C. Report of the Working Group on the New International Economic Order on the work of its fourteenth session

(Vienna, 2-13 December 1991) (A/CN.9/359) [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]

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. 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

[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.

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

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

of the methods of procurement other than tendering that the Working Group had agreed the Model Law should allow under certain conditions.

4. At the thirteenth session (15 to 26 July 1991), the Working Group had before it draft articles 1 to 35 (A/CN.9/WG.V/WP.30) and draft articles 36 to 42 (review provisions, A/CN.9/WG.V/WP.27), as well as a note by the Secretariat on competitive negotiation (A/CN.9/WG.V/WP.31). At that session the Working Group reviewed draft articles 28 to 42 of the Model Law. The Working Group requested the Secretariat to revise articles 28 to 42 taking into account the discussion and decisions at that session. In addition the Working Group requested the Secretariat to prepare a report on suspension of procurement proceedings to aid it in its further consideration of article 41.[6]

5. The Working Group, which was composed of all States members of the Commission, held its fourteenth session in Vienna from 2 to 13 December 1991. The session was attended by representatives of the following States members of the Working Group: Argentina, Canada, China, Cuba, Czechoslovakia, France, Germany, Iran (Islamic Republic of), Japan, Libyan Arab Jamahiriya, Mexico, Spain, Togo, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

6. The session was attended by observers from the following States: Bolivia, Brazil, Greece, Holy See, Indonesia, Lebanon, Pakistan, Peru, Philippines, Poland, Republic of Korea, Yemen, Sudan, Switzerland, Thailand, Turkey and Zaire.

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

(a) United Nations organizations: International Bank for Reconstruction and Development, International Trade Centre UNCTAD/GATT;

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

(c) International non-governmental organizations: International Bar Association.

8. The Working Group elected the following officers:

Chairman: Mr. Leonel Pereznieto (Mexico)

Vice-Chairman: Ms. Corinne B. Zimmerman (Canada)

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

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

(a) Provisional agenda (A/CN.9/WG.V/WP.32);

(b) Procurement: draft articles 1 to 27 (A/CN.9/WG.V/WP.30) and draft articles 28 to 42 (A/CN.9/WG.V/WP.33) of Model Law on Procurement;

(c) Procurement: suspension of procurement proceedings: note by the Secretariat (A/CN.9/WG.V/WP.34).

[6]A/CN.9/356, para. 196.

10. 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.

11. With respect to its consideration of agenda item 3, the Working Group decided to turn its attention first to draft articles 1 to 27 of the Model Law on Procurement (A/CN.9/WG.V/WP.30), and then to draft articles 28 to 42 (A/CN.9/WG.V/WP.33). It was decided to consider the report on suspension of procurement proceedings (A/CN.9/WG.V/WP.34) at the time of the consideration of the articles in the Model Law dealing with review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law (articles 36 to 42).

12. The deliberations and decisions of the Working Group with respect to its consideration of draft articles 1 to 27 of the Model Law on Procurement are contained in chapter I of the present report.

13. The deliberations and decisions of the Working Group with respect to its consideration of draft articles 28 to 42, and with respect to the note on suspension of procurement proceedings, are contained in chapter II of the report. Gaps in the numbering of articles 1 through 41 in the present report reflect the fact that, during the course of the preparation of the Model Law, certain articles have been deleted or incorporated into other articles, without the draft articles having been renumbered.

DELIBERATIONS AND DECISIONS

I. Discussion of draft articles 1 to 27 of Model Law on Procurement (A/CN.9/WG.V/WP.30, and annex to A/CN.9/WG.V/WP.33)

General remarks

14. It was recalled that at earlier points in its consideration of draft articles of the Model Law, the Working Group had agreed to turn its attention, at a later stage, to the structure of the Model Law. The Working Group affirmed its intention to keep the question of structure in mind as its review of the draft Model Law progressed. The Working Group also noted that it had been agreed at the last session to allocate time during the present session to consider the possible function and structure of a commentary, as well as the timing and procedure of its preparation.

Preamble

15. The Working Group affirmed that the Model Law should contain a statement of objectives since such a statement would provide a useful tool for interpretation. It was noted that, pursuant to a decision taken at the twelfth session, the location of the statement of objectives had been moved from article 3 to the preamble. However, the view was expressed that the inclusion of a preamble would not

accord with the legislative drafting approach used in some States. It was suggested that the Model Law should refer to the possibility of setting forth the statement of objectives in a substantive provision in order to accommodate the need of such States to enact the Model Law in a manner consistent with their practice. An opposing view was that the Model Law should not encourage disparity among enacting States as to the location of the statement of objectives since such disparity might foster inconsistent judicial interpretation, thereby diminishing the degree of uniformity of law achieved by the Model Law. After deliberation, the Working Group decided that the statement of objectives should be retained in the preamble, but that at the same time it should be made clear, perhaps in a commentary, that enacting States had the option of setting forth the statement of objectives in a substantive provision.

16. As to the content of the statement of objectives, the view was expressed that the reference in subparagraph *(b)* to the competence of contractors and suppliers was superfluous and could cause confusion since the question of competence was properly the subject of substantive provisions governing qualifications of contractors and suppliers. In view of that observation, it was agreed to delete the word "competent".

Article 1

Scope of application

17. The Working Group considered the revised version of article 1 as contained in document A/CN.9/WG.V/WP.30.

18. General agreement was expressed with the basic thrust of paragraphs (1) and (2), which established the presumption of the applicability of the Model Law, while excluding application to procurement involving national defence and national security unless otherwise decided by the procuring entity. However, some hesitation was expressed with regard to paragraph (3), which implemented the decision that the Model Law should permit enacting States to opt for exclusion of the application of the Model Law to additional types of procurement in a general manner or on a case-by-case basis. In particular, the propriety of permitting exclusion of the Model Law by way of procurement regulations was questioned. The view was expressed that if, despite the provision of six methods of procurement covering a broad range of possible circumstances, it would be considered necessary to provide for grounds for exclusion beyond national security and defence, any such additional grounds should, for the sake of transparency, be set forth in the Model Law itself.

19. The prevailing view was that the Model Law should provide States with the possibility of excluding application of the Model Law in a general manner or on a case-by-case basis and that this should be expressly provided for in the Model Law rather than merely referred to in the commentary. At the same time, it was agreed that it should be made clear that the making of additional exceptions was strictly optional. It was felt that exclusion by regulation was a necessary option since it would not always be possible for an enacting State to envisage at the time of enactment all the types of circumstances that might arise in which exclusion of the Model Law would be desirable. Without the flexibility afforded by exclusion through regulations, enacting States would be left only with the time-consuming avenue of seeking statutory amendments when circumstances arose that had not been envisaged at the time of enactment, thus limiting the acceptability of the Model Law. There was also general agreement with the approach taken in paragraph (3) to case-by-case application of the Model Law, namely, that such a case-by-case approach should apply only to types of procurement specified in the Model Law or in the procurement regulations, thereby ensuring transparency and preventing informality in the exclusion process.

20. It was observed that the use of procurement regulations to exclude application of the Model Law highlighted the need to ensure public availability of such regulations. It was also recalled that the question of the effect of a failure by an enacting State to issue procurement regulations on provisions of the Model Law referring to procurement regulations had arisen with respect to a number of other provisions considered by the Working Group. In this context, the possibility of such a failure to issue procurement regulations was said to underscore the need to make it clear that the issuance of procurement regulations served as a prerequisite for making exclusions beyond those provided for in the Model Law. A view was expressed that questions such as the effect of a failure to issue procurement regulations might be dealt with in article 4.

21. The Working Group next considered the manner in which article 1 was formulated. In that regard, it was observed that there might be an apparent inconsistency between the presumption in paragraph (1) of the general applicability of the Model Law and the presumption in paragraph (3) of non-applicability to certain types of procurement. It was also pointed out that uncertainty might result from the fact that paragraph (3) referred to an express declaration by the procuring entity to contractors and suppliers concerning application of the Model Law to normally excluded areas, while paragraph (2) referred to a similar express declaration without specifying to whom that declaration had to be made. Finally, it was suggested that it should be made clearer that the specification by the enacting State of additional exclusions may be made only in the Model Law itself or in the procurement regulations.

22. In order to address those concerns of a drafting nature, it was proposed that article 1 should be reformulated along the following lines:

> "This Law applies to all procurement by procuring entities other than
>
> *(a)* procurement involving national security or national defence,
>
> *(b)* ... (each State enacting the Model Law may specify in the Model Law additional types of procurement), or
>
> *(c)* procurement of a type specified in the procurement regulations
>
> except where and to the extent that the procuring entity declares to contractors and suppliers at the beginning of the procurement proceedings that this Law does apply."

23. It was suggested that additional clarity might be achieved by replacing the word "specified" in subparagraph *(c)* by the word "excluded". It was also suggested that the reference to the duty of the procuring entity to inform contractors and suppliers of the application of the Model Law in normally excluded areas "at the beginning of the procurement proceedings" was vague and should be replaced by specific references to the various instruments that were used to solicit participation in procurement proceedings, such as invitations to tender or to prequalify and requests for proposals or for quotations. Subject to those refinements, the Working Group agreed to the reformulation of article 1 along the proposed lines.

Article 2

Definitions

24. The Working Group considered the revised version of article 2 as contained in document A/CN.9/WG.V/WP.30.

25. Prior to commencing its review of article 2, the Working Group recalled its previous decision to reconsider the necessity of retaining all the definitions currently included therein. The attention of the Working Group was also drawn to the need to formulate cross-references in the definitions to the operative provisions of the Model Law in a consistent manner in order to avoid uncertainty. It was also suggested that, once the definitions have been finalized, they should be arranged in alphabetical order.

"Procurement" (subparagraph (new a))

26. It was proposed that the words "if the value of those incidental services does not exceed that of the goods or construction themselves" in subparagraph (new *a)* should be deleted. In support of that proposal it was stated that the words introduced a mathematical formula for deciding when services should be construed as incidental which was unnecessarily rigid and artificial and would be difficult to apply in practice. According to that view, there might be elements other than value that would be relevant in determining whether a particular contract concerned predominantly goods (or construction) or services. It was also pointed out that deletion of the language in question would not preclude the use of a purely mathematical approach where appropriate. It was further suggested that, rather than attempting to define the notion of incidentality of services by reference to a purely mathematical formula, it would be more appropriate to outline in a commentary the various elements, including value, that would be relevant to a determination of whether services were an incidental component.

27. In response to the proposal to delete the language in question, it was pointed out that the inclusion of a mathematical measure, while possibly presenting some difficulties in certain exceptional cases in which it was difficult to separate services from the goods or construction, would provide a degree of general certainty as to the meaning of the word "incidental" that would otherwise not be available. Discussion of the matter in a commentary was said to be an inadequate manner of dealing with an issue that affected the scope of application of the Model Law. It was also noted that the language, which reflected a formulation used in the GATT Agreement on Government Procurement as well as in the United Nations Convention on Contracts for the International Sale of Goods, was in line with the earlier decision of the Working Group that, at least at the present time, the Model Law should not address the procurement of services. A concern was expressed that deletion of the language might create an inconsistency with the GATT Agreement on Government Procurement that would cause difficulties for States that were parties to that Agreement. After deliberation, the Working Group decided to retain the subparagraph in its present form and to include in the commentary a discussion of the determination of whether services were incidental.

"Procuring entity" (subparagraph (a))

28. It was agreed to add the word "and" at the end of each version of subparagraph (i) in order to make clear that subparagraph (ii) would be additional to either version of subparagraph (i).

"Goods" (subparagraph (b))

29. It was proposed to add the word "systems" to the illustrative list of goods contained in subparagraph *(b)*. In response, a concern was raised that the inclusion of that term might give particular prominence to the problem of defining incidental services since, in the case of the purchase of systems such as computer systems, services were a relatively costly component. However, the Working Group was of the opinion that that concern alone should not be a ground for not adding the reference to systems since the problem of incidental services also arose with respect to other items listed in the definition. The proposal was accepted.

"Construction" (subparagraph (c))

30. A concern was expressed that the words "if they are provided for in the procurement contract" might be interpreted as requiring that the incidental activities covered were only those referred to in a procurement contract that was in a specific documentary form. In order to avoid this implication, it was agreed to use instead the words "if they form part of the procurement contract".

"Tender security" (subparagraph (f))

31. A view was expressed that the definition raised matters of substance and should therefore appear instead in article 26, which dealt with tender securities. The prevailing view was that it should be retained in its present position (see, however, paragraph 139). As to the content of the definition, it was suggested that the reference to the "obligations" of a contractor or supplier might erroneously imply a reference to performance obligations under the procurement contract. In order to avoid that implication, it was agreed to begin the definition instead by referring to a security "given by a contractor or supplier to the procuring entity to guarantee entry into a contract if the contract is awarded to the contractor or supplier". It was also agreed to delete the reference to letters of credit from the illustrative list of instruments that could serve as tender securities so as not to give undue prominence to what would be an unusual use of ordinary commercial letters of credit in a guaranty function.

