III. PROCUREMENT

A. Report of the Working Group on the New International Economic Order on the work of its thirteenth session

(New York, 15-26 July 1991) (A/CN.9/356) [Original: English]

CONTENTS

INTRODUCTION

1. At its nineteenth session in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order.[1] The Working Group commenced its work on this topic at its tenth session (17 to 25 October 1988), by considering a study of procurement prepared by the Secretariat.[2] The Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussion and decisions at the session.[3]

[1] *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 243.

[2] A/CN.9/WG.V/WP.22.

[3] A/CN.9/315, para. 125.

2. A draft of the model law on procurement and an accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25) were considered by the Working Group at its eleventh session (5 to 16 February 1990). The Working Group requested the Secretariat to revise the text of the model law taking into account the discussion and decisions at that session. It was agreed that the revision need not attempt to perfect the structure or drafting of the text. It was also agreed that the commentary would not be revised until after the text of the model law had been settled, and that no revision of the commentary would be prepared for the twelfth session of the Working Group. In addition, the Working Group requested the Secretariat to prepare for the twelfth session draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity.[4]

3. At the twelfth session (8 to 19 October 1990), the Working Group had before it the second draft of articles 1 to 35 (A/CN.9/WG.V/WP.28), as well as draft provisions on review of acts and decisions of, and procedures followed by, the procuring entity (draft articles 36 to 42, contained in A/CN.9/WG.V/WP.27). At that session, the Working Group reviewed the second draft of articles 1 to 27. It did not have sufficient time to review draft articles 28 to 35, or the draft articles on review of acts and decisions of, and procedures followed by, the procuring entity and decided to consider those articles at its thirteenth session. The Working Group requested the Secretariat to revise articles 1 to 27 to take into account the discussion and decisions concerning those articles at the twelfth session.[5] The Secretariat was also requested to report to the thirteenth session of the Working Group on the treatment in national procurement laws of competitive negotiation, one of the methods of procurement other than tendering that the Working Group had agreed the Model Law should allow under certain conditions.

4. The Working Group, which was composed of all States members of the Commission, held its thirteenth session in New York from 15 to 26 July 1991. The session was attended by representatives of the following States members of the Working Group: Bulgaria, Canada, Chile, China, Cuba, Cyprus, Egypt, France, Germany, India, Iran (Islamic Republic of), Iraq, Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Morocco, Nigeria, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

5. The session was attended by observers from the following States: Brazil, Burkina Faso, Cape Verde, Colombia, Ecuador, Haiti, Honduras, Indonesia, Lebanon, Pakistan, Peru, Philippines, Republic of Korea, Sweden, Switzerland, Thailand, Turkey, Uganda, United Republic of Tanzania, Vanuatu, Venezuela, Viet Nam and Yemen.

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

(a) United Nations organizations: International Bank for Reconstruction and Development, United Nations Industrial Development Organization, Inter-Agency Procurement Services Unit;

(b) Intergovernmental organizations: Asian-African Legal Consultative Committee;

(c) International non-governmental organizations: International Bar Association, International Chamber of Commerce.

7. The Working Group elected the following officers:

Chairman: Mr. Robert Hunja (Kenya)

Rapporteur: Mr. Hussein Ghazizadeh (Islamic Republic of Iran).

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

(a) Provisional agenda (A/CN.9/WG.V/WP.29);

(b) Procurement: review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law on Procurement (A/CN.9/WG.V/WP.27);

(c) Procurement: draft articles 1 to 35 of Model Law on Procurement (A/CN.9/WG.V/WP.30);

(d) Procurement: competitive negotiation; note by the Secretariat (A/CN.9/WG.V/WP.31).

9. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Procurement.
4. Other business.
5. Adoption of the report.

10. With respect to its consideration of agenda item 3, the Working Group decided to turn its attention first to draft articles 28 to 35 of the Model Law on Procurement (A/CN.9/WG.V/WP.30). It was decided to consider the report on competitive negotiation (A/CN.9/WG.V/WP.31) at the time of the consideration of the articles in the Model Law dealing with competitive negotiation.

11. The deliberations and decisions of the Working Group with respect to its consideration of draft articles 28 to 35 of the Model Law on Procurement and the report on competitive negotiations are contained in chapter I of the present report.

12. After the completion of consideration of draft articles 28 to 35 of the Model Law and of the report on competitive negotiation, the Working Group considered the review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law (A/CN.9/WG.V/WP.27).

13. The deliberations and decisions of the Working Group with respect to its consideration of draft articles 36 to 42 on the review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law are contained in chapter II of the report.

[4]A/CN.9/331, para. 222.

[5]A/CN.9/343, para. 229.

DELIBERATIONS AND DECISIONS

I. Discussion of draft articles 28 to 35 of the Model Law on Procurement (A/CN.9/WG.V/WP.30)

Article 28

Examination, evaluation and comparison of tenders

Paragraph (1)

14. As regards subparagraph *(a)*, the Working Group decided to retain the third sentence which allowed requests for clarifications of tenders, and responses to those requests, to be communicated by telephone subject to written confirmation, in view of the fact that such telephone communication was widely used. The Working Group noted that similar provisions on telephone communication had been added in a number of places in the Model Law and requested the Secretariat to consider consolidation of those provisions into a single provision.

15. It was proposed that the last sentence should be limited to restricting changes in the tender price, rather than also containing a prohibition against changes in other matters of substance. In support of that proposal, it was stated that the restriction on changes of substance other than price raised issues relating to the responsiveness of a tender, which was dealt with in other provisions of the Model Law, including articles 2*(j)*, 28(2)*(c)* and 28(4). The Working Group requested the Secretariat to redraft the last sentence with a view to taking into account the aspect of responsiveness, including the permissibility of minor deviations pursuant to paragraph (4), and to allowing within that scope discussion for clarification of issues other than price.

16. As regards subparagraph *(b)*, a view was expressed that the term "purely arithmetical errors apparent on the face of a tender" might raise difficulties in some legal systems. The Working Group decided to defer a decision on the subparagraph pending its consideration of other articles of the Model Law.

Paragraph (2)

17. A question was raised whether the present formulation, which obligated the procuring entity to "reject" a tender under the specified circumstances, implied a duty on the part of the procuring entity to take some formal action of rejection, beyond mere passive non-acceptance. Such a formal action might involve, for example, providing a contractor or supplier whose tender had been rejected with the reasons for the rejection. A view was expressed that the imposition of such a duty to give reasons for rejection of tender would be more appropriate in paragraph (2) than in article 29. It was suggested, however, that, if the intent of the provision was not to impose a duty to take a formal action and that mere non-action would suffice, words such as "shall not accept a tender" might be more appropriate in the *chapeau* than the words "shall reject a tender". At the same time, it was recognized that the question of whether to require a formal act of rejection was of particular significance to the rights and remedies of aggrieved contractors and suppliers and that, therefore, the question should be considered in the context of the discussion of the draft articles on review.

18. A proposal was made to delete subparagraph *(d)*, which provided for rejection of a tender received by the procuring entity after the deadline for submission of tenders, in view of the requirement in article 24(3) that late tenders be returned unopened. While it was suggested that the laws of some States required governmental entities to respond to submissions of documentation, the Working Group was agreed that subparagraph *(d)* could be deleted in view of the provision of article 24(3), to which reference might be made in the commentary to paragraph (2).

Paragraph (3)

19. The Working Group decided to replace the words "the procuring entity may reject a tender" in the first sentence by the words "the procuring entity shall reject a tender" so as to make the rejection of a tender mandatory rather than merely discretionary when a contractor or supplier attempted to improperly influence the procuring entity's decision. It was felt that such an approach was more apt to further the objectives of the Model Law.

Paragraph (4)

20. A view was expressed that, since paragraph (4), which permitted tenders with minor deviations from the required specifications to be considered responsive, and article 2*(j)*, which defined the term "responsive tender", both dealt with the responsiveness of tenders, it was necessary either to delete the definition in article 2*(j)* or to ensure consistency in the language of the two provisions. The Working Group noted that a cross-reference to paragraph (4) had been added to article 2*(j)* with a view to establishing consistency between the two provisions.

21. It was observed that not all types of permitted deviations could be quantified as required by the second sentence. In the light of that observation, the Working Group decided to add the words "to the extent possible" after the words "shall be quantified".

Paragraph (7)

22. Concern was expressed as to the suitability of the term "most economic tender", which appeared in subparagraphs *(a)* and *(c)*, on the ground that that term did not appear to take sufficient account of the use by the procuring entity of criteria other than price to select a tender. It was stated that the term, while appropriate in subparagraph *(c)*(i), which dealt with selection of the tender with the lowest price, was less appropriate in the context of subparagraphs *(c)*(ii) and *(d)*, which referred to selection of a tender on the basis of criteria other than price. A similar concern was expressed with regard to the term "lowest evaluated tender" used in subparagraph *(c)*(ii). Similar misgivings were expressed with respect to the term "most advantageous tender" that had been used in the earlier draft. It was widely felt that a more neutral term, such as "successful" tender, should be used.

23. The view was expressed that it was not clear when the various criteria for the selection of a tender mentioned in subparagraphs *(c)*(i), *(c)*(ii) and *(d)* were applicable. It was generally agreed that in order to alleviate that lack of clarity it was necessary for paragraph (7) to make it clear that the procuring entity must indicate the selection criteria in the solicitation documents.

24. It was proposed that paragraph (7) might be simplified by deleting subparagraph *(d)*. In support of that proposal it was suggested that the criteria referred to in subparagraph *(d)* could be viewed as encompassed within the criteria referred to in subparagraph *(c)*(ii). That proposal did not attract support as it was generally recognized that the socio-economic criteria in subparagraph *(d)* were distinct from the criteria in subparagraph *(c)*(ii), which referred to operational and functional characteristics of the goods or construction that tended to be quantifiable. It was suggested that, as an alternative to the deletion of subparagraph *(d)*, the Model Law might limit the socio-economic criteria that a procuring entity would be permitted to consider to those set forth in the procurement regulations. However, it was generally felt that the identification of permissible socio-economic criteria was a basic element of the Model Law that should be retained. That view was reinforced by the fact that article 4 made the promulgation of procurement regulations discretionary. A proposal was made that subparagraph *(d)* should be expanded to include national defence and national security considerations.

25. Another proposal for simplifying paragraph (7) was to combine subparagraphs *(d)* and *(e)*. In response, it was pointed out that the two provisions were conceptually different, as subparagraph *(d)* dealt with socio-economic criteria, while subparagraph *(e)* involved the application of a margin of preference in the form of a mathematical formula. However, the Working Group did accept a proposal to delete the second sentence of subparagraph *(e)*, which dealt with detailed aspects of the application of a margin of preference. It was agreed that such detailed provisions were more appropriately dealt with in the procurement regulations. Yet another proposal was that additional clarity might be achieved by listing all the permissible criteria, presently contained in subparagraphs *(c)* and *(d)*, in a single subparagraph.

26. The Working Group then considered the following proposed reformulation of subparagraphs *(c)*, *(d)* and *(e)*:

"*(c)* The successful tender shall be:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph *(e)*; or

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of criteria specified in the solicitation documents, which criteria shall be objective and quantifiable to the extent possible.

"*(d)* In determining the lowest evaluated tender in accordance with subparagraph *(c)*(iii), the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph *(e)*;

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods or completion of construction, the functional characteristics of the goods or construction, the terms of payment and of guarantees;

(iii) socio-economic criteria including the balance of payments position or foreign exchange reserves of [this State], industrial off-sets, local content including manufacture, labour and materials, regional economic development, encouragement of domestic investment or activity, encouragement of employment equity, limitation of certain production to domestic suppliers, transfer of technology and the development of managerial, scientific and operational skills; and

(iv) national defence and security considerations.

"*(e)* In evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors and suppliers or for the benefit of tenders for domestically produced goods. The margin of preference shall be calculated in accordance with the procurement regulations."

27. The Working Group noted that the term "successful tender" was being used provisionally pending the determination of a more suitable expression. Subparagraph *(c)*(i) was found to be satisfactory.

28. It was observed that the proposed reformulation of subparagraph *(c)*(ii) did not indicate the manner in which the quantification of the non-price criteria would be carried out. It was therefore proposed that the subparagraph provide that such criteria must be expressed in monetary terms or given a relative weight. That proposal gave rise to a discussion of whether the subparagraph should require both the assignment of a relative weight to non-price criteria and the expression of those criteria in monetary terms. In support of requiring both assignment of relative weight and expression in monetary terms, it was stated that leaving the procuring entity with a choice might be interpreted as giving the procuring entity the right to determine the manner of quantifying non-price criteria after tenders had been received, rather than requiring a decision upon a method of quantification at the outset and an indication of the manner of quantification in the solicitation documents. While the Working Group agreed with the need to make known the method of quantification of non-price factors in the solicitation documents, the prevailing view was that it was not advisable to require both the assignment of relative weight and expression in monetary terms. It was felt that such an approach would encounter difficulties because there were some types of such criteria that were difficult if not impossible to quantify.

