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**United Nations Commission
on International Trade Law**
Working Group I (Procurement)
Eighth session
Vienna, 7-11 November 2005

Annotated provisional agenda for the eighth session of Working Group I (Procurement)

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

II. Composition of the Working Group

1. The Working Group is composed of the following States: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Benin, Brazil, Cameroon, Canada, Chile, China, Colombia, Croatia, Czech Republic, Ecuador, Fiji, France, Gabon, Germany, Guatemala, India, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Lebanon, Lithuania, Madagascar, Mexico, Mongolia, Morocco, Nigeria, Pakistan, Paraguay, Poland, Qatar, Republic of Korea, Russian Federation, Rwanda, Serbia and Montenegro, Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela (Bolivarian Republic of) and Zimbabwe.



2. In addition, States that are not members of the Commission, as well as relevant intergovernmental and international non-governmental organizations, may be invited to attend the session as observers. In accordance with established UNCITRAL practice, observer delegations may participate actively in the deliberations leading to decisions, which are taken by consensus.

III. Annotations to agenda items

Item 1. Opening of the session

3. The eighth session of Working Group I (Procurement) is scheduled to be held at the Vienna International Centre from 7 to 11 November 2005. Meeting hours will be from 9.30 a.m. to 12.30 p.m., and from 2 p.m. to 5 p.m., except on Monday, 7 November 2005, when the session will commence at 10 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

(a) Previous deliberations

5. At its thirty-sixth session, in 2003, the Commission considered a note by the Secretariat on possible future work in the area of public procurement (A/CN.9/539 and Add.1). It was observed that the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”)¹ contained procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process and that it had become an important international benchmark in procurement law reform. Nevertheless, it was also observed that, despite the widely recognized value of the Model Law, novel issues and practices had arisen since its adoption that might justify an effort to adjust its text. At that session, strong support was expressed for the inclusion of procurement law in the Commission’s work programme and the Commission requested the Secretariat to prepare for its further consideration detailed studies on the issues identified in the note by the Secretariat and to formulate proposals on how to address them.

6. At its thirty-seventh session, in 2004, the Commission had before it a note by the Secretariat (A/CN.9/553) submitted pursuant to that request. At that session, the Commission decided that the 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. 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.

7. The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004). The Working Group used the notes by the Secretariat (A/CN.9/WG.I/WP.31 and 32) as a basis for its deliberations. At that session, the Working Group decided to entrust the Secretariat with the preparation of draft materials and studies reflecting the deliberations of the Working Group for consideration at its future session. It further decided that at its seventh session it would proceed with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (see para. 8 below).

(b) Summary of the Working Group's consideration at its sixth session of its proposed work programme

8. At its sixth session, the Working Group considered the following topics: (a) electronic publication of procurement-related information; (b) the use of electronic communications in the procurement process; (c) controls over the use of electronic communications in the procurement process; (d) electronic reverse auctions; (e) the use of suppliers' lists; (f) framework agreements; (g) procurement of services; (h) evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies; (i) remedies and enforcement; (j) alternative methods of procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; and (m) legalization of documents.

9. With respect to electronic publication of procurement-related information, 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 of the Model Law as to the value of electronic publication (A/CN.9/568, para. 21). The Working Group was of the view that the use of electronic publication under the Model Law should remain optional (A/CN.9/568, para. 27). 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 (A/CN.9/568, para. 28).

10. With respect to the use of electronic communications in the procurement process, 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 (A/CN.9/568, para. 39).

11. With respect to controls over the use of electronic communications in the procurement process, 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 (A/CN.9/568, para. 41).

12. With respect to electronic reverse auctions, the Working Group recognized the reality of electronic reverse auctions and confirmed 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, including as regards existing approaches for handling the risk of abnormally low prices (A/CN.9/568, para. 54).

13. With respect to the use of suppliers' lists, 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 (A/CN.9/568, para. 61). The Working Group considered the manner in which the use of suppliers' lists might be regulated with a view to contributing to enhanced transparency and preventing discrimination in the use of suppliers' lists (A/CN.9/568, para. 62). There was strong support in the Working Group for the use of optional rather than mandatory suppliers' lists (A/CN.9/568, para. 63).

14. With respect to framework agreements, 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 (A/CN.9/568, para. 74). 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 (A/CN.9/568, para. 78).

15. With respect to procurement of 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 (A/CN.9/568, para. 93).

16. With respect to evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies, the Working Group recognized 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. It was agreed 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 (A/CN.9/568, para. 101).

17. With respect to remedies and enforcement, the Working Group agreed that: (a) it would be useful to provide further guidance 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; (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 (A/CN.9/568, para. 112).

18. With respect to alternative methods of procurement, 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 (A/CN.9/568, para. 116).

19. With respect to community participation in procurement, it was 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. 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 (A/CN.9/568, para. 122).

20. With respect to simplification and standardization of the Model Law, 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 (A/CN.9/568, para. 126).

21. With respect to the legalization of documents, 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) (A/CN.9/568, para. 128).