"Currency" (subparagraph (g)*)*

32. The Working Group found the definition of "currency" to be generally acceptable.

Definitions of procurement methods (subparagraphs (g bis) *to* (i)*)*

33. A view was expressed that the use of the words "in accordance with" in the definitions to refer to the substantive provisions governing the various methods of procurement might erroneously imply that the definitions were meant to apply to procurement methods only to the extent that those methods were correctly used. On a more fundamental level, the Working Group agreed to delete the definitions of all of the procurement methods available under the Model Law on the ground that those definitions largely consisted of references to operative provisions and therefore were of little value at this stage of the development of the Model Law.

"Contractor or supplier" (subparagraph (i bis)*)*

34. The Working Group found the definition of "contractor or supplier" to be generally acceptable.

"Responsive tender" (subparagraph (j)*)*

35. The view was expressed that it was not appropriate to include in article 2 the definition of "responsive tender" since it touched on matters of substance that were properly the subject of operative provisions of the Model Law such as article 28 dealing with the examination and evaluation of tenders. There was broad support for this view, although at the same time it was pointed out that deletion of the definition might be less desirable if the term were used in the Model Law at points other than article 28. Accordingly, the Working Group requested the Secretariat to examine the frequency and location of use of the term, and to delete the term from the list of definitions if its use was essentially limited to the provisions on examination and evaluation of tenders. The Secretariat was also requested to consider whether the substance of the definition might be usefully incorporated in article 28.

Article 3 bis

International agreements or other international obligations of this State relating to procurement

36. The Working Group considered the revised version of article 3 *bis* as contained in document A/CN.9/WG.V/WP.30.

37. A proposal was made to expand article 3 *bis* so as to include a reference to intergovernmental agreements concluded between different levels of government in federal States. It was suggested that such a clause would be considered a necessity by States with a federal structure because agreements might be concluded between the national government of the federal State and its subdivisions, as well as between individual subdivisions, relating to matters covered by the Model Law. A degree of hesitation was expressed as to the proposal on the ground that it might intrude into matters of internal constitutional and administrative arrangements, matters perhaps better left to the commentary. It was also suggested such an expansion would restrict the scope of application of the Model Law to the detriment of uniformity. After discussion, the Working Group came to the conclusion that the proposed expansion was desirable, particularly in the case of federal States in which the national government did not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law. In such cases, a provision in the Model Law, such as that found in article 2*(a)*, providing for its implementation at different levels of government would not suffice. Neither was it felt to be appropriate to leave to the commentary a matter of such importance to the scope of application of the Model Law. Mention was made of the possibility of placing the new provision in a separate paragraph in order to avoid the mixing of national with international issues.

38. The Working Group gave its agreement to a proposal to replace the words "shall be applied" by the words "shall prevail" as the latter formulation was deemed more appropriate for dealing with the inconsistencies referred to in article 3 *bis*.

Article 4

Procurement regulations

39. The Working Group considered the revised version of article 4 as contained in document A/CN.9/WG.V/WP.30.

40. The view was expressed that the present formulation of article 4 was overly broad and might have the unintended effect of permitting, by way of the procurement regulations, conduct not envisaged under the Model Law. Accordingly, it was proposed that language along the lines of "to carry out the purposes and provisions of this Law" should be used in place of the existing expression "elaborate upon or supplement this Law". The proposal met with the agreement of the Working Group, which requested the Secretariat to revise article 4 so as to find the precise formulation needed to indicate that the procurement regulations must be within the spirit and purposes of the Model Law.

41. The Working Group considered whether to include in article 4 a general rule on the effect of a failure to issue procurement regulations on provisions of the Model Law that referred to such regulations. It was observed, in that regard, that it might be difficult to come up with such a general rule since the effect of non-issuance might vary from one provision to another. In particular, it was suggested that, whereas in one provision the effect of non-issuance might be that the procuring entity is deprived of the power to take a particular action, in another provision the result of non-issuance might be an enhancement of the procuring entity's power. Accordingly, the Working Group decided to forego the addition of a general rule and instead to consider the matter for specific regulation at the relevant points in the Model Law.

42. Expression was given to the notion that the Model Law might address the manner in which the procurement regulations were to be developed, for example, by provid-

ing for an opportunity for interested parties to comment on the regulations during a preparatory stage. However, it was generally felt that the manner in which the procurement regulations were developed was a matter beyond the scope of the Model Law.

43. It was agreed that the addition of a reference to exclusion of the Model Law by way of the procurement regulations, as mentioned in note 1 to article 4 (A/CN.9/WG.V/WP.30), was unnecessary.

Article 5

Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

44. The Working Group considered the revised version of article 4 as contained in document A/CN.9/WG.V/WP.30 and found that article to be generally acceptable.

Article 7

Methods of procurement

45. The Working Group considered the revised version of article 7 as contained in document A/CN.9/WG.V/WP.30.

Paragraphs (1) and (new 2)

46. The Working Group recalled its extensive deliberations at the last session concerning article 7 and noted that the current text implemented the decisions that had been reached at that session. Those decisions included the addition of two new methods of procurement, namely, request for proposals and request for quotations. It was also recalled that considerable attention had been given to the question of overlap between the conditions for use of various methods of procurement other than tendering, in particular two-stage tendering, request for proposals, and competitive negotiation. Paragraph (new 3) contained the solution to the problem of overlap that had been agreed upon at the last session. That solution involved an order of preference to be followed by the procuring entity in selecting a procurement method when the circumstances of a given case fit the conditions for use of more than one method of procurement other than tendering.

47. The Working Group engaged in a further review of the presentation of the various methods of procurement other than tendering, focusing on two specific questions. The first question, on the legislative level, was whether it would be advisable for the Model Law, as it presently did, to recommend to enacting States to incorporate all the methods of procurement set forth in the Model Law, in particular in view of the fact that enacting States would not necessarily be familiar with each of those methods. The second question, on the level of practice, was whether anything further could be done to ameliorate the problem of overlap between the conditions for use of the various methods of procurement other than tendering.

48. Differing views were expressed as to the first question. One view was that it was preferable to recommend that the full array of procurement methods should be enacted since this might usefully expose enacting States to methods that they were not familiar with, without necessarily compelling their use. The prevailing view, however, was that it would be inappropriate and futile to recommend the incorporation of each of the methods, in particular since it was not the practice in most States to employ such a wide range of procurement methods and since three of the methods (two-stage tendering, request for proposals and competitive negotiation) were apparently somewhat interchangeable. The interchangeability of those methods was said to be evidenced by the fact that they were used in different States for similar procurement situations. It was recalled in this connection that the decision to include all of those three methods stemmed partly from the desire on the part of the Working Group to accommodate that divergent practice in the Model Law and thus enhance the acceptability of the Model Law.

49. It was suggested that the Model Law should recommend a particular structure for selecting methods of procurement, for example, that at least one of two-stage tendering, request for proposals and competitive negotiation would have to be selected. However, it was generally agreed that the actual structure of the choice of procurement methods other than tendering to be incorporated into national law should be left to the enacting State. It was further agreed that possible criteria to be used by a legislature in making a selection should be given in the commentary. For example, the commentary could point out that an enacting State might wish to base its selection on the relative degree of competition found available under the different methods.

50. The Working Group then turned its attention to whether anything further could be done to clarify the decision to be made by the procuring entity in practice as to the choice of a procurement method, particularly in cases of overlap of the conditions for use. One suggestion was to ensure that it was sufficiently clear that tendering proceedings were to be engaged in for all procurement, except in those cases that fit only within the conditions for use of methods other than tendering. It was suggested that this might be done by including tendering proceedings in the list of procurement methods set forth in paragraph (new 2). As to the possibility of overlap between the conditions for use of methods of procurement other than tendering, it was generally felt that the order of preference provided in paragraph (new 3) for cases of overlap was a sufficient measure. It was also noted that the problem of overlap would be eased somewhat as a result of the decision to give enacting States the option of not incorporating each of the methods of procurement, in that the problem of overlap would diminish if an enacting State did not adopt each of the methods of procurement. It was further noted that the commentary might provide practical guidance to procuring entities in selecting a procurement method.

51. The practical difficulties that might arise from overlap were said to be further diminished by the fact that, under the current version of article 36, the Model Law did not provide for a private remedy for a failure by the procuring entity to correctly exercise its discretion in selecting a method of procurement. It was suggested that this restric-

tion might be mentioned in article 7, although the general view was that a clear provision in the chapter on review would suffice. A related question was raised as to whether a private remedy would be available in cases which did not involve the potential applicability of two methods of procurement, but in which the procuring entity simply selected a method of procurement in disregard of the conditions for use of that method. It was agreed to defer consideration of that question until further review of article 36.

52. It was observed that the words "subject to" found in the cross-references in paragraph (new 2) to provisions containing the conditions and procedures for use of the various procurement methods might convey an unintended notion of limitation. Wording along the lines of "in accordance with" or "as provided in" was suggested as a possible replacement.

Paragraph (new 3)

53. A proposal was made to inject a degree of flexibility and discretion into the order of preference to be followed when the circumstances of a given procurement fit the conditions for use of more than one of the methods of procurement other than tendering in order to ensure that the most appropriate method was used. It was suggested that this added flexibility might be achieved by establishing the principle that the procuring entity could, in cases of overlap, select the "most appropriate" method. According to such a scheme, the order of preference would come into play when two methods were deemed equally appropriate. That proposal failed to attract support as it was considered inconsistent with the approach that the Working Group had decided upon, namely, that, in order to ensure transparency and the highest possible level of competition, there should be no discretion left to the procuring entity in the selection of a procurement method in cases of overlap. Doubts were also expressed on the ground that the concept of appropriateness was vague and would be difficult to define, resulting in an excess of discretion. By contrast, under the present scheme, the selection of a procurement method would have to be justified in relation to specific conditions for use set out in the operative provisions. Accordingly, the Working Group found paragraph (new 3) to be generally acceptable (see, however, paragraph 197).

Paragraph (5)

54. It was agreed that, in line with a decision that had been taken at the last session in connection with record requirements (A/CN.9/356, para. 58), the words "and shall specify the relevant facts" should be deleted, and that the words "statement of the circumstances" should be replaced by the words "statement of the grounds and circumstances".

Article 8

Qualifications of contractors and suppliers

55. The Working Group considered the revised version of article 8 as contained in document A/CN.9/WG.V/WP.30.

Paragraph (new 1)

56. The Working Group found paragraph (new 1) to be generally acceptable.

Paragraph (1)

57. The view was expressed that subparagraph *(a)*(ii) displayed the difficulty inherent in requiring a contractor or supplier to prove a negative fact, namely, the absence of insolvency. It was suggested that it might be preferable to instead place an affirmative duty on the procuring entity to ascertain the solvency of the contractor or supplier. A similar view was expressed with regard to subparagraph *(a)*(iv).

58. It was agreed to add the words "or their principals or officers" to the beginning of subparagraph *(a)*(iv). It was also agreed that the subparagraph should not specify the length of time during which contractors or suppliers were to be free of any criminal offence or other transgression of the type referred in question. It was felt that the setting of the length of time was a matter better left to the enacting State.

59. It was noted that administrative proceedings were commonly used to suspend or disbar contractors and suppliers found guilty of wrongdoing such as faulty accounting, default in contractual performance, or fraud. Accordingly, it was agreed to add a provision authorizing the procuring entity to disqualify contractors or suppliers that had been found guilty in such administrative proceedings. It was proposed that, in order to implement this decision, words along the lines of "or otherwise disqualified under administrative suspension or disbarment proceedings" should be added to subparagraph *(a)*(iv). It was also suggested that, rather than grounds for suspension or disbarment being specified in the Model Law, examples of the types of offences concerned should be referred to in the commentary. In a similar vein, a proposal that the Model Law should go so far as to include provisions establishing the basis for such proceedings did not receive support, in particular since such proceedings were not used in all jurisdictions.

Paragraph (2)

60. The Working Group found paragraph (2) to be generally acceptable.

Paragraph (2 bis)

61. It was agreed to add the words "if any" after the words "prequalification documents" in paragraph (2 *bis*) in order to take account of cases in which there were no prequalification proceedings.

Paragraph (2 ter)

62. The Working Group found paragraph (2 *ter*) to be generally acceptable.

Paragraph (3)

63. It was stated that the words "prior to the conclusion of the procurement proceedings" used in paragraph (3) to identify the deadline by which contractors and suppliers would be required to present proof of their qualifications were vague, in particular since there might be differing views as to the point at which procurement proceedings were concluded. The Working Group agreed to a proposal that contractors and suppliers should be required to present

proof prior to examination and evaluation of tenders. It was observed, however, that that formulation appeared to be relevant specifically to tendering proceedings.

Article 8 bis

Prequalification proceedings

64. The Working Group considered the revised version of article 8 *bis* as contained in A/CN.9/WG.V/WP.30.

Paragraphs (1) and (2)

65. The Working Group found paragraphs (1) and (2) to be generally acceptable.

Paragraph (3)

66. The Working Group next considered the manner in which the Model Law should refer to the required contents of the prequalification documents. At the previous session, the Working Group had discussed whether the Model Law should list the required contents in detail or whether it might be sufficient to refer to the procurement regulations. The Secretariat was requested to consider the manner in which both approaches might be incorporated into the Model Law as options to be given to enacting States. In response to that request, the text before the Working Group at the present session presented two approaches. Under the first approach ("Option I"), the Model Law would refer to the procurement regulations for the list of required contents. By contrast, the second approach ("Option II") provided for a full listing in the Model Law of the requirements. In order to ensure uniformity under Option I, it was suggested that the commentary should indicate to enacting States that the procurement regulations should incorporate all of the requirements listed in the Model Law under Option II. Upon further deliberation, the Working Group decided that it would not be appropriate to include optional approaches with respect to this issue. It was agreed that Option II was preferable to Option I in particular because of the risk that not establishing the detailed requirements in the Model Law would run counter to the objectives of the Model Law and prejudice uniformity of law. It was also pointed out that the requirements listed in Option II were an indispensable bare minimum that would otherwise have to be listed in the procurement regulations, and that the remaining feature of Option I, namely the right to use the procurement regulations to list additional requirements, was available under subparagraph *(g)* of Option II. Reference was also made to the difficulties that might arise if a State that had selected Option I failed to promulgate procurement regulations.

