II. PROCUREMENT

A. Report of the Working Group on the New International Economic Order on the work of its twelfth session (Vienna, 8-19 October 1990) (A/CN.9/343) [Original: English]

CONTENTS

*Gaps appearing in the numbering of the second draft of articles 1 to 27 are due to the deletion and consolidation of several articles contained in the first draft pursuant to decisions taken by the Working Group at the eleventh session.

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, held at Vienna from 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 discussions 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 the session. It was agreed that the revision need not attempt to perfect the structure or drafting of the text. It was also agreed that the commentary would not be revised until after the text of the model law had been settled, and that no revision of the commentary would be prepared for the twelfth session of the Working Group. In addition, the Working Group requested the Secretariat to prepare for the twelfth session draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity.[4]

3. At its twenty-third session (25 June to 6 July 1990), the Commission expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously.[5]

4. The Working Group, which was composed of all States members of the Commission, held its twelfth session at Vienna from 8 to 19 October 1990. The session was attended by representatives of the following States members of the Working Group: Argentina, Bulgaria, Canada, Chile, China, Czechoslovakia, Egypt, France, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Morocco, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia.

5. The session was attended by observers from the following States: Finland, Kuwait, Lebanon, Oman, Pakistan, Philippines, Republic of Korea, Romania, Saudi Arabia, Switzerland, Thailand, Turkey.

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

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

(b) Intergovernmental organizations: League of Arab States, Office Central des Transports Internationaux Férroviaires (OTIF);

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

7. The Working Group elected the following officers:

Chairman: Mr. Robert Hunja (Kenya)

Rapporteur: Ms. Jelena Vilus (Yugoslavia).

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

(a) Provisional agenda (A/CN.9/WG.V/WP.26);

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

(c) Procurement: second draft of articles 1 to 35 of Model Law on Procurement (A/CN.9/WG.V/WP.28).

9. The Working Group adopted the following agenda:

(a) Election of officers;

(b) Adoption of the agenda;

(c) Procurement;

(d) Other business;

(e) Adoption of the report.

10. With respect to its consideration of item *(c)*, the Working Group decided to turn its attention first to the second draft of articles 1 to 35 of the Model Law on Procurement (A/CN.9/WG.V/WP.28). It was decided to defer consideration of the review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law on Procurement (A/CN.9/WG.V/WP.27) until such time as the review of the second draft of articles 1 to 35 was completed.

DELIBERATIONS AND DECISIONS

I. Discussion of second draft of articles 1-27 of model law on procurement (A/CN.9/WG.V/WP.28)

Article 1
Application of Law

11. It was generally agreed that the application of the Model Law should be as broad as possible so as to achieve the greatest degree of uniformity in the law relating to procurement. To that end, the Working Group agreed that the word "all" should be added to the opening provision

[1] Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *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] *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 17* (A/45/17), para. 29.

of article 1, so that the provision would read along the following lines: "This Law applies to all procurement by procuring entities."

12. It was recognized, however, that some States might be reluctant to adopt the Model Law without the ability to exclude its application to certain types of procurement. In particular, it was said that States should be able to exclude procurement in cases where national defence or national security was involved, and possibly in other cases involving important national interests. An opposing view was that providing for exclusions from the application of the Model Law ran counter to the objective of uniformity of law.

13. The national security exclusion presently appearing in paragraph (2) of article 1 was regarded as too narrow, since it referred only to procurement for national security or national defense "purposes" and did not cover other cases involving national security or national defence (see also paragraphs 225 and 226 below).

14. It was agreed that a State should be able to exclude the application of the Model Law to particular types of procurement in a general manner, e.g., by setting forth the exclusions in article 1 of the Model Law enacted by it or in the procurement regulations, or on a case-by-case basis. Exclusions on a case-by-case basis should not be made in a secretive or informal manner. It was also agreed that a procuring entity should be able to apply the Model Law to procurement that fell within an exclusion if the entity wished to do so. In order to promote transparency, the applications of the Model Law in such cases should be brought to the attention of the contractors and suppliers in the tender solicitation documents.

