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Report of Working Group I (Procurement) on the work of its sixth session (Vienna, 30 August-3 September 2004)

Contents

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I. Introduction

1. At its thirty-seventh session, in 2004, the Commission decided that the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services[1] ("Model Law") would benefit from being updated to reflect new practices, in particular those that resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform. However, it was pointed out that in updating the Model Law care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven.[2]

2. The Commission decided to entrust the elaboration of proposals for the revision of the Model Law to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, and the Secretariat was requested to present to the Working Group appropriate notes further elaborating on issues discussed in document A/CN.9/553, in order to facilitate the considerations of the Working Group.[3]

II. Organization of the session

3. The Working Group, which was composed of all States members of the Commission, held its sixth session in Vienna from 30 August to 3 September 2004. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Belarus, Belgium, Brazil, Canada, China, Colombia, Czech Republic, France, Germany, Japan, Lithuania, Mexico, Morocco, Nigeria, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Singapore, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

4. The session was attended by observers from the following States: Afghanistan, Mali, Peru, Philippines, Saudi Arabia, Ukraine and Yemen.

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

(a) *United Nations system*: United Nations Secretariat and Programme (Office of Legal Affairs (General Legal Division) and United Nations Office for Project Services (UNOPS)), United Nations Industrial Development Organization (UNIDO) and World Bank;

(b) *Intergovernmental organizations*: Banque Ouest Africaine de Développement (BOAD), European Commission and International Development Law Organization (IDLO);

(c) *International non-governmental organizations invited by the Commission*: Center for International Legal Studies (CILS), International Bar Association (IBA), International Federation of Consulting Engineers (FIDIC) and the Arab Planning Institute (API).

6. The Working Group elected the following officers:

Chairman: Mr. Stephen R. Karangizi (Uganda)

Rapporteur: Mr. Marek Slegl (Czech Republic)

7. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.I/WP.30); a note by the Secretariat setting out issues arising from the use of electronic communications and technologies in procurement (A/CN.9/WG.I/WP.31), and another note by the Secretariat presenting possible additional points for review in the Model Law (A/CN.9/WG.I/WP.32).

8. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Future work in the area of procurement.
5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

9. At its sixth session, the Working Group began its work on the elaboration of proposals for the revision of the Model Law, pursuant to a decision taken by the Commission at its thirty-seventh session (see above, para. 2). The Working Group used the notes by the Secretariat referred to in paragraph 7 above (A/CN.9/WG.I/WP.31 and 32) as a basis for its deliberations.

10. The Working Group decided to entrust the Secretariat with the preparation of drafting materials and studies reflecting the deliberations of the Working Group for consideration at its future session. It further decided that at its next session it would proceed with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence.

11. At the end of its substantive deliberations, the Working Group was given presentations by the World Bank and FIDIC on the topic of the avoidance of fraud and corruption in public procurement, followed by question-and-answer sessions. The Working Group heard that the World Bank had recently revised its procedures in addressing allegations of fraud and corruption with a view to enhancing the efficiency and effectiveness of that process. The Working Group also heard that FIDIC had developed an integrity management system, the aim of which was to prevent corruption through, among other things, encouraging integrity throughout an organization. The Working Group welcomed those presentations and noted that, in its ongoing work, the question of fraud and corruption avoidance would be one aspect to be taken into account when revising the Model Law.

IV. Consideration of topics for future work

A. Recent developments in public procurement—procurement application of electronic communications and technologies

1. General remarks

12. It was noted that two main technological developments in the last ten years had changed the manner in which procurement had been undertaken: first, the use of electronic means of communication had become widespread and, secondly, certain States now operated some parts of their procurement electronically. Such use, it was pointed out, was rapidly increasing and was being considered under a variety of domestic laws and by international and regional organizations. It was further observed that the use of electronic procurement offered many potential benefits, including improved value for money and enhanced transparency in the procurement process.

13. The Working Group recalled that the Model Law had been used in many jurisdictions as a model for modern government procurement systems, and that in its further deliberations, the Working Group should work towards promoting the increased use and effective implementation of the Model Law. It was also observed that, consequently, the Model Law should avoid becoming overly prescriptive in its approach, and should retain the flexibility that underscored it when adopted in 1994. Further, the Working Group stressed that the Model Law should be retained as an instrument that was relevant for all systems and should not be directed at any type of system in particular. Additionally, it was noted that revisions to the Model Law should seek to remove obstacles to the use of modern procurement methods.

14. The Working Group noted that the potential benefits of electronic procurement summarized above were consistent with the main aims and objectives of the Model Law. The Working Group proceeded to consider the extent to which the Model Law might need to be reviewed so as to enable full advantage of electronic procurement to be taken by enacting States.

15. It was pointed out that the use of electronic procurement would depend on the availability of appropriate infrastructure and other resources. For example, laws regulating the use of written communications, electronic signatures, on what should be considered an original document and the admissibility of evidence in court might be an obstacle to the use of electronic procurement. Those issues, the Working Group noted, had been addressed in the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001), and were the subject of ongoing work by the Commission. Nonetheless, the view was expressed that the Guide to Enactment might usefully refer legislators to those documents and the ongoing work of the Commission in that field.

16. The Working Group was generally of the view that, for purposes of consistency, those issues should be addressed by measures other than procurement laws in enacting States, and that the issues should be addressed in a manner that sought to promote access to procurement opportunities. However, the view was also expressed that the Guide to Enactment might usefully offer some guidance on such issues.

17. The Working Group expressed strong support for the proposition that, as a consequence of rapid technological advances and of the divergent level of technical sophistication in Member States, the provisions of the Model Law should be formulated in a technologically neutral manner.

18. In summary, the Working Group noted three key principles that should form the basis for including the use of electronic communications and technologies in the Model Law. First, the Model Law should, to the extent possible, encourage the use of those communications and technologies in procurement. Secondly, it should make appropriate provisions in a technologically neutral manner and, thirdly, further and more detailed guidance might be provided in the Guide to Enactment, as appropriate. The Working Group agreed that the formulation should cover all means of communication and provide guidance on the controls that are needed for their use.

2. Possible areas of work relating to electronic procurement

19. It was observed that the main policy issues concerning the use of electronic procurement arose in the following areas: advertisement of procurement-related information (including the publication of the laws and regulations governing procurement contracts), of solicitation documents and related information, and of contract awards, the use of electronic communications in the procurement process, and the use of electronic (reverse) auctions. The Working Group proceeded to consider the scope of future work in respect of each of those areas.

(a) Electronic publication of procurement-related information

20. Electronic publication of procurement-related information, it was said, may provide wider dissemination of such information than would be achieved through traditional paper means by making it more accessible to more suppliers. It was stressed that the aim of such publication is to improve the access of the public to procurement opportunities.

21. The Working Group expressed the view that the Model Law should encourage the electronic publication of information that the Model Law currently required States to publish. Furthermore, it was felt that it might be desirable to provide guidance in the Guide to Enactment as to the value of electronic publication.

22. It was also noted that article 5 of the Model Law provided for a general principle of accessible publication for the law itself as well as "procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law", such that the information "[should] be promptly made accessible to the public and systematically maintained". The Working Group noted that article 5 of the Model Law appeared to be sufficiently broad in scope as to encompass publication in any manner—electronic or by paper means—as it addressed the issue from the standpoint of accessibility.

23. On the other hand, the Working Group noted that the provisions of article 24 of the Model Law implied that the relevant publication would be made in paper form. Bearing in mind the potential benefits of disseminating information on procurement opportunities through electronic means, the Working Group agreed that

it should consider options for making appropriate revisions to that article to remove obstacles to electronic publication of the information referred to therein.