67. It was agreed that the bracketed reference in the *chapeau* to the information that was "necessary" should be deleted. That reference was considered unnecessary and likely to have the unintended effect of prompting disputes as to whether the procuring entity had included in the prequalification documents all the information necessary to enable contractors and suppliers to prepare and submit applications to prequalify. It was accepted that paragraph (3) should indicate clearly that it referred to the minimum information required to be included and that a procuring entity would remain free to provide additional information if necessary. To this end, it was agreed that the words "shall contain" in the *chapeau* of paragraph (3) should be replaced by the words "shall include". Other agreed changes to Option II included the addition of the price of the solicitation documents (article 14 (1)*(f)*) to the excluded items mentioned in the *chapeau*, and the replacement of the words "required to be included", found in the *chapeau*, by the word "specified". It was also agreed to replace the words "requirements established by the procuring entity" in subparagraph *(g)* by the words "requirements that may be established by the procuring entity" in view of the possibility of non-issuance of procurement regulations and so as to avoid suggesting that the establishment of additional requirements was mandated.

Paragraph (3 bis*)*

68. With regard to the response time allowed to the procuring entity, it was agreed to replace the words "shall be given in sufficient time" by the words "shall be given within a reasonable period of time". It was felt that the existing formulation might lead to disputes as to what amounted to "sufficient time".

Paragraph (3 ter*)*

69. It was noted that paragraph (3 *ter*) would be deleted in view of the addition of article 10 *bis*, which contained a consolidated provision on communications between the procuring entity and contractors and suppliers.

Paragraph (4)

70. A number of interventions were directed at the need to make clearer the framework within which prequalification proceedings were to be conducted. The features of that framework that were referred to were the principle that the prequalification decision must be based on the criteria set forth in the prequalification documents, that a decision must be made with respect to each contractor and supplier that applied for prequalification, and that the results of the prequalification exercise must be conveyed in a timely fashion to the contractors and suppliers involved. While the Working Group recognized that the elements of this framework were set forth, either explicitly or implicitly, in the various articles governing qualifications and prequalification proceedings, in particular article 8 (new 1) and (2 *bis*) and in the second sentence of article 8 *bis* (1), as well as in paragraph (4), it was agreed that additional clarity would be desirable. A view was also expressed that some other detailed aspects of the contents of the prequalification documents might be mentioned, such as the requirement that contractors and suppliers applying for prequalification submit proper addresses.

71. No objections were raised to the retention of the bracketed language in paragraph (4), which established an obligation on the part of the procuring entity to make available to the general public the names of the contractors and suppliers that had been prequalified. It was agreed, however, that such disclosure would only be required upon written request. It was also noted that the disclosure aspect of paragraph (4) might not be incorporated in States in which such disclosure was contrary to confidentiality laws.

Paragraph (5)

72. The Working Group found paragraph (5) to be generally acceptable.

Paragraph (6)

73. It was noted that, at the twelfth session, the Working Group had decided to defer a decision on the necessity for paragraph (6) or on its formulation until the consideration of article 28(8 *bis*), which referred to the right of the procuring entity to request contractors and suppliers to reconfirm their qualifications. The Working Group recalled that at the thirteenth session it had considered article 28(8 *bis*) and had reached certain conclusions concerning the approach to be taken in the Model Law towards the question of reconfirmation. In particular, it had been agreed 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 and that the Model Law should make it clear that the criteria to be used in reconfirming qualifications should be the same as those used in prequalification. In that light, the Working Group had also agreed that the use of the word "re-evaluating" in article 8 *bis* (6) needed to be reconsidered. At the present session, the Working Group reaffirmed its earlier decision as to the need to provide for reconfirmation and the basic approach to be followed.

74. While no specific objections were raised in principle to the modification of the text of paragraph (6) proposed by the Secretariat with a view to avoiding the use of the word "re-evaluating", there was a clear sentiment, as in the case of paragraph (4), that the framework in which the reconfirmation aspect of the prequalification proceedings operated needed to be particularly clear. In that regard, it was suggested that paragraph (6) should refer to the rules set forth in article 28 (8 *bis*) as to the criteria to be used for reconfirmation.

75. A more general question was raised as to whether the provisions on qualifications and on prequalification, as currently formulated, gave the procuring entity sufficient leeway to disqualify contractors and suppliers that submitted false or inaccurate information concerning their qualifications. It was pointed out that the submission of false and inaccurate information was a problem that arose with a certain degree of frequency and that the procuring entity needed to be empowered to respond appropriately at any stage of the procurement proceedings. It was said that the need for such a safety-valve was heightened by the fact that procuring entities sometimes did not carefully examine information on qualifications until a successful contractor or supplier had been selected. It was suggested that the Model Law was not clear as to the steps a procuring entity was permitted to take in cases of false or inaccurate information. The Working Group agreed that the Model Law should clearly provide for disqualification on such grounds at any stage of the procurement proceedings.

76. The Working Group then considered the following proposed reformulation of paragraph (6) intended to reflect the deliberations and decisions that had preceded:

> "The procuring entity may require the contractor or supplier submitting the successful tender to reconfirm its qualifications in accordance with the criteria utilized to prequalify such contractor or supplier in light of the circumstances at the time and may disqualify a contractor or supplier if it finds at any time that the prequalification or reconfirmation information submitted is false or inaccurate."

77. Subject to the drafting refinement that it should be made clear that the procuring entity was to disqualify contractors and suppliers that failed to reconfirm, the proposed text generally met with the agreement of the Working Group. However, differing views were expressed as to the proposed restriction of reconfirmation to the successful contractor or supplier. One view was that such a restriction was appropriate because, both from the standpoint of the efficiency of the procuring entity and of fairness to contractors and suppliers, the point of selection of a successful contractor and supplier was the most relevant point of time for reconfirmation in view of the continually shifting circumstances that contractors and suppliers often found themselves in. In particular, it was suggested that a procuring entity engaged in evaluating tenders would not be inclined to interrupt that process in order to engage in reconfirmation. It was also observed that, where no prequalification had taken place, it was common practice for procuring entities not to consider qualifications until a successful contractor or supplier had been chosen. The view was also expressed that the proposed restriction would help to curb arbitrary or abusive use of reconfirmation to exclude contractors and suppliers from procurement proceedings.

78. The prevailing view, however, was that the right of the procuring entity to request reconfirmation should not be restricted to any particular stage of the procurement proceedings nor limited to the successful contractor or supplier. It was noted that such a flexible approach merely left the matter to the discretion of the procuring entity, which would be unlikely to exercise its right to request reconfirmation in a futile manner. This approach was also viewed favourably because it would permit a procuring entity to request several contractors or suppliers submitting the most interesting tenders to reconfirm their qualifications at the same time. Without such an option, time would be lost in the event that the successful contractor and supplier failed to reconfirm its qualifications, since the procuring entity would be limited to sequentially requesting contractors and suppliers to reconfirm. It was further pointed out that, from the standpoint of speedy resolution of grievances through recourse proceedings, as well as from the standpoint of detecting false and inaccurate information, the possibility of reconfirmation at earlier stages was preferable.

79. A final addition to paragraph (6) agreed upon by the Working Group was that, as in the case of the rule in paragraph (4) for prequalification proceedings generally, the procuring entity should be obligated to notify the results of the reconfirmation.

Article 10

Rules concerning documentary evidence provided by contractors and suppliers

80. The Working Group considered the revised version of article 10 as contained in document A/CN.9/WG.V/WP.30 and found that article to be generally acceptable.

Article 10 bis

Communications between procuring entity and contractors and suppliers

81. The Working Group considered the text of article 10 *bis* as found in the annex to A/CN.9/WG.V/WP.33.

82. Reference was made to the increasing use of electronic data interchange ("EDI") for communications between procuring entities and contractors and suppliers in connection with procurement proceedings. There was a consensus that the use of such evolving communication techniques needed to be accommodated. However, a question was raised as to whether the reference solely to telephone communication and the terminology used in the present formulation of article 10 *bis* was broad enough. In particular, attention was focused on whether the word "record" would be universally recognized as appropriate since it might be interpreted as requiring a printed form, while some EDI transmissions which were stored in computer form did not automatically appear in a printed form. It was pointed out that the present formulation was based on one used in the recently adopted United Nations Convention on the Liability of Operators of Transport Terminals in International Trade and had been tailored to encompass the use of EDI. The Working Group requested the Secretariat to review article 10 *bis* in view of the concerns that had been raised, as well as in the light of UNCITRAL's ongoing activities in the EDI field.

83. Beyond the question of the precise formulation of article 10 *bis*, it was suggested that consideration should be given to covering in article 10 *bis* the provisions on communication found in article 12(2)*(b)*, referring to means of communication other than telephone, and encompassing the communication of solicitation documents (see paragraphs 102 and 106).

Article 10 ter

Record of procurement proceedings

84. The Working Group considered the text of article 10 *ter* as found in the annex to A/CN.9/WG.V/WP.33.

Paragraph (1)

85. The Working Group agreed to refer here and at other points in article 10 *ter* to "offers", in addition to referring to tenders, proposals and quotations, in order to make it clear that coverage of competitive-negotiation proceedings was being contemplated. The Working Group found paragraph (1) to be otherwise generally acceptable.

86. It was agreed to add a provision reflecting the requirement in article 11(1) that a procuring entity that restricted participation in procurement proceedings on the basis of nationality would have to state in the record the grounds and circumstances for the restriction. There was a consensus that this portion of the record should not be subject to the disclosure requirements of article 10 *ter*.

Paragraph (2)

87. The Working Group considered the outstanding question of the point of time at which the relevant portions of the record should be made available to the general public. It was generally agreed that the earlier point of time should be chosen, namely the acceptance of the tender, proposal, offer or quotation. It was noted that a provision along these lines might have to be adjusted in jurisdictions with laws governing confidentiality.

Paragraph (2 bis*)*

88. Differing views were expressed as to the point of time at which disclosure of the relevant portions of the record should be made to contractors and suppliers. One view was that the disclosure requirement should not be triggered until the entry into force of the procurement contract in order to avoid unwarranted disruption of the procurement proceedings. It was suggested that such an approach was necessary in order to avoid spawning spurious claims for review based on information disclosed in the record. The prevailing view, however, was that disclosure to contractors and suppliers was required at the earlier stage, i.e., upon acceptance of the tender, proposal, offer or quotation, so as to give meaning to the right to seek review. It was noted that delaying disclosure until entry into force would in many cases have the effect of depriving aggrieved contractors and suppliers of a meaningful remedy since, under a large body of law, the procurement proceedings were deemed concluded upon the entry into force of the procurement contract. In this connection, the attention of the Working Group was drawn to the important role of private remedies in the enforcement of procurement legislation. Finally, the Working Group agreed that paragraph (2 *bis*) should not implicitly restrict the power of a court to order disclosure at an earlier point of time.

Paragraph (3)

89. It was agreed that paragraph (3) was unnecessary and should therefore be deleted since the access to the record by governmental bodies exercising an audit or control function over the procuring entity would not depend on provisions in the Model Law.

Paragraph (4)

90. The Working Group requested the Secretariat to review the formulation of paragraph (4) so as to ensure that it was clearly limited to an exclusion of liability for money damages and did not exclude the possibility of injunctive and other forms of relief.

Article 10 quater

Inducements from contractors and suppliers

91. The Working Group agreed to the expansion of the provision on inducements to cover all methods of procurement available under the Model Law. At the same time, it was noted that article 10 *ter* (1)*(f)* required the inclusion in the record of information on disqualification of contractors and suppliers on the grounds of inducements and that that information would be disclosed pursuant to article 10 *ter*

(2 *bis*). A concern was expressed that such disclosure would be unwarranted and, particularly in cases in which the offering of the inducement was not the subject of criminal proceedings, might expose the procuring entity to liability under libel rules. While the Working Group was of the view that the information should be included in the record, it was agreed to add a provision to the present article limiting disclosure of that portion of the record to the contractor or supplier alleged to have offered the inducement. Disclosure of the information to the contractor or supplier alleged to have misbehaved was designed to permit that contractor or supplier to seek review if it felt that the disqualification was unjustified. It was therefore agreed to modify article 10 *ter* (2 *bis*) accordingly.