Article 2
Definitions

15. It was observed that several of the definitions in this article served to delineate the scope of application of the Model Law. It was agreed that those definitions should be drafted as broadly as possible so as to maximize the coverage of the Model Law and thus promote uniformity of law.

16. It was stated that careful consideration should be given to whether some of the definitions provided in the article were necessary. Definitions that merely referred to other articles of the Model Law were said to be unnecessary. It was said that, in principle, definitions should be provided only when needed to assist the user of the Model Law in understanding its provisions, or to define terms of art that could be wrongly interpreted if not defined.

17. Reference was made to the importance of aligning the definitions provided in the article with the substantive provisions of the Model Law in which the defined terms were dealt with in order to avoid conflicts between the definitions and the substantive provisions. To deal with the possibility of such conflicts, a proposal was made to add a provision establishing, in the event of an inconsistency, whether the definition or the substantive article was to prevail. The proposal was not adopted. A provision of that nature was said to be unknown in the legislative practice of many States. In addition, it was observed that definitions should be drafted so as not to conflict with substantive articles. It was noted that in the final stages of the drafting of the Model Law the definitions would have to be re-examined to ensure their consistency with the substantive articles.

18. A view was expressed that the *chapeau* of the article should be changed to read, "In this Law".

"Procurement" (new subparagraph (a)*)*

19. It was agreed that the definition of "procurement" should read along the following lines:

> " 'Procurement' means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves, but not services in themselves."

20. The Working Group reaffirmed its earlier decisions (A/CN.9/331, para. 20; A/CN.9/315, para. 25) to deal at the present stage only with the procurement of goods and construction and not of services, except services that were incidental to the goods or construction being procured. It was noted that services were an important element of the Uruguay Round of trade negotiations currently being held under the auspices of the General Agreement on Tariffs and Trade (GATT), and it was said to be inappropriate to attempt to deal with services in the Model Law before those negotiations were completed. In addition, it was observed that, since services were not procured on the same basis or with the same procedures as goods and construction, additional provisions would have to be formulated for the Model Law if services were to be covered. In accordance with its decision not to deal with services, the Working Group agreed that the words "and the acquisition of telecommunications, transport or insurance services", that presently appeared at the end of the definition of "procurement", and the references to services that appeared elsewhere in the text, not be retained.

21. A view was expressed that the commentary to the Model Law should indicate whether the acquisition of goods or construction in the context of joint ventures, licensing, and other arrangements not specifically referred to in the definition of "procurement" were covered by the definition.

"Procuring entity" (subparagraph (a)*)*

22. A proposal was made to not define "procuring entity" in the Model Law, but, instead, to indicate that each State should specify in an annex to the Model Law as enacted by it those entities that were to be covered by the Model Law. The proposal was not adopted. The prevailing view was that a definition of "procuring entity" along the lines presently provided in subparagraph *(a)* was useful

because it clarified that organs of the Government (referred to in subparagraph *(a)*(i)) as well as public and other entities that were not part of the Government (referred to in subparagraph *(a)*(ii)), were covered by the Model Law. In addition, by covering all organs of the Government except those specifically excluded, subparagraph *(a)*(i) was regarded as consistent with the policy of maximizing the coverage of the Model Law. In response to a view that a State should not be able to exclude any organs of the central Government from the coverage of the Model Law, it was observed that the ability to exclude certain organs was important for some States, and that those States might be reluctant to enact the Model Law if no exclusions were permitted.

23. It was agreed that the reference to "the administration" should be deleted from subparagraph *(a)*(i), as its meaning was not clear and it did not seem to add anything to the provision.

24. It was noted that subparagraph *(a)*(i) presented a difficulty in at least one country where governmental organs did not engage in procurement themselves, but, rather, did so through commercial enterprises owned by them. It was agreed that that situation could be addressed in the commentary to the Model Law.

25. A view was expressed that subparagraph *(a)*(i) should cover not only organs of the Government of the State enacting the Model Law, but also organs of governments of subdivisions of the State (e.g., governmental organs of units of a federation and of local units). In response, it was noted that, in some federal systems, the national Government could not legislate in respect of procurement for units of the federation or for local governmental units. However, units of the federation could adopt the Model Law themselves.