24. Given the aim of promoting the use and implementation of the Model Law, it was agreed that flexibility should be retained, and the Working Group in its work should achieve a balance between the provisions in the Model Law, which would address the issues from the standpoint of the policies and principles, and the Guide to Enactment, which would address them in more detail, where appropriate, and also provide guidance to legislators. Consequently, the Working Group considered that there should be limited regulation beyond appropriate statements of the governing principles in the Model Law itself, but that appropriate further guidance might usefully be provided in the Guide to Enactment. For example, a discussion of the need for and ways of ensuring sufficient public access to the information concerned might be provided.

25. The Working Group noted that a significant issue was the extent to which electronic publication should be mandatory or optional, that is, in a particular case effected by electronic means alone, or by electronic means as an addition to traditional paper-based means.

26. Strong support was expressed for the view that electronic publication should be permitted, but on an optional basis, notably so as to preserve the principle of flexibility and reflecting differing situations prevailing in enacting States. The Working Group further noted that consistency in the manner of communication should be provided for, such that the public would be able to locate all relevant information pertaining to a particular procurement.

27. The Working Group also considered the issue of mandatory use of electronic publication. The Working Group was of the view that the use of electronic publication under the Model Law should remain optional. Nonetheless, the Working Group agreed that the Guide to Enactment might set out considerations to assist legislators in establishing thresholds of technological maturity and market access after which they might wish to consider the mandatory electronic publication of information.

28. As regards the content of information to be published, the Working Group noted that it should further consider whether additional information relevant to potential suppliers, which the Model Law did not currently require to be published, might be brought within the scope of any new provision or guidance given. Such information, it was observed, might include some internal policies or guidance, and general information, such as general forthcoming procurement opportunities. It was observed that the Model Law did not currently address such information, as, for example, article 24 of the Model Law addressed the publication of invitations to participate in a forthcoming procurement, such as an invitation to tender or to prequalify, and there was no equivalent provision governing steps in the procurement process earlier in time. It was observed that any further information to be contemplated might need to be defined in the Model Law, or that appropriate further guidance in the Guide to Enactment might be warranted. The Working Group requested the Secretariat to provide it with a further note addressing those issues for consideration at its next session.

29. The Working Group requested the Secretariat to prepare draft materials reflecting its deliberations, in the form of draft model provisions and draft guidance texts, as appropriate, for future consideration by the Working Group.

(b) Use of electronic communications in the procurement process

30. With regard to the use of electronic communications in the procurement process, it was noted that the main policy issues included the following: (a) whether the law should permit or require procuring entities to use electronic communications by consent with suppliers or authorize either party to require electronic communications; and (b) whether those rules should attach conditions to the use of electronic means to safeguard the objectives of the procurement law, so as to prevent the electronic means chosen from operating as a barrier to access, to secure confidentiality, to ensure authenticity and security of transactions, and the integrity of data.

31. It was observed that article 9 (1) of the Model Law, which addressed the form of communications to be used in the procurement process, provided that subject to any requirement of form specified by the procuring entity when first soliciting participation, all communications should be in a form that provided a record of the content of the communication. There was general agreement in the Working Group that the Model Law gave the procuring entity broad discretion in establishing any "requirement of form" for communications when initially soliciting participation by suppliers.

32. It was noted, however, that several provisions of the Model Law suggested that suppliers could not be required to submit tenders electronically under the Model Law as currently drafted. Under article 30 (5)(a), for example, tenders were to be submitted "in writing, signed and in a sealed envelope", or "in any other form specified in the solicitation documents", subject to certain conditions. Article 30 (5)(b) specifically provided for the right of a supplier to submit a tender by the "usual" method set out in article 30 (5)(a), namely in writing, signed and in a sealed envelope. According to the Guide to Enactment, this was an "important safeguard against discrimination in view of the uneven availability of non traditional means of communication such as [Electronic Data Interchange (EDI)]". The Model Law should not operate or be seen as a barrier to the most efficient use of electronic communications, nor should it lag behind practical developments in its approach to the use of electronic communications. These and related provisions might need to be adjusted so as to ensure that they did not create obstacles to the use of electronic communications.

33. As regards the extent to which electronic communications (including the electronic submission of tenders) could be required or made mandatory, the Working Group generally agreed on the desirability of approaching the issue in a flexible manner. There was broad agreement to the effect that the Working Group's deliberations should preserve that situation and should not aim, for instance, at enabling a supplier to impose a particular means of communications on the procuring entity. As regards, however, the procuring entity's right to require electronic communications, it was generally felt that it would be unwise to craft a rule that contemplated that possibility for all cases and circumstances.

34. It was pointed out that, in certain circumstances, a requirement for use of electronic communications in a given case might effectively result in discrimination against or among suppliers. Article 9 (3) of the Model Law, however, stated that the procuring entity should not discriminate against or among suppliers on the basis of the form in which they transmitted or received communications. Consequently, mandatory electronic communications might not be permissible if the means used to engage in electronic communications were not reasonably accessible to potential suppliers.

35. It was considered whether, even if time limits for submitting requests to pre-qualify or for submitting tenders were the same for all suppliers, it might be prima facie discriminatory under article 9 (3) of the Model Law if those time limits were set with regard to the sufficiency of time for those communicating by electronic means only. It was noted that the fact that two suppliers used different means of communications did not by itself mean that there was discrimination. There was broad agreement that the rule in article 9 (3) did not necessarily require all suppliers to use the same methods for communication with the procuring entity. After discussion, it was agreed that the essential element that needed to be preserved was the effective equivalence of the means of communication used in order to avoid discrimination.

36. In further support of a flexible approach on the matter, it was also observed that in practice there might be situations in which electronic communications did not function properly, for instance, because of limitations in the capacity of the systems used, such as insufficient bandwidth for the transmission of large electronic files, technical failure or other external circumstances such as a power cut or a natural disaster.

37. Accordingly, it was suggested that the Working Group should allow for appropriate options regarding the use of electronic communications in the Model Law. One possible option, it was said, might be to provide that the mandatory use of electronic communications should not be imposed as a general requirement.

38. In response to those suggestions, it was stated that the Working Group should not undertake to draft detailed provisions as to the circumstances that allowed the use of electronic communications or the types and conditions of appropriate approval or justification for the use of electronic communications. Government procurement varied greatly in size, commercial and technical requirements, and the existence of those variations made it unwise to attempt to formulate rules that suited all legal systems. Rather, it might suffice to point out the issues that legislators in different States might wish to take into consideration when introducing or enabling electronic communications in public procurement in the Guide to Enactment.

39. The Working Group took note of those concerns. Nevertheless, it was generally agreed that it would be useful to formulate provisions that expressly enabled and, in appropriate circumstances, promoted the use of electronic communications, possibly subject to a general requirement that the means of communication imposed by the procuring entity should not unreasonably restrict access to the procurement. Additional guidance and explanations on various options regarding the kind of means available and the controls that might be needed should be included in the Guide to Enactment.

40. The Working Group took note of those options and decided that they should be reflected in any draft model provisions that the Secretariat might prepare for future consideration. The Working Group agreed that, regardless of the final decision, the Guide to Enactment might usefully provide detailed guidance on the matter.

(c) Controls over the use of electronic communications in the procurement process

41. The Working Group recognized that efficient and reliable electronic procurement systems required appropriate controls as regards security, confidentiality and authenticity of submissions, and integrity of data, for which special rules and standards might need to be formulated. In particular, it was noted that the following guiding principles might form a useful basis for any future rules or guidance on the use of electronic communications in the procurement process:

(a) The means of communication imposed should not present an unreasonable barrier to participation in the procurement proceedings (a principle that would allow a requirement for paper-based or electronic communications in appropriate circumstances);

(b) There should be appropriate procedures and systems to establish the origin of communications (authenticity);

(c) The means and mechanisms used should be such as to ensure that the integrity of data was preserved;

(d) The means used should enable the time of receipt of documents to be established, if the time of receipt were significant in applying the rules of the procurement process (i.e. for submission of requests to participate and tenders/proposals);

(e) The means and mechanisms used should ensure that tenders and other significant documents were not accessed by the procuring entity or other persons prior to any deadline, so as to prevent procuring entities' passing information on other tenders to favoured suppliers and to prevent competitors from gaining access to that information themselves (security);

(f) The confidentiality of information submitted by or relating to other suppliers is maintained.