29. A similar exchange of views took place with respect to the words "to the extent possible" in the proposed reformulation of subparagraph *(c)*(ii). The view was expressed that those words should be deleted because they might permit the procuring entity to avoid the obligation to quantify non-price criteria, thereby diminishing objectivity and transparency in the tendering proceedings. The prevailing view, however, was that the words "to the extent possible" should be retained with respect to the obligation to express non-price criteria in monetary terms.

30. A view was expressed that in the proposed reformulation of subparagraph *(c)*(ii), in particular because of the use of the term "criteria", it was not clear whether reference was being made to the situations in which a procuring entity might wish to consider non-price considerations rather than to the particular formulas to be applied in using non-price considerations in evaluating and comparing tenders.

31. In view of the foregoing deliberations and decisions, the Working Group agreed to the formulation of subparagraph *(c)*(ii) along the following lines, subject to the proviso that the procuring entity make clear in the solicitation documents the manner in which non-price criteria would be quantified:

> "(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable."

32. The Working Group found subparagraphs *(d)*(i) and (ii) to be satisfactory.

33. It was generally agreed that the procuring entity should not have absolute discretion in the selection of non-price criteria to be used in evaluating and comparing tenders, as would be the case if no provisions were included in either the Model Law or the procurement regulations concerning the types of permitted non-price criteria. On that basis, the Working Group considered whether the Model Law should list permitted non-price criteria and whether such a listing in the Model Law should be exhaustive or illustrative, or whether it would suffice to provide that the procuring entity would be limited to using only those criteria set forth in the procurement regulations. It was recognized that listing such criteria in the procurement regulations rather than in the Model Law would have the advantage of flexibility since an enacting State that wished to alter the list of permitted criteria could do so more readily if the list were included in regulations rather than legislation. At the same time, any alteration of a listing in the procurement regulation would in all likelihood be subject to public scrutiny. Despite these advantages, the Working Group refrained from opting for a listing in the procurement regulations since article 4 provided that the promulgation of procurement regulations was optional and reliance on regulations would therefore risk the possibility that a basic element of the procedures promulgated by the Model Law would not be adopted by some enacting States.

34. The decision to list permitted non-price criteria in the Model Law gave rise to the question whether the listing in the Model Law should be exhaustive or whether enacting States should be given the option of expanding the list set forth in subparagraph *(d)*(iii) in order to adapt tendering proceedings to their particular needs and circumstances. It was generally agreed that such flexibility was desirable and could be achieved by indicating in square brackets at the end of the subparagraph that enacting States could expand the list. The Working Group also agreed that the words "socio-economic criteria including" found at the beginning of the proposed subparagraph *(d)*(iii) should be replaced because the term "socio-economic" was not considered an appropriate description of the criteria set forth in the subparagraph and because the word "including" left it unclear whether the list of criteria in the subparagraph was intended to be exhaustive or merely illustrative. It was decided to use the words "other factors, namely," instead. It was further agreed to accept the addition in subparagraph *(d)*(iv) of national defence and security as an additional non-price criterion.

35. The Working Group agreed to the proposed reformulation of subparagraph *(e)*.

Paragraph (8)

36. A question was raised as to whether paragraph (8) should specify the point of time and rate of exchange at which tender prices expressed in different currencies would be converted into a single currency for the purpose of evaluating and comparing tenders. The Working Group agreed that such a modification was unnecessary because the point of time and rate of exchange were specified in article 17(2)*(q)* and decided that inclusion of a cross-reference to that provision was unnecessary. The Working Group further decided to retain the words "of all tenders" and "the same" that had been added to it to make clear that all tender prices were to be converted to the same currency.

Paragraph (8 bis)

37. A view was expressed that the nature of the reconfirmation of the qualifications of the successful contractor or supplier referred to in the paragraph was not clear in the light of the practice in some States according to which the initial qualification or the prequalification of contractors and suppliers was merely a preliminary examination of qualifications for the purpose of determining whether to permit contractors and suppliers to submit tenders. Under such an approach, at a later stage the contractor or supplier submitting the successful tender was subject to an in-depth examination of its qualifications. It was suggested that the Model Law should accommodate a two-stage approach of that type. The prevailing view, however, was that in the interest of fairness the reconfirmation of qualifications should be limited to verifying whether the data submitted at the initial or prequalification stage had changed. Accordingly, the Working Group affirmed that the Model Law should make it clear that the criteria used in reconfirming qualifications should be the same as those

used in prequalification. Furthermore, in order to minimize uncertainty as to the nature of reconfirmation, the Working Group agreed that the use of the word "re-evaluating" in article 8 *bis* (6) needed to be reviewed.

38. The Working Group next considered whether, as in the existing draft, reconfirmation should be mandatory when the procuring entity had engaged in prequalification, and discretionary when no prequalification proceedings had been engaged in. It was noted that article 8 *bis* (6) left reconfirmation discretionary, without requiring reconfirmation in either type of situation. The Working Group agreed that the need for reconfirmation depended on the particular circumstances of tendering proceedings and that it was inappropriate for the Model Law to establish a general requirement of reconfirmation for tendering proceedings in which the procuring entity had engaged in prequalification. Accordingly, it was decided to align paragraph (8 *bis*) with the discretionary approach taken in article 8 *bis* (6).

39. The Working Group noted that, in accordance with articles 28(2)*(a)* and 32(1), the procuring entity was obligated to reject the selected tender if the contractor or supplier in question failed to reconfirm its qualifications. However, the question remained whether the Model Law should indicate how the procuring entity should proceed in such a case. According to one view, the Model Law, in the interest of fairness to the remaining contractors and suppliers, should obligate the procuring entity to select the next most economic tender. The prevailing view, however, was that such an obligation was overly restrictive since the possibility existed that, for a variety of reasons, none of the remaining tenders would be acceptable. It was considered to be more appropriate to obligate the procuring entity to select the next most economic tender, subject to the right to reject all tenders under article 29. The Working Group noted that such an approach would be in line with the discretionary approach taken in article 32(4) for the case in which the contractor or supplier whose tender had been accepted failed to sign a required procurement contract or to provide a required performance security.

40. In the discussion of paragraph (8 *bis*), it was suggested that in the case of a failure by the selected contractor or supplier to reconfirm its qualifications the procuring entity would have to resort to competitive negotiation, if rejection of all tenders pursuant to article 28(2) or (3), or article 29, were to be retained in the Model Law as a condition for use of that method of procurement (see article 34 (new 1) *(e)*). It was pointed out, however, that article 29, as presently formulated, referred to the rejection of all tenders, and could be interpreted as not covering the case in which a selected contractor or supplier failed to reconfirm its qualifications and the procuring entity then wished to reject all the remaining tenders. It was agreed that article 29 should clearly permit a procuring entity to reject all tenders remaining after a selected contractor or supplier failed to reconfirm its qualifications.

Paragraph (9)

41. A concern was expressed that paragraph (9), which restricted the disclosure of information concerning examination, clarification, evaluation and comparison of tenders, was apparently inconsistent with the provision in article 33(2) concerning public disclosure of the record of the procurement proceedings. It was suggested that, in order to minimize that apparent inconsistency, it was necessary to restrict the availability of the record of the tendering proceedings to contractors and suppliers that had participated in the tendering proceedings. In response to that concern, it was pointed out that the two provisions were intended to deal with different issues, at different points of time with respect to the tendering proceedings. Whereas article 33(2) provided for public availability of the record of the tendering proceedings following the entry into force of the procurement contract, paragraph (9) appropriately prohibited disclosure of information prior to that point of time in order to protect the integrity of the tendering proceedings. The Working Group noted that the apparent inconsistency might be alleviated by deletion of the reference to article 33(2) and decided to defer a final decision on paragraph (9) until its consideration of article 33(2).

Article 29

Rejection of all tenders

Paragraph (1)

42. The Working Group was generally agreed that, subject to any possibly required approval, a procuring entity should have a right to reject all tenders and that this right should be reserved in the solicitation documents. It was observed that it was in the public interest to allow such flexibility to a procuring entity. The Working Group noted that it had been decided, in connection with its consideration of article 28(8 *bis*), to make it clear in article 29 that the right to reject all tenders encompassed the situation in which the selected contractor or supplier failed to reaffirm its qualifications and the procuring entity then wished to reject all remaining tenders.

43. A proposal was made that a procuring entity should be allowed to reject "any or all" tenders. In support of that proposal, it was stated that the terminology suggested was in use in some countries and that it would allow a procuring entity to reject, for example, a contractor or supplier who had prequalified but was unacceptable to the procuring entity in the light of past experience. In opposition to the proposal, it was stated that the problem of an unsuitable contractor or supplier could best be dealt with at the stage of prequalification and that the addition of the proposed language might suggest that a procuring entity was entitled to exclude a contractor or supplier who had prequalified from being selected on grounds other than those specified in the solicitation documents. Such a result would be unfair and would undermine the integrity of the tendering process. The proposal was not accepted.

44. It was proposed that the words "for any reason other than for the sole purpose of engaging in competitive negotiation proceedings and other than any fraudulent purpose" should be deleted from paragraph (1). It was stated in support of that proposal that the principle embodied in those words could be dealt with in the provisions dealing with the conditions for use of competitive negotiation and single

source procurement. Moreover, the inclusion of the language in question in paragraph (1) might lead to the erroneous conclusion that the rejection by a State of all tenders for the purpose of entering into competitive-negotiation proceedings or single source procurement might give rise to remedies against the procuring entity. Finally, it was pointed out that the possibility that all tenders might be rejected was a normal commercial risk which contractors and suppliers took into account when they participated in procurement proceedings. In opposition to the proposal, it was stated that the words in question stated a particularly important principle, namely that rejection of all tenders should not be for the sole purpose of enabling the State to engage in other methods of procurement such as competitive negotiation and single source procurement. Such a rejection, it was observed, would be contrary to the preference accorded in article 7 to tendering proceedings and would be unfair to contractors and suppliers since participation in tendering proceedings entailed expenses on the part of contractors and suppliers. In addition, the words "any fraudulent purpose" should be retained as they were designed to check corruption in the exercise of the right to reject all tenders and might be useful in the interpretation of the Model Law. It was stated in reply that the question of fraud or corruption was adequately handled by other branches of the law such as criminal or administrative law.

45. After deliberation, the Working Group decided to delete the words "for any reason other than for the sole purpose of engaging in competitive negotiation proceedings and other than any fraudulent purpose".

Paragraph (1 bis)

46. It was suggested that paragraph (1 *bis*) should be expanded to cover additional reasons other than the one of price specified in the current text. In support of that proposal it was stated that there were several other reasons, such as a change in the nature of the procurement need, for which the procuring entity might wish to reject all tenders and thereafter engage in competitive-negotiation proceedings. The prevailing view, however, was that paragraph (1 *bis*) was unnecessary and could be deleted in view of the fact that paragraph (1), in providing for the rejection of all tenders for any reason, was sufficiently broad to cover the circumstances referred to in paragraph (1 *bis*), and in view of the fact that the conditions for use of methods of procurement other than tendering were set forth in the articles of the Model Law dealing with those other methods. After deliberation, the Working Group decided to delete paragraph (1 *bis*).

Paragraph (2)

47. A view was expressed that the words "but shall not be required to justify those grounds" required further consideration and should therefore be placed between square brackets. Those words might present difficulties in jurisdictions where courts had inherent power to review administrative decisions and to go behind the reasons advanced for administrative actions. Moreover, there might be cases where it would be appropriate to require a procuring entity to justify the grounds for the rejection of tenders. It was further suggested that the approach taken in paragraph (2) could affect the ability of aggrieved parties to exercise remedies and might therefore be reconsidered when the Working Group discussed the provisions on remedies.

48. The prevailing view, however, was that the words should be retained and should not be placed in square brackets. In support of that view, it was stated that a procuring entity should not be required to justify the grounds for its rejection of all tenders. A procuring entity should be free not to proceed with a procurement on economic, social or political grounds which it need not justify. It was sufficient that it gave the reasons, and there should be no remedy against the procuring entity for the rejection of all tenders, particularly in view of the fact that the procuring entity would, pursuant to article 17*(x)*, reserve the right to reject all tenders in the solicitation documents.