Article 11

Participation by contractors and suppliers

92. The Working Group considered the revised version of article 11 as contained in A/CN.9/WG.V/WP.30.

93. A proposal was made to transfer article 11 to chapter I so as to apply to all methods of procurement the presumption that contractors and suppliers were permitted to participate in procurement proceedings without regard to nationality. Some doubts were expressed as to the appropriateness and necessity of such an expansion of article 11 on the ground that it would not reflect actual practice. In particular, it was pointed out that the procurement methods other than tendering available under the Model Law were largely geared to circumstances in which the procuring entity knew which particular contractors or suppliers it wished to approach. It was also pointed out that the presumption of internationality was already applicable to two-stage tendering by way of the incorporation by reference of chapter II, and that article 33 *ter* (2) provided a vehicle for the procuring entity embarking on request-for-proposals proceedings to obtain an expression of interest from contractors and suppliers internationally. A concern was raised that the application of article 11 to request-for-proposals proceedings might appear to be inconsistent with the notion contained in article 33 *ter* (2) that the solicitation of expressions of interest in participating in request-for-proposals proceedings did not confer any rights on contractors and suppliers.

94. The prevailing view was in favour of the proposal to move article 11 to the general provisions. It was felt that the extension of the presumption of internationality to methods of procurement other than tendering would encourage greater openness in procurement and thereby promote one of the important objectives of the Model Law, without compelling the procuring entity to engage in international procurement counter to economy and efficiency or the other grounds mentioned in article 11. It was also suggested that the generalized application of article 11 would help to ensure equal treatment of foreign contractors and suppliers when procurement proceedings involving methods other than tendering were conducted on an international footing.

95. The Working Group agreed that paragraph (1) needed to be refined in order to clarify that it was composed of two distinct components, the first referring to the closure of procurement proceedings to all but domestic contractors and suppliers, and the second referring to nationality-based restrictions stemming from factors such as tied-aid arrangements and boycott legislation. As to the first component, the view was expressed that permitting restriction to domestic participants on the basis of "economy and efficiency" was an imprecise and vague notion. However, the prevailing view was that the alternative to such a formulation would be no restriction at all on the right of the procuring entity to engage in domestic procurement and that it was preferable therefore to retain the present approach. It was agreed that the application of the notion of economy and efficiency should be explained in the commentary. It was further agreed that the reference in paragraph (1) to economy "or" efficiency should be modified to reflect the more restrictive formulation economy "and" efficiency found in article 12 (2)*(a)*.

96. The Working Group noted that, in view of the decision to expand the application of article 11, it would be appropriate to apply to the methods of procurement other than tendering the requirement that the procuring entity declare to contractors and suppliers whether the procurement proceedings were open to participation without regard to nationality. Such a requirement was presently, by way of article 14(1)*(d bis)*, applicable to tendering proceedings. It was also noted that, while the grounds for any restriction of internationality would not have to be stated in the instrument soliciting participation, that ground would, pursuant to article 11 (1), have to be stated in the record. It was further agreed that the reference in the last sentence of paragraph (1) to that record requirement should be aligned with the language agreed upon for similar references elsewhere in the Model Law, namely, to refer to a "statement of the grounds and circumstances", with the deletion of the requirement that the procuring entity should "specify the relevant facts".

97. The Working Group recalled its decision at the twelfth session to reformulate article 11 so as to avoid referring to "international" procurement proceedings and to avoid the concomitant need to refer to "foreign" contractors and suppliers. It was recognized that, while the revised formulation permitted the Model Law to avoid raising the sometimes complicated question of the definition of "foreign", the use of the term "domestic" raised similar problems of definition. However, the Working Group affirmed its preference for the revised formulation in that it placed the burden on the enacting State of the procuring entity to determine which contractors and suppliers it wished to consider as domestic.

Paragraph (1 bis*)*

98. The Working Group agreed that it should be made clear that the procuring entity remained free to apply in wholly domestic procurement the measures to which paragraph (1 *bis*) referred. Particular reference was made to the possible relevance to domestic procurement of the provisions concerning currency, payment and language.

Article 12

Solicitation of tenders and of applications to prequalify

99. The Working Group considered the revised version of article 12 as contained in A/CN.9/WG.V/WP.30.

Paragraphs (1) and (1 bis)

100. The Working Group found paragraphs (1) and (2) to be generally acceptable.

Paragraph (2)

101. The view was expressed that, while it might be the natural tendency of procuring entities to prefer to deal with limited lists of contractors and suppliers, the Model Law should not provide for the limited tendering procedure contemplated in paragraph (2). It was suggested that paragraph (2) granted an excessive degree of discretion to the procuring entity and that, at most, a limited procedure should be available only when the procuring entity could identify all potential contractors or suppliers. The prevailing view was that limited tendering was a widely used approach that the Model Law had to take into account. It was suggested that the discretion granted to the procuring entity was usefully tempered by the requirement in the second sentence of subparagraph *(a)* that the number of contractors and suppliers invited to participate should be sufficient to ensure effective competition. In order to promote greater transparency, the Working Group decided to add a requirement, akin to the one found in article 11 (1), that the procuring entity should state in the record the grounds and circumstances underlying the decision to limit the tendering proceedings.

102. It was noted that, in view of the addition of paragraph (1 *bis*), a reference to that paragraph needed to be added to the proviso at the beginning of subparagraph *(a)*.

103. The discussion by the Working Group revealed the need to make it clearer that subparagraph *(b)*, with its reference to urgent circumstances, did not provide an alternate ground to the grounds set forth in subparagraph *(a)* for engaging in limited tendering, but rather was subject to subparagraph *(a)* and only referred to the manner of communicating the invitation to tender in limited tendering proceedings. It was agreed that, in the reference at the beginning of subparagraph *(b)* to a writing requirement, the words "may be sent in writing" should be replaced by the words "shall be sent". At the same time, the Working Group noted that the formulation of subparagraph *(b)* would have to be reviewed with a view to the use of methods of communication involving EDI.

Article 14

Contents of invitation to tender and invitation to prequalify

104. The Working Group considered the revised version of article 14 as contained in A/CN.9/WG.V/WP.30.

105. The Working Group affirmed the approach in article 14 (1) *(d bis)*, which excluded alteration of declarations that tendering proceedings were open to international participation, but permitted the opening to international participation of tendering proceedings originally declared to be domestic.

Article 17

Solicitation documents

106. The Working Group considered the revised version of article 17 as contained in A/CN.9/WG.V/WP.30 and in the annex to A/CN.9/WG.V/WP.33.

Paragraph (1)

107. It was pointed out that there were States in which solicitation documents and other documentation relating to procurement proceedings were being transmitted through the use of EDI techniques and that such use of EDI in procurement proceedings was likely to continue evolving and spreading. It was proposed in that light that the Model Law should go beyond what had been agreed to with respect to the communications covered by article 10 *bis* and should contain a general provision enabling enacting States to permit the use of EDI in place of traditionally paper-based documentation. The proposal met with the agreement of the Working Group. At the same time, the Working Group struck a note of caution to the effect that such a provision needed to take account of the fact that the procedures in the Model Law reflected a practice that was rooted in paper-based documentation, as was seen in the Working Group's decision at the twelfth session to retain the requirement in article 24(4) that tenders should be in writing. It was also noted that the use and availability of EDI was not uniform around the world.

Paragraph (2)

108. The Working Group decided to delete the bracketed reference in the *chapeau* to the inclusion in the solicitation documents of "necessary" information on the ground that such a reference was unnecessary and might have the unintended effect of prompting disputes as to whether solicitation documents included all the necessary information. It was also agreed that the *chapeau* should make it clear that the procuring entity was not precluded from including in the solicitation documents information beyond that listed in paragraph (2).

109. The Working Group then turned its attention to specific aspects of the required contents of solicitation documents. A suggestion was made that subparagraph *(e)* should refer to incidental services.

110. The view was expressed that subparagraph *(e bis)* went too far in requiring that the solicitation documents reveal the manner in which non-price factors would be quantified. It was pointed out that all that was normally required in practice was that the solicitation documents should indicate the relative weight to be assigned to non-price factors in the evaluation and comparison of tenders, whereas the present formulation might be read as requiring the detailed disclosure of the actual formulas and scoring schemes. In support of the existing formulation it was suggested that the more detailed level of disclosure would have a beneficial effect and that the language was sufficiently flexible to permit a more limited disclosure. However, it was a concern that that flexibility might lead to disputes, and in view of the established practice the Working Group opted for the more limited approach. Accord-

ingly, it was decided to replace the words "and the manner in which any such non-price factors are to be quantified" by the words "and the relative weight of such non-price factors".

111. It was agreed that the requirement in subparagraph *(f)* that the solicitation documents should indicate the terms and conditions of the procurement contract needed to be softened since there would be cases in which the procuring entity would not be in a position to describe fully the terms of the procurement contract at the time of the drawing up of the solicitation documents.

112. The Working Group agreed to the addition to subparagraph *(i)* of a requirement that the solicitation documents should specify the composition of the price to be quoted in tenders. It was also agreed that this new text, in addition to citing transportation and insurance charges as examples of price elements, should also cite as examples duties and taxes.

113. It was agreed that subparagraph *(l)* should make it clearer that the solicitation documents should indicate any particular requirements as to the form and the issuer of the tender security that must be met in order for the tender security to be acceptable.

114. The Working Group noted that, in view of the change in terminology in article 28(7) agreed to at the previous session, the term "most economic tender" in subparagraph *(p)* would be replaced by the term "successful tender".

115. The view was expressed that it was sufficient to refer to any other requirements relating to the preparation and submission of tenders and that it would therefore be possible to delete the words "and to the procurement proceedings" at the end of subparagraph *(r)*, since those words were ambiguous and seemed unnecessary. It was pointed out, however, that the preparation and submission of tenders represented only one aspect of the procurement proceedings and that the procuring entity might, in some cases, impose requirements that did not, strictly speaking, relate to the preparation or submission of tenders themselves, but that nevertheless merited mention in the solicitation documents. For example, the procuring entity might require contractors to attend a pre-tendering meeting at a construction site in order for contractors to be deemed eligible. It was proposed that the formulation might be made clearer by referring to "other aspects of the procurement proceeding". It was also suggested that consideration should be given to moving the substance of subparagraph *(r)* to the end of paragraph (2) since subparagraph *(r)* was in the nature of a "catch-all" provision.

116. The Working Group decided to retain subparagraph *(w)*, on which it had deferred a decision at the twelfth session. A proposal to delete subparagraph *(w)* on the ground that its substance could be considered covered under subparagraph *(s)* did not receive support, as it was generally felt that the purposes of the two provisions differed. At the same time, it was felt that the subparagraph needed to be refined in order to make its meaning clear, namely, that the solicitation documents must give notice of the right afforded under article 36 to contractors and suppliers to seek review, and not that the procuring entity was enabled to limit in the solicitation documents the extent of its liability under the review provisions of the Model Law.

117. Subject to minor modifications, the Working Group agreed to the language that had been proposed for addition to subparagraph *(y)* to implement the decision at the previous session that the solicitation documents should refer to any final approvals required for entry into force of the procurement contract, as well as to the time expected to be needed for such approvals to be obtained. Those modifications included the use of the word "execution" in place of the word "signature" and the introduction of the notion of "estimated period of time". The latter modification was urged because the procuring entity might not be able to predict with certainty the amount of time that would be needed to obtain a final approval. It was also agreed that subparagraph *(y)* should be revised so as to make it clear that it was the procurement contract, rather than the tender itself, that entered into force.

Article 19

Charge for solicitation documents

118. The Working group considered the text of article 19 as contained in A/CN.9/WG.V/WP.30 and found that article to be generally acceptable.

Article 20

Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification and solicitation documents

119. The Working Group considered the revised version of article 20 as contained in A/CN.9/WG.V/WP.30.

Paragraph (1)

120. A proposal was made to delete the last part of paragraph (1), which established an objective test prohibiting specifications and related requirements that had the effect of creating obstacles to participation of contractors and suppliers, regardless of whether the procuring entity had the intention of creating such obstacles. According to that proposal, paragraph (1) would be left only with a subjective test, i.e, specifications and related requirements that created obstacles would only be prohibited if it was the intent of the procuring entity to create such obstacles. A modified proposal was to refer simply to the prohibition of specifications and related requirements that created obstacles, without specifying whether the subjective "intent" or the objective "effects" test was to be followed, leaving that matter to be determined under other laws. The Working Group decided to accept the latter proposal.

121. It was proposed that paragraph (1) should only be directed to obstacles that were "unnecessary". This proposal failed to gain support as the Working Group affirmed its earlier decision against such a limitation.

Paragraph (1 bis)

122. It was agreed that a provision should be included stating the principle that specifications and related requirements which created obstacles to foreign contractors and suppliers were not to be used. The wording proposed by the Secretariat was found to be acceptable, subject to the replacement of the word "regardless" by the word "because". At the same time, the Working Group affirmed its earlier decision in regard to paragraph (3) that the Model Law should not accord a preference to international standards.

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

123. The Working Group found paragraphs (2), (3) and (4) to be generally acceptable.

Article 22

Clarifications and modifications of solicitation documents

124. The Working Group considered the revised version of article 22 as contained in A/CN.9/WG.V/WP.30.

Paragraph (1)

125. It was agreed to replace the words "in sufficient time to enable the contractor or supplier" by words along the lines of "in a reasonable time to enable the contractor or supplier", as the latter formulation was regarded as less likely to lead to disputes.

Paragraph (2)

126. It was proposed that paragraph (2) should require that addenda to the solicitation should be communicated to contractors and suppliers in a reasonable time to enable the addenda to be taken account of in the preparation and submission of tenders. It was agreed, however, that the proposed modification was unnecessary as the point was covered adequately in article 24(2), which required the procuring entity to extend the deadline for submission of tenders when necessary in cases of clarification or modification of the solicitation documents.