42. There was general agreement within the Working Group that the above principles provided a good basis for the formulation of specific rules, standards or guidance on the matter. The views differed, however, as to the form and desirable level of detail in which those principles should be expressed.

43. One view was that most of those principles already applied to paper-based procurement procedures—for example, the principle that tenders should be authentic or should remain confidential during the tendering procedure. Therefore, the Working Group should carefully consider the need for any specific additional standards or rules, and should take into account the extent to which the relevant background law, such as general laws on electronic commerce and electronic signatures, already addressed the issues that the proposed principles were concerned with. The Working Group should avoid duplicating work that had already been accomplished by the Commission, for instance through the UNCITRAL Model Law on Electronic Commerce.

44. Another view expressed was that if the Working Group intended to formulate legislative guidance that enabled use of electronic communications in the procurement process without mandating it, it would be useful to spell out in the Model Law itself the conditions under which electronic communications should be used.

45. The Working Group agreed that the exact form of its guidance was a matter for further consideration by the Working Group. There was general agreement, however, that such guidance should be formulated in a manner that covered all means of communication, giving a general idea on the controls that were needed, and should not be overly prescriptive.

(d) Electronic reverse auctions

46. The Working Group noted that electronic reverse auctions, in their several variants, while still in their infancy, might become a wider used procurement procedure. Reverse auctions were structured as tendering proceedings in which suppliers were provided with information on the other tenders, and could amend their own tenders on an ongoing basis in competition with the other suppliers, normally without knowing the identity of the latter. In an electronic reverse auction, suppliers posted tenders electronically through an electronic auction site, using information on ranking or amount required to beat other suppliers' offers. Suppliers could view in electronic form the progress of the tenders as the auction proceeds and amend their own tenders accordingly. The auction might take place over a set time period, or may operate until a specified period had elapsed without a new tender. Reverse auctions, it was pointed out, were most commonly used for standardized products and services for which price was the only, or at least an essential, award criterion, since it was generally price alone that featured in the "auction" process. However, other criteria could be used and built in to the auction phase, or evaluated in a separate phase in the overall procedure.

47. The Working Group noted that the Model Law did not address auctions. The tendering method used for goods and works procurement assumed a single-tendering stage, and prohibited substantial changes to tenders—including to the price—after submission (article 34 (1) (a)). It also prohibited procuring entities from disclosing tender information (article 34 (8)), thus preventing auctions by agreement between the entity and suppliers. The provision conferring a right to tender in writing in a sealed envelope also precluded an auction in the absence of consent by the suppliers (articles 30 (5) (a) and (b)). The same rules applied to restricted tendering (article 47 (3)). It was suggested that the obstacles to implement reverse auctions and other procedures involving electronic means should be removed from the Model Law.

48. The question was raised as to whether the Working Group should also consider whether other types of auctions, not currently regulated under the Model Law, should also be subject to its provisions. In response, it was noted that the general policy objections that had led to the original decision by UNCITRAL not to mention reverse auctions in the Model Law, above all the risk of collusion among suppliers, was one that could be sufficiently controlled only in electronic reverse auctions, in which the identity of the bidders was not disclosed and that, therefore, only electronic reverse auctions should be acknowledged in a revised version of the Model Law.

49. There was strong support for the suggestion that the Working Group should formulate legislative guidance dealing with electronic reverse auctions. It was said that in the experience of some countries, electronic reverse auctions could generate significant savings, as they stimulated suppliers to offer their best possible price. They were also said to promote transparency, since they provided an incentive to the procuring entity to specify non-price award criteria precisely. Modern technology had allowed the traditional objections to the use of reverse auctions, which existed at the time the Model Law was prepared, to be overcome. Indeed, information technology made it possible to operate reverse auctions in a transparent manner (in that information on other tenders was available and the outcome of the procedure visible to participants), while at the same time preserving confidentiality, which was essential to reduce the risk of collusion among suppliers. Electronic technologies had facilitated the use of reverse auctions by greatly reducing the transaction costs.

50. As to the manner in which provisions on electronic reverse auctions could be incorporated in the regime of the Model Law, it was suggested that auctions should be treated as a distinct procurement method, in view of its special features, such as the publication of prices during the tender process (otherwise prohibited) and a two-phase evaluation of tenders, which deviated from traditional tendering procedures and required specific provisions. Another proposal was to treat electronic auctions as a version of traditional procurement methods, rather than as an entirely new method requiring separate rules.

51. However, there were also strong notes of caution in view of the possible difficulties of electronic reverse auctions. They included, for example, the risk of encouraging an excessive focus on price, the risk that suppliers might be induced to offer abnormally low prices (a phenomenon called “auction fever”), leading to significant problems during the administration phase if the selected supplier was unable to meet its obligations. Moreover, it was said that it was difficult for procuring entities to recognize whether suppliers used electronic reverse auctions to collude, a situation particularly dangerous in markets dominated by oligopolies, where participants could use auctions for signalling prices among themselves. A better alternative, at least for certain markets, might be other methods, such as “dynamic purchasing”, in which market prices were established using electronic catalogues (see para. 58), which had also the advantage of being more flexible than electronic reverse auctions.

52. The countervailing view was that, if appropriately conceived and conducted, the benefits of electronic auctions outweighed their possible disadvantages. In view of their increasing use, the desirable course of action would be to make provision for electronic reverse auctions in the Model Law and to attempt to provide guidance on how to eliminate or reduce the possible risks entailed by them. For example, as regards the types of procurement that might be suitable for an electronic reverse auction procedure, it was generally felt that enacting States should be advised that the potential benefits of auctions would accrue only to the extent that an initial common specification against which tenders were submitted could be drafted, and for procurements for which non-price criteria could be effectively quantified. The risk of abnormally low prices, it was said, could be addressed by provisions similar to those that existed in some regional systems, which allowed a procuring entity that had reasons to suspect that prices quoted by a supplier were unrealistic to require that supplier to provide additional information to substantiate its prices.

53. It was pointed out, in that context, that the issue of abnormally low prices was broader than the so-called "auction fever" phenomenon sometimes found in electronic reverse auctions. In fact, the risk of attractive but unrealistic low prices might conceivably occur in the course of any type of procurement procedure. That general issue, it was further noted, had not been expressly addressed in the Model Law, apparently in view of the difficulty in formulating appropriate solutions for the problem. Provisions aimed at preventing abnormally low prices by establishing minimum prices might not be entirely consistent with the principle of competition that underlay the Model Law. Other approaches, such as provisions authorizing a procuring entity to reject specific bids on the grounds that they contained abnormally low prices, in turn, might lend themselves to abuse and would need to be carefully considered.

54. The Working Group concluded its consideration of the matter by recognizing the reality of electronic reverse auctions and confirming its willingness to consider the appropriateness of enabling provisions for the optional use of electronic reverse auctions in the Model Law. However, before making a final decision on the matter, the Working Group agreed that it would be useful to have more information on the practical use of electronic reverse auctions in the countries that had introduced them. The Secretariat was requested to provide that information in the form of a comparative study of practical experience, including as regards existing approaches for handling the risk of abnormally low prices in electronic reverse auctions. In addition to the analysis of current practice in respect of electronic reverse auctions, the Working Group requested the Secretariat to conduct a comparative study on how procuring entities handled abnormally low-prices. It was agreed that the study should also consider the relationship between the practice of abnormally low prices and competition law.