49. After deliberation, the Working Group decided to adopt paragraph (2) as drafted at present.

Paragraph (3)

50. The Working Group adopted paragraph (3) as drafted at present. The Secretariat was requested to consider placing the reference to telephone communication in an omnibus provision.

Article 30

Negotiations with contractors and suppliers

51. A view was expressed that article 30 was unnecessary and should be deleted since the procedures set forth in the Model Law for tendering proceedings, in particular article 28(1), clearly ruled out negotiations and since the Model Law provided for the use under specified conditions of methods of procurement involving negotiation. The prevailing view, however, was that it was important to state the principle that no negotiations shall take place between the procuring entity and a contractor or supplier over a tender, particularly in the light of the fact that procuring entities and contractors and suppliers were often under the impression that they could negotiate even where tendering had been chosen as the method of procurement.

52. It was noted that the reference to article 29 (1 *bis*) would have to be deleted in view of the earlier decision of the Working Group to delete that provision from the Model Law (see above, paragraph 5), and that the reference to article 31(4) was of diminished relevance in view of the fact that the Working Group had decided to treat two-stage tendering as a separate method of procurement.

Article 31

Two-stage-tendering proceedings

Paragraph (1)

53. It was proposed that in paragraph (1) and other paragraphs of this article the term "performance specifications" should be added as one of the possible indications of the goals of a given project.

Paragraphs (2), (3) and (4)

54. The Working Group adopted the text of paragraphs (2), (3) and (4) unchanged.

Paragraph (5)

55. The Working Group found paragraph (5) to be generally satisfactory and decided to retain the reference in square brackets to the right of the procuring entity to delete or modify any evaluation criterion set forth in the solicitation documents. It requested the Secretariat to reformulate the reference to forfeiture of the tender security so as to reflect the fact that this reference was only applicable where provision of a tender security in the first stage of a two-stage-tendering proceeding was required by the procuring entity.

Paragraph (6)

56. It was proposed that the requirement that a procuring entity should specify in the record of the procurement proceedings the relevant facts on which it relied in invoking article 31(1) should be deleted. In support of that view, it was stated that the procuring entity should not be required to disclose facts that might violate the rights of privacy of contractors and suppliers or facts that might damage the commercial interests of contractors and suppliers. It was observed that it was sufficient to require the procuring entity to disclose the circumstances on which the procuring entity relied in invoking paragraph 31(1). Another proposal was that paragraph (6) should be deleted altogether as the requirement of inclusion in the record of the procurement proceedings of a statement of the grounds on which the procuring entity relied to select a method of procurement other than tendering was sufficiently dealt with in article 7(5); if that requirement were to be retained in article 31, it would have to be repeated elsewhere in provisions dealing with all the methods of procurement other than tendering.

57. The prevailing view, however, was that paragraph (6) should be retained. In support of this view it was stated that the problems of the invasion of privacy and breach of commercial interests of contractors and suppliers were unlikely to arise with respect to the information referred to in paragraph (6) since it concerned a decision on the method of procurement to be used that was taken before the selection of contractors and suppliers. The provision was important as it would serve as a mechanism of control by requiring a procuring entity that decided to use two-stage tendering to record the facts on which it based its decision. The record could also be usefully referred to in other cases where a procuring entity was considering the appropriateness of two-stage tendering.

58. However, in view of the concern that had been raised, the Working Group decided to delete the words "specifying the relevant facts" and to reformulate paragraph (6) so as to require the inclusion in the record of a statement of the "grounds and circumstances" on which the procuring entity relied in invoking paragraph 31(1). It was agreed that at a later stage consideration might be given to consolidating into a single omnibus provision all the provisions in the Model Law currently dealing with records of proceedings involving various methods of procurement, in which event there might be no need for the provision in paragraph (6).

59. The Secretariat was requested to consider the restructuring of article 31, as well as of other articles dealing with methods of procurement other than tendering, with a view to setting forth in separate articles the conditions for the use of the methods and the provisions dealing with the procedures to be followed for those methods.

Article 32

Acceptance of tender and entry into force of procurement contract

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

60. A question was raised as to whether paragraph (1), which provided that the most economic tender was to be selected, was consistent with article 29(1), which authorized the procuring entity to reject all tenders. It was agreed that that apparent inconsistency should be rectified by adding the words "subject to article 29" to the beginning of paragraph (1).

61. The Working Group noted that the second sentence of paragraph (1) raised the same question that had been raised in the context of articles 28 (8 *bis*) and 29 (1), namely, whether the Model Law should indicate what the procuring entity should do in the event the selected contractor or supplier failed to reconfirm its qualifications. It was agreed that paragraph (1) should reflect the approach decided upon earlier according to which the procuring entity, subject to the right to reject all remaining tenders pursuant to article 29, was required to select the next most economic tender.

62. It was noted that some States followed the rule reflected in paragraph (2), according to which a procurement contract entered into force upon dispatch of the notice of acceptance of the tender, while other States followed the rule embodied in paragraph (3), according to which the procurement contract entered into force upon the actual signature of the contract following notification of acceptance. It was generally agreed that the Model Law should provide for both methods and that the approach taken in paragraphs (2) and (3) was therefore basically acceptable.

63. Differing views were expressed as to the reference in the second sentence of paragraph (3)*(a)* to the applicable law as a source of the requirement of a signed, written procurement contract. According to one view, the general reference to applicable law was satisfactory because it called attention to the relevance of a law other than the Model Law in determining the formal validity of the procurement contract. According to another view, a general reference to applicable law, in the absence of an identification of the applicable law, would result in uncertainty for the procuring entity as to which law would govern the validity of the procurement contract. Such uncertainty would make it particularly difficult to prepare the solicitation documents. It was suggested that to preclude such uncertainty the general reference to applicable law should be replaced by a rule that the validity of the pro-

curement contract would be governed by the law of the procuring entity's State. It was also suggested that, if the Model Law did not indicate the law applicable to the validity of the procurement contract, it would be necessary for the Model Law to determine whether a signed contract was required for the entry into force of the procurement contract.

64. Opposition was expressed to the identification in the Model Law of the law applicable to the validity of the procurement contract on the ground that the question of the law applicable to the validity of contracts involved generally recognized rules of private international law, which had been made the subject of multilateral treaties. It was also suggested that a rule in the Model Law that the validity of the procurement contract was to be subject to the law of the procuring entity's State might not be sufficient to ensure the applicability of that law in any given case and that such a rule would not be compatible with the principle of free choice of law. It was pointed out that a prudent procuring entity would not permit the validity of a public contract to be governed by any other law than its own. If the procuring entity wished to ensure that the law of its State would govern the validity of the procurement contract, it should so indicate in the solicitation documents, thereby binding the selected contractor or supplier, who had, by participating in the tendering proceedings, agreed to the terms and conditions set forth in the solicitation documents. Such an approach would be in line with the generally recognized principle of freedom of contract.

65. In view of the foregoing considerations, it was agreed that the need to refer to applicable law as a possible source of the requirement of a signed procurement contract could be obviated by reformulating paragraphs (2) and (3) so as to provide that a procurement contract would enter into force upon dispatch of the notice of acceptance, unless the solicitation documents stipulated that the signature of a procurement contract was necessary. Such a stipulation in the solicitation documents might stem from mandatory provisions of the law applicable to the procuring entity, or merely from the established practice of the procuring entity. It was further agreed that the commentary should advise procuring entities to consider indicating in the solicitation documents the law applicable to the validity of the procurement contract.

66. A view was expressed that the Model Law should accommodate the practice in some States which required the procuring entity, after notifying acceptance of a tender or signing a procurement contract, to obtain a final approval of the procurement contract as a precondition for entry into force of that contract. An opposing view was that such approval requirements, at least to the degree they were applicable following acceptance of a tender or entry into force of a procurement contract, were undesirable and should not be encouraged by the Model Law. Such requirements were said to cause uncertainty on the part of contractors and suppliers as to when, if ever, the procurement contract would in fact receive the final approval and performance could begin. The risk to contractors and suppliers was aggravated when the solicitation documents required the selected contractor to provide a performance bond upon notice of acceptance or signature of a procurement contract and before the issuance of the final approval. Faced with such uncertainty as to the actual length of time their tender price would have to be valid and with other risks, contractors and suppliers would be discouraged from participating in the tendering proceedings or would be forced to increase their tender prices. It was also suggested that permitting States to impose such final approval requirements would limit the degree of uniformity of law achieved by the Model Law on a significant issue.

67. Another view was that the Model Law should allow for the imposition of an approval requirement at the final stages of the selection process, but that the approval should be obtained at an earlier point, prior to the dispatch of the notice of acceptance. It was said that such an approach would have the advantage of avoiding the delays and increased risks and costs that might otherwise result from a final-approval requirement. It would also take account of the fact that, pursuant to paragraphs (2) and (3), a procurement contract could enter into force by virtue of the dispatch of a notice of acceptance or through the signature of a procurement contract.

68. The prevailing view was that the Model Law had to recognize the right of a State to condition entry into force of the procurement contract upon a final approval that would be issued following the acceptance of a tender. A number of States regarded it as essential that entry into force of the procurement contract be subject to a final approval. This was said to be the case, in particular, when a procurement contract was to be signed, since an approving authority could not be expected to issue an approval on the basis of a preliminary or incomplete version of the procurement contract. One approach to reflecting that decision was to indicate in the commentary that States, in implementing the Model Law, were free to incorporate approval requirements not set forth in the Model Law. Another proposal was to provide that the approval would be deemed given if no decision was announced within a specified period of time, with the possibility for the procuring entity to obtain an extension. Yet another proposal was to add a subparagraph (a *bis*) along the following lines that would take into account concerns about delay, as well as the two possible ways in which a procurement contract could enter into force:

> "Where the procurement contract is required to be approved by a higher authority or the Government, the approval shall be given within a reasonable time after the notice is dispatched to the contractor or supplier. The procurement contract shall not enter into force or, as the case may be, be executed before the approval is given."

69. The proposed subparagraph was found to be generally acceptable. In order to limit delays, a proposal was made to fix a specific period of time within which the approval must be issued rather than to use the words "within a reasonable time". That proposal was not accepted as it was generally felt to be preferable to take account of the fact that the amount of time required for approval would vary from case to case, depending on the circumstances such as the amount and nature of the procurement contract and the level of government from which the approval would have to emanate. The Working Group did agree, however, that,

in order to mitigate the risk of delay, the Model Law should, perhaps in article 17(2)*(y)* or as a new paragraph (3)*(b)*(iv) or (3)*(c)* of article 32, require of the procuring entity to specify in the solicitation documents the amount of time that would be required to obtain the necessary approvals and to link the validity period of tenders and of any required tender security to that period of time. Such an approach would institute more balance between the rights and obligations of contractors or suppliers and of the procuring entity by excluding the possibility that a selected contractor or supplier would remain committed to the procuring entity for a potentially indefinite period of time with no assurance of the eventual entry into force of the procurement contract. The Working Group noted that the addition of subparagraph (3) (a *bis*) might require consequential changes in subparagraph (3)*(b)* and article 17(2)*(y)*.

70. The view was expressed that, for the purpose of clearly differentiating between issues dealing with acceptance of a tender and issues related to entry into force of a procurement contract, consideration should be given to treating those two categories of issues, which were now grouped together in article 32, in separate articles.

71. A question was raised as to the usefulness of the formulation of paragraph (3)*(b)*(i), (ii) and (iii), which set forth rules governing the conduct of the procuring entity and the contractor or supplier in the period of time between the dispatch of a notice of acceptance and the signature of a procurement contract. It was suggested that the import of those provisions, which appeared to be based on the principles of international law governing the conduct of signatories to a treaty prior to ratification and entry into force, was unclear in the context of procurement proceedings. In particular, it was questioned to what extent those rules, as opposed to rules in some other law of the enacting State, would be applicable to a contractor or supplier that refused to sign a procurement contract. The meaning of the words "object or purpose" in paragraph (3)*(b)*(i) was also questioned.

72. After deliberation, the Working Group decided to revert to the more general statement of principle set forth in the earlier draft (contained in document A/CN.9/WG.V/WP.24), thereby necessitating the deletion of paragraph (3)*(b)*(i), (ii) and (iii). It was further agreed that it should be made clear that paragraph (3)*(b)* was subject to the possibility that the entry into force of the procurement contract would be contingent upon a final approval.