26. The Working Group considered various possible ways to cover in subparagraph *(a)*(i) organs of all levels of government and also to take account of the needs of federal States that could not legislate for governments of their subdivisions, but no satisfactory solution was found. Ultimately, the Working Group agreed to provide two alternative versions of subparagraph *(a)*(i). One version would cover all governmental organs, including governmental organs of subdivisions of a federation. It would be adopted by non-federal States and by federal States that could legislate for their subdivisions. The other version would cover only organs of the national Government; it would be adopted by federal States that could not legislate for their subdivisions.

27. A view was expressed that the criterion for determining whether an entity was to be covered by subparagraph *(a)*(ii) should be whether or not it engaged in procurement with funds provided by the Government. It was pointed out that in some States there were enterprises that in some cases engaged in procurement with funds provided by the State and in other cases engaged in procurement with their own funds. In response to that view it was generally agreed that the commentary should discuss the criteria that should be used for determining which entities should be covered by the subparagraph.

28. It was noted that a State might either specify categories of entitites or identify specific entities to be covered by subparagraph *(a)*(ii).

"Goods" (subparagraph (b)*)*

29. A proposal was made to refer in subparagraph *(b)* only to "moveable" goods, so as not to cover real property. It was pointed out, however, that the term "moveable" had particular juridical meanings in different legal systems, and that using the term might have unintended consequences in some legal systems.

30. With respect to the words within square brackets at the end of subparagraph *(b)*, it was generally agreed that the reference to goods in solid, liquid or gaseous form should be retained. With respect to the references to energy, it was agreed that reference should be made only to electricity and not to nuclear or other energy. In that connection it was stated that only electricity itself, and the equipment that produced it, could be the subject of procurement.

31. A view was expressed that petroleum should be excluded from the definition of goods, as it was not purchased by procedures provided in the Model Law. It was noted that States where special rules for petroleum were needed could, in enacting the Model Law, determine how petroleum should be treated.

"Construction" (subparagraph (c)*)*

32. It was generally agreed that subparagraph *(c)* be reformulated along the following lines:

> "'Construction' means all work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities in connection with construction."

33. An opinion was expressed that activities such as drilling, mapping satellite photography and seismic investigation should be covered even if they were not connected with construction, since they were generally procured on the same basis and by means of the same procedures as goods and construction. The prevailing view, however, was that, without the link with construction, those activities might be regarded as services, which were not at the present stage to be dealt with in the Model Law; thus, the activities should be covered only where they were connected with construction.

"Procurement proceedings" (subparagraph (d)*)*

34. Doubts were expressed as to whether the definition of "procurement proceedings" was needed. It was noted that the definition as presently formulated would be too restrictive if the Working Group were to decide to include in the Model Law types of proceedings in addition to those currently specified in the definition. It was decided

to delete the definition, recognizing that it would be possible to re-examine that decision if consideration of subsequent provisions of the Model Law revealed that a definition would be useful.

"International tendering proceedings" (subparagraph (e)*)*

35. Several difficulties were said to arise with respect to the definition of "international tendering proceedings" contained within square brackets in article 2*(e)*. It was said that the definition gave rise to difficulties, for example, with respect to its application in the case of a contractor and supplier that had established a residence in a State solely to benefit from the State's advantageous taxation provisions, and in the case of a contractor or supplier that had places of business in more than one State. In the case of a contractor or supplier that was organized as a corporation, the definition gave rise to questions as to whether it referred to the State of incorporation, or to the States where the officers or shareholders had their residences or places of business. It was also pointed out that some States imposed different rules for determining who was a national of the State depending on the purpose for which nationality was relevant. In addition, the words "encourage and promote" were said to constitute statements of policy rather than legal norms. Various proposals were made with the aim of improving the definition, including a proposal that the reference to "habitual residences" be deleted and proposals directed at making the reference to places of business more specific.

36. It was questioned whether a definition of "international tendering proceedings" was necessary at all. In that connection, the Working Group considered the role of the term in the Model Law and the relationship among articles 2*(e)*, 3*(b)* and 11. It was noted that, as provided in article 3*(b)*, an underlying objective of the Model Law was to foster and encourage participation in procurement proceedings by competent contractors and suppliers, including, where appropriate, by what were referred to generally as "foreign" contractors and suppliers. It was observed that the Model Law provided various special procedures to be used in tendering proceedings when participation in those proceedings by "foreign" contractors and suppliers was to be fostered and encouraged. The function of article 11 was to establish when those special procedures were to be used.