B. Possible areas for review in the Model Law

1. The use of suppliers' lists

55. It was noted that suppliers' lists (also known as qualification lists, qualification systems or approved lists) identified selected suppliers for future procurements and could operate as either mandatory or optional lists. Mandatory lists required registration of the supplier on the list as a condition of participation in the procurement. A supplier might choose to register on an optional list, but not doing so did not prejudice eligibility for a particular contract. Admission of a supplier to a list might involve a full assessment of the supplier's suitability for certain contracts, some assessment or no assessment at all. However, there was normally an initial assessment of some qualifications, leaving others to be assessed when the supplier was considered for specific contracts.

56. It was also observed that, in addition to what were commonly known as "suppliers' lists", there existed analogous arrangements including "contractors' registers" and other compilations of suppliers. It was agreed that the discussions would address all manner of registration that operated de facto as a suppliers' list, whatever its appellation, and whether the registration concerned was with the procuring entity or a third party.

57. The Working Group noted that the Model Law did not address the subject of suppliers' lists, although it did not prevent procuring entities from using optional lists to choose suppliers in procurement that did not require advertising, such as restricted tendering, competitive negotiations, requests for proposals or quotations and single-source procurement. It was suggested that, at the time the Model Law was drafted, the Commission was not in favour of promoting the wide use of suppliers' lists, because their use was then diminishing, and because of the opportunity presented to procuring entities to restrict competition and engage in protectionism by the use of such lists. That approach was in line with the policy of many international lending institutions, which did not regard the use of lists as good practice. It was also noted that the regulation of suppliers' lists would have involved issues that the Commission did not consider appropriate to address at that time, including whether either or both optional and mandatory lists should be regulated, and the number of controls that would be necessary to include in the Model Law. At the same time, however, the Commission had not wished to go as far as to express a recommendation against their use.

58. It was observed that suppliers' lists were increasing in use and frequency in many States, particularly in the case of bulk purchases of commodity items. Such use had also arisen from the rise of electronic catalogues—that is, product catalogues with single or multiple suppliers. Following a tender, the suppliers were selected to provide an electronic catalogue from which the procuring entity could choose and order goods and services, and this procedure might also lead to more procurement being conducted in a way that involves de facto reliance on suppliers' lists.

59. The advantages and disadvantages encountered in the use of the suppliers' lists were noted. Such lists, it was said, assisted in streamlining the procurement process, leading to cost savings both to the procuring entity and the suppliers, and thereby promoting efficiency and economy, aims of the Model Law itself. In particular, it was observed that lists might save time and cost by eliminating the need to provide and evaluate separate qualification information for each contract, and reduce costs for suppliers in finding contract information. However, it was noted that their use had not always led to the possible cost savings identified, and that in some cases they had operated in practice to restrict competition, and even to facilitate collusion and corruption. Also, lists were observed to operate as mandatory lists even where they were stated to be optional. In addition, it was considered that the greatest risks arose where lists were operated in a disguised manner.

60. It was pointed out that those regimes that regulated the use of lists limited in some cases the entities that might use them and controlled their use to ensure that the lists operated in a reasonable and transparent way. Control measures typically included requirements such as registration remaining permanently open, that the time taken to register suppliers should be as short as possible, and that registration through mail and (where feasible) applications using the Internet should be permitted.

61. Accordingly, and recognizing that, whether or not they were viewed as consistent with the aims and objectives of the Model Law, suppliers' lists were in use in various States, it was agreed that it would be appropriate to acknowledge their existence and use. Indeed, failure to do so would undermine the principles of the Model Law, in that their operation would not be subject to minimum standards

of transparency. As a separate consideration, it was agreed that regulating suppliers' lists could provide a transparent and non-discriminatory way of selecting suppliers for those restricted procurement methods in respect of which there was no control over the selection of suppliers in the Model Law, and of addressing informal compilations of suppliers (including registrations with third parties). The aim would be to ensure that fairer and more transparent access to the lists for suppliers was put into place. Further, given that suppliers' lists were recognized under other international procurement regimes to which certain member States were subject, some degree of harmonization would be necessary as well as desirable.

62. With a view to contributing to enhanced transparency and preventing discrimination in the use of suppliers' lists, the Working Group then considered the manner in which they might be regulated. The view was expressed that the use of lists should be addressed with caution, given the inherent risks to competition and transparency that they involved. The Working Group noted that a balance between the provisions of the Model Law and guidance provided in the Guide to Enactment was required, and recalled that, as a general principle, neither text should be overly prescriptive in any event.

63. There was strong support in the Working Group for the use of optional rather than mandatory suppliers' lists. It was recalled that the main procurement methods under the Model Law, i.e. tendering proceedings, necessarily excluded the use of mandatory lists in that they involved a fully open solicitation of bids or the equivalent. It was argued that to permit the use of mandatory lists in tendering proceedings, under which a full and open pre-qualification would be replaced by selection of those invited to submit a tender from a list, would be a retrograde step that would undermine the entire basis of the main procurement methods under the Model Law.

64. It was further noted that the Working Group might elect to seek to restrict the use of suppliers' lists in general to defined circumstances or for defined purposes. In particular, it was suggested to restrict the use of mandatory lists to procurements not subject to tendering procedures and to certain compilations of suppliers (such as contractors' registers). A divergence of views was expressed as to whether such restrictions were desirable, noting that some compilation system would necessarily operate in such limited procedures.

65. It was suggested that the requirement for the publication of the existence of lists would add a significant element of control over the use of lists. It was agreed that the existence of lists should be advertised with reasonable frequency and on an ongoing basis. In that respect, it was noted that the Model Law did not allow advertisement of a list to serve as a substitute for advertising a specific contract, with the aim of improving efficiency. The Working Group agreed to revisit at a later date the issue of whether advertising the existence of a list rather than a specific procurement should be permitted in a revised Model Law.

66. Additionally, the Working Group agreed that all suppliers should be given an opportunity to become aware of the lists and so to register and to apply for qualification at any time, to be included within a reasonably short period (so as to ensure that unjustified delays in registration do not effectively reduce competition), and to be notified of any decisions to terminate a list or remove them from it. A related control that could be considered would be that suppliers not yet registered,

where the registration was delayed pending receipt of government certification as regards taxation or similar matters, be considered if there were sufficient time to complete the registration process.

67. As to the extent to which the provisions should be included in the Model Law itself, or in the Guide to Enactment (and in some cases they could be left to implementing regulations in individual States), the Working Group agreed that a decision on this matter would be possible only when draft provisions were before them for consideration. The issues upon which there was as yet no consensus could also be reconsidered at that stage.

2. Framework agreements

68. It was noted that framework agreements were arrangements for securing the repeat supply of a product or service over a period of time, which involved a call for initial tenders against set terms and conditions, the selection of one or more suppliers on the basis of the tenders, and the subsequent placing of periodic orders or contracts with the supplier(s) chosen as particular requirements arose. Their main use arose in circumstances in which procuring entities required particular products or services over a period of time but did not know the exact quantities, nature or timing of their requirements. Framework agreements could be in the form of single-supplier or multi-supplier framework agreements and were said to be widely used. In some countries they were regulated by national law, and their use was also acknowledged by some regional bodies or by international lending institutions.

69. The potential benefits of using framework agreements, rather than commencing a new procurement procedure for each requirement, were said to include the saving of procedural costs and time in procurement. In particular, the arrangements avoided the need to advertise individual contracts and to assess suppliers' qualifications for every order placed, as that phase of the process was carried out once only at the conclusion of the framework agreement. Framework agreements, it was said, could also enhance value for money and other procurement objectives by providing a more transparent procedure than would otherwise exist for small purchases. In particular, it was observed that aggregation of contract amounts under a framework agreement might justify the costs of advertising, and framework suppliers had an interest in monitoring the operation of purchases under the arrangement.