Paragraph (4)

73. The Working Group noted that paragraph (4) would have to be redrafted in line with the decision of the Working Group that, in the event the selected contractor or supplier failed to reconfirm its qualifications, the procuring entity would be obligated to select the next most successful tender, subject to its right to reject all remaining tenders (see paragraph 2 above). It was further noted that the words "may be accepted" in the first sentence were not consistent with the words "shall be given" in the second sentence and that they should be replaced by the words "shall be accepted". The Working Group found paragraph (4) to be otherwise acceptable.

Paragraph (5)

74. The Working Group adopted the text of paragraph (5) unchanged.

Paragraph (6)

75. A proposal was made that the definition of the term "dispatched" in subparagraph *(b)* should be qualified by the proviso that contractors and suppliers had the right to prove that receipt of a notice had not taken place. Misgivings were expressed with regard to the proposal because of the questionable nature of the evidence that might be adduced to prove lack of receipt, unless the procuring entity was obligated to use a method of communication providing for acknowledgement of receipt.

76. Another proposal was that subparagraph *(b)* should be deleted and the definition of "dispatch" dealt with in the commentary. It was pointed out that the notion of dispatch was well developed in many legal systems and that the term as used in the Model Law would be interpreted accordingly. While accepting the proposal to delete subparagraph *(b)*, the Working Group noted that the possibility of the inclusion in the Model Law of an omnibus provision on communications might present an opportunity to define the term "dispatch".

Article 33

Record of tendering proceedings

77. The Working Group considered in particular the question of the content and purpose of the record of the tendering proceedings required to be maintained by the procuring entity and noted that the content and purpose of the record was closely linked to the question of the extent to which the record should be disclosed. It was also noted that the question of the purpose or use of the record was closely related to issues dealt with in the provisions of the Model Law dealing with review. The Working Group therefore continued and completed its discussion of the record requirement after having reviewed articles 36 to 42. In view of the fact that record requirements were found in a number of provisions of the Model Law dealing with various methods of procurement, the Working Group decided that it would be desirable to consolidate those provisions into a single provision dealing with the contents, and extent of disclosure, of records for all methods of procurement.

78. It was noted that a distinction had to be drawn between the question of the potential use of information contained in the record for the purpose of exercising remedies available under the Model Law and the question of any remedies that might be available for a failure by the procuring entity to prepare a record or for gaps or incorrect information in the record. In regard to remedies of the latter type, a further distinction had to be drawn between remedies that might be available to private parties and corrective measures that might be required in order to ensure transparency. As regards remedies available to private parties, it was agreed that such parties should be entitled to compel the procuring entity to establish a record, but not to receive damages in the event of a breach of the procuring entity's obligations with respect to records. It was also agreed that consideration

should be given to providing an exception to time limitations for seeking review under the Model Law to the extent that an aggrieved contractor or supplier was prevented from exercising its right to seek review as a result of a breach by the procuring entity of the record requirement.

79. It was noted that the record of the procurement proceedings would be of interest to three categories of users and that the information of interest to those different categories varied according to the purpose to which information contained in the record would be put. Those categories included the general public, contractors and suppliers that participated in some way in the procurement proceedings, and governmental bodies exercising an audit or control function over the procuring entity. Accordingly, it was agreed that the Model Law should draw a distinction between those parts of a record that should be available to any person, those that should be available to aggrieved contractors and suppliers and yet other parts that would be kept exclusively in the public interest for auditors.

80. As to the general public, it was agreed that it would be sufficient for the record to contain a brief description of the goods or construction to be procured, the names and addresses of contractors and suppliers that submitted tenders or other types of proposals and an indication of which contractor or supplier was selected. It was agreed that the record to be disclosed to contractors and suppliers should include additional information relative to issues such as the qualifications, or lack thereof, of contractors and suppliers, the price and a summary of each tender or proposal and of the procurement contract, a summary of the evaluation and comparison of tenders or proposals and information concerning rejection of tenders or proposals. It was agreed that the restrictions on disclosure of information imposed by paragraphs (2)*(a)* and *(b)* should remain in place, but that the Model Law should indicate that disclosure may be made subject to the order of a competent court. Such an exception would permit the exceptional use of the restricted information when deemed necessary by a court, for example in the case of review proceedings. Information included in the record for the third category of users would include, for example, the statement required in article 7(5) of the grounds on which the procuring entity relied to select a particular method of procurement.

81. The Working Group agreed that the record should be made available to the various categories of users upon completion of the procurement proceedings as provided in paragraph (2) and, pending further revision of the provision, to retain both alternatives contained in square brackets. It was further agreed that the issue of access to information contained in the record prior to that point of time would not be addressed in the Model Law but would be left to other branches of law such as access to information legislation and the law of evidence.

Articles 33 ter *to 33* sexies

Request-for-proposals proceedings

82. The Working Group considered the following proposal for a streamlined version of the provisions contained in articles 33 *ter* to 33 *sexies* concerning the conditions for use and procedures for use of request-for-proposals proceedings:

"Article 33 ter

"Request for proposals

"(1) (Subject to approval by . . .) a procuring entity may engage in procurement by means of requests for proposals addressed to as many contractors or suppliers as practicable, provided that the following conditions are satisfied:

(a) the procuring entity has not decided upon the particular nature or specifications of the goods or construction to be procured and seeks proposals as to various possible means of meeting its needs;

(b) the selection of the successful contractor or supplier is to be based on both the effectiveness of the means proposed and on the price of the proposal; and

(c) the procuring entity has established the factors for evaluating the proposals and has determined the relative weight to be accorded to each such factor and the manner in which they are to be applied in the evaluation of the proposals.

"(2) The factors referred to in paragraph (1)*(c)* shall measure:

(a) the competence of the contractor or supplier;

(b) the effectiveness of the proposal submitted by the contractor or supplier; and

(c) the price submitted by the contractor or supplier for carrying out its proposal and the life cycle costs associated therewith.

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

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

(b) a description of the procurement need including any technical specifications and other parameters to which the proposal must conform, as well as the location of any construction to be effected;

(c) the factors for evaluating the proposal, the relative weight to be given to each such factor, expressed in monetary terms to the extent practicable, and the manner in which they shall be applied in the evaluation of the proposal; and

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

"(4) The procuring entity shall open all proposals in such a manner as to avoid the disclosure of their contents to competing contractors and suppliers.

"(5) The procuring entity may conduct negotiations with contractors or suppliers with respect to their proposals and may seek or permit revisions of such proposals provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a contractor or supplier shall be confidential; and

(b) subject to paragraph (8), one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to such negotiations without the consent of the other party.

"(6) Following completion of negotiations, the procuring entity may request contractors or suppliers to submit, by a specified date, a best and final offer with respect to their proposals.

"(7) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the factors referred to in paragraph (2) and set forth in the request for proposals shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price; and

(c) the price of a proposal shall only be considered by the procuring entity after completion of the technical evaluation.

"(8) [provision on record of request for proposals]."

83. The view was expressed that the version contained in the proposal left certain gaps, in particular because it did not retain the provision in article 33 *ter* (2) incorporating by reference provisions contained in the article governing tendering proceedings. For example, since the proposal contained no provisions on the acceptance of a proposal or the entry into force of the procurement contract, and since there was no incorporation by reference of article 32, the Model Law would not indicate the time when the procurement contract entered into force in the context of request-for-proposals proceedings. It was pointed out in reply that the Model Law did not contain provisions of that type for other methods of procurement such as single source procurement, competitive negotiation and request for quotations.

84. It was agreed that request-for-proposals proceedings under the Model Law should be regarded as a method of procurement completely distinct from tendering and that it was therefore inappropriate to incorporate provisions dealing with tendering. The question of entry into force of the procurement contract in such proceedings could be left to the applicable law.

Paragraph (1)

85. A proposal was made that the *chapeau* should be modified so that, in addition to requiring that the request for proposals be addressed to as many contractors as practicable, it would require the request for proposals to be given to at least three contractors or suppliers, if possible. A view was expressed that such a modification was unnecessary because in the type of large project that was typically involved in request-for-proposals proceedings the procuring entity, acting out of its own self-interest, would solicit as many proposals as it could. The prevailing view, however, was that the proposed modification was desirable because simply requiring the sending of the proposal to as many contractors and suppliers as "practicable" did not ensure that in every case the procuring entity solicited proposals from a sufficient number of contractors and suppliers to establish a minimum degree of competition.

86. Another proposal, aimed at enhancing competition in request-for-proposals proceedings, was that the procuring entity should be required to publish a notice concerning the request-for-proposals proceedings. Objections were expressed to such a publication requirement on the grounds that it would blur the distinction between request-for-proposals proceedings and tendering proceedings by placing the procuring entity in a position of having to evaluate proposals from contractors and suppliers whose proposals it did not necessarily wish to consider. Moreover, the concern was expressed that the amount of time spent by the procuring entity in evaluating proposals would be increased greatly. The prevailing view, however, was that it was desirable for the procuring entity to be generally required to publicize the request-for-proposals proceedings so as to enhance competitiveness, but that that requirement should be subject to some limitations. One proposal for doing so to a relatively limited extent was merely to require that the procuring entity contact the most significant contractors and suppliers in a particular sector. That proposal was regarded as unworkable because it involved a high degree of subjectivity. Another proposal was to provide for notice, but on a discretionary basis. It was pointed out that such an approach was of limited value because the proposed text did not preclude a procuring entity from publishing a notice if it so desired. Yet another proposal was that the procuring entity should be required to contact the professional associations of contractors and suppliers operating in the sectors involved in the project in question.

87. In view of the foregoing considerations and deliberations, the Working Group agreed to add a provision to paragraph (1) along the following lines:

"The procuring entity shall publish in a widely circulated trade journal a notice seeking expression of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it inappropriate to do so."

88. The Working Group expressed its understanding that the publication of the notice would not bestow any rights on contractors or suppliers, including any right to have a proposal evaluated.

89. It was agreed to replace the words "has not decided" by the words "has been unable to fully decide". It was felt that the new language would avoid suggesting that a procuring entity could procure through requests for proposals when it had been in a position to decide, but merely failed to take the necessary steps to decide, on the types of goods to purchase. The word "fully" was added so as not to preclude the use of requests for proposals when the procuring entity was in a position to decide only partially upon the particular nature or specifications of the goods or construction to be procured.

90. A question was raised as to the appropriateness of retaining subparagraphs *(b)* and *(c)* in paragraph (1). It was suggested that the current position of the subparagraphs, which concerned procedures for use of request for proposals, might cause confusion since paragraph (1) concerned the conditions for use of requests for proposals and the procedures for use were referred to elsewhere in the pro-

posed text. In support of the structure in the proposed text, it was stated that the inclusion of subparagraphs *(b)* and *(c)*, while not strictly necessary, was intended to make clear from the outset those essential features of a request-for-proposals proceedings. A question was also raised as to the necessity of retaining subparagraph *(a)*, on the ground that it was of such a general nature that it might also be an apt description of the criteria used to select a contractor or supplier in proceedings involving other methods of procurement. The Working Group decided to retain subparagraph *(a)* and, pending further consideration, to retain subparagraphs *(b)* and *(c)* in their current position. It was also agreed that the reference in subparagraph *(b)* to the "effectiveness of the means proposed" needed to be aligned with the reference in paragraph (2)*(b)* to the "effectiveness of the proposal".

91. A concern was expressed that the meaning of the words "factors for evaluating the proposals" in subparagraph *(c)* was not clear. In order to address that concern, it was proposed that a provision should be added along the following lines containing a non-exhaustive list of the type of factors being referred to:

> "The factors referred to in paragraph (1)*(c)* may include the proposed work structure, identification of key technical problems and outlines of solutions, proposed schedule of milestones, and quality and time control systems to be employed."

92. The inclusion of such a provision was objected to on the ground that such a list, although intended to be non-exhaustive, might be interpreted in some jurisdictions as limiting the procuring entity to the use only of factors similar to those included in the list. In view of that possibility, the Working Group decided that it would be preferable not to include the proposed provision, but instead to include in the commentary an explanation of the reference to factors.

Paragraph (2)

93. It was agreed to replace the words "shall measure" in the *chapeau* with words such as "shall concern" in view of the fact that subparagraph *(c)* referred to price and in order to make it clear that price itself could be a factor.

