/CN.9/WG.II/WP.55	Volume XVII: 1986	Part two, III, B, 1	193
A/CN.9/WG.II/WP.56	Volume XVII: 1986	Part two, III, B, 2	207
A/CN.9/WG.II/WP.58	Volume XVIII: 1987	Part two, III, B	127
A/CN.9/WG.II/WP.60	Volume XIX: 1988	Part two, II, B	79
A/CN.9/WG.II/WP.62	Volume XX: 1989	Part two, IV, B, 1	200
A/CN.9/WG.II/WP.63	Volume XX: 1989	Part two, IV, B, 2	203
A/CN.9/WG.II/WP.65	Volume XXI: 1990	Part two, IV, B	238
A/CN.9/WG.II/WP.67	Volume XXII: 1991	Part two, III, B, 1	324
A/CN.9/WG.II/WP.68	Volume XXII: 1991	Part two, III, B, 2	330
A/CN.9/WG.II/WP.70	Volume XXII: 1991	Part two, III, D, 1	352
A/CN.9/WG.II/WP.71	Volume XXII: 1991	Part two, III, D, 2	371
A/CN.9/WG.II/WP.73 and Add.1	Volume XXIII: 1992	Part two, IV, B	313
A/CN.9/WG.II/WP.76 and Add.1	Volume XXIV: 1993	Part two, II, B, 1	155
A/CN.9/WG.II/WP.77	Volume XXIV: 1993	Part two, II, B, 2	168

(c) Working Group III: International Legislation on Shipping

A/CN.9/WG.III/WP.6	Volume IV: 1973	Part two, IV, 2	146
A/CN.9/WG.III/WP.7	Volume IV: 1973	Part two, IV, 3	155
A/CN.9/WG.III/WP.11	Volume V: 1974	Part two, III, 3	165

Document symbol	Volume, year	Part, chapter	Page
-----------------	--------------	---------------	------

(d) Working Group IV**(i) International Negotiable Instruments**

A/CN.9/WG.IV/WP.2	Volume IV: 1973	Part two, II, 2	117
A/CN.9/WG.IV/CRP.5	Volume VI: 1975	Part two, II, 2	136
A/CN.9/WG.IV/WP.21	Volume XIII: 1982	Part two, II, A, 2(a)	72
A/CN.9/WG.IV/WP.22	Volume XIII: 1982	Part two, II, A, 2(b)	77
A/CN.9/WG.IV/WP.23	Volume XIII: 1982	Part two, II, A, 2(c)	80
A/CN.9/WG.IV/WP.24 and Add.1 and 2	Volume XIII: 1982	Part two, II, A, 2(d-f)	81
A/CN.9/WG.IV/WP.25 and Add.1	Volume XIII: 1982	Part two, II, A, 2(g,h)	98
A/CN.9/WG.IV/WP.27	Volume XIII: 1982	Part two, II, B, 2	262
A/CN.9/WG.IV/WP.30	Volume XVII: 1986	Part two, I, A, 3	72
A/CN.9/WG.IV/WP.32 and Add.1-10	Volume XVIII: 1987	Part two, I, 2	66
A/CN.9/WG.IV/WP.33	Volume XVIII: 1987	Part two, I, 3	99

(ii) International Payments

A/CN.9/WG.IV/WP.35	Volume XIX: 1988	Part two, I, A, 2	35
A/CN.9/WG.IV/WP.37	Volume XX: 1989	Part two, I, B	56
A/CN.9/WG.IV/WP.39	Volume XX: 1989	Part two, I, D	88
A/CN.9/WG.IV/WP.41	Volume XXI: 1990	Part two, I, B	42
A/CN.9/WG.IV/WP.42	Volume XXI: 1990	Part two, I, C	60
A/CN.9/WG.IV/WP.44	Volume XXI: 1990	Part two, I, E	90
A/CN.9/WG.IV/WP.46 and Corr.1	Volume XXII: 1991	Part two, I, D, 1	162
A/CN.9/WG.IV/WP.47	Volume XXII: 1991	Part two, I, D, 2	193
A/CN.9/WG.IV/WP.49	Volume XXII: 1991	Part two, I, F	214
A/CN.9/WG.IV/WP.51 and Add. 7	Volume XXIII: 1992	Part two, II, B	47
A/CN.9/WG.IV/WP.53	Volume XXIII: 1992	Part two, V, B	365
A/CN.9/WG.IV/WP.55	Volume XXIV: 1993	Part two, III, B	208