70. It was stated that the Model Law did not contain specific provisions on framework agreements. To some extent, single-supplier and some multi-supplier agreements could arguably be operated under existing procedures, for instance, if they were treated as tendered procurements divided into lots. However, under the Model Law, the tender solicitation documents had to state the quantity of goods required (though accompanying regulations might permit an estimate alone) and, under a framework arrangement, the quantity was normally unknown. It was further noted that the Model Law's tendering proceedings did not contemplate arrangements that involved entering into a binding contract, for example, when orders were placed. In particular, article 36 (4) provided that a contract arose when a tender was accepted, and did not provide for contracts that would arise only when the procuring entity later decided to make specific purchases. It was suggested that the requirement for publishing a public notice of a "contract award" under article 14, which applied to all procedures, did not appear to be suited for providing

publicity for frameworks. There was, on the other hand, no requirement to publish the results of a competition to choose framework suppliers, nor, arguably, to publish details of contracts awarded to the various suppliers.

71. The view was expressed that the Working Group should approach framework agreements with caution. It was stated that some countries with extensive experience with framework agreements were currently undertaking a thorough revision of the way they operated. It had been recognized that framework agreements in those countries had generated significant savings in the overall procurement budget. However, framework agreements had also generated less easily measurable, yet not insignificant costs. They included, for instance, lost opportunities for procuring entities and suppliers that did not have access to framework agreements, lack of transparency and loss of competition.

72. It was further said that adequate management of framework agreements required constant efforts to maximize transparency and competition at every step of the procurement process, even including giving notice of procurement requirements as they arose and publishing notices of contract awards with a view to stimulating direct response from the market where the solution contemplated in the framework agreement was not optimal. Without sufficient transparency and competition, however, framework agreements tended to create a marketplace that was based on relationships between suppliers and purchasers, rather than competition among suppliers, an undesirable situation that should not be promoted. Further control measures included a shift towards non-binding forms of frameworks, following costly litigation with suppliers challenging contract awards to suppliers that were not original participants in a framework. There were also expressions of concern about the duration of a framework, which generally should be no longer than technology involved would last or government requirements would remain unchanged.

73. In response, the Working Group heard explanations about the positive experience with the implementation of framework agreements in other regions. Single-supplier frameworks had been used in some countries for small repetitive purchases of certain products where quantities were expected to vary within a certain range, but it was not known when a procurement requirement would arise and how much would be needed in each stage. To avoid a whole series of contracts that would not be interesting for suppliers, framework agreements with estimated quantities had been entered for one or more years. The aim in those systems was to avoid successive competitions at greater cost. It was recognized that framework agreements also created some problems, but those were not regarded as insurmountable. For instance, the risk of loss resulting from purchasing at fixed prices at times when market prices were falling—as was frequently the case with information technology products—could be overcome by introducing a second stage of competition at each time a procurement requirement arose, in the form of a mini-tender. Other common controls included limits on the duration, with possibility of extensions only upon justification. Also, review procedures could address risks of excess price if the suppliers are seen not to be following the rules.

74. There was general agreement that the Commission should acknowledge the fact that framework agreements, even if not currently mentioned in the Model Law, were used in practice. However, the views differed on how to deal with framework agreements.

75. There was strong support in the Working Group that guidance on the matter beyond merely acknowledging the existence of practice should be given. Indeed, enacting States would expect guidance from the Commission on how best to take advantage of framework agreements. Such guidance should offer advice on certain minimum protective measures to avoid misuse and ensure efficiency in public spending. There were several suggestions on matters that the Working Group should consider, including the following: (a) the desirable level of competition in a multi-supplier framework; (b) whether framework agreements should be exclusive; (c) appropriate criteria for establishing the duration of framework agreements; (d) suitable types of procurement for framework agreements; (e) procedures for selecting the participants in a framework agreement and for awarding purchase orders. However, even some of those who favoured a more comprehensive treatment of framework agreements cautioned the Working Group against the risk of limiting the usefulness of framework agreements by formulating too many conditions for their use. Some matters, it was said, should be left for the procuring entity to decide.

76. However, there was some support to the proposition that nothing in the Model Law appeared to preclude an enacting State from using framework agreements. If anything needed to be done, it would be sufficient to acknowledge their existence in the Guide to Enactment and provide some information on issues related to their implementation. It was suggested that the Working Group should adopt a flexible and pragmatic approach and should avoid formulating overly prescriptive guidance on the matter. For instance, objective external factors, such as technology type and market conditions, rather than arbitrary time limits, should govern the duration of a framework agreement. Likewise, it would be undesirable to attempt to draw up a list of situations where the use of a framework agreement might be appropriate, since conditions varied greatly among States, and in view of the fact that the Model Law should be able to operate adequately everywhere.

77. In response, it was observed that the Guide to Enactment could provide advice as to how framework agreements could be brought into line with the Model Law, only to the extent that the Model Law could be said to accommodate framework agreements. The Model Law itself, it was said, did not deal with framework agreements and, in a few instances, it appeared to create obstacles to their use. Consequently, general statements on framework agreements in the Guide to Enactment would not provide a sufficient basis for dealing with the matter and the Guide would not be the adequate place to deal with framework agreements if the Working Group were to conclude that the Model Law did not support their use.

78. With a view to facilitating further deliberations by the Working Group on the general approach to framework agreements, including the level of detail with which they should be treated and the appropriate way of dealing with them (i.e. whether by model provisions, legislative guidance or both), it was agreed that the Working Group should first examine whether and to what extent the Model Law, in its current form, created obstacles to the use of framework agreements. The Working Group agreed to request the Secretariat to prepare a note on the matter, including as appropriate, draft guidance materials, for consideration by the Working Group at a future session.

3. Procurement of services

79. The discussions focused on the question of whether the Model Law should be revised so as to narrow down the scope of services for which the "principal method for procurement of services" provided for in articles 37-45 of the Model Law could be used. It was observed that that method had in practice worked satisfactorily for certain types of procurement, notably intellectual services that did not lead to measurable physical outputs, such as consulting or other professional services. Questions were raised, however, about the appropriateness of that method, for instance, in connection with services for which the procuring entity could provide quality and quantity specifications in advance of the procurement concerned. It was observed that considering services separately in the Model Law had led to a focus on the special characteristics of some services procurement, rather than on the common features of many procurements of goods and construction and those of services.

80. The Working Group took note of the background information in paragraphs 41 to 44 of a note by the Secretariat (A/CN.9/WG.I/WP.32) about the provisions in the Model Law governing the "principal method for procurement of services". The experience of national and regional organizations in this matter was also considered. A common feature noted was that the provisions for the procurement of services were more flexible than for goods and construction.

81. The procedures in one regional organization allowed the use of a flexible form of competitive negotiations, including a prior publication of the procurement opportunity, as the main procurement method in cases in which it was not possible to draw up specifications with precision. This situation applied in particular to financial services and "intellectual services", defined as those with no physical output (though their main feature was an intellectual element), but the critical aspect of the services was the qualitative aspect—the technical merit—of the proposals. Its use, however, was not limited to those cases. The initial responses of suppliers would lead to the finalization of the specification at issue. In order to address the issue of transparency and to preserve flexibility, material changes to the specification during the process, and the point at which it was finalized, were disseminated. The best and final offer of each supplier would be recorded as a safeguard.

82. One multilateral lending institution had adopted a different approach. Noting that development banks did not become involved in certain less complex types of services procurement (such as cleaning services), "intellectual services", as described above, had been separated from all other types of services procurement. After an open call for expressions of interest, a limited number of short-listed suppliers would be invited to submit a proposal, possibly after a formal process of pre-qualification. The qualitative merit of proposals was factored into their evaluation and combined with their price, in a manner that varied according to the type of service, and the winner thereby selected. Since the relative cost of preparing a good proposal was high in the context of the value of the project, it was considered inappropriate to invite many suppliers to bear such costs with little chance of selection, as they would operate as a disincentive to participation and the cost of so doing would ultimately be borne by the procurement process as a whole. It was also observed that the high relative cost might deter small- and medium-sized

enterprises from participating, which might run counter to certain States' general industrial policies.