94. It was proposed that the competence of the contractor or supplier referred to in subparagraph *(a)* as one of the weighted factors to be used in evaluating a proposal be removed from paragraph (2). In support of that proposal, it was stated that the competence of a contractor or supplier was not quantifiable and should be treated as a separate threshold requirement, to be used merely in determining whether to admit a contractor or supplier into the request-for-proposals proceedings. According to that view, the use of competence as a factor in evaluating and comparing proposals entailed a high degree of subjectivity and increased the risk of corruption. The proposal was objected to on the ground that it would be legitimate for the procuring entity to use competence as an evaluation factor because the procuring entity might be less confident in the ability of one particular contractor or supplier rather than in the ability of another to implement the proposal. The Working Group agreed that competence should be retained as an evaluation factor in view of the safeguards against abusive practices contained in the Model Law. At the same time, it was agreed that the Model Law should authorize the procuring entity to exclude contractors or suppliers deemed unreliable or incompetent from participation in the request-for-proposals proceedings. Such a result might be achieved by providing that the procuring entity had the right to pursue only those proposals that it wished. In order to distinguish competence as an evaluation factor from such a provision, it was agreed that subparagraph *(a)* should be modified to refer to the relative technical and managerial competence of contractors and suppliers.

95. The Working Group adopted subparagraphs *(b)* and *(c)* unchanged.

Paragraph (3)

96. The Working Group adopted subparagraph *(a)* unchanged.

97. It was agreed to delete the words "specifications" in subparagraph *(b)* in order to avoid inconsistency with paragraph (1)*(a)*, in which it was provided that the procuring entity was entitled to engage in request-for-proposals proceedings when it had been unable to decide fully upon the specifications of the goods or construction to be procured.

98. While it was recalled that the Working Group had decided in connection with its discussion of article 28 that the expression of evaluation factors in monetary terms was a particularly appropriate method of evaluating and comparing tenders, questions were raised as to the practicability of the requirement in subparagraph *(c)* that evaluation factors in request-for-proposals proceedings should, to the extent practicable, be expressed in monetary terms. In particular, it was questioned how proposals would be evaluated and compared when only some of the evaluation factors could be expressed in monetary terms. It was pointed out that in cases in which all evaluation factors could not be expressed in monetary terms all factors would have to be converted to the "merit-point" system. The view was expressed that expression of evaluation factors in monetary terms lent itself to a greater degree of objectivity in the evaluation and comparison of tenders. The Working Group agreed that the approach used in the proposed text was acceptable, in that it recommended the expression of evaluation factors in monetary terms, but permitted the procuring entity to avoid doing so when it was not practicable. At the same time, the Working Group noted the crucial nature of the requirement that contractors and suppliers be informed in the request for proposals of the evaluation factors and the manner of application of those factors. It was further agreed that the reference to expression in monetary terms should be placed immediately after the words "the factors for evaluating the proposal", in order to avoid suggesting that the relative weight of the factors could be expressed in monetary terms.

99. The Working Group adopted subparagraph *(d)* unchanged.

Paragraph (4)

100. The Working Group adopted paragraph (4) unchanged.

Paragraph (5)

101. The Working Group adopted subparagraphs *(a)* and *(b)* unchanged.

102. It was pointed out that situations might arise in which the procuring entity might wish to modify evaluation factors set forth in the request for proposals. In some cases the procuring entity might be prompted to make such modifications by information derived from proposals or from negotiations with contractors and suppliers. A question was raised as to the extent to which the Model Law should permit modification of evaluation factors, and as to whether such a modification might permit a contractor or supplier to surmise the content of a competing proposal. It was agreed that modifications of evaluation criteria set forth in the request for proposals should be permitted, on the condition that those modifications applied and were communicated to all participating contractors and suppliers. It was also agreed that such modification should be permitted even after commencement of negotiations, but that any modification should be carried out in a way that preserved the confidentiality of the negotiations. It was further agreed that a new subparagraph should be added to paragraph (5) setting forth the requirement that any modifications or clarifications of the request for proposals should be communicated to all participating contractors and suppliers.

103. It was proposed that the Model Law should require the procuring entity, if it wished to negotiate with a contractor or supplier concerning its proposal, to extend the opportunity to all contractors and suppliers that had submitted proposals and whose proposals had not been rejected. It was agreed to accept the proposal and to embody it in an additional subparagraph in paragraph (5).

Paragraph (6)

104. The Working Group agreed to the inclusion of a "best and final offer" procedure (BAFO) in the procedures for use of requests for proposals. However, it was agreed that the BAFO procedure should be made mandatory in order to promote competitiveness and transparency in the proceedings. Accordingly, it was decided to replace the words "may request" by the words "shall request". It was also agreed that the BAFO should be requested from all contractors and suppliers remaining in the proceedings and that it should be made clear that the BAFO referred to all aspects of an offer, and not just to price.

Paragraph (7)

105. It was suggested that subparagraph *(a)* should refer to paragraph (3)*(c)* in place of paragraph (2). It was also suggested that the subparagraph might allude to the manner of application of the factors and take into account the possibility of amendment of the factors set forth in the request for proposals.

Article 34

Competitive-negotiation proceedings

106. The Working Group recalled that, at the twelfth session, it had requested the Secretariat to report to the current session on provisions in national procurement laws on the method of procurement referred to in the Model Law as competitive negotiation. It was noted that that report (A/CN.9/WG.V/WP.31) was before the Working Group.

107. The Working Group commenced its discussion of article 34 with an exchange of views as to the desirability of providing for competitive negotiation as one of the methods of procurement other than tendering. The view was expressed that the conditions for use of competitive negotiation were too broadly worded and allowed the procuring entity excessive discretion in deciding whether to forego the use of tendering proceedings. It was further stated that any need that a procurement entity might have to procure through negotiation was already adequately provided for by two other methods of procurement, namely, two-stage tendering and request for proposals, and that article 34 could therefore be deleted in its entirety. It was also stated that the Model Law in its current form would create confusion for procurement officials because there was overlap between the conditions for use of competitive negotiation as set forth in article 34 and the conditions for use of two-stage tendering and request for proposals. To attempt to address the problem of overlap, it was suggested that consideration should be given to treating those three methods of procurement as alternatives, any of which the procuring entity would be free to select.

108. As had been the case at previous sessions of the Working Group, the prevailing view was that the Model Law should provide for competitive negotiation. It was agreed that the mere fact that the application of the Model Law in a given case might reveal an overlap between the conditions of use of different methods of procurement did not mean that those methods could be generally treated as alternatives under the Model Law. It was also pointed out that article 7(3) dealt with the problem of overlap by establishing an order of preference that was meant to be followed in cases of overlap among various methods of procurement other than tendering. The Working Group did, however, express the view that the conditions for use of competitive negotiation needed to be refined further.

Paragraph (new 1)

109. In line with its decision at the twelfth session that the conditions for use of methods of procurement other than tendering should be set forth in the individual articles dealing with those other methods, the Working Group agreed to the inclusion of the conditions for use of competitive negotiation in paragraph (new 1).

110. There was general agreement with the thrust of subparagraph *(a)*. However, it was felt that the provision was worded too broadly and could be interpreted to cover a range of procurement situations in which it would be more appropriate to use more competitive methods of procurement. It was agreed that the subparagraph needed to be reformulated in order to emphasize more clearly that the goods must be of a special nature or particularly technically complex in order to justify resort to competitive negotiation.

111. It was proposed that subparagraph *(b)* should be modified in order to make it clearer that urgency was a ground for using competitive negotiation only when engaging in tendering proceedings was impossible. In that vein, it was suggested that specific reference might be made to circumstances in which it was impossible to follow the solicitation procedures set forth in article 12. It was decided that such a modification was unnecessary as subparagraph *(b)* already implicitly referred to specific aspects of tendering such as the procedures in article 12. The Working Group did agree, however, that the subparagraph should limit the use of competitive negotiation on the ground of urgency to cases of urgency that were unforeseeable and did not result from the dilatory conduct of the procuring entity.

112. A question was raised as to the necessity of retaining the words "except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs" at the end of paragraph *(c)*. It was agreed that the words should be retained because they were meant to ensure that the contract to be entered into by the procuring entity was for genuine research and not for commercial purposes. The Working Group adopted the paragraph unchanged.

113. It was observed that subparagraph *(d)* as currently formulated limited resort to competitive negotiation in cases of procurement involving national defence or national security aspects only to those cases in which secrecy was required. It was suggested that such an approach was too narrow because there might be cases of procurement involving national defence or security considerations, but not necessitating secrecy, in which the procuring entity would regard competitive negotiation as the most appropriate method of procurement. Misgivings were expressed as to the proposed broadening of the scope of subparagraph *(d)* out of a concern that it could result in the inappropriate avoidance of tendering proceedings in cases in which national defence or security considerations were peripheral. After deliberation, the Working Group accepted the proposal to remove the reference to secrecy and to refer only to national defence and security. It was felt that such an approach would broaden the possibility of application of the Model Law.

114. A question was raised as to whether the inclusion of national defence and security considerations as a ground for the use of competitive negotiation was consistent with the provision in article 1(2) that excluded application of the Model Law to procurement involving national defence or security, except and to the extent indicated by the procuring entity. In particular, a concern was expressed that the juxtaposition of the two provisions might result in confusion as to whether the Model Law was generally applicable to national defence procurement. The Working Group noted that article 1(2), which dealt with the scope of application of the Model Law, permitted the procuring entity to apply the Model Law to procurement involving national defence or security. As such, the reference in subparagraph *(d)* to national defence or security did not relate to the scope of application of the Model Law, but rather permitted a procuring entity, once it had decided to apply the Model Law, to use competitive negotiation. It was agreed that the formulation of subparagraph *(d)* should be reviewed in order to see whether it would be possible to make the relationship between subparagraph *(d)* and article 1(2) clearer, perhaps by adding to subparagraph *(d)* a cross-reference to article 1(2). It was further agreed that the commentary should indicate that national defence and security considerations had been added as a ground for competitive negotiation in order to encourage as broad an application of the Model Law to national defence and security procurement as possible.

115. A proposal was made to modify subparagraph *(e)* so as to provide that when competitive-negotiation proceedings were engaged in on the grounds of unsuccessful tendering proceedings, the resultant procurement contract should not be for a higher price than the price offered in the tendering proceedings and that the contractual terms of the procurement contract should remain the same. The proposal was not accepted as it was felt to unduly restrict the procuring entity. Moreover, questions were raised as to the practicability of such an approach, in particular because prices might rise during the period of time between the termination of the unsuccessful tendering proceedings and the commencement of the competitive-negotiation proceedings. The suggestion that an inflation factor could be added to address that possibility failed to attract support. It was agreed that subparagraph *(e)* should be retained along its current lines and that the reference to circumstances in which engaging in new tendering proceedings was unlikely to result in a procurement contract was a sufficient safeguard against abusive resort to competitive negotiation. The Secretariat was requested to examine subparagraph *(e)* in order to determine whether any changes would have to be made in view of the earlier decision of the Working Group concerning the right of the procuring entity to reject all tenders when a selected contractor or supplier failed to reconfirm its qualifications.

116. As in the discussion of other provisions of the Model Law containing references to the procurement regulations, the appropriateness and effect of the reference to the procurement regulations in subparagraph *(f)* was questioned in view of the discretion given to enacting States by article 4 as to whether to issue procurement regulations. The need for consideration of that question with respect to subparagraph *(f)* was obviated by the decision of the Working Group to delete the subparagraph on the ground that request-for-quotation proceedings were a more competitive and therefore more appropriate method of procurement for low-value procurement than the more complex and secret method of competitive negotiation.

Paragraph (new 1 bis)

117. It was agreed that, in view of the decision not to retain paragraph (new 1) *(f)*, there was no need to retain paragraph (new 1 *bis*).

Paragraph (1)

118. It was brought to the attention of the Working Group that the procurement laws of some States provided that in negotiation proceedings the procuring entity should require that all participating contractors and suppliers should, by a

fixed date at the latter stages of the procurement proceedings, make what is their "best and final offer" (BAFO) and that the selection of a contractor or supplier should be based on those final offers. It was suggested that such a procedure would inject discipline and competition into the negotiation proceedings and that consideration should be given to including it in paragraph (1). Reservations were expressed, however, to including a general requirement of a BAFO procedure. While it was recognized that in some circumstances such a procedure might be helpful, there was a danger that it might in some cases unduly restrict the negotiating power of the procuring entity and limit its ability to obtain the best value. The concern was also expressed that a BAFO procedure might have the unintended effect of fostering collusion among contractors or suppliers. In view of the foregoing considerations, the Working Group agreed that the Model Law should provide for a BAFO procedure, but that its use should be left to the discretion of the procuring entity. The Working Group also expressed its understanding that the concept of a BAFO referred not just to price, but to technical and all other aspects of an offer as well. It was agreed that the commentary should discuss factors to be considered by a procuring entity in determining whether to use a BAFO procedure. The Working Group adopted the text of paragraph (1), subject to the addition of the BAFO procedure.