Paragraph (3)

127. It was noted that paragraph (3) would be deleted as a consequence of the addition of article 10 *bis*.

Paragraph (4)

128. The Working Group agreed with a suggestion that paragraph (4) should specify that the minutes of the meeting of contractors and suppliers were to be provided to contractors and suppliers promptly and prior to the deadline for submission of tenders. A related suggestion was that, since the minutes might contain information of an importance tantamount to that of an addendum to the solicitation documents, the timing of the transmission of the minutes might require an extension of the deadline for submission of tenders and that specific mention of this should be made.

Article 23

Language of tenders

129. The Working Group considered the revised version of article 23 as contained in A/CN.9/WG.V/WP.30 and found that article to be generally acceptable.

Article 24

Submission of tenders

130. The Working Group considered the revised version of article 24 as contained in A/CN.9/WG.V/WP.30.

Paragraph (1)

131. As in the case of article 22(1), the Working Group agreed to replace the concept of "sufficient time" by the concept of "reasonable time". It was also agreed that, in place of referring to "all interested contractors and suppliers", paragraph (1) should refer to all contractors and suppliers to whom the procuring entity had provided the solicitation documents.

Paragraphs (2) and (2 bis)

132. A proposal was made to expand the grounds for extension of the deadline for the submission of tenders to include the situation in which an insufficient number of contractors and suppliers responded to an invitation to tender. That proposal did not attract support, in particular because it was felt that merely extending the deadline would not resolve such a problem. It was pointed out that a procuring entity in such a case would be better advised to restart the tendering proceedings and to advertise in a more effective manner. A broader proposal was made that paragraphs (2) and (2 *bis*) should leave the question of extension of the deadline entirely to the discretion of the procuring entity, subject only to the giving of notice to contractors and suppliers. In support of that proposal it was stated that the current formulation unnecessarily restricted the discretion of the procuring entity in determining whether to extend the deadline for the submission of tenders. That proposal also failed to attract support, as the Working Group felt that it would be inappropriate to inject such a degree of discretion and flexibility in regard to as important a procedural aspect of tendering procedures as the deadline for submission of tenders.

133. A question was raised as to whether the provision in paragraph (2 *bis*) permitting extension of the deadline where circumstances beyond the control of contractors or suppliers prevented the submission of tenders was meant to apply only to circumstances which affected all contractors and suppliers (e.g., a mail strike in the country of the procuring entity) or whether it applied even when the circumstance affected as few as a single contractor or supplier (e.g., a mail strike in the country of one of the contractors or suppliers). One view was that the Model Law should not permit the procuring entity to extend the deadline if only a single contractor or supplier was prevented from submitting its tender. Another view was that such an option should be open to the procuring entity, but that the current formulation could be interpreted as being sufficiently flex-

ible to give the procuring entity the necessary discretion. According to that view, the matter was better left to statutory interpretation since a more specific statement of the right of the procuring entity to accommodate the needs of a single contractor or supplier might encourage an excessive degree of attention by the procuring entity to the needs of particular contractors or suppliers. However, the prevailing view was that, since paragraph (2 *bis*) was understood to encompass circumstances that affected even a single contractor or supplier, this should be made explicit. It was felt that such a clear approach would recognize the necessary discretion of the procuring entity without compelling the procuring entity to accommodate individual contractors and suppliers. Accordingly, it was decided that reference should be made to any circumstance beyond the control of "a" contractor or supplier.

Paragraph (2 ter)

134. It was noted that paragraph (2 *ter*) would be deleted in view of the addition of article 10 *bis*.

Paragraph (3)

135. The Working Group found paragraph (3) to be generally acceptable, but agreed with a suggestion that its substance should appear following the substance of paragraph (4).

Paragraph (4)

136. A view was expressed that the requirement that tenders should be submitted in writing was overly rigid in view of the increasing use of EDI techniques and of the possibility that methods of maintaining confidentiality in the EDI context might exist. In response, it was recalled that the Working Group had decided to add a provision enabling enacting States to incorporate the use of EDI and that the matter should be considered in that context (see paragraph 106). It was also noted that EDI was not uniformally available throughout the world.

137. It was agreed to replace the words "the tender" in the second sentence by the words "its tender".

Article 25

Period of effectiveness of tenders; modification and withdrawal of tenders

138. The Working Group considered the revised version of article 25 as contained in A/CN.9/WG.V/WP.30 and found that article to be generally acceptable.

Article 26

Tender securities

139. The Working Group considered the revised version of article 26 as contained in A/CN.9/WG.V/WP.30.

140. The Working Group agreed with a proposal to incorporate into article 26 the definition of the term "tender security" currently located in article 2 *(f)*.

Paragraph (1)

141. A question was raised as to whether subparagraph *(a bis)* was redundant in view of similar language in article 17 (2) *(l)*. It was noted that there were several other instances of repetition in the operative provisions of statements made in article 17 concerning the contents of the solicitation documents and that this raised a question of structure to which the Working Group might wish to return at a later stage.

142. It was agreed to add to subparagraph *(a bis)* a reference to the form and substance of the tender security as an aspect of the acceptability of the tender security to which the solicitation documents may refer. A proposal that a requirement should be included that the solicitation documents should specify the currency of a tender security in the form of a cash deposit did not attract support, in particular because such forms of tender security were relatively rare, and also because it was felt that the point was adequately covered by the reference to the form and substance of the tender security.

143. It was proposed that subparagraph *(a bis)* should require the solicitation documents to specify which institution or class of institutions would be acceptable to the procuring entity for the issuance of the tender security. The rationale behind that proposal was to prevent the situation from arising in which a contractor or supplier found out only after having posted a tender security that the issuer of its security was unacceptable. The Working Group found that the proposed requirement would be difficult to apply. However, in order to address the problem the proposal was intended to cover, the Working Group agreed to add a provision requiring that, in advance of the submission of tenders, the procuring entity would be obligated to respond to a request from a contractor or supplier to confirm the acceptability of a proposed issuer or of a confirming institution, if required.

144. The view was expressed that the rule in subparagraph *(b)* barring rejection of tender securities due to foreign issuance was excessively weakened by the exception granted to procuring entities that were not permitted by law to accept tender securities of foreign issuers. The Working Group recalled its previous discussion of this question and affirmed that such an exception needed to be incorporated into the Model Law. However, in view of the fact that such an exception would not be needed in all enacting States, it was decided that the optional character of the exception should be indicated.

145. A proposal was made to delete in subparagraph *(b)* the words "if the tender security and the institution or entity otherwise conform to lawful requirements set forth in the solicitation documents" on the grounds that those words were unnecessary. Upon examination, the Working Group decided not to accept the proposal since, without the language in question, subparagraph *(b)* would override subparagraph *(a bis)*. It was agreed, however, that the word "lawful" was unnecessary in view of subparagraph *(a bis)* and should be deleted.

146. The Working Group decided to delete the language in subparagraph *(d)* permitting the procuring entity to

specify grounds for forfeiture of the tender security other than withdrawal or modification of the tender following the deadline for submission, or failure to sign a procurement contract or to provide a required performance security. It was felt that those were the only grounds for forfeiture that the Model Law should recognize.

Paragraph (2)

147. The Working Group found paragraph (2) to be generally acceptable.

Article 27

Opening of tenders

148. The Working Group considered the revised version of article 27 as contained in A/CN.9/WG.V/WP.30.

149. A question was raised as to whether there might be cases, other than procurement involving national security or defence, in which the procuring entity should be permitted not to apply the public-opening requirements set forth in article 27. The Working Group was of the view that the requirements in article 27 represented an important pillar of transparency and discipline in tendering proceedings and that exceptions should not be countenanced. At the same time, it was noted that, under article 1, the enacting State could exclude, or provide for the limited application of, the Model Law in certain types of procurement.

II. Discussion of draft articles 28 to 41 of Model Law on Procurement (A/CN.9/WG.V/WP.33)

Article 28

Examination, evaluation and comparison of tenders

150. The Working Group considered the revised version of article 28 as contained in A/CN.9/WG.V/WP.33.

Paragraph (1)

151. The Working Group agreed to the retention of subparagraph *(b)*, the decision on which had been deferred at the previous session. It also agreed to a proposal to add a requirement that a procuring entity that exercised its right to correct an arithmetical error apparent on the face of the tender should give notice of the correction to the contractor or supplier that submitted the tender. Subject to that amendment, paragraph (1) was found to be generally acceptable.

Paragraph (2)

152. The Working Group considered the question whether the use of the words "shall reject a tender" implied a duty on the part of the procuring entity to take some formal action of rejection with respect to rejected tenders. It was agreed that, if this was not the intended import, language along the lines of "shall not accept a tender" would be preferable. In considering this question, the Working Group examined the merits of a proposal to require the procuring entity to give contractors and suppliers whose tenders were rejected notice of rejection immediately upon the taking of the decision to reject. The Working Group decided not to incorporate such a procedure, in particular because it was considered to be an unjustified added burden on the procuring entity at a time when it was busy evaluating tenders and that it might suggest that the procuring entity would have to make a specific decision on each tender with respect to each of the criteria listed in paragraph (2). Accordingly, in order to avoid suggesting the need for a formal action of rejection, it was decided to replace the words "shall reject a tender" by the words "shall not accept a tender".

153. It was proposed that subparagraph *(a)* should be deleted in view of the provisions elsewhere in the Model Law specifically dealing with the qualifications of contractors and suppliers. That proposal failed to generate support as it was felt to be indeed appropriate to refer to lack of qualifications on the part of the submitting contractors or supplier in a provision listing all of the other grounds for rejection of a tender. The Working Group did agree, however, that the cross-reference in subparagraph *(a)* to article 8(3) had been rendered unnecessary by the decision in article 8(3) to require that contractors and suppliers should submit evidence of qualification at the latest prior to the commencement of examination of tenders.

Paragraph (3)

154. It was noted that paragraph (3) had been incorporated in article 10 *quater*.

Paragraph (4)

155. The Working Group recalled the decision made during the discussion of the definition of "responsive tender" in article 2*(j)* to incorporate in paragraph (4) the notion that, in order to be considered responsive, a tender had to conform to all of the requirements set forth in the solicitation documents.

Paragraph (7)

156. Differing views were expressed as to a suggestion that the term "lowest evaluated tender" used in subparagraphs *(c)*(ii) and *(d)* should be replaced by the term "most favourable tender". Support for the alternate term was expressed on the grounds that the term "lowest evaluated tender" might suggest that price was the dispositive factor and that the term appeared to be opaque and contradictory. The prevailing view, however, was that the term "most favourable tender" connoted an undesirable degree of subjectivity, while the existing term, despite its drawbacks, was preferable because it suggested a greater degree of objectivity.

157. A view was expressed that a reference should be included in subparagraph *(d)*(ii) to the costs of operating incidental services. As to subparagraph *(d)*(iii), it was agreed that the reference to "balance of payments position *or* foreign exchange reserves" should be changed to "balance of payments position *and* foreign exchanges reserves", as those were two related aspects of a single factor.

158. The Working Group considered again the manner in which the Model Law should treat margins of preference, which were referred to in subparagraph *(e)*. It was noted that the present text reflected the decision reached at the previous session not to include any particular formula in the Model Law, but merely to refer to the application of margins of preference in accordance with the procurement regulations. One suggestion for further refinement was to refer to the solicitation documents as an alternate source of authority for the use of margins of preference. A related suggestion was that subparagraph *(e)* should refer only to the solicitation documents as a source of authority for the use of margins of preference on the ground that the paramount obligation of the procuring entity was to apprise contractors and suppliers through the solicitation documents of the manner in which tenders would be evaluated and compared. Those suggestions involving the solicitation documents did not prove to be persuasive, however, as the Working Group felt that the authority to use a margin of preference should not stem purely from the solicitation documents, and because the requirement that the solicitation documents should describe the use of a margin of preference was felt to be sufficiently established in articles 17*(p)* and 28(7)*(a)*.

159. Another idea was to apply to margins of preference terms analogous to those contained in article 11(1), which provided for restriction of tendering proceedings to domestic contractors and suppliers on the grounds of economy and efficiency. Such an approach was seen to be inappropriate, however, since the concept of economy and efficiency was foreign to margins of preference, which were intended to promote development of local production capacity.

160. The Working Group did lend its support to the suggestion that the provision on margins of preference should be tightened somewhat by making it subject to the type of optional approval requirement found in certain other provisions of the Model Law, as well as by including an indication of the consequences of not issuing procurement regulations relating to the margins of preference. Accordingly, it was further agreed to add words to the effect that the margin of preference shall be authorized by and calculated in accordance with the procurement regulations.

Paragraph (8)

161. The Working Group found paragraph (8) to be generally acceptable.

Paragraph (8 bis)

162. A proposal was made to align paragraph (8 *bis*) with article 8 *bis*(6), in which the Working Group had decided not to limit the procedure of reconfirmation of qualifications only to the successful contractor or supplier. In response, it was observed that the current formulation encompassed cases in which the procuring entity had not actually engaged in prequalification proceedings, and that in such cases the notion of reconfirmation was of limited relevance since the evaluation of qualifications took place at the same time as the examination of tenders. By contrast, paragraph (6) of article 8 *bis* referred to cases in which the procuring entity had engaged in prequalification proceedings. It was said that were paragraph (8 *bis*) of article 28 to be expanded as proposed to contractors and suppliers other than the successful contractor or supplier, it would be necessary, in order to ensure even-handedness, to require the procuring entity to request reconfirmation from all contractors and suppliers. In view of those observations, it was agreed to retain the existing formulation of paragraph (8 *bis*).