83. National regimes were said to take widely divergent approaches to that issue, but even the most flexible systems, it was observed, did not allow for free use of all the selection procedures provided for in the Model Law's principal method for the procurement of all types of services. Rather, entities were required to use the ordinary methods for procurement of goods when purchasing services, unless specific exceptions applied. The Working Group agreed that the Model Law should take note of current practice and relevant experience.

84. The view was expressed that the use of the Model Law's principal method for the procurement of services should be treated with caution because of the risks to transparency and of potential abuse arising from the flexibility and use of discretion in subjective questions inherent in that method.

85. It was noted that the objectives and processes of procurement under the Model Law were the same irrespective of the type of procurement (services or others), and so even if the evaluation criteria should be different, an attempt should be made for a consistent approach in the selection of the procurement method.

86. It was recalled that the aim of ensuring value for money in procurement led to the conclusion that if a detailed specification could be drafted at the outset, tendering proceedings would be the optimal method of procurement. It was noted that the issue before the Working Group was how to address the situation in which such a specification could not be drafted and tendering was not appropriate. It was agreed that all four procurement methods other than tendering available to procuring entities should be provided for, but the Working Group should address consideration of the choice among such methods. It was also acknowledged that there was little guidance in either the Model Law or the Guide to Enactment as currently drafted on this choice.

87. The Working Group considered three main aspects of the issue. First, whether the Model Law should specify when particular procurement methods should be available, possibly by reference to particular types of services, and notably whether it should restrict the principal method for the procurement of services to certain types of services. If so, should those services be defined, for example by reference to the type of services at issue or prevailing circumstances? A further aspect of that issue was whether there could be a clear definition of the services, for example, of intellectual services. Thirdly, in the light of the Working Group's wish to avoid too prescriptive an approach and of the experience of States and organizations as described above, how detailed should any new provisions be and where should they be found?

88. An example of how the above issues might interrelate was the fact that certain projects might comprise several stages, with each giving rise to a separate procurement with different characteristics. Accordingly, a construction project might include an architectural design and a construction phase. It was important to recognize that the costs of the construction phase must be borne in mind when assessing the relative merits of the design proposals (which may themselves be submitted in a design contest) in order to achieve the best value for money for the entire project.

89. The Working Group considered the proposed limitation on the use of the principal method for the procurement of services. Possible alternatives included whether tendering should be the principal method for the procurement of services, and whether tendering should be the second preferred alternative after the request for proposals procedure (or vice versa). In response to those suggestions, however, there was strong support for the view that there should be no changes to the Model Law as it was currently drafted.

90. As regards the notion of services, the Working Group agreed that the question of whether intellectual services were amenable to precise definition was pivotal to its deliberations. It was observed that definitions should, to the extent possible, be consistent with definitions provided in other systems. It was also noted that a definition would be more difficult if a project might involve a mixture of goods and services, and the cost element of each might not reflect their relative importance to the project. For example, in the context of computerization project, the initial hardware might comprise the most significant cost element, but the ongoing services component might dictate the success or otherwise of the project. Should such a project be defined as an intellectual services project? Similarly, some types of services might in some circumstances require specialized knowledge and not in others, so that the approach for intellectual services might be appropriate in some cases only.

91. Furthermore, it was pointed out that if the principal method for the procurement of services were available only for intellectual services defined as those not measurable by output, there was a risk that too much procurement would be contracted through tendering. It was observed that it was increasingly common to structure services contracts, including those with very significant intellectual components, as performance-based, so that they were in fact measurable by output. The fact that they had a measurable output, however, was not sufficient reason to subject them to the tendering procedure (which was not appropriate for complex procurement).

92. Finally, it was added that there was an increasing tendency in some systems to treat all complex projects as services procurement. For example, a hydroelectric power plant could be treated as a service for the provision of power, and the procuring entity would not need to purchase the plant itself.

93. In conclusion, and after considerable discussion reflecting the difficulties in defining intellectual services, the Working Group agreed that the Model Law should retain all the various options in methods for the procurement of services currently provided, and that therefore there was no need to revise it in that respect. However, the Working Group also agreed on the need to formulate guidelines in the Guide to Enactment for the use of each method, depending on the type of services at issue and the relevant circumstances. In so doing, the main aims and objectives of the Model Law should be expressly related to the guidance so provided.

4. Evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies

94. The Working Group noted that, when the Model Law was drafted, it was recognized that States might use procurement to promote other policy goals, which might be economic or non-economic, such as industrial, social or environmental.

That concept was reflected in article 34 (4) of the Model Law and discussed in the Guide to Enactment. It was noted that the Model Law did not mandate the use of procurement for such purposes, but suggested ways to do it in a transparent way. The Working Group was invited to consider whether the Model Law provided for the right balance between the aims of maximizing economy and efficiency in procurement, and other policy goals, and if not, what measures should be taken to achieve a better balance either through amending the Model Law, or giving relevant guidance in the Guide to Enactment.

95. In consideration of these issues, the attention of the Working Group was drawn to two subparagraphs of article 34 (4) of the Model Law: subparagraph (c)(iii), dealing with non-objective factors permitted to be taken into account in determining the lowest evaluated tender; and subparagraph (d), dealing with granting a margin of preference for domestic needs. Some overlap between provisions of those subparagraphs was said to exist since both of them aimed at promoting the domestic economy.

96. It was noted that, despite possible objections, as a matter of principle, to the use of public procurement to promote other policy goals, rather than only obtaining "value for money", it was acknowledged that in practice States often used public procurement to achieve those other goals. Moreover, the view was expressed that in certain instances, it was appropriate and important to use procurement as a tool to achieve those goals provided that such use did not undermine the main objectives of the procurement process, such as economy, efficiency, transparency, competition and equitable treatment of all suppliers and contractors. However, it was generally felt that the focus of the Model Law should remain that of procurement rather than the promotion of other policy goals.

97. Two ways were considered to limit the potential for abuse if the procurement were used for such purposes: (a) to include the promotion of other policy goals in specifications; or (b) make such goals quantifiable evaluation criteria and disclose them at the solicitation stage, as already envisaged in article 34 (4) (b)(ii) of the Model Law. Additional control measures might include requirements such as the following: that other policy goals must relate to the object of the procurement; that their evaluation should not be left entirely to the discretion of the procuring entity; and that their use as evaluation criteria must preserve essential principles of good procurement practice, such as equal treatment of suppliers and the need to promote competition. Another way of enhancing transparency, it was said, was to use such evaluation criteria in such a way that their misuse might be challenged through the bid protest mechanisms.

98. The Working Group considered those suggestions extensively. Generally, it was felt that the Model Law did provide for sufficient balance and there was no need to amend it. If, however, the Working Group decided to amend it, that should be done without prejudice to the principles of the procurement as enumerated in the preamble of the Model Law. A better alternative, however, might be to leave the Model Law intact and provide for more explanations in the Guide on when the procurement could be used to promote other policy goals and how to ensure that such uses were transparent.

99. Concern was expressed with respect to the retention of shadow pricing of foreign exchange and counter-trade arrangements as factors to be taken into account

in determining the lowest evaluated tender (article 34 (4) (d) of the Model Law). The Working Group did not exclude the possibility of reconsidering, in due course, the appropriateness of those references in the Model Law.

100. The Working Group also noted that enacting States might be restricted in their ability to use non-economic criteria in evaluating and comparing tenders under international or regional treaties or agreements binding on them. It was agreed, however, that article 34 (4) of the Model Law, did not mandate the use of domestic preferences and that article 3 of the Model Law adequately dealt with that issue by affirming the precedence of treaty obligations over the provisions of the Model Law.

101. The Working Group concluded by recognizing that existing provisions of the Model Law provided sufficient balance between the need for the economy and efficiency and possibility for an enacting State to address other policy goals through the procurement. However, some of those other policy goals listed in the Model Law seemed to be outdated and the Working Group could consider at a later stage the desirability or otherwise of retaining them. No final decision was taken at this stage by the Working Group on the need for or desirability of formulating additional control mechanisms to ensure transparency in the use of procurement to promote other policy goals in the text of the Model Law. It was agreed, however, that the Working Group might consider formulating additional guidance on means to enhance transparency and objectivity in the use of other policy goals within evaluation criteria.