37. The term "international tendering proceedings" was used in article 11 as a convenient way to refer to tendering proceedings involving the use of those special procedures. That usage of the term "international tendering proceedings" formed the basis of the definition that was contained in article 2*(e)*.

38. In view of the close relationship between article 2*(e)* and article 11, the Working Group decided to defer further discussion of article 2*(e)* until it reached article 11, when the two articles would be considered together. At that stage the question of whether a definition of "international tendering proceedings" was needed, and, if so, its content could be reviewed. That subsequent discussion is reflected in paragraphs 118 to 120 below.

"Tender security" (subparagraph (f)*)*

39. A proposal was made to delete the definition of "tender security". The definition was said to be unnecessary in view of the fact that the nature of the security required by the procuring entity would be stipulated in the tender solicitation documents. However, the definition was found to be acceptable in substance, subject to certain modifications and clarifications.

40. It was questioned whether the examples of types of tender securities listed in the definition were necessary. The prevailing view was that the examples were useful. It was agreed that a reference should be made to additional types of instruments that were used as securities, such as stand-by letters of credit, surety bonds, promissory notes and bills of exchange. It was also agreed that the reference to financial institutions should be deleted, since some types of tender securities were issued by institutions that in some States may not be regarded as financial institutions (e.g., by insurance companies).

41. In the light of the foregoing discussion, the following definition of tender security was found to be generally acceptable:

> " 'tender security' means a security for the performance of the obligations of a tenderer, including such arrangements as guarantees, surety bonds, letters of credit, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange."

"Currency" (subparagraph (g)*)*

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

"Tendering proceedings" (subparagraph (g bis)*)*

43. The Working Group found the definition of "tendering proceedings" to be generally acceptable.

"Competitive negotiation proceedings" (subparagraph (h)*)*

44. The definition presently set forth within square brackets was said to present the danger of conflicting with article 34. Pursuant to that view, a suggestion was made that the words within square brackets should be deleted and that the definition should simply refer to article 34. In opposition to that suggestion, it was said such a definition would serve no purpose.

45. The prevailing view was that the definition presently set forth within square brackets provided useful information to the user of the Model Law. It was agreed, however, that the wording should be expanded so as to refer to negotiations on a competitive basis between the procuring entity and "at least two" contractors and suppliers.

"Single source procurement" (subparagraph (i)*)*

46. The Working Group found the definition of "single source procurement" to be generally acceptable.

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

47. A question was raised as to the suitability of the term "contractor", since a person or enterprise would not become a "contractor" until it entered into the procurement contract. It was agreed, however, that since the definition referred to "any potential party" to a procurement contract the definition was satisfactory.

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

48. It was generally agreed that the opening words of the definition should be changed to read along the following lines: " 'Responsive tender' means a tender that . . .".

49. It was observed that, in providing that a tender was responsive if it conformed to the requirements of the tender solicitation documents, the definition was inconsistent with article 28(4), which contained an exception to the necessity for conformity to the tender solicitation documents. To remedy that inconsistency, it was agreed that a reference to article 28(4) should be added to the definition. It was also agreed that the definition should be modified so as to refer to conformity with "all" requirements set forth in the tender solicitation documents.

50. A proposal was made that the definition should refer to "mandatory" requirements of the tender solicitation documents, in order to distinguish specifications or stipulations in the tender solicitation documents to which tenders must conform from those to which tenders need not conform and in respect of which tenderers might make offers to enhance their tenders. The proposal was not accepted because the word "requirement" itself implied that conformity was mandatory.

51. It was agreed that the words at the end of the definition beginning with "including requirements concerning" were superfluous and should be deleted.

52. In the light of the foregoing discussion, it was generally agreed that the definition should be reformulated along the following lines:

> " 'Responsive tender' means a tender that conforms to all requirements set forth in the tender solicitation documents, subject to article 28(4)."