22. At its seventh session held in New York from 4 to 8 April 2005, the Working Group continued its work on the elaboration of proposals for the revision of the UNCITRAL Model Procurement Law. The Working Group used the notes by the Secretariat referred to in paragraph 6 above (A/CN.9/WG.I/WP.34 and 35 and their addenda and A/CN.9/WG.I/WP.36) as a basis for its deliberations. The report of Working Group I on the work of its seventh session is document A/CN.9/575, and the background to the current work of the Working Group is found in paragraphs 5-7 of A/CN.9/WG.I/WP.33.

(c) Summary of conclusions at the Working Group's seventh session

23. At its seventh session, the Working Group requested the Secretariat to prepare drafting suggestions for its eighth session, reflecting the deliberations of the

Working Group at its seventh session, on (i) electronic publication and communication of procurement-related information, (ii) other aspects arising from the use of electronic means of communication in the procurement process, such as controls over their use, (iii) electronic reverse auctions, and (iv) abnormally low tenders. The Working Group further decided, time permitting, to take up the topic of framework agreements at its eighth session (A/CN.9/575, para. 9). In this regard, it recalled its consideration of the subject at its sixth session at which the Secretariat was entrusted with the preparation of a note on this question (A/CN.9/568, para. 78).

(i) The use of electronic communications in the procurement process

24. As regards the use of electronic communications in the procurement process, the Working Group agreed to continue its consideration of new provisions to be incorporated in the Model Law, as a new article 4 bis. This article would promulgate the general principles of functional equivalence and technological neutrality to be observed in communicating during the procurement process, without stipulating the conditions for functional equivalence between electronic and written tenders. The Working Group reaffirmed its earlier decision that those conditions fall to be treated in general law on electronic commerce and not in procurement law, and consequently that the Model Law would not address them and that provisions regarding electronic communications would be included in the Model Law if the procurement context strictly required such provision. Nonetheless, it was agreed that the Guide to Enactment would provide guidance for enacting States on relevant requirements (A/CN.9/575, paras. 12 and 34).

25. The Working Group also decided to continue at a future session its deliberations on definitions of the terms “writing” and “electronic means [of communication]”, perhaps based on the definitions of these notions in the European Union procurement directives of 31 March 2004 (Directives 2004/17/EC and 2004/18/EC), and on whether such definitions should be included in the Model Law (A/CN.9/575, para. 23).

26. As regards the form of communications, the Working Group agreed that the procuring entity should be able to select any form of communication, without being required to justify its choice, provided that the chosen form met certain “accessibility standards”, such as that the form selected (i) should not represent an obstacle to access to the procurement process, (ii) would be justified to promote economy and efficiency in the procurement process and (iii) would not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition. The Working Group also agreed that the supplier should not be able to select the method of communication to be used, and that the principles regarding the use of communications should apply, *mutatis mutandis*, to their form of communications as set out in article 9 of the Model Law (A/CN.9/575, paras. 32-33).

(ii) The electronic publication of procurement-related information

27. As regards the electronic publication of legal texts and other information, the Working Group agreed that the scope of article 5 of the Model Law should be expanded to cover all procurement-related information that the Model Law required to be published, including legal texts. The Working Group also agreed to consider

whether further procurement-related information that the Model Law did not currently require to be published should fall within the scope of article 5. The Working Group decided to continue its deliberations on this question taking into account the results of a study of relevant publication practices in national and international systems to be presented to the Working Group at its eighth session. As regards the methods of publication, the Working Group agreed that the main principle would be that any method of publication could be selected as long as the chosen method complied with the “accessibility standards” and that such principle would apply to all procurement-related information that the Model Law would require or permit to be published under expanded article 5 (A/CN.9/575, paras. 25-27).

(iii) Electronic submission of tenders, proposals and quotations

28. As regards the electronic opening of tenders, the Working Group requested the Secretariat to provide drafting material for its consideration with respect to article 33 to accommodate any system for opening tenders, whether electronic or traditional (A/CN.9/575, para. 42).

29. As regards the acceptance of tenders and entry into force of a procurement contract, the Working Group concluded that no specific provision to enable these matters to be handled electronically was needed in the Model Law. However, the Guide to Enactment would provide guidance for enacting States on relevant requirements (A/CN.9/575, para. 50).

(iv) Legal value of electronic documents

30. As regards the legal value of electronic documents used in or resulting from procurement proceedings, the Working Group agreed to continue its consideration of an expanded article 11 to be incorporated in the Model Law, based on the broader concepts of dissemination of information and accessibility standards, and that the Model Law should also provide that procurement regulations may establish procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and, where appropriate, confidentiality of information (A/CN.9/575, paras. 45-47).