Article 29

Rejection of all tenders

163. The Working Group considered the revised version of article 29 as contained in A/CN.9/WG.V/WP.33.

Paragraph (1)

164. A view was expressed that it was inappropriate to permit the procuring entity to reject all tenders remaining after the failure of the successful contractor or supplier to meet a request to reconfirm its qualifications. The prevailing view was that, as had been decided at the previous session, such a right should be recognized, in particular because there might not be any acceptable tenders left after the initially selected tender fell through. A suggestion was made that, in order to guard against abuse, it should be made clear that rejection of all tenders should only be for legitimate reasons. The Working Group considered such an amendment to be unnecessary in view of the second sentence, which required the procuring entity to communicate to contractors and suppliers, upon request, the grounds for rejection of all tenders. The Working Group did agree, however, that it was not necessary to include in article 29 a specific reference to the right of the procuring entity to reject all tenders remaining after a failure to reconfirm, since such a case was covered by the notion of "rejection of all tenders". It was pointed out in that regard that the procuring entity would not issue a notice of acceptance under article 32 until its request for reconfirmation had been honoured.

Paragraphs (2) and (3)

165. The Working Group found paragraphs (2) and (3) to be generally acceptable.

Article 30

Negotiations with contractors and suppliers

166. The Working Group considered the text of article 30 as contained in A/CN.9/WG.V/WP.33 and found that article to be generally acceptable.

Article 32

Acceptance of tender and entry into force of procurement contract

167. The Working Group considered the revised version of article 32 as contained in A/CN.9/WG.V/WP.33.

Paragraph (1)

168. The Working Group found paragraph (1) to be generally acceptable.

Paragraphs (2), (3), (3 bis) and (3 ter)

169. It was noted that the provisions in article 32 referring to the requirement of the signature of a procurement contract and to the requirement of a final approval for entry into force of the procurement contract would be of varying relevance to enacting States. Accordingly, it was agreed that the Model Law should indicate that enacting States where either of those requirements were not traditional would not have to incorporate them. Enacting States in which such requirements applied only in certain cases could incorporate the text in its present form, with possible further specification in the Model Law or in the procurement regulations of the specific classes of procurement contracts or situations to which the requirements were applicable (e.g., contracts over a certain value). It was further agreed to add in paragraph (3) *(a)* an optional reference to signature of the procurement contract by the "requesting ministry". Such an alternative to the reference to the procuring entity as a signatory to the procurement contract would be incorporated by enacting States in which the procurement contract was not typically signed by the governmental entity, such as a central tendering board, that conducted procurement proceedings for all government ministries.

170. A question was raised as to the effect of the issuance of the notice of acceptance pursuant to paragraph (1) on the right of a contractor or supplier to withdraw its tender, and as to the sanctions that would be applicable in the event of a withdrawal following issuance of the notice. In particular, the question was raised whether a contractor or supplier that wished to withdraw its tender following the issuance of the notice of acceptance would be exposed to any liability beyond the forfeiture of the tender security. It was observed that the result might vary depending upon whether a procurement contract entered into force pursuant to the issuance under paragraph (2) of a notice of acceptance, or upon the signature of a procurement contract under paragraph (3). It was also observed that it was not precluded by article 32 that, once a procurement contract had entered into force in accordance with the issuance under paragraph (2) of the notice of acceptance, withdrawal of the successful tender would result not only in forfeiture of the tender security, but also in liability under the procurement contract. By contrast, when a procurement contract was to enter into force upon signature of a contract under paragraph (3), withdrawal of a tender following issuance of the notice, but prior to signature, might not result in such extensive liability since a procurement contract had not yet entered into force. It was suggested, however, that a limitation on the right of withdrawal of a tender following issuance of the notice of acceptance, but prior to signature, might be found in the second sentence of paragraph (3) *(b)*, which provided that, between the time of the issuance of the notice and the signature of the procurement contract, neither the procuring entity nor the successful contractor or supplier should take any action interfering with the entry into force or performance of the procurement contract.

171. The Working Group was in agreement that the sanction that the Model Law should provide for in the event of withdrawal of a tender following issuance of the notice of acceptance should be forfeiture of the tender security, in particular because it was considered to be impractical and not in the interest of the procuring entity to attempt to compel a contractor or supplier that had changed its mind about entering into the procurement contract to perform that contract. At the same time, the Working Group was of the view that the Model Law should not exclude the possibility that in such cases the contractor or supplier would be liable under the applicable contract law, a possibility not excluded by the existing text. Accordingly, it was decided not to modify the relevant portions of article 32. The discussion did reveal, however, a certain lack of clarity in article 25 as to the sanction under the Model Law for a withdrawal of a tender following the deadline for the submission of tenders. Accordingly, it was agreed to replace in article 25(3) the words "but not thereafter" by the words "without forfeiting its tender security". A related suggestion was to add to article 25(3) a statement similar to the one already contained in article 26(1)*(d)*(i) to the effect that withdrawal of a tender following the deadline for submission of tenders would result in forfeiture of the tender security. A view was also expressed that it should be made clear in article 25(1) that tenders could be withdrawn following the deadline for submission of tenders, albeit subject to forfeiture of the tender security.

Paragraph (4)

172. The Working Group found paragraph (4) to be generally acceptable.

Paragraph (5)

173. The Working Group found paragraph (5) to be generally acceptable. It was observed, however, that the words "if required" might be misinterpreted as referring to the notice of the procurement contract rather than to the tender security.

Paragraph (6)

174. The Working Group found paragraph (6) to be generally acceptable.

New article 33 bis

Conditions for use of two-stage tendering

175. The Working Group considered the revised version of new article 33 *bis* as contained in A/CN.9/WG.V/WP.33.

176. It was suggested that consideration should be given to revising the reference to the solicitation of proposals from "contractors and suppliers" in order to take cognizance of the possibility that, in cases in which a combination of goods and construction was being procured, the procuring entity might be soliciting proposals from both contractors and suppliers. It was noted that similar questions might arise with respect to the appropriateness of the expressions "contractors and suppliers" and "contractors or suppliers" at other points in the Model Law. Accordingly, the Working Group requested the Secretariat to review the entire Model Law in this regard.

177. A suggestion that subparagraph *(b)* should be deleted on the ground that it concerned matters sufficiently covered in subparagraph *(a)* did not receive support.

Article 33 bis

Procedures for two-stage tendering

178. The Working Group considered the revised version of article 33 *bis* as contained in A/CN.9/WG.V/WP.33 and found that article to be generally acceptable.

Article 33 ter

Conditions for use of request for proposals

179. The Working Group considered the revised version of article 33 *ter* as contained in A/CN.9/WG.V/WP.33.

180. As it had done at the previous session, the Working Group considered a suggestion that the reference to certain procedural aspects of request-for-proposals proceedings found in the *chapeau* of paragraph (1), in subparagraphs *(b)* and *(c)*, and in paragraph (2) should be moved to article 33 *quater*, which concerned the procedures to be followed in such proceedings. The Working Group affirmed, for the most part, its earlier decision. It was decided to retain the texts in the *chapeau* and in subparagraphs *(b)* and *(c)* of paragraph (1) in their present position. It was considered that those provisions dealt with the decision on the part of the procuring entity as to the number of contractors and suppliers to be approached and the manner of selection of a proposal and were therefore relevant to the conditions for use. It was also suggested that those elements made the conditions for use of requests for proposals more easily distinguishable from the conditions for use of other methods of procurement. It was agreed, however, that these considerations did not apply to paragraph (2) and that therefore paragraph (2) should be moved to article 33 *quater*.

181. It was proposed that the final portion of paragraph (2), which indicated that the solicitation by the procuring entity of expressions of interest in submitting proposals did not confer any rights on contractors and suppliers, was unnecessary and should be deleted. However, the Working Group decided to retain that proviso. It was recalled that, when the decision was made at the previous session to require the procuring entity to solicit expressions of interest, it had been considered necessary to make it clear that the liability of the procuring entity to contractors and suppliers was not being expanded by virtue of the addition of the procedure in question.

Article 33 quater

Procedures for request-for-proposals proceedings

182. The Working Group considered the revised version of article 33 *quater* as contained in A/CN.9/WG.V/WP.33.

Paragraph (1)

183. The Working Group found paragraph (1) to be generally acceptable.

Paragraph (2)

184. A proposal was made to add to the *chapeau* of paragraph (2) the requirement that the procuring entity should send a request for proposals to each contractor or supplier that expressed an interest in participating in response to the notice procedure set forth in article 33 *ter* (2), unless the procuring entity had decided that it wished only to send the request for proposals to a restricted list. It was noted that the rationale behind such an expanded procedure, which was the practice in certain States, was that, as a general rule, those contractors or suppliers that expressed an interest should be given an opportunity to submit proposals. Objections were raised to the proposal on the ground that it would place an additional burden on the procuring entity at a time when it was already busy. It was also suggested that the additional language involved would unduly complicate the Model Law without actually adding anything, since the procuring entity would remain free to except itself from the requirement.

185. In an attempt to accommodate both the practice reflected in the existing text, as well as the practice reflected by the proposed addition, it was proposed that the two approaches would be incorporated as alternatives. While the Working Group agreed to the need to accommodate both practices, it decided that to expressly provide for the two approaches as alternatives was unnecessary since, under the existing text, the procuring entity remained free to send the request for proposals to whomever it wished, including to any or all of the contractors and suppliers that expressed an interest in the proceedings. Accordingly, it was decided to retain the existing text and to make clear in a commentary the options open to the procuring entity.

Paragraph (3)

186. It was agreed that specific reference should be made to the communication to contractors and suppliers of modifications of the evaluation criteria. Subject to that refinement, the Working Group found paragraph (3) to be generally acceptable.

Paragraph (4)

187. The Working Group gave its assent to a suggestion that paragraph (4) should be limited to prohibiting the disclosure of the contents of proposals to competing contractors and suppliers. It was felt that, by referring to the opening of proposals, the current formulation might give the unintended implication that the opening of proposals should be conducted in public. A suggestion for implementing the agreed modification was to replace the word "open" by a word such as "treat" or "review".

Paragraph (5)

188. The Working Group agreed to a proposal to delete subparagraph *(d)*, which provided that any modification of the evaluation criteria following the commencement of negotiations should not violate the confidentiality of the negotiations. It was recognized that modification of the evaluation citeria would not in itself pose a problem of confidentiality, since those criteria did not contain a summary of or statement concerning proposals. It was also observed that the concern intended to be addressed by subparagraph *(d)* would be met by the revised version of paragraph (4).

Paragraph (6)

189. The Working Group found paragraph (6) to be generally acceptable.

Paragraph (7)

190. In response to the observation that the procedures set forth in subparagraphs *(b)* and *(c)* concerning the separate evaluation of the price represented one, but not the exclusive, approach to the treatment of price found in practice, it was agreed to treat those subparagraphs as optional or illustrative.

Additional paragraph

191. The Working Group was in agreement with a proposal to add a provision to the effect that any award made by the procuring entity should be in accord with the evaluation criteria set forth in the request for proposals.

New article 34

Conditions for use of competitive negotiation

192. The Working Group considered the revised version of new article 34 as contained in A/CN.9/WG.V/WP.33.

193. In reviewing new article 34, the Working Group revisited the question of the overlap in the conditions for use of competitive negotiation, two-stage tendering and request for proposals—a problem that had been discussed at the previous session as well as at the current session in connection with the review of article 7 (see paragraphs 45 to 52). In that respect, it was widely felt that the condition in subparagraph *(a)*, which included references to the special nature and particularly complex technical character of the goods or construction, was vague and arguably very similar to conditions applicable to other methods, thus failing to establish a clear and enforceable standard to be used in determining when competitive negotiation, as opposed to those other methods, was appropriate.

194. Several approaches were considered in an attempt to clarify subparagraph *(a)* and to make the condition contained therein distinguishable from similar conditions for use found in the Model Law for the other methods of procurement. One suggestion was to delete the reference to the "special nature" of the goods, as well as the reference to construction, and to focus on the notion of a "particularly complex technical character", perhaps even referring to specific types of goods such as computers and automatic data processing for which competitive negotiation was used in certain countries. That suggestion encountered opposition on the ground that it would excessively narrow the grounds for the use of competitive negotiation. No strong objections were raised, however, to the proposed deletion of the reference to the scope and volume of goods or construction.

195. The Working Group recalled that one of the reasons why competitive negotiation, as well as two-stage tendering and request for proposals, had been included, a reason which was also a source of the overlap among the conditions for use of those methods, was that those methods were used in different States to deal with basically the same type of situation, namely, cases in which the procuring entity was unable to bring specifications to the level required for tendering proceedings. It was also noted that this fact was behind the decision in respect of article 7 to give enacting States a choice among the methods of procurement other than tendering (see paragraphs 46 to 48). In that light, it was suggested that, rather than making any further attempt to refine subparagraph *(a)* so as to make it more distinguishable from similar conditions for use for the other methods, it would be more appropriate, at least with regard to certain types of overlapping conditions for use, to treat those methods as equal options.