Article 3
Underlying objectives

53. It was agreed that the word "objectives" appearing within square brackets in the *chapeau* of article 3 should be retained.

54. A view was expressed that the statement of objectives should be retained in article 3. It was generally agreed, however, that since the statement of objectives of the Model Law presently set forth in article 3 did not create substantive rights or obligations for parties, it should be set forth in a preamble to the Model Law rather than in the body of the Law itself.

55. It was noted that, as article 3 was presently formulated, the objective of economy in procurement, set forth in paragraph *(a)*, was subordinate to the objective of efficiency, which was set forth in the *chapeau*. It was generally agreed that the objectives of economy and efficiency should be given equal status by removing the reference to efficiency from the *chapeau* and placing it in subparagraph *(a)*, which would read, "to maximize economy and efficiency in procurement".

56. A view was expressed that the word "economy" that was used in the phrase "economy in procurement" in subparagraph *(a)*, and the word "economic" used in the phrase "most economic tender" in article 28(7)*(c)*, were unclear, and it was questioned whether the two words were intended to convey the same meaning. It was also said that both words should be defined. In response, it was stated that "economy in procurement" was a general term that referred to the procuring entity's obtaining the best value in the procurement, while "most economic tender", as defined in article 28(7)*(c)*, referred to the two optional criteria to be used by the procuring entity for selecting the successful tender, namely, the tender with the lowest price or the lowest evaluated tender. It was also believed that no confusion between the terms "economy in procurement" and "most economic tender" was likely to arise, especially once the objective of economy in procurement was moved to the preamble.

57. It was agreed that the statement of the objectives of the Model Law should be expanded and should include a reference to the objective of promoting international trade.

58. It was agreed that the reference in subparagraph *(b)* to participation by contractors and suppliers whose places of business or habitual residences were located outside the enacting State would have to be aligned with the results of the consideration by the Working Group of the definition of "international tendering proceedings" in article 2*(e)*. With respect to subparagraph *(c)*, a view was expressed that the words "to promote competition between contractors and suppliers" should be changed to "to promote equal competition between contractors and suppliers".

Article 3 bis
International agreements or other international obligations of this State relating to procurement

59. There was general agreement with the rule in article 3 *bis* that, if the Model Law conflicted with a treaty entered into by a State enacting the Model Law, the treaty would prevail. Objection was expressed, however, to the rule whereby, in the event of a conflict of the Model Law with agreements between the enacting State and organs of other States, or with agreements between the enacting State and international financing institutions, those agreements would prevail over the Model Law. It was said that such agreements should not be treated in the same manner as treaties. It was noted that the rule that the agreements were to prevail conflicted with the principle in some legal systems that courts must apply national legislation even if that legislation was inconsistent with the State's international obligations. It was also said that the effect of the rule would be to authorize executive departments to enter

into agreements that abrogated legislation enacted by parliament, which would not be acceptable in some countries. Finally, it was stated that it would often be possible for States, in negotiating agreements with financing institutions, to avoid conflicts between those agreements and the Model Law enacted by the States.

60. The prevailing view was that the rule that international agreements were to prevail should be retained. The rule was said to be consistent with constitutional and legal principles in many legal systems, and reflected practice in connection with financing by international financing institutions. It was common for a borrowing State to agree that its loan agreement with the international financing institution would prevail over inconsistent provisions of national law. Such loan agreements were usually ratified by the parliaments of the borrowing States and were said to be in the nature of treaties. Thus, the agreements would, as a matter of law, usually prevail over inconsistent provisions in national legislation. Nevertheless, the express rule to that effect in article 3 *bis* was desirable in that it would prevent uncertainty on the part of procurement officers as to whether the agreement or the Model Law would prevail and would prevent consequent delays in procurement. It was stated that the concerns that some States might have about the conclusion by the executive branch of government of an agreement that prevailed over a law enacted by the parliament could be alleviated somewhat if the States were to designate in their procurement regulations the governmental organs that were authorized to enter into agreements with financing institutions.