Paragraph (2)

119. The Working Group accepted a proposal to add the word "clarifications" to the list of elements of information referred to in paragraph (2). Subject to that change, the Working Group adopted the paragraph.

Paragraph (3)

120. A view was expressed that it was not clear whether paragraph (3), as currently formulated, in particular the reference to "any third person", only prohibited the disclosure of information by the procuring entity and by participating contractors and suppliers to persons not involved in the competitive negotiation proceedings. In particular, a concern was expressed that the paragraph might be interpreted as not prohibiting the sharing of information on the negotiations by participating contractors and suppliers. While it was recognized that the procuring entity might ordinarily be more tempted to share information with a particular contractor or supplier about its negotiations with another contractor or supplier than competing contractors and suppliers might be to share information among themselves, it was noted that the danger existed of collusion among participating contractors or suppliers. It was agreed that the restriction in paragraph (3) on disclosure of information by participants in the proceedings to any third person was intended to cover sharing of information among contractors or suppliers as well as disclosure by a procuring entity to a contractor or supplier of information concerning negotiations with another contractor or supplier. It was suggested that the intended meaning of the paragraph could be made clearer by referring to "any other person" or to "any other contractor or supplier or any third person", instead of merely referring to "any third person".

121. It was suggested that the restriction on disclosure of information was too broadly formulated and might therefore conflict with legislation found in some States concerning access to information and that only the disclosure of "confidential" information should be restricted. In support of the existing formulation, it was stated that the need to protect confidentiality in competitive-negotiation proceedings meant that, in particular during the negotiations, no third party should have the right to information about the negotiations between the procuring entity and a contractor or supplier. It was pointed out that, in States with access-to-information legislation, such legislation would resolve any conflict with the Model Law. According to that view, the extent to which information should be made public was dealt with adequately in paragraph (4). The Working Group agreed with the basic thrust of the existing text, but at the same time recognized that it would be useful to attempt to restrict somewhat its scope to the type of information that was meant to be protected. That information concerned technical and price aspects of the negotiations and did not concern matters which might usefully be revealed without prejudicing the proceedings such as the identity of participating contractors and suppliers. As to the exact manner of reformulating paragraph (3), the proposal to add the word "confidential" did not gain support because there was a concern that it would raise complicated questions as to what information was confidential, particularly in view of the fact that paragraph (3) provided that the negotiation process as a whole was confidential. It was agreed that specific reference could be made to technical and price information, as well as to other market information. It was also suggested that additional clarity could be achieved by making it clear that paragraph (3) referred to the time prior to the termination of the competitive-negotiation proceedings, while paragraph (4) involved the disclosure of information following the termination of the competitive-negotiation proceedings.

122. The Secretariat was requested to revise paragraph (3) with a view to reflecting the deliberations and decisions of the Working Group.

Paragraph (4)

123. It was agreed to defer consideration of record requirements for competitive-negotiation proceedings until the consideration by the Working Group of an omnibus provision governing record requirements generally.

Article 34 bis

Request for quotations

Paragraph (1)

124. It was proposed that the reference to the types of goods for which request for quotations might be appropriate should be modified to include a reference to goods which were readily identifiable or available at list prices in order to make it clear that reference was being made to goods for which there was a market. It was observed that the term "list price" was not sufficiently precise. The Working Group agreed with the thrust of the proposal and requested the Secretariat to examine the specific manner in which it might be implemented.

125. A view was expressed that the appropriateness and effect of setting in the procurement regulations the amount

below which request-for-quotations proceedings might be engaged in needed to be reconsidered in view of the fact that article 4 made issuance of procurement regulations discretionary. It was pointed out that, according to the approach taken in some legal systems, a failure on the part of the enacting State to issue procurement regulations would mean that procuring entities would not be able to engage in request-for-quotations proceedings. It was noted that the effect of a failure by an enacting State to promulgate procurement regulations was raised with respect to other provisions of the Model Law and that the Working Group had decided to consider the matter further in a general manner.

126. A suggestion was made that the commentary should indicate that procuring entities using this method of procurement should take the steps necessary to ensure that standardized goods being procured met the required quality standards.

Paragraph (2)

127. The Working Group adopted the text of paragraph (2) without change.

Paragraph (3)

128. The Working Group considered whether paragraph (3) should require the procuring entity to obtain quotations from a specified minimum number of contractors or suppliers. While the Working Group recognized that setting a minimum number, as was done in the draft under consideration, had the advantage of clarifying the obligations of the procuring entity, it was generally agreed that setting a rule for all cases would be unworkable. This was because there might be instances in which the procuring entity would not be able to obtain quotations from the minimum number, for example, when less than the minimum number of contractors or suppliers were available to meet the procuring entity's needs. In an attempt to find an approach that would be flexible, while still preserving some of the benefit of referring to a minimum number, it was agreed to require the procuring entity to obtain quotations from as many contractors as practicable, and from at least three if possible.

129. A question was raised as to the necessity of retaining in the final sentence the prohibition against negotiation. It was suggested that that sentence might be deleted because the use of negotiation in the context of request for quotations took place in practice. The prevailing view was that the prohibition against negotiation should remain in place because it was an important element of this method of procurement. It was also agreed that negotiation should be prohibited because the Model Law provided other methods of procurement that dealt sufficiently with the need that the procuring entity might have to use negotiation in procurement.

Paragraph (4)

130. It was proposed that the term "lowest priced responsive quotation" should be used instead of the term "lowest price" to ensure that the procuring entity was not obligated to accept the lowest quotation if that quotation was not otherwise responsive. The need for such flexibility might arise, for example, where a contractor or supplier quoting the lowest price could not promise to deliver the goods within the required period of time. The Working Group accepted the proposal. It was also pointed out that the current formulation might have the unintended effect of suggesting that the procuring entity was obligated to accept the lowest quotation, even if that quotation was too high. It was suggested that this could be clarified by making it clear that the procuring entity was obligated to accept the lowest responsive quotation only if an award was in fact made.

131. The view was expressed that paragraph (4) in its current form would leave the procuring entity no choice but to accept the lowest quoted price, even if it was quoted by a contractor or supplier that the procuring entity knew to be unreliable. In order to avoid tying the hands of the procuring entity in such a manner, it was suggested that the word "responsible" be inserted before the words "contractor or supplier". The need for such an amendment was questioned on the ground that request-for-quotations proceedings allowed the procuring entity to verify the reliability of contractors and suppliers prior to requesting quotations from them. The Working Group recognized, however, that there might be circumstances in which a procuring entity only discovered the unreliability of a contractor or supplier after it had received the lowest quotation from that contractor or supplier. It was agreed that, in such a case, as well as when the procuring entity was limited to lists or rosters of contractors or suppliers, the procuring entity should be able to reject the lowest quotation if it came from an unreliable contractor or supplier. As to the precise drafting, the word "qualified" was suggested as an alternative to the word "responsible", but was objected to on the ground that it might tend to diminish the informality of request-for-quotations proceedings. Objections were also raised to a proposal to use the word "competent". The Secretariat was requested to find a formulation that would take into account the reliability of the contractor or supplier.

132. A question was raised whether the term "lowest price" included elements other than the cost of the goods themselves, such as transportation and insurance charges. It was suggested that the use of the term could be understood in the context of the evaluation of the quotations by the procuring entity to determine which quotation would have to be selected in order to enable the procuring entity to obtain the goods it was procuring at the lowest total cost and that the question raised was of a drafting nature. The Secretariat was requested to consider whether the question of which elements were to be included in the price was also relevant to other methods of procurement and, if so, whether there might be a need to include a definition of "price" in article 2. It was also suggested that, to the extent it did not raise matters of substance, the question of the components of price could be left to the commentary.

Paragraph (5)

133. It was agreed to defer consideration of record requirements for request-for-quotations proceedings until the consideration by the Working Group of an omnibus provision governing record requirements generally.

Article 35

Record of single source procurement

Paragraph (new 1)

134. In line with its decision at the twelfth session that the conditions for use of methods of procurement other than tendering should be set forth in the individual articles dealing with those other methods, the Working Group agreed to the inclusion of the conditions for use of single source procurement in paragraph (new 1). Concomitantly, it was agreed that the title of the article would read "single source procurement".

135. A view was expressed that the reference to a large number of circumstances in which single source procurement would be available risked increasing the extent of overlap between the conditions for use of different methods of procurement and that some of the conditions for use of single source procurement were of doubtful utility and could therefore be deleted. In response, it was stated that article 7(3), which established an order of preference among methods of procurement other than tendering, dealt adequately with the possibility of overlap.

136. It was proposed that subparagraph *(a)* should be deleted on the ground that the low value of a procurement should not justify resort to single source procurement. It was pointed out that the provision failed to establish an obligation to seek an advantageous price and that the Model Law provided for a more competitive method that could be used for low-value procurement, namely, request for quotations, and that that method could be used with little additional effort. In view of the foregoing, it was agreed to delete subparagraph *(a)*.

137. It was agreed to retain subparagraph *(b)* in its current form. However, a question was raised as to the relationship between the subparagraph and the practice in some States of requiring licences.

138. As regards subparagraph *(c)*, the view was expressed that urgency should not be available as a ground for resort to single source procurement when the condition resulting in the urgency was foreseeable and could have been avoided, or was due to the dilatory conduct of the procuring entity. It was agreed that subparagraph *(c)* should be modified in accordance with that view. It was further agreed that, as currently formulated, subparagraph *(c)* was not sufficiently distinguishable from urgency as a ground for use of competitive negotiation pursuant to article 34 (new 1)*(b)*. Accordingly, the Working Group decided to limit subparagraph *(c)* to catastrophic events. A view was expressed that subparagraph *(c)* could be further restricted by limiting the amount of a procurement that could be single-sourced to only what was needed until such time as a more competitive method of procurement could be employed.

139. A concern was expressed that subparagraph *(d)* might, in the name of standardization, have the effect of encouraging procuring entities, against their own interest, to continue to procure the same types of goods or construction. That would needlessly exclude the possibility of a competitive procurement approach that might result in the procurement of more suitable goods and might reduce opportunities to develop local production. In view of this concern, the Working Group agreed that subparagraph *(d)* should be reformulated to make it clear that it applied only when there was no feasible alternative. The procuring entity should be required to consider factors including whether the original procurement was suitable, the size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the suitability of alternatives to the goods in question. A view was expressed that there was an inconsistency between the words "must be procured" used in subparagraph *(d)* and the words "may procure" used in the opening words of paragraph (new 1).

140. The Working Group decided not to add proposed subparagraphs (*d* bis) and (*d* ter). The text of subparagraph *(e)* was adopted unchanged.

141. It was agreed to modify subparagraph *(f)* in line with the modification that had been agreed to with respect to article 34 (new 1)*(d)*. It was suggested that the commentary should indicate that the purpose of including subparagraph *(f)* was to facilitate the application of the Model Law to procurement involving national security or national defence.

142. As regards subparagraph *(g)*, a view was expressed that the availability of socio-economic factors as a ground for single source procurement would increase significantly the risk of abusive resort to single source procurement. According to that view, a State that wished to promote socio-economic policies could do so effectively through tendering proceedings, which were competitive and open to public scrutiny, and therefore more likely to result in an effective use of public funds. In response, it was stated that States generally would be reluctant to forego completely the right to use single source procurement for socio-economic reasons. Invariably Governments encountered special situations in which there were compelling socio-economic and political reasons for awarding a procurement contract without any type of competitive procedure. That might be the case, for example, when a production facility employing a very large proportion of the working population in a particular area was in danger of closing down.

143. In view of the foregoing considerations, the Working Group agreed that the Model Law should have a safety-valve provision along the lines of subparagraph *(g)* for exceptional situations, but that certain procedures had to be included to ensure transparency. It was noted that the Working Group had agreed to avoid the use of the term "socio-economic" in article 28 because of its vague nature and that for similar reasons it should be avoided in subparagraph *(g)* (see paragraph 34 above). The following reformulation of subparagraph *(g)* was proposed:

> "*(g)* where procurement from a particular contractor or supplier is necessary in order to promote a policy specified in article 28(7)*(c)*(iii) and approval is obtained following public notice and adequate opportunity to comment".

The Working Group found the proposed reformulation acceptable, subject to the addition of the following lan-

guage intended to make clear the exceptional nature of subparagraph *(g)*:

"... and procurement from no other contractor or supplier is capable of promoting those policies".

144. It was agreed that reference to the circumstances addressed by subparagraph *(h)* had become unnecessary in view of the modification of subparagraph *(f)* and that subparagraph *(h)* could therefore be deleted.