196. A specific proposal was made as to the extent to which competitive negotiation, two-stage tendering and request for proposals should be treated as equal options. That proposal involved establishing as a common condition for the use of each of those methods the inability of the procuring entity to draw up specifications. The inclusion of that common condition for each of those methods would not exclude the inclusion of other, divergent conditions for use for the different methods (e.g., urgency, for competitive negotiation, and, for request for proposals, the decision of the procuring entity to use an evaluation and selection scheme characteristic of that method of procurement). A variant of that proposal was to delete subparagraph *(a)*, thereby limiting to two-stage tendering and request for proposals the common condition of the inability of the procuring entity to draw up specifications. There was considerable support for the latter approach, on the ground that those two methods were adequate to deal with the type of procurement situations contemplated for competitive negotiation, while at the same time being more disciplined, transparent and competitive than competitive negotiation.

197. However, an objection was raised to precluding the availability of competitive negotiation in cases in which the procuring entity was unable to draw up specifications on the ground that it was precisely in such cases that competitive negotiation was traditionally regarded in some States as the appropriate procurement method. The suggestion was made that those States might wish to deal with such special cases, which might include, for example, the procurement of very complex technology or of specially commissioned artistic works, by excluding those categories of procurement from the Model Law. In support of that suggestion, the view was expressed that such exclusions would have minimal impact since, at any rate, the application of competitive negotiation procedures provided a very limited degree of restraint on the procuring entity. However, the Working Group was unable to form a consensus behind an approach that would foster exclusions from the Model Law or exclude the use of competitive negotiation in cases in which the procuring entity was unable to formulate complete specifications.

198. After deliberation, the Working Group decided to request the Secretariat to implement the proposal that the three methods in procurement should be treated as equal options as regards cases in which the procuring entity was unable to formulate complete specifications. It was noted that such a solution did not completely resolve the problem of overlap in the admittedly unlikely event that an enacting

State would incorporate both two-stage tendering and competitive negotiation. In such a State, a procuring entity that wished to use competitive negotiation on the ground of inability to formulate specifications, would be precluded from doing so by virtue of the order of preference established in article 7 (new 3) governing cases of overlap in conditions for use. Accordingly, the Working Group decided to review again at the next session the question of the overlap in the conditions for use of the methods of procurement, including the question of the order of preference established in article 7 (new 3).

199. The Working Group affirmed the decision made at the last session to limit urgency as a ground for the use of competitive negotiation to cases in which the circumstances giving rise to the urgency were not foreseeable by, or a result of dilatory conduct on the part of, the procuring entity.

200. It was proposed that subparagraph *(e)* should be expanded to cover the case in which a contractor or supplier defaulted in the performance of a procurement contract already in force and the procuring entity did not have time to engage in new tendering proceedings because of urgent needs. It was generally felt that such a case was adequately covered by subparagraph *(b)* and that it was therefore unnecessary to expand subparagraph *(e)* as suggested. A concern was also voiced that such an expansion of subparagraph *(e)* might have the unintended effect of fostering unjustified resort to competitive negotiation. The Working Group did, however, request the Secretariat to ensure that all language versions of subparagraph *(b)* would clearly cover a case of the type in question.

Article 34

Procedures for competitive negotiation

201. The Working Group considered the revised version of article 34 as contained in A/CN.9/WG.V/WP.33.

202. The Working Group agreed to replace the word "may" in paragraph 3 *bis* by the word "shall" so as to make the "best and final offer" procedure mandatory. Article 34 was otherwise found to be generally acceptable.

New article 34 bis

Conditions for use of request for quotations

203. The Working Group considered the revised version of new article 34 *bis* as contained in A/CN.9/WG.V/WP.33.

Paragraph (1)

204. Questions were raised as to the appropriateness of the use of the word "standardized" to refer to the type of goods that were the subject of request-for-quotations proceedings. It was said to be unclear whether that word was intended to refer merely to goods that were ready made as opposed to being manufactured to a particular customer's specifications, or whether the word was intended to refer to the conformity of the goods with national or international technical standards. The Working Group expressed its understanding that it was the former meaning that should be conveyed. At the same time, a view was expressed that the language chosen should take account of the concern of importing countries that goods meet the required quality standard. It was suggested that, in place of the word "standardized", words or expressions such as "standard" or "commercially available" should be used instead. However, those words also were considered to be insufficiently clear. The Working Group requested the Secretariat to consider the matter further in the light of the observations that had been made.

Paragraph (2)

205. The Working Group found paragraph (2) to be generally acceptable.

Article 34 bis

Procedures for request for quotations

206. The Working Group considered the revised version of article 34 *bis* as contained in A/CN.9/WG.V/WP.33.

Paragraph (3)

207. As had been agreed in the context of article 17(2)*(i)* with respect to the composition of the price in tendering proceedings, it was agreed to add a reference to duties and taxes as additional examples of elements that would form part of the price quotation.

208. A concern was expressed that the reference to the "cost" of the goods might have the unintended effect of suggesting that procuring entities should request a complete breakdown of the basis on which contractors and suppliers arrived at a price for the goods themselves (e.g., calculation of overhead and level of profit). It was said that the difficulty was compounded by the use later in the paragraph of the word "price", and that it would be preferable to use the word "price" in both locations. While some support was expressed for the present formulation and misgivings were voiced as to the double use of the word price, the Working Group recognized the concern over the use of the word "cost" and requested the Secretariat to attempt to find an appropriate formulation.

Paragraphs (3 bis*) and (4)*

209. The Working Group found paragraphs (3 *bis*) and (4) to be generally acceptable.

Article 35

Single source procurement

210. The Working Group considered the revised version of article 35 as contained in A/CN.9/WG.V/WP.33.

Paragraph (new 1)

211. A number of interventions were made aimed at loosening somewhat the restrictions that had been placed on

subparagraph *(c)*, which provided for urgency as a grounds for the use of single source procurement. One proposal was to delete the reference to catastrophic events, with the result that resort could be had to single source procurement on the grounds of urgency as long as the condition giving rise to the urgency was neither foreseeable nor due to the dilatory conduct of the procuring entity. It was further suggested that, with the removal of the reference to catastrophic events, the subparagraph should be cast in terms of a *force majeure* clause, namely, a clause permitting the use of single source procurement when the use of such a procurement method was dictated by events that were beyond the control of the procuring entity. Another proposal was to provide simply that the use of single source procurement would be permitted when the use of any other method was impossible. Those proposals failed to attract general support, however, as the Working Group affirmed its view that the use of single source procurement on the grounds of urgency should be limited to catastrophic cases. At the same time, it was agreed that the commentary should indicate that, in such cases, the procuring entity should limit its procurement to the quantity required to deal with the emergency situation, thus leaving the procurement of its general needs to the more competitive procurement methods.

212. The Working Group also considered a proposal to delete the restriction that had been added at the previous session limiting the urgency grounds to cases in which the condition giving rise to the urgency was unforeseeable and not due to the dilatory conduct of the procuring entity. It was pointed out that, given the basic premise of a catastrophic situation, the retention of that restriction would lead to anomalous results. In particular, a combination of catastrophic circumstances and the restrictive formulation of subparagraph *(c)* might leave a procuring entity unable to resort to single source procurement or, for that matter, to any other method of procurement, thus resulting in serious harm to the public interest. In view of such a possibility, the Working Group agreed that it was necessary to delete the restriction in question. It was felt that, with the remaining restriction to catastrophic events and the proviso that no other method of procurement must be available, there were sufficient safeguards in place to limit abusive resort to single source procurement on the grounds of urgency.

213. In subparagraph *(d)*, the Working Group agreed to replace the words "the size of the proposed procurement" by the words "the *limited* size of the proposed procurement". In subparagraph *(e)*, it was decided to replace the word "development" by the words "development leading to the procurement of a prototype" in order to achieve alignment with similar language in new article 34 *(c)*.

Article 36

Right to review

214. The Working Group considered the revised version of article 36 as contained in A/CN.9/WG.V/WP.33.

215. A proposal was made to add to article 36 the requirement that, in order to obtain review, a complaint must state that the procuring entity was "*prima facie* in breach of a duty set forth in the Model Law", i.e., that it should be apparent from the face of the complaint that what the procuring entity was alleged to have done was in fact a violation of a duty imposed by the Model Law. It was suggested that the addition of such a requirement would help to preclude frivolous complaints, thereby limiting disruption of procurement proceedings. That proposal failed to generate significant support, in particular because of a concern that any such language in article 36 seeming to restrict the right to review would create uncertainty and might jeopardize the effectiveness of the review procedures as a tool for enforcement of the Model Law. It was also observed that such a restriction was implicit in the review process as was evidenced by the reference in article 38(2) to dismissal of complaints. It was further observed that, while the proposed limitation might have some relevance to court proceedings, article 36 was not geared only to judicial review.

216. The Working Group then turned its attention to the alternatives that had been included for indicating the provisions that imposed duties the breach of which would give rise to a cause of action. Upon review of those alternatives, the Working Group agreed that variant 1, which referred simply to the breach of a duty imposed by "this law", was preferable to variant 2, which involved a listing of a large number of provisions of the Model Law intended to be subject to the review procedures. It was felt that the simpler approach would be easier to implement and would avoid the possible pitfall inherent in variant 2 that the listing might somehow be incomplete. At the same time, it was agreed that the commentary should indicate, on the basis of the provisions found in variant 2 and including the additional paragraph agreed for article 33 *quater*, which provisions should give rise to private remedies. It was also agreed that, as a consequence of the decision to use the variant 1 approach, it would be necessary to indicate, either in article 36 or at relevant points in the Model Law, that certain provisions involving the exercise of discretion by the procuring entity would not give rise to private remedies.

217. The Working Group gave its assent to a proposal to delete the words "at any stage of the procurement proceedings or after the procurement proceedings have terminated" found at the end of article 36. It was felt that the notion addressed in that language was adequately and more precisely covered in the subsequent provisions on review.

Article 37

Review by procuring entity or by approving authority

218. The Working Group considered the revised version of article 37 as contained in A/CN.9/WG.V/WP.33.

Paragraph (1)

219. A question was raised as to the appropriateness of the reference in paragraph (1) to an "authority", which was the first reference of its kind in the Model Law. In response, it was pointed out that that reference needed to be understood in the context of the optional approval requirement referred to at various points in the Model Law. At the same time, note was made of the fact that the reference to approval in paragraph (1) might have to be aligned with the

optional character of the approval requirement in the Model law. The Working Group found paragraph (1) to be otherwise generally acceptable.

Paragraph (2)

220. It was agreed that the reference in the second sentence of paragraph (2) to complaints seeking only compensation for tender or proposal preparation costs should be deleted since that matter was addressed, and more appropriately so, in article 38(2)*(g)*. It was also noted that the reference to the "person" submitting a complaint needed to be changed to a reference to a "contractor or supplier" in line with the decision at the previous session in connection with article 36 to limit the availability of review to contractors and suppliers. An additional drafting suggestion was that, for the purposes of clarity, the words "the earlier of the time when" should be replaced by a formulation along the lines of "whichever is earlier".

Paragraph (3)

221. The Working Group found paragraph (3) to be generally acceptable.

Paragraph (4)

222. It was noted that the reference to the "person" submitting the complaint would be modified to refer to the "contractor or supplier" submitting the complaint. Paragraph (4) was found to be otherwise generally acceptable.

Paragraph (5)

223. A suggestion was made to eliminate paragraph (5) by redistributing its contents to other provisions. According to that suggestion, the first sentence, which referred to the institution of proceedings under article 38 or 40, would be incorporated in article 38(1)*(b)*, and the second sentence, which dealt with the cessation of the competence of the procuring entity and of the approving authority under article 37 upon the institution of such proceedings, would be incorporated in paragraph (6) of the present article. However, the suggestion was regarded as unworkable since paragraph (5) referred not only to administrative review under article 38, but also to judicial review under article 40.

Paragraph (6)

224. The Working Group found paragraph (6) to be generally acceptable.

Article 38

Administrative review

225. The Working Group considered the revised version of article 38 as contained in A/CN.9/WG.V/WP.33.

Paragraph (1)

226. It was observed that, while paragraph (1) established certain time limits for the commencement of administrative review actions with reference to the point of time that the complainant became aware of the circumstances in question, the Model Law did not provide any absolute limitation period for the commencement of review. It was agreed that this was a matter better left to be addressed by other national law and that the commentary should address the point. It was observed that the present case was a good illustration of the usefulness of the commentary in pointing out to legislatures in enacting States the potential relationship between the review provisions in the Model Law and other provisions of national law.

227. It was noted that the reference in subparagraph *(c)* to the "person" claiming to be adversely affected would be modified to refer to a "contractor or supplier".

Paragraph (1 bis)

228. The Working Group found paragraph (1 *bis*) to be generally acceptable.

Paragraph (2)

229. The Working Group noted that subparagraph *(d)*, and perhaps subparagraph *(e)*, which referred to the annulment or revision of actions and decisions of the procuring entity, would have to be clarified in order to make it clear that they stopped short of authorizing the annulment of a procurement contract that had entered into force. This would be in line with the decision of the Working Group at the previous session that the Model Law should not itself authorize the annulment of procurement contracts. Any such annulment would be left to other national law, for example, criminal or administrative law. In order to clarify the point in subparagraph *(d)*, it was suggested that words should be added along the lines of "other than any act or decision by which the procurement contract is constituted". Were it to be considered necessary to clarify the same point in subparagraph *(e)*, it was suggested that words should be added there along the lines of "other than any decision bringing the procurement contract into force". An alternative drafting suggestion was to limit the applicability of subparagraphs *(d)* and *(e)* to the period of time prior to the entry into force of the procurement contract.