61. It was pointed out that, according to the final phrase of article 3 *bis*, agreements with organs of other States and with international financing institutions would not completely replace the Model Law, but would apply only to the extent of a conflict with the Model Law. A view was expressed that, in order to emphasize the presumption of the applicability of the Model Law, article 3 *bis* should be redrafted to state that all procurements were to be governed by the Model Law, except to the extent that the Model Law conflicted with treaty or other international obligations of the enacting State.

62. It was agreed that article 3 *bis* should be modified so as to clarify that only agreements with governmental international financing institutions, and not agreements with non-governmental institutions, would prevail over inconsistent provisions of the Model Law. A proposal to expand the article to refer to agreements with all international institutions was not accepted. It was also agreed that the article should refer not only to obligations "under" treaties or agreements entered into by States but also obligations "arising out of" such treaties and agreements, in order to ensure that, for example, directives of the European Community (EC), which were promulgated pursuant to the EC Treaty, would prevail over inconsistent provisions of the Model Law.

63. A question was raised as to whether it was appropriate for article 3 *bis* to provide that not only existing treaties and agreements, but also future ones, prevailed over inconsistent provisions of the Model Law. That feature of article 3 *bis* was generally found to be acceptable.

Article 4
Procurement regulations

64. It was agreed that article 4 should be modified to take into account provisions of the procurement regulations excluding the application of the Model Law to certain types of procurement (see paragraph 14 above).

Article 5
Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

65. The Working Group found article 5 to be generally acceptable.

Article 6
Control and supervision of procurement

66. It was observed that, in some States, the organ that was to approve acts and decisions of the procuring entity might vary depending upon the act or decision in question. Accordingly, the Working Group decided to delete article 6, which vested in a single organ authority to approve all acts and decisions that were subject to approval. It also decided that each article dealing with an act or decision that was subject to approval should designate the organ that was to exercise the approval function. In order to enable a State to change the organ without having to amend the Model Law enacted by the State, it was suggested that the State should be able to change the organ by designating the new organ in the procurement regulations.

67. It was noted that the approval of acts and decisions of the procuring entity by another administrative authority was contrary to practice in some States. It was accepted that such States could delete references to the approval function when they enacted the Model Law.

Article 7
Methods of procurement and conditions for their use

68. The Working Group agreed with the approach presently reflected in paragraph (1), namely, that tendering was the preferred method of procurement.

69. With respect to paragraph (2), differing views were expressed as to the desirability of providing in the Model Law for procurement by competitive negotiation. According to one view, it was dangerous to provide for that method of procurement since it gave the procuring entity broad and uncontrolled freedom to negotiate with contractors and suppliers in any manner that it saw fit. In the absence of any procedural structure to control the negotiating process, the negotiations could potentially be engaged in by the procuring entity in a commercially inappropriate manner. Furthermore, no objective criteria were provided with respect to the selection of the contractor or supplier with which the procurement contract would

be concluded. Such criteria were said to be important in order to provide guidance to the procuring entity with respect to the negotiations, and to provide standards against which the decision of the procuring entity could be evaluated by an approving authority or in proceedings instituted for review of the decision. In short, the method was said to lack transparency and to be open to abuse. The view was also expressed that other, more appropriate, methods of procurement were available for procurement in the situations in which it was contemplated that competitive negotiation would be used.

70. The prevailing view was that competitive negotiation should be retained in the Model Law. It was said to be used in practice in several countries. It was also said to be the most appropriate method of procurement in certain cases, for example, in the procurement of goods or construction with a substantial technological component; thus it should be made available to procuring entities. Control could be exercised over the use of competitive negotiation by requiring the procuring entity to obtain approval for the use of that method from a higher supervisory authority or by subjecting its use to other methods of control and supervision. It was noted that, in some countries, administrative control over procurement was exercised by means of audit procedures after the procurement proceedings. It was questioned, however, whether that was an adequate method of control over the conduct of the proceedings. It was agreed that the conditions set forth in paragraph (2) as to when competitive negotiation could be used were not appropriate and should be revised.

71. The Working Group agreed that single source procurement, provided for in paragraph (3), should be retained in the Model Law. It also agreed that the method of procurement presently referred to in article 31 as two-stage tendering proceedings should be retained, but should be provided for in the Model Law as a separate method of procurement, and should not be dealt with in the section of the Model Law dealing with tendering proceedings.