145. Doubts were expressed as to the advisability of retaining subparagraph *(i)*. In particular, the view was expressed that the provision might preclude the use of competitive methods of procurement by permitting a procuring entity to award a procurement contract to a contractor or supplier willing to build or acquire special facilities or capacity, without requiring the procuring entity to determine whether any other contractors or suppliers would be willing to do the same and perhaps at a better price. It was further suggested that in those cases in which there actually was only one contractor or supplier capable of meeting the procuring entity's needs, subparagraph *(i)* was unnecessary. It was therefore agreed to delete subparagraph *(i)*.

Paragraph (new 1 bis)

146. It was agreed to delete paragraph (new 1 *bis*) as a consequence of the deletion of subparagraph (new 1)*(a)*.

Paragraphs (1) and (2)

147. It was agreed to defer consideration of record requirements for single source procurement proceedings until the consideration by the Working Group of the possibility of an omnibus provision governing record requirements for all methods of procurement. A question was raised whether there might be any procedural requirements relating to single-source-procurement proceedings, beyond record requirements, that might usefully be addressed in the Model Law. In response it was suggested that inclusion of additional procedural detail might raise the risk of overcomplicating the Model Law.

II. Discussion of draft articles 36 to 42 of the Model Law on Procurement (A/CN.9/WG.V/WP.27)

148. For the purpose of its consideration of the review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law, the Working Group had before it a report by the Secretariat (A/CN.9/WG.V/WP.27) outlining three possible approaches to the treatment of the question of review proceedings. The first approach was to prepare provisions intended to be adopted by an implementing State as an integral part of the Model Law. Draft articles 36 to 42 were presented to the Working Group for its consideration of that approach. The second approach was to prepare provisions dealing with review, but to intend those provisions to have a function different from that of the main body of the Model Law in that articles 36 to 42 would serve as guidance to implementing States in evaluating the sufficiency and effectiveness of their review procedures. The provisions would contain all of the elements considered by the Commission to be essential components of a sufficient and effective means of review. Under the third approach, the Model Law on Procurement would not contain provisions of a legislative nature on review. Rather, the adoption of the Model Law by the Commission would be accompanied by an expression by the Commission of the necessity for an effective means of review, in the form of a recommendation to States setting forth the elements that it considered essential. A possible formulation for such a recommendation was presented to the Working Group.

149. The Working Group commenced its consideration of the question of review with a discussion of the three possible approaches. In support of the first approach, it was stated that the effectiveness of the Model Law as a benchmark of good procurement practice, both for States with procurement legislation in place and for States without such legislation, would be diminished if the Model Law did not contain minimum provisions on review of the type proposed in articles 36 to 42. However, objections were expressed with regard to the first approach because of the fact that review procedures touched on fundamental conceptual and structural aspects of diverse legal systems and systems of State administration, thereby rendering difficult the formulation of review provisions designed for universal application. As to the second approach, a view was expressed that it was not clear to what degree that approach differed from the third approach. The utility of the third approach was questioned on the ground that a mere recommendation would not be a sufficiently effective means of ensuring that States enacting the Model Law would also provide for the necessary review procedures. It was pointed out that the issuance by the Commission of a recommendation, which the Secretariat had proposed to be modelled after a Directive adopted by the Council of the European Communities (EC) dealing with review in cases covered by EC directives relating to procurement, would be less effective than the issuance of the directive by the Council of EC. That difference was due in particular to the fact that the EC directive was subject to the EC enforcement machinery. After deliberation, the Working Group decided to defer a decision on which of the three approaches to adopt until the completion of its consideration of draft articles 36 to 42.

Article 36

Right to review

150. It was agreed that review provisions in the Model Law should include a rule along the lines of article 36, identifying generally the parties who would be entitled to seek review. It was noted that such a rule, which was referred to in some legal systems as a rule on standing, was typically defined in relation to the interest of a party in, or harm suffered from, an action of a governmental entity, and that it did not concern the ultimate merits of substantive claims involved in an action. However, it was widely felt that several of the key elements of the rule set forth in article 36 were too broadly worded and would thus create uncertainty as to the scope of the review procedures outlined in the Model Law. In particular, the concern was expressed that the reference to "any person" was not sufficiently precise, that the reference to the interest or injury that a person was required to have in order to be entitled to

seek review needed to be narrowed, that the reference to unlawful acts or decisions of, or procedures followed by, the procuring entity was too broad and might therefore encompass certain aspects of the procurement proceedings that should not give rise to private remedies, and that the permissibility of review at any stage of the procurement proceedings or after termination of the procurement proceedings left it unclear which aspects of the procurement process were subject to article 36 and whether there were any time limitations on review.

151. As to the manner in which reference should be made to the parties whose claims for review would be admissible, the Working Group agreed that, in place of referring to "any natural or juridical person", article 36 should refer to "any contractor or supplier". That term was preferable because it was defined in article 2 and included would-be contractors and suppliers. A question was raised as to the implications of including a reference to nationality, in view of the Working Group's decision at the eleventh session in connection with article 11 to generally avoid references to the nationality of contractors and suppliers so as to avoid the need to define nationality. It was also suggested that the reference to nationality might have the unintended effect of suggesting that foreign contractors and suppliers had a right to challenge a procuring entity's decision to restrict participation in procurement proceedings to domestic contractors and suppliers. In response, it was pointed out that the reference to nationality in article 36 was for the purpose of excluding nationality as a prerequisite for standing and that therefore it did not need to be defined and should not be related to the right of a procuring entity under the Model Law to engage in a wholly domestic procurement proceeding. It was agreed that there would be no reference to nationality.

152. Differing views were expressed as to the type of act, decision or procedure on the part of the procuring entity that would give a contractor or supplier standing to complain. According to one view, the current reference to "an unlawful act or decision of, or procedure followed by, the procuring entity" was satisfactory because it did not limit the right of a contractor or supplier to seek review on the basis of the nature of the act, decision or procedure in question. According to that view all actions of the procuring entity should be subject to review, and contractors and suppliers should not be precluded from seeking review on the basis of the nature of the act complained of. It would then be left to the reviewing body to determine in individual cases the merit of claims for review. The prevailing view, however, was that the extent to which the provisions of the Model Law gave rise to the right to review and to remedies needed to be narrowed because not all of the provisions of the Model Law imposed obligations which, if unfulfilled by the procuring entity, should properly be regarded as giving rise to a private right to review on the part of an aggrieved contractor or supplier.

153. It was noted that some provisions of the Model Law imposed a duty on the procuring entity to take a particular action or follow a particular procedure, while other provisions left matters to the discretion of the procuring entity. It was agreed that that distinction between duty and discretion and, when a duty was imposed, the purpose of that duty, should serve as the basis for distinguishing between provisions that gave rise to a private right to review and those that did not. According to that approach, provisions obligating the procuring entity to exercise discretion would not give rise to private remedies, except to the extent that the procuring entity failed to exercise discretion at all or exercised it in an arbitrary fashion. Furthermore, there were some provisions involving the procuring entity's discretion that in no case should give rise to a private remedy. Thus, according to the approach agreed upon by the Working Group, the provisions of the Model Law dealing with qualification and selection of contractors and suppliers imposed duties on the procuring entity that gave rise to a private right to review, while provisions such as article 7, concerning the selection by the procuring entity of a method of procurement, and article 3 *bis*, concerning the relationship between the Model Law and international obligations of the enacting State, related to discretionary matters that were aimed at the general public interest and therefore not to be regarded as establishing any private rights. It was further agreed that review and remedies for breach of the duties imposed on the procuring entity with respect to the maintenance of records of procurement proceedings could only be properly discussed when the Working Group had decided upon the purpose and content of those records.

154. Several proposals were made as to the precise manner of indicating in the Model Law the provisions that imposed duties the breach of which would give rise to a cause of action. One proposal, based on the legislative drafting approach used in some States, was that article 36 should simply refer to the breach by the procuring entity of duties imposed by the Model Law. Another proposal, based on the legislative drafting approach used in some other States, was to include in the Model Law a list of the articles which imposed duties the violation of which would give rise to a cause of action. A concern was expressed that the risk inherent in such a list was that some provisions might be overlooked. Another difficulty cited with respect to such a list was that in some legal systems it might be regarded as improperly mixing substantive rules with questions of standing. It was pointed out, however, that, at least in those States in which the use of such a list was familiar, such an approach might be less likely to conflict with existing procedural rules of the general administrative law. In order to accommodate both types of approaches, it was suggested that the Model Law should present the alternatives to enacting States and permit them to adopt the more suitable approach. This could be done either by presenting the alternatives in the Model Law or by retaining only the simple rule in the text of the Model Law and setting forth the list of provisions giving rise to remedies in the commentary, with an indication that an enacting State could, if it so wished, incorporate the list into the text of the Model Law.

155. Yet another suggestion was that in the various sections of the Model Law where it was deemed appropriate to provide for remedies, in particular the sections on qualification and selection of contractors and suppliers, provisions could be included to indicate that those sections gave rise to private remedies, and that it might then be possible to leave procedural matters to be solved according to the applicable general administrative law of the enacting State.

It was suggested that such an approach would have the advantage of focusing on substantive rules on the right to review and remedies in the specific context of procurement, something that could not be done through the general administrative law of the enacting State, thereby avoiding encroachment into general areas of administrative law.

156. In line with the Working Group's decision that the right to review should concern only certain provisions of the Model Law, in particular qualification and selection of contractors and suppliers, it was agreed that the notion of interest or injury that a person would be required to have in order to be entitled to seek review should be linked to the actual or potential loss or damage suffered when the procuring entity violated duties established in those provisions. Concomitantly, actual or potential loss suffered as a result of a breach of provisions that granted the procuring entity discretion should be excluded from that notion.

157. As to the stage at which review may be sought, a question was raised whether article 36 was intended to cover actions of the procuring entity taken prior to the commencement of the procurement proceedings. The specific example cited concerned the exclusion by the procuring entity of a contractor or supplier from a list or roster of contractors or suppliers maintained by the procuring entity independently of any particular procurement proceedings. A question was also raised as to whether article 36 might be interpreted as referring not only to review related to the procurement proceedings, but also to review in connection with disputes related to the performance of the procurement contract. In response to those questions, it was noted that article 36 was intended to refer only to aspects of procurement proceedings addressed in the Model Law and that this should be made clear.

158. After deliberation, the Working Group requested the Secretariat to revise article 36 to reflect the discussion and decisions of the Working Group, including the decision to provide for the alternative methods referred to in paragraph 154, above, of listing or referring to the duties the breach of which would give rise to remedies.

Article 37

Review by procuring entity or by approving authority

Paragraph (1)

159. The view was expressed that it was inappropriate for the Model Law to provide that review should in the first instance be before the procuring entity or the approving authority. According to that view the likelihood that a procuring entity or an approving authority would overturn its own earlier decision was low and therefore, in view of the costs and time involved in pursuing such a path, the procedure envisaged in article 37 should not be required by the Model Law. It was also stated that the procedure in article 37 would contradict legislation in some States which gave aggrieved parties direct access to judicial review. The prevailing view, however, was that the basic approach in paragraph (1) was useful and should be retained. It was felt to be desirable to give the procuring entity an opportunity to reconsider a decision because there might be many cases in which a procuring entity would of its own accord be willing to correct mistakes that had been made. Such an approach was commonly used and would avoid unnecessarily burdening the judiciary with cases that might have been resolved by the parties themselves. It was also pointed out that without such a procedure aggrieved contractors and suppliers that did not wish to pursue judicial or other methods of review would be left without any avenue of review. A suggestion that initial review by the procuring entity or the approving authority be made discretionary did not receive support.

160. The Working Group noted that the opening words of paragraph (1) ("Unless the procurement contract has already entered into force"), as well as paragraph (3), had been placed within square brackets in order to invite the Working Group to consider whether those provisions, which provided that the competence of the procuring entity or the approving authority to hear a complaint ceased upon the entry into force of the procurement contract, should be retained. It was also noted that the Secretariat had indicated that the underlying policy of those provisions was that, once the procurement contract entered into force, there were no corrective measures that the head of the procuring entity or of the approving authority could usefully require (apart from compensation), unless annulment of the procurement contract was authorized at that stage of the review process.