5. Remedies and enforcement

102. The Working Group noted that the issue of remedies and enforcement touched upon the question of the legality of government acts and upon the separation of powers between the executive and the judicial branches of a particular State. There would be a broad range of approaches to those questions in different legal systems, which made it important to address the issue of review in a measured way. Indeed, States differed significantly in their approach to enforcement and in the extent to which they offered review at the instigation of the supplier. In some countries, there was a long-standing system of review before specialist authorities and courts, while in other countries there was no general legislative provision for such review (except to the extent required by international obligations and subject to judicial review procedures). In some legal systems there were administrative sanctions for breaches of procurement law by organs of the State, and proceedings were brought before an administrative tribunal, while in yet other legal systems there was a combination of administrative review, including possible suspension of procurement proceedings, and judicial review of procurement decisions through the ordinary courts and special criminal proceedings for violations of procurement laws by procuring entities.

103. In recognition of those factors, the provisions of chapter VI of the Model Law were limited to general guidance, and a footnote to chapter VI suggested that enacting States might not incorporate some or all of the articles, leaving considerable room for the enacting State in implementing the Model Law. Furthermore, the Model Law left certain areas unregulated, such as the question of the independence of the administrative review body, the form of the relief to be given (which might include orders or recommendations), and there were no provisions for a judicial or quasi-judicial proceeding. There was no provision

creating a right to judicial review, though article 57 allowed enacting States that operated judicial review to include procurement review within the relevant courts' jurisdiction.

104. Recognizing that caution should be exercised in any attempt to expand the review and enforcement provisions of the Model Law, the Working Group considered the following issues:

(a) Whether there should be a more articulate recommendation as to the inclusion and operation of review provisions in the national law and further guidance, including draft model provisions, in the Guide to Enactment;

(b) Whether the administrative review provisions should be strengthened, for example, by requiring an independent review process;

(c) Whether more detailed advice and guidance should be given concerning the judicial review process, including in respect of the powers of the courts and time frame for the review, the possible reversal of incorrect procurement decisions and remedies that were available; and

(d) Whether the scope of provisions relating to exceptions to review (article 52 (2)) should be revisited.

105. With respect to the issue in (a) above, doubt was expressed as to whether it would be feasible at all to propose a model for review and enforcement that would be acceptable in various jurisdictions. It was suggested that it would be better not to attempt to include detailed provisions in the Model Law itself, as the Guide to Enactment was better suited for explaining the various approaches and policy options, including their practical implications and possible advantages or disadvantages. For example, the Guide to Enactment might explain that review procedures would enhance the oversight interests of the government and would protect the rights of prospective contractors.

106. The views differed with respect to the issue in (b). The need for an independent administrative review mechanism was stressed because it might be unrealistic to expect that review by the procurement entity of its own acts and decisions would always be impartial and efficient. It was suggested that the Guide to Enactment should provide for details for the establishment of an independent administrative review body (e.g. whether it should function on a permanent basis or established for each case). It was noted that effective independent review in some countries was already achieved through the court system. Thus, the establishment of additional structures for those States would not be desirable if to do so might distort the structure and functioning of the government.

107. It was agreed that the identity of the body entrusted with the review function was less important than its independence from the procuring entity and political pressure in making decisions, and its efficiency. Examples of powers that should be available to the reviewing body included the following: the possibility to intervene without delay and to suspend or cancel the procurement proceedings; the power to implement other interim measures, such as giving restraint orders and imposing financial sanctions for non-compliance; the power to award damages if intervention was too late (e.g. after the contract was awarded); and the ability to proceed swiftly within a reasonably short period of time (4-5 weeks were suggested as an optimal time-frame). At that juncture, the Working Group was referred to the discussions on

the independence and powers of regulatory bodies that had been held in connection with the formulation of advice on the regulatory framework for public utilities during the preparation of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. Reference was also made to the relevant provisions of the Agreement on Government Procurement of the World Trade Organization (GPA), in particular its article 20, which provided for the review by a court or impartial independent review body that did not have interest in the outcome of the procurement. The view was expressed that the provisions in the GPA might be used to assess the areas for improvement in the review and enforcement mechanisms provided for in the Model Law.

108. As for the suggestion in (c) above that more detailed advice and guidance should be given concerning the judicial review process, the view was expressed that such guidance would be useful especially if it would encourage the swift disposition of procurement-related disputes by courts. It was observed, however, that excessive reliance on judicial review might not always be the best solution, because in many jurisdictions court proceedings were lengthy and courts lacked procurement-related expertise. That situation was said to be unsatisfactory. Indeed, speed of intervention was an essential factor in any effective review process because meaningful results for aggrieved parties could only be expected if effective remedies were available at pre-award stages. In recognition of that, it was noted that certain national and regional regulations provided for a period between the award and final formation of a procurement contract to allow protests by aggrieved parties. It was therefore important to inform courts of the possibility of suspending procurement proceedings as a worthwhile option to pursue. The Working Group took note of those views and agreed that enacting States might benefit from advice on how to improve the effectiveness of judicial review. Such advice, which might also help to harmonize law and practice in that regard, should, however, respect the various legal traditions in different States and should not be overly prescriptive.

109. As for the revision of the scope of provisions relating to exceptions to review (article 52 (2)) referred to in (d) above), it was suggested that some—if not all—of those exceptions should be deleted from the Model Law. In particular, the exception relating to the selection of the procurement method under article 52 (2)(a) was criticized on the ground that lack of accountability in respect of the selection of procurement methods was one of the areas that had led to most abuses in practice. As a whole, the exceptions in article 52 (2) were said to undermine the integrity of the procurement system and should be deleted. It was also noted that GPA did not provide for exceptions to review.

110. In response, it was pointed out that allowing review, including judicial review, of all matters mentioned in article 52 (2) might give rise to difficulties in some legal systems. For instance, the judicial branch in certain jurisdictions had limited powers to challenge decisions of executive bodies alleged to be taken in the public interest. Furthermore, in some legal systems a prospective supplier might lack standing to challenge decisions such as the selection of a procurement method, which were typically taken by the procuring entity prior to initiation of procurement proceedings. The Working Group was invited to recognize the fact that different legal systems provided various ways for controlling the acts of procuring entities, not all of which relied on challenge by bidders. It was also pointed out that irrespective of the Working Group's decision on that issue, the review of the issues

identified in article 52 (2) would in some cases still be possible under provisions of other laws, for instance, on the ground that the decision by the procuring entity was based on improper motive.

111. The Working Group also considered whether alternative dispute settlement procedures in procurement proceedings were appropriate. The view was expressed that, while those procedures might be useful at the post-award stage, their utility in pre-award stages was doubtful. Furthermore, in some jurisdictions it had been found that recourse to arbitration and other extrajudicial dispute settlement methods might not always contribute to the development of the law, to the extent that in many legal systems arbitral awards of settlement agreements were not conducive to establishing a binding precedent. While it would be appropriate to recognize the use of alternative dispute settlement procedures in procurement proceedings, it was emphasized that the impression that those procedures could always substitute for judicial review should be avoided.

112. The Working Group concluded its deliberations by agreeing on the following:

(a) That it would be useful to provide further guidance, probably in the Guide to Enactment, on review provisions that national laws could incorporate;

(b) Recognizing the fact that there were different systems, some of which favoured review through the courts while others favoured independent administrative review, the Working Group should leave various options open for States, taking into account that the Model Law was sufficiently flexible in this regard and that the independence of the reviewer is paramount. If there was a need for additional comments on that subject, they could be reflected in the Guide;

(c) Provisions related to the judicial review process should be left for enacting States; and

(d) The list of exceptions in article 52 (2) should be deleted. However, the Guide to Enactment should indicate that enacting States might wish to exclude some matters from the review process, which could include some of those currently listed in that article and other matters. The Guide to Enactment should indicate the rationale for such exclusions and explain the implications of any exclusions, such as the risk that they might preclude effective review and control of the proper management of the procurement process.