230. It was noted that the question in subparagraph *(g)* as to the types of loss to be compensable in administrative review proceedings remained outstanding from the previous session. Differing views were expressed as to the two variants before the Working Group, one of which provided for compensation only of costs associated with participation in the procurement proceedings, and the other one for broader losses suffered. One view was that limiting recovery merely to tender or proposal preparation costs would result in insufficient compensation. At the same time, it was acknowledged that exposing the procuring entity also to liability for other losses suffered, in particular lost profit, was excessive given the fact the compensation would come from the public purse. It was therefore suggested that compensation should be set somewhere between the mere costs associated with participating in the procurement proceedings and lost profit. The prevailing view, however, was that the Model Law should not recommend as necessary the adoption of a standard of compensation beyond costs associated with the procurement proceedings. In particular, the concern was voiced that the Model Law should not add to the burdens borne by procuring entities in the developing world. At the same time, it was agreed that the Model Law should not exclude the possibility of compensation of costs beyond those associated with the procurement proceedings.

231. Several suggestions were considered for leaving open the possibility of compensation beyond the costs associated with the procurement proceedings. One suggestion was to indicate that the administrative body may require the payment of compensation "at least" for costs associated with the procurement proceedings. Another suggestion was that the possibility of additional compensation would remain open without the addition of any such language because a complainant might obtain further compensation from a court. The Working Group finally decided that it would be best to present both approaches to compensation currently embodied in subparagraph *(g)* as options for the enacting State and to discuss in the commentary the choice to be made in this regard by legislatures.

Paragraphs (3) and (4)

232. The Working Group found paragraphs (3) and (4) to be generally acceptable.

Article 39

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

233. The Working Group considered the revised version of article 39 as contained in A/CN.9/WG.V/WP.33.

Paragraph (1)

234. The Working Group found paragraph (1) to be generally acceptable.

Paragraph (2)

235. The view was expressed that paragraph (2) was not clear as to two facets of the question of participation in review proceedings of contractors and suppliers other than the contractor or supplier submitting the complaint. The first facet was the standard in paragraph (2) to be used to determine which contractors and suppliers would be admitted. A view was expressed that the current standard, which referred to any contractor or supplier whose interests were or could be affected, was too vague and should be replaced by a reference to "direct and material" interest. It was suggested that such a limitation would help to ensure that review proceedings did not assume unmanageable proportions. The prevailing view, however, was that the existing formulation was adequate, particularly in view of the discretion remaining in the hands of the review body to determine whether a given contractor or supplier met the admission test. It was also felt that the possibility of broader participation should not be unduly restricted since it was in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible. The other facet of paragraph (2) addressed by the Working Group was whether paragraph (2) provided sufficient guidance as to the extent of the participation that would be allowed to those third-party contractors and suppliers that had been admitted to the proceedings. It was suggested in this regard that the mere reference to a "right to participate" might not provide an adequate indication of whether the participation of such third parties was to be at a full level (e.g., including the right to submit briefs) or whether it could be restricted in some way. On this question also, the Working Group was of the view that it would be preferable to retain the general formulation in the existing text. It was agreed, however, that the commentary should alert legislatures that there might be a need in their jurisdictions for establishing rules to govern issues not dealt with in article 39(2).

Paragraph (3)

236. The Working Group noted that the first reference in paragraph (3) to the "person" submitting the complaint would be modified to refer to a "contractor or supplier". As to the second such reference, it was agreed that it should be similarly replaced, and that reference should also be made at that point to the furnishing of the decision to any governmental authority (e.g., an approving authority) that may have participated in the review proceedings. It was also agreed that the formulation of the reference at the end of paragraph (3) to confidentiality should be aligned with provisions at other points of the Model Law restricting disclosure of information that would prejudice legitimate commercial interests.

Article 40

Judicial review

237. The Working Group considered the revised version of article 40 as contained in A/CN.9/WG.V/WP.33.

238. It was agreed that the drafting of article 40 should be refined in order to avoid giving rise to the interpretation that procuring entities were precluded from seeking judicial review of decisions reached at lower levels of the review process. One suggestion for doing so was to replace the words "jurisdiction over an action commenced by a contractor or supplier" by the words "jurisdiction over, *or in connection with,* an action commenced by a contractor or supplier". The Working Group found article 40 to be otherwise generally acceptable.

Article 41

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

239. The Working Group considered the text of article 41 as contained in A/CN.9/WG.V/WP.33, as well as the note by the Secretariat on the question of suspension contained in A/CN.9/WG.V/WP.34.

240. The Working Group resumed its consideration of the question of suspension of the procurement proceedings and of the performance of the procurement contract, a question that had been left unresolved at the last session. Differing views were expressed as to the threshold question of whether it was at all necessary to include in the Model Law a provision on suspension. One view was that article 41 should be deleted because adequate provision existed for suspension without an article specifically on that point. In particular, it was suggested that suspension was available from the procuring entity itself by virtue of article 37(4), from an administrative review body under article 38(2)*(b)*, and from the courts under the applicable rules of civil procedure. It was also suggested that a provision such as article 41

would intrude into those existing rules governing court procedure and that those rules should not fall within the domain of the Model Law. It was further suggested that the availability in many countries of provisional court measures, which would encompass a measure such as suspension, obviated the need for any mention of the possibility of suspension at lower levels of the review process. The prevailing view, however, was that the Model Law, in particular because of the need to establish uniformity of law, should contain a provision on suspension. At the same, it was generally agreed that article 41 should be restricted to dealing with the availability of suspension in review proceedings under articles 37 and 38 and that it should not venture into the question of the power of courts to order suspension. Neither, it was agreed, should article 41 provide for suspension of the performance of the procurement contract. It was agreed that that question should be left to other national laws.

241. Having decided that article 41 should be retained in some form, the Working Group turned its attention to the two variants that remained on the table from the previous session, with variant A providing for automatic suspension and variant B providing for discretionary suspension. Differing views and considerations were expressed with regard to the advantages and disadvantages possessed by those two variants. It was noted that the automatic suspension feature of variant A had the advantage of freezing the status quo and thereby preserving the rights of the complainant. Particular reference was made to the value of such an approach for complaints filed shortly before the issuance of the notice of acceptance, i.e., shortly before the entry into force of the procurement contract. It was recalled that, with the decision of the Working Group not to provide in the Model Law for suspension of the procurement contract, an automatic suspension would be more likely than a discretionary approach to ensure the availability of a meaningful remedy for complaints filed shortly before the entry into force of a procurement contract. It was also suggested that an approach involving an automatic suspension would be more likely to result in the settlement of complaints at a lower level, short of judicial intervention, thus fostering more economical and efficient dispute settlement and judicial economy. At the same time, it was recognized that the discretionary approach embodied in variant B had the advantage of avoiding the degree of disruption of procurement proceedings likely to result under an automatic-suspension regime because the reviewing body would be in a position to ferret out the type of frivolous complaints that would create problems under variant A.

242. In view of the fact that both variants displayed important advantages and disadvantages, there was broad support for attempting to craft a provision on suspension that would combine the desirable elements of both variants. In that light, the Working Group was able to achieve broad agreement that article 41 should provide for a mandatory suspension, but that that suspension would be applicable only if the reviewing body determined that the complaint met certain criteria specified in the Model Law. It was further agreed that another crucial feature of article 41 should be that the procuring entity would be able to override the suspension requirement on the basis of urgent public interest considerations. In order to ensure that such an override was not used capriciously or arbitrarily, it was agreed that a procuring entity wishing to override should certify the ground for the override, thus providing a record for later judicial review. At the same time, with a view to limiting disruption of the proceedings in such critical cases, it was agreed that the procuring entity's certification should be conclusive with respect to all levels of review except judicial review.

243. The Working Group considered the question of the length of time of the suspension. A proposal that the overall length of time be set at thirty days failed to gain support as it was felt that such a length of time was too long and disruptive. Another proposal was to set a very short preliminary period of suspension during which a determination could be made as to whether a longer suspension was necessary. While some misgivings were expressed as to the meaningfulness of a short period of time, it was generally agreed that the initial period of suspension should be short, for example, five days or one week. It was felt that such a short period, which would be in line with the attempt to find a middle ground between variants A and B, would limit disruption, while at the same time accomplishing the essential purpose of freezing the status quo while the review body obtained an impression of the complaint and thereby determined the extent of the suspension, if any, that would be merited. It was also noted that, in cases in which the issuance of the notice of acceptance itself triggered entry into force of the procurement contract, a complainant filing a protest following the issuance of a notice should be permitted to request a suspension. A further point that was noted was that the application of a suspension may affect time limits in the procurement proceedings, for example, the deadline for the submission of tenders.

244. The Working Group considered a number of suggested criteria to be met by a complaint in order to obtain a suspension. One proposal was that the complainant should be required to provide an affidavit or some other form of a sworn statement on the face of which would be apparent the allegation of injury and probability of success. Questions were raised as to the meaningfulness of such a requirement, its low evidentiary value and the unfamiliar nature of affidavits in some legal systems. In response to those questions, it was pointed out that the purpose of the statement was not, at this stage, to initiate an adversarial hearing or an evidentiary examination, but merely to require the complainant to make its *ex parte* allegations under oath. It was also suggested that, while the particular form of an affidavit might not be familiar in all legal systems, the possibility of issuing a sworn statement of some sort existed widely. Another proposed criterion was that the complainant should be required to make a statement concerning the effect of a granting or of a denial of the suspension on the balance of interests between the complainant and the procuring entity, and between the complainant and other contractors and suppliers. Similar points were made in favour and in opposition to this criterion as had been made with regard to the sworn statement. A final suggestion was that the complainant should be required to post a security to cover losses that might result from the suspension in the event that the complaint proved to be unjustified. While there was some support for such a requirement, the prevailing view was that it would raise difficulties related to the time required to obtain a security and to the narrowing effect that it might have on the availability of the suspension.

245. The Working Group requested the Secretariat to redraft article 41 in light of the above discussion.

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Footnote for review provisions

246. It was recalled that at the thirteenth session the Working Group had deferred a final decision on the treatment in the Model Law of the question of review proceedings. Having considered the articles on review again at the present session, the Working Group decided to retain those articles as a part of the Model Law that States might enact without change or with only such minimal changes as were necessary to meet particular important needs of the enacting State. However, in view of the fact that the provisions on review were more likely than other parts of the Model Law to affect constitutional and administrative systems in place in the enacting State, the Working Group considered that it would be necessary to indicate, by way of a footnote at the beginning of chapter IV, that an enacting State might not see fit to incorporate, to one degree or another, the provisions on review. The footnote would, at the same time, indicate that those provisions might nevertheless be used to measure the adequacy of review procedures available in the enacting State.

III. Future work

247. At the conclusion of the Working Group's deliberations on the draft articles of the Model Law, the Working Group requested the Secretariat to revise the Model Law to take into account the decisions taken at the present session.

248. The Working Group discussed its future plan of work, in particular, the finalization of the draft Model Law for presentation to the Commission, and the possible functions, structure, and schedule of preparation of the commentary. In regard to the preparation of the draft Model Law for presentation to the Commission, the Working Group noted the urgency of the need for the Model Law and expressed its intention of completing its preparation of the Model Law at the next session in order to be able to present the Model Law to the Commission at its twenty-sixth session.

249. As it had done at the previous session, the Working Group affirmed the importance of having a commentary to accompany the Model Law. As regards the nature of the commentary, the Working Group noted that the content of the commentary would differ depending upon its function. Three possible functions were identified, including guidance to legislatures considering enactment of the Model Law, practical guidance to procuring entities applying the Model Law, and, lastly, a guide to judicial interpretation of the Model Law. It was agreed that, at least at the initial stage, priority should be given to the preparation of a commentary aimed at giving guidance to legislatures, without precluding the possibility that at a later stage the decision would be made to prepare commentaries with other functions. As to the timing and method of preparation of the commentary, it was agreed that, although it may have been desirable for the legislative commentary to be reviewed by the Working Group at the time of its final review of the draft Model Law, completion of the Working Group's consideration of the Model Law should not be delayed until the preparation by the Secretariat of a draft commentary. At the same time, the Working Group decided that, upon the preparation of the draft commentary by the Secretariat, it would convene a small and informal ad hoc working party of the Working Group to review the draft commentary.

250. The Working Group noted that the fifteenth session, subject to approval by the Commission, would be held from 22 June to 2 July 1992 in New York.

D. Working papers submitted to the Working Group on the New International Economic Order at its fourteenth session

1. Procurement: draft articles 1 to 35 of Model Law on Procurement: report of the Secretary-General (A/CN.9/WG.V/WP.30) [Original: English]

[Text reproduced in chapter III, B, 1, pp. 221 to 243.]

2. Procurement: draft articles 28 to 42 of Model Law on Procurement: note by the Secretariat (A/CN.9/WG.V/WP.33) [Original: English]

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