161. The Working Group recognized that there might be cases in which it would be appropriate for a procurement contract that had entered into force to be annulled. This might be the case, for example, where a large contract was awarded to a particular contractor or supplier as a result of fraud. However, it was generally felt that annulment of procurement contracts was particularly disruptive to the procurement process and generally not in the public interest and should therefore not be provided for in the Model Law. Instances in which annulment was appropriate would be dealt with adequately by the applicable contract or criminal law. It was agreed that the commentary should indicate that the lack of provisions in the Model Law on annulment did not preclude the availability of annulment under other bodies of law. Accordingly, no objections were raised to the retention of the text within square brackets at the beginning of paragraph (1).

Paragraph (2)

162. Support was expressed for the notion of limiting the period of time during which review before the head of the procuring entity or of the approving authority would be available. At the same time, it was pointed out that the length of that period of time might be determined according to the nature of the remedy being sought. For example, it would not be necessary to subject a claim for compensation for costs incurred in preparing a tender to a tight time limitation, whereas such a limitation would be appropriate where the remedy involved suspension of the procurement proceedings.

Paragraph (3)

163. The Working Group adopted the concepts in paragraph (3).

Paragraph (4)

164. A question was raised as to whether the proposed 20-day deadline would provide the head of the procuring entity or of the approving authority with a sufficient amount of time to conduct any needed investigations prior to the issuance of the written decision. This might particularly be a problem when large bureaucracies were involved. It was proposed that the provision be modified to refer to 20 working days, which would at least resolve any uncertainty as to the effect of holidays and weekends. Another proposal, which did not receive support, was that the procuring entity should be permitted to issue an oral decision within a short period of time, with a longer period of time permitted for the written decision. The Secretariat was requested to consider the question of the time-limit further in view of the discussion by the Working Group.

165. In the discussion of paragraph (4), the question arose whether the head of the procuring entity or of the approving authority should be required to suspend the procurement proceeding upon receipt of a petition for review. A concern was expressed that such a requirement would be disruptive of the procurement proceedings and might invite abusive practices such as frivolous complaints by contractors and suppliers aimed at forcing payments from a procuring entity that wished to avoid disruption of the procurement proceedings. At the same time, it was recognized that some provision on suspension might be appropriate in order to preserve the legitimate rights of aggrieved contractors and suppliers. The Working Group noted that possible issues relevant to the content of a provision on suspension included the identity of the issuer of the suspension, the elements that would have to be established in order to obtain a suspension, the duration of the suspension and which aspects of the procurement proceedings were to be suspended. The Working Group noted that article 41 dealt with suspension of procurement proceedings and decided to defer further discussion of suspension until its consideration of that article.

166. Misgivings were expressed about the reference in paragraph (4)*(b)* to the granting of compensation by the head of the procuring entity or of the approving authority. In particular, the concern was raised that such compensation payments were open to abuse. It was also pointed out that the procuring entity or approving authority might in many cases not have the authority to make such payments and that the feasibility of such an approach might depend upon the size of the entity in question and whether it had within itself a quasi-independent review body. The view was expressed that in order to avoid those problems the power to grant compensation should be vested in a court or other independent body. An opposing view was that the reference to payment of compensation could be retained because there was nothing inherently wrong in permitting the head of the procuring entity or of the approving authority to compensate aggrieved contractors or suppliers. Such an approach would avoid unnecessary litigation. It was further pointed out that subparagraph *(b)* was permissive and that it would therefore be left to the financial and budgetary controls of the enacting State to determine whether such direct compensation was appropriate. It was proposed that subparagraph *(b)* be modified to emphasize the exceptional character of such payments. Another proposal was that an independent body should be charged with the responsibility of recommending to the head of the procuring entity or of the approving authority whether to pay compensation.

167. The Working Group agreed that the Model Law should enable the head of the procuring entity or of the approving authority to pay compensation. However, it was also agreed that that did not necessitate a mention of such compensation in the Model Law.

Paragraph (5)

168. It was suggested that consideration should be given to including in paragraph (5) a provision requiring the automatic referral of a petition for review to the next level of review upon an unfavourable decision by the head of the procuring entity or of the approving authority. The Working Group adopted the concepts in paragraph (5).

Paragraph (6)

169. The Working Group adopted the concepts in paragraph (6).

Article 38
Administrative review

170. The Working Group noted that article 38 provided for hierarchical administrative review and that States where hierarchical administrative review against administrative actions, decisions and procedures was not a feature of the legal system might choose to omit article 38 and provide only for judicial review (article 40). It was proposed that this option should be expressed in the Model Law, either by placing article 38 between square brackets or by adding an appropriate footnote.

Paragraph (1)

171. As regards the reference to "a person" in the opening words of the paragraph, it was agreed that that reference as well as any other reference in the article concerning the potential applicants for review should be aligned with the decision of the Working Group on article 36 as the general rule on standing (see paragraphs 150 to 158 above).

172. It was further agreed that paragraph (1) should include a time-limit for submission of complaints that should be sufficiently short so as not to adversely affect the progress of the tendering proceedings. It was also agreed that article 38 should require that notice of the complaint be given to the procuring entity or the approving authority so as to enable that body to carry out its obligation under article 39(1) to notify all contractors and suppliers of the complaint.

Paragraph (2)

173. Concerns were expressed that the opening words that empowered the review body to grant one or more of

the remedies listed in subparagraphs *(a)* through *(h)* would not be acceptable to those States where review bodies did not have that power but could merely make recommendations. With a view to accommodating those concerns, it was agreed that the words "may grant" should be replaced by the words "may [grant] [recommend]".

174. The list of possible remedies was found to be too narrow in one respect and too wide in another respect. It was agreed that the possibility of dismissing the complaint should be expressly listed as one of the possible measures of the review body. It was also agreed that subparagraph *(f)* should be deleted, in line with the earlier decision of the Working Group that annulment or setting aside of a procurement contract after its entry into force should not be envisaged in the Model Law but left to other branches of law (e.g., contract law or criminal law).

Paragraphs (3) and (4)

175. The Working Group adopted the concepts in paragraphs (3) and (4).

Article 39

Certain rules applicable to review proceedings under article 37 [and article 38]

Paragraph (1)

176. A suggestion was made that the procuring entity or the approving authority should be required to carry out its duty of notification under paragraph (1) promptly after having received notice of a complaint under article 37.

Paragraph (2)

177. Various concerns were expressed with regard to variants A and B of paragraph (2). Variant A was regarded as inappropriate, in view of the decision of the Working Group relating to annulment of the procurement contract (see paragraph 161). Another concern was that variant A was drafted in a way that would unjustifiably preclude the successful contractor or supplier from participating in the review proceedings. Yet another concern was that the words "by a person" were not consistent with the decision of the Working Group on the general rule of standing in article 36.

178. As regards variant B, one concern was that the first sentence was too embracing in that it might allow contractors or suppliers with frivolous claims to participate in the review proceedings. Another concern was that the first sentence did not sufficiently specify the category of persons in relation to the type or stage of procurement proceedings affecting their interests.

179. Yet another concern was that the right to participate in review proceedings was a basic right that should not be curtailed by the Model Law. It would be contrary to such a basic right if the review body were empowered, as was apparently done by the second sentence, to take a final decision on whether an aggrieved party could participate in the review proceedings. Accordingly, a suggestion was made that paragraph (2) should be deleted.

180. In the light of the above concerns, the Working Group, after deliberation, agreed to retain as paragraph (2) only the first sentence of variant B, subject to replacing the words "claiming that its interests" by the words "whose interests" and replacing the words "may request" by the words "has a right". It was understood that the review body would, on the basis of that provision, determine the question of the right to participate, like any other issue before it, but that the decision would be subject to any administrative or judicial review provided for in the laws of the enacting State.

Paragraph (3)

181. The Working Group adopted the concepts in paragraph (3).

Article 40

Judicial review

182. It was agreed that the words "a person" in the *chapeau* of article 40 should be changed to read "any contractor or supplier" in accordance with the earlier decision of the Working Group with respect to similar wording in article 36 of the Model Law.

183. A clarification was sought as to whether article 40 was intended to grant judicial review over procurement decisions under the Model Law on an exclusive basis or concurrent jurisdiction to the courts with the other administrative bodies that were given the power of review under articles 37 and 38 of the Model Law. It was replied that article 40 provided for judicial proceedings and conferred jurisdiction on the specified court or courts, and that it specified the circumstances in which an action might be commenced and that the existence of concurrent jurisdiction depended upon whether a State that had hierarchical administrative review required exhaustion of that administrative review.

184. It was proposed that the article should contain provisions on the nature and scope of judicial review that was to be conducted by a court under the article. The provisions could deal with such matters as whether the review by the court would be a complete review of the administrative action on the merits or whether the review would be restricted to errors of law on the part of the administrative organ and whether the court would be empowered to substitute its own decision for that of the administrative organ or whether it was merely empowered to annul that decision. It was stated that such provisions would be particularly useful in jurisdictions where judicial review of administrative acts was less developed or not sufficiently refined to take into account the specific characteristics of procurement proceedings.

185. In opposition, views were expressed that the Model Law should not contain provisions on the nature and scope of judicial review. It was stated that the matter would be difficult to deal with in the Model Law as State practice on the nature and scope of judicial review varied considerably from country to country. It was suggested that the need for

guidance to jurisdictions could be met by explanations in the commentary to the Model Law or in notes to article 40.

186. It was generally agreed that the article should be as broad as possible in stating the right of any aggrieved contractor or supplier to bring an action before a court of law. It was stated that judicial review was the most important vehicle of redress in the Model Law. It was further observed that under many international conventions the broadest possible access to courts by aggrieved parties was guaranteed.

187. It was proposed that article 40 should contain only the opening sentence and that the last sentence of the *chapeau* and subparagraphs *(a)* through *(d)* should be deleted. It was stated that that would ensure the broadest possible access to the courts. The proposal was accepted.

Article 41

Suspension of procurement proceedings [and of performance of procurement contract]

188. As regards the two approaches provided in article 41 as variant A and variant B, variant B was regarded as preferable to variant A, on the ground that it gave more discretion to the organ ordering the suspension. Such discretionary power was desirable since suspension of procurement proceedings or of a procurement contract could in some situations cause serious disruption to the proceedings and hardship to the procuring entity and the public. It was observed that suspension could for instance cause a delay in the completion of a project.

189. A number of suggestions were made with regard to the exercise of the power of suspension. One suggestion was that the authority exercising the power of suspension should be required to give reasons for its decision. Another suggestion was that consideration should be given to setting time-limits for the duration of a suspension so as to avoid delays in procurement proceedings. Yet another suggestion was that suspension might be better dealt with in respect of each level of authority exercising powers of review. It was observed that, for example, a decision of the first review authority not to exercise the power of suspension might create problems for other levels of review.

190. After discussion, it was felt that the issue of suspension raised many issues which needed further consideration. It was decided to request the Secretariat to prepare a note on the subject for the consideration of the Working Group at its fourteenth session.

Article 42

Disciplinary, administrative or criminal responsibility of procuring entity

191. A view was expressed that article 42 could be broadened so as to cover civil responsibility. The prevailing view, however, was that the provision was unnecessary. It was stated that the Model Law did not in any of its provisions affect rights under other laws. Given that situation there was no need to state that review proceedings had no effect on any disciplinary, administrative or criminal responsibility that the procuring entity or officer might bear under the law of the State.

192. The Working Group agreed to delete article 42.

III. Future plan of work, including preparation of commentary

193. At the conclusion of the Working Group's deliberations on draft articles 28 to 42 of the Model Law, the Working Group discussed its future plan of work, in particular, the preparation of the commentary. It was recalled that the Working Group, at its eleventh session, had endorsed its decision taken at the tenth session that the Model Law should be accompanied by a commentary and that it had discussed the possible functions and structure of the commentary without, however, taking a final decision with respect to such function and structure (A/CN.9/331, paras. 13-16).

194. It was pointed out that the Working Group, during its entire deliberations, had proceeded on the assumption that the Model Law would be accompanied by a commentary, eventually to be adopted by the Commission. For example, the Working Group had decided in respect of a number of issues not to settle them in the Model Law but to address them, sometimes with various options, in the commentary so as to provide guidance to States in implementing the Model Law.

195. The Working Group reaffirmed its earlier decision that the Model Law should be accompanied by a commentary. The Working Group also decided to consider in detail at its next session the possible function and structure of the commentary as well as the timing and procedure of its preparation.

196. The Working Group noted that the fourteenth session would be held in Vienna from 2 to 13 December 1991 and requested the Secretariat to revise the Model Law in light of the deliberations and decisions at the thirteenth session. It was decided to hold the fifteenth session, subject to approval by the Commission, from 22 June to 2 July 1992 in New York rather than from 3 to 14 August 1992 as originally scheduled and indicated in the report of the twenty-fourth session of the Commission.