113. The Working Group requested the Secretariat to prepare draft materials that took into account the above deliberations, for consideration by the Working Group in due course.

6. Other matters

(a) Alternative methods of procurement

114. It was suggested that it might be useful to review the need and conditions of use of some "[a]lternative methods of procurement" set out in Chapter V of the Model Law, so as to address concerns expressed by certain multilateral lending institutions and other bodies that the number of such alternative methods was excessive. Although it was noted in the Model Law itself that an enacting State need not and perhaps should not enact all such methods, the Working Group was invited

to consider whether the provisions relating to certain of the alternative methods should be reviewed.

115. In particular, the following suggestions were made: the "two-stage tendering" procedure (article 46) could be treated as a form of open tendering, aimed at refining specifications throughout the first stage of the tendering process in order to achieve a transparent selection in the second stage, instead of being categorized as an "alternative method". Secondly, in view of the fact that methods other than open tendering procedures might have been used in practice more widely than had been anticipated, the grounds for using those methods should be restricted. For example, the grounds for "restricted tendering" (articles 20 and 47) could be narrowed from "disproportionate" cost of other procedures and "limited number of suppliers" to the latter only, and the justifications for using "single-source procurement" should be restricted so as not to include extrinsic considerations such as transfer of technology, shadow-pricing or counter trade (as was currently the case under article 22 (2) of the Model Law). An additional suggestion was that the "request for proposals" and "competitive negotiation" procedures (articles 48 and 49) might be deleted altogether.

116. The Working Group generally agreed that it should in due course consider the need for and desirability of circumscribing more clearly the conditions under which the so-called alternative methods of procurement could be resorted to, with a view to reducing the risk of abuse in their use. The Working Group agreed that it might further consider in the future eliminating some of those methods and presenting them in a manner that stressed their exceptional, rather than alternative, nature within the system of the Model Law.

117. The Working Group took note of a concern that treating the "two-stage tendering" procedure (article 46) as a form of open tendering might undermine the objectivity of the tendering method under the Model Law and agreed that the proposal needed to be carefully considered in due course. The Working Group further agreed that article 22 of the Model Law needed to be revisited (in particular, paragraph 2 of the article should be deleted) with a view to enhancing transparency and that, generally, the justification requirements for all "alternative methods" under article 18 might be strengthened.

118. Lastly, the Working Group agreed that it should revert to the proposal to delete subparagraph (b) of article 20—which allowed the use of restricted tendering when 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—after it had had an opportunity to consider how that provision would relate to other procurement methods, such as framework agreements, which the Working Group had tentatively agreed to consider (see para. 78).

(b) Community participation in procurement

119. It was pointed out that the most efficient way to implement a project might sometimes be through the participation of users (known as community participation). Those users had an incentive to ensure good quality in the performance of work affecting them directly. For example, community participation might lead to a sustainable delivery of services in sectors unattractive to larger companies such as health, agricultural extension services and informal education. It

might offer benefits including the improvement of the quality of the end product, in that: (a) local people would be motivated to see that adequate standards were achieved and that work was completed on time; (b) the potential for on-site disputes could be reduced; and (c) bureaucracy might also be reduced through the use of less formal procedures. There could also be other potential benefits, including the provision of local employment using labour-intensive technologies, the utilization of local know-how and materials, the encouragement of local businesses and the improvement of municipal accountability, which might form part of enacting States' social goals. In practice, however, many countries could not avail themselves of community participation in project execution in view of the fact that their procurement laws did not provide for that possibility. The Working Group was therefore invited to consider ways in which community participation might be recognized in the Model Law.

120. The Working Group recognized the potential value of community participation in the implementation phase of a procurement project, by enhancing public scrutiny on public expenditure. Experience had shown that community control could be effective if the community in question had sufficient knowledge about the project, which was typically the case for small-scale projects. In case of larger projects, however, the need for appropriately informing the community about essential elements of the project might place an unreasonable burden on the procuring entity. Community participation, it was further stated, was generally welcome where it added to the overall transparency and efficiency of the procurement process, but should be carefully considered where it rendered the decision-making process less transparent or resulted in added costs or loss of competition. The view was also expressed, in that connection, that community participation was not per se a method of procurement, but an implementation modality for publicly funded projects and that the authority to carry out projects with community participation would not normally derive from the procurement laws of a country, but from other rules and regulations governing public expenditure.

121. In response, it was pointed out that, in practice, the involvement of the local community might be one of the criteria for the selection of the method of procurement or for the award of the contract. Alternatively, tenderers might offer their best solutions, including community participation if they so choose, and those solutions might then be compared, or the conditions of implementation might be set to include the employment of local labour or materials, or part of the budget for the project might be set aside for community participation.

122. The Working Group felt that most issues raised by community participation related primarily to the planning and implementation phases of a project, more than to the procurement process. As such, community participation was not a matter that could be easily addressed in the Model Law. Being aware, however, of the growing importance of community participation and the possible need for enabling legislation in many jurisdictions, the Working Group agreed that it should review the provisions of the Model Law with a view to ensuring that they did not pose obstacles to the use of community participation as a requirement in project-related procurement. The Guide to Enactment, it was further agreed, might provide additional guidance on the matter.

(c) Simplification and standardization of the Model Law

123. It was observed that some enacting States had chosen not to enact some of the more detailed parts of the Model Law, finding that they had not proved necessary for legislation in the States concerned. It was also suggested that some restructuring of the presentation of the Model Law might also prove useful as a tool to assist enacting States in formulating domestic legislation.

124. It was said, in particular, that certain provisions currently found in the text of the Model Law might be moved to an annex to the Model Law, or to model provisions that the Guide to Enactment could provide. Examples included article 7 (3), listing the contents of pre-qualification documents, article 11, listing information in the record of the proceedings, article 25, listing the contents of invitations to tender and pre-qualify in tendering procedures, article 27, listing the contents of the solicitation documents, article 38, concerning the contents of a request for proposals for services under the principal method for the procurement of services, and article 48 (4), concerning the content of a request for proposals under the relevant procedure.

125. The need for shortening the Model Law was questioned. It was explained that some States would prefer to have a more comprehensive instrument and, in any event, enacting States could exercise their discretion regarding the level of details and structure they deemed appropriate for their local conditions, including drafting techniques and traditions.

126. The Working Group agreed that there was some room for improving the Model Law's structure and for simplifying its contents, by some reordering or by eliminating unnecessarily detailed provisions or moving them to the Guide to Enactment. It was generally felt that the desired result should be a more user-friendly Model Law where all essential elements would be preserved and presented in an improved structure and in a simpler way. The same principles should be observed in preparing the revised Guide to Enactment. Recognizing that, in the process of introducing new topics into the Model Law, changes would inevitably have to be made in its structure, the Working Group was of the view that it would be preferable to revert to the proposals for simplification of the Model Law at a later stage.

(d) Legalization of documents

127. It was noted that article 10 of the Model Law provided that if the procuring entity required the legalization of documents, it should not impose any requirements other than those provided by the general law for the type of documents in question. However, that article imposed no restrictions on the power of procuring entities to call for legalization of documents. In practice, it was said, procuring entities sometimes required the legalization of documents by all those who needed to demonstrate their qualifications to participate in a procurement procedure, which could be time-consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers might be passed on to procuring entities.

128. The Working Group generally agreed that it would be desirable to limit the power of procuring entities to require legalization of documentation from a successful supplier alone. In doing so, the Working Group agreed that it could consider in due course whether article 10 could be combined with article 6 (5).

Notes

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

[2] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 81.

[3] Ibid., para. 82.