72. It was generally agreed that the present draft of the Model Law did not provide a sufficient range or variety of appropriately differentiated methods of procurement to meet the needs of procuring entities. It was agreed, therefore, that additional methods should be provided, namely, request for proposals, to be used in cases where the procuring entity sought a variety of proposals for meeting its procurement need, and request for quotations, to be used for relatively low value procurement of readily identifiable goods.

73. As to the structure of article 7, the Working Group considered two possible approaches. Under one approach, article 7 would list each of the procurement methods provided by the Model Law and describe the conditions under which each method could be used. Under the other approach, the conditions for the use of the various methods would be set out in the articles of the Model Law dealing with those methods.

74. The Working Group appointed an ad hoc Working Party to consider the content and structure of article 7 in the light of its discussion and decisions. The ad hoc Working Party was requested to elaborate conditions for the use of procurement methods other than tendering and the procedures involved in those methods. The following paragraphs reflect the discussion and decisions of the Working Group based on the recommendations of the ad hoc Working Party. The Secretariat was requested to take account of the discussion and decisions in preparing the next draft of the Model Law.

75. It was agreed that article 7 should contain a listing of all methods of procurement provided for in the Model Law. They would be: tendering, two-stage tendering, request for proposals, competitive negotiation, request for quotations and single source procurement. The conditions under which each method could be used, and the procedures involved in those methods, would be set out in individual articles of the Model Law dealing with each method. It was also agreed, subject to the decision of the Working Group concerning the treatment in the Model Law of the approval function, to provide that the decision of the procuring entity to use a method of procurement other than tendering would be subject to approval. The question of which organ would give such approval would be left to each State.

76. It was observed that the issue of whether tendering proceedings were to be open to contractors and suppliers without regard to nationality was dealt with in article 11. It was agreed that the issue of such participation in other methods of procurement should be dealt with in the articles dealing with each of those methods.

77. It was observed that the conditions under which a procuring entity would be entitled to engage in limited tendering proceedings was dealt with in article 12(2). The Working Group agreed that the Model Law should also deal with the conditions under which participation in proceedings involving other methods of procurement could be limited to particular contractors and suppliers chosen by the procuring entity.

Tendering proceedings

78. With respect to tendering proceedings, it was agreed that the substance of article 7(1) should be retained.

79. It was noted that, when the use of a method of procurement other than tendering proceedings was justified, the circumstances of a particular procurement might justify the use of more than one such method. For those cases, it was agreed that the following order of preference should be established: (i) two-stage tendering; (ii) request for proposals; (iii) competitive negotiation; (iv) request for quotations; (v) single source procurement.

Two-stage tendering

80. It was agreed that the conditions for use and procedures for two-stage tendering should be in essence those presently provided in article 31, with appropriate modifications made to take into account that the method was to be a separate method.

Request for proposals

81. It was agreed that the procuring entity should be entitled to use the request for proposals method when it had not identified a particular solution to its procurement need and required proposals as to various possible solutions. The Working Group did not accept a proposal to limit the use of that method to cases in which the use of two-stage tendering was not practicable.

82. As to the procedures to be followed in procurements involving this method, the procuring entity would request from contractors and suppliers proposals as to the means of solving its procurement need. The selection of the contractor or supplier with which to enter into a procurement contract would be based not only on price but also on other objective and quantifiable criteria. The evaluation of the proposals would involve the use of a list of weighted criteria, which would be clearly disclosed to contractors and suppliers. Contractors and suppliers would also be informed of the relative weights of the criteria to be used. The criteria would measure both the competence of the contractor or supplier submitting the proposal and the effectiveness of its proposal in meeting the procuring entity's procurement need. The effectiveness of the proposal would be evaluated separately from the price.

83. Disagreement was expressed with the requirement that the criteria for the selection of the contractor or supplier with which to enter into the contract had to be objective and quantifiable. It was noted that, for the procurement of some types of goods, such as computer systems, it was not possible to establish quantifiable criteria. In the circumstances in which the request for proposals method was designed to be used, it was frequently necessary for the evaluation process to contain a subjective element. In response to the suggestion that the request for proposals method should be adapted to the procurement of computer