(v) Electronic reverse auctions

31. As regards electronic reverse auctions (ERAs), taking account of the increasing use of ERAs and the twin aims of harmonization and promotion of best practice, the Working Group concluded that the revised Model Law should contain provisions on ERAs. Those provisions could take the form of a general enabling provision providing the key principles for the use of ERAs, notably the conditions for and limitations to the use of ERAs (see, further, A/CN.9/WG.I/WP.35, paras. 20-25). Further, the Working Group agreed to confine ERAs under the Model Law to the procurement of clearly specified goods, works and services whose non-price criteria could be quantified and decided that the Guide to Enactment would address the use of ERAs in detail. The Working Group agreed to continue its deliberations in the consideration of new provisions to be incorporated in the Model Law, taking into account, first, that goods, services or construction to be procured by ERAs should be capable of clear specification, that the types of purchases may need to be restricted and a requirement for a competitive market

(A/CN.9/WG.I/WP.35, paras. 8 and 20). Secondly, the provisions would enable the use of ERAs as a procurement method rather than an optional phase in other procurement methods. Thirdly, account should be taken of the approach on the same subject by the parties currently revising the plurilateral Government Procurement Agreement of the World Trade Organization (GPA) as regards the use of ERAs (A/CN.9/575, para. 67).

32. The Working Group postponed its final decision on the question of whether non electronic reverse auctions should be provided for in the Model Law until it had before it draft provisions governing the use of ERAs (A/CN.9/575, para. 65).

(vi) Abnormally low tenders

33. As regards abnormally low tenders (ALTs), the Working Group agreed to continue its consideration of new provisions to be incorporated in the Model Law enabling the identification of possible ALTs. In particular, it was agreed to allow procuring entities to investigate possible ALTs through a price justification procedure (A/CN.9/575, para. 76). The Working Group concluded that further guidance should be provided in the Guide to Enactment taking into consideration discussions in a study by the Secretariat (A/CN.9/WG.I/WP.36).

Item 6. Adoption of the report

34. The Working Group may wish to adopt, at the close of its session, on Friday, 11 November 2005, a report for submission to the thirty-ninth session of the Commission (planned to be held in New York, from 19 June to 14 July 2006). The main conclusions reached by the Working Group at its ninth half-day meeting (that is, on the morning of Friday, 11 November) will be summarily read out for the record by the Chairman at the tenth half-day meeting and subsequently incorporated into the Working Group's report.

IV. Scheduling of meetings and documentation

35. The Working Group's eighth session will last for five working days. There will be ten half-day meetings available for consideration of the agenda items. The Working Group may wish to note that, consistent with decisions taken by the Commission at its thirty-fourth session,² the Working Group is expected to hold substantive deliberations during the first nine half-day meetings (that is, from Monday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the tenth and last meeting of the Working Group (on Friday afternoon).

36. The Working Group may wish to devote its first eight half-day meetings (from Monday to Thursday) to its deliberations on agenda item 4, and to reserve its penultimate half-day meeting (on Friday morning) for an exchange of views on the possible additional issues as regards procurement that may warrant consideration by the Working Group in due course (agenda item 5).

37. The Working Group will have before it, and may wish to use as a basis for its consideration, the following notes by the Secretariat:

(a) A note concerning the use of electronic communications in the procurement process, including drafting materials (A/CN.9/WG.I/WP.38);

(b) A note concerning electronic publication of procurement-related information, including a comparative study and drafting materials (A/CN.9/WG.I/WP.39);

(c) A note concerning ERAs, including drafting materials (A/CN.9/WG.I/WP.40);

(d) A comparative study of framework agreements (A/CN.9/WG.I/WP.41);
and

(e) A note concerning framework agreements, including drafting materials (A/CN.9/WG.I/WP.42).

38. A limited number of the following background documents will be made available at the session:

(a) The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its accompanying Guide to Enactment (1994);

(b) The UNCITRAL Model Law on Electronic Commerce (1996);

(c) The UNCITRAL Model Law on Electronic Signatures (2001);

(d) Report of Working Group I (Procurement) on the work of its sixth session (A/CN.9/568);

(e) Report of Working Group I (Procurement) on the work of its seventh session (A/CN.9/575);

(f) Recent developments in the area of public procurement—issues arising from the increased use of electronic communications in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.31);

(g) Recent developments in the area of public procurement—issues arising from recent experience with the UNCITRAL Model Law on Procurement of Goods, Construction and Services: note by the Secretariat (A/CN.9/WG.I/WP.32).

(h) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.34 and Add.1 and 2);

(i) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in public procurement: Comparative study of practical experience with the use of electronic (reverse) auctions in public procurement: note by the Secretariat (A/CN.9/WG.I/WP.35 and Add.1);

(j) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in public procurement: Comparative study of abnormally low tenders: note by the Secretariat (A/CN.9/WG.I/WP.36).

39. UNCITRAL documents are posted on the UNCITRAL website (<http://www.uncitral.org>) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the documents by accessing the Working Group's page in the "Working Groups" section of the UNCITRAL website.

Notes

¹ For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also published in the Yearbook of the United Nations Commission on International Trade Law, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL web site (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).

² *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 381, available on the UNCITRAL website under "Commission sessions" and then "34th session, 25 June-13 July 2001, Vienna".