(e) Working Group V: New International Economic Order

A/CN.9/WG.V/WP.4 and Add.1-8	Volume XII: 1981	Part two, IV, B, 1	100
A/CN.9/WG.V/WP.5	Volume XII: 1981	Part two, IV, B, 2	189
A/CN.9/WG.V/WP.7 and Add.1-6	Volume XIII: 1982	Part two, IV, B	326
A/CN.9/WG.V/WP.9 and Add.1-5	Volume XIV: 1983	Part two, IV, B	99
A/CN.9/WG.V/WP.11 and Add.1-9	Volume XV: 1984	Part two, III, B	247
A/CN.9/WG.V/WP.13 and Add.1-6	Volume XVI: 1985	Part two, III, A, 2	215
A/CN.9/WG.V/WP.15 and Add.1-10	Volume XVI: 1985	Part two, III, B, 2	269
A/CN.9/WG.V/WP.17 and Add.1-9	Volume XVII: 1986	Part two, II, B	107
A/CN.9/WG.V/WP.19	Volume XVIII: 1987	Part two, II, A, 2	103
A/CN.9/WG.V/WP.20	Volume XVIII: 1987	Part two, II, A, 3	104
A/CN.9/WG.V/WP.22	Volume XX: 1989	Part two, II, B	116
A/CN.9/WG.V/WP.24	Volume XXI: 1990	Part two, II, B	138
A/CN.9/WG.V/WP.25	Volume XXI: 1990	Part two, II, C	150
A/CN.9/WG.V/WP.27	Volume XXII: 1991	Part two, II, B, 1	283
A/CN.9/WG.V/WP.28	Volume XXII: 1991	Part two, II, B, 2	291
A/CN.9/WG.V/WP.30	Volume XXIII: 1992	Part two, III, B, 1	221
A/CN.9/WG.V/WP.31	Volume XXIII: 1992	Part two, III, B, 2	243
A/CN.9/WG.V/WP.33	Volume XXIII: 1992	Part two, III, D, 2	273
A/CN.9/WG.V/WP.34	Volume XXIII: 1992	Part two, III, D, 3	287
A/CN.9/WG.V/WP.36	Volume XXIV: 1993	Part two, I, B	79

7. Summary Records of discussions in the Commission

A/CN.9/SR.93-123	Volume III: 1972	Supplement	1
A/CN.9/SR.254-256	Volume XIV: 1983	Part three, I, A	197
A/CN.9/SR.255-261	Volume XIV: 1983	Part three, I, B, 1	202
A/CN.9/SR.270-278, 282 and 283	Volume XIV: 1983	Part three, I, B, 2	229
A/CN.9/SR.286-299 and 301	Volume XV: 1984	Part three, I	339
A/CN.9/SR.305-333	Volume XVI: 1985	Part three, II	399
A/CN.9/SR.335-353, 355 and 356	Volume XVII: 1986	Part three, II	317

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/SR.378, 379, 381-385 and 388	Volume XVIII: 1987	Part three, III	165
A/CN.9/SR.402-421, 424 and 425	Volume XX: 1989	Part three, II	261
A/CN.9/SR.439-462 and 465	Volume XXII: 1991	Part three, II	459
A/CN.9/SR.467-476, 481 and 482	Volume XXIII: 1992	Part three, III	419
A/CN.9/SR.494-513	Volume XXIV: 1993	Part three, III	343

8. Texts adopted by Conferences of Plenipotentiaries

A/CONF.63/14 and Corr.1	Volume V: 1974	Part three, I, A	209
A/CONF.63/15	Volume V: 1974	Part three, I, B	210
A/CONF.63/17	Volume X: 1979	Part three, I	145
A/CONF.89/13, annexes I-III	Volume IX: 1978	Part three, I, A-D	211
A/CONF.97/18 and annexes I and II	Volume XI: 1980	Part three, I, A-C	149
A/CONF.152/13	Volume XXIII: 1992	Part three, I	405

9. Bibliographies of writings relating to the work of the Commission

(no document symbol)	Volume I: 1968-1970	Part three	299
A/CN.9/L.20/Add.1	Volume II: 1971	Part two	143
(no document symbol)	Volume II: 1972	Part two	148
(no document symbol)	Volume III: 1972	Part two	311
(no document symbol)	Volume IV: 1973	Part two	229
A/CN.9/L.25	Volume V: 1974	Part three, II, A	216
(no document symbol)	Volume V: 1974	Part three, II, B	242
(no document symbol)	Volume VI: 1975	Part three, II, A	298
(no document symbol)	Volume VII: 1976	Part three, A	321
(no document symbol)	Volume VIII: 1977	Part three, A	311
(no document symbol)	Volume IX: 1978	Part three, II	219
(no document symbol)	Volume X: 1979	Part three, II	174
(no document symbol)	Volume XI: 1980	Part three, IV	168
(no document symbol)	Volume XII: 1981	Part three, III	271
(no document symbol)	Volume XIII: 1982	Part three, IV	426
(no document symbol)	Volume XIV: 1983	Part three, IV	276
(no document symbol)	Volume XV: 1984	Part three, II	378
A/CN.9/284	Volume XVI: 1985	Part three, III	511
A/CN.9/295	Volume XVII: 1986	Part three, III	399
A/CN.9/313	Volume XVIII: 1987	Part three, III	191
A/CN.9/326	Volume XIX: 1988	Part three, III	215
A/CN.9/339	Volume XX: 1989	Part three, III	343
A/CN.9/354	Volume XXI: 1990	Part three, I	305
A/CN.9/369	Volume XXII: 1991	Part three, IV	551
A/CN.9/382	Volume XXIII: 1992	Part three, V	469
A/CN.9/402	Volume XXIV: 1993	Part three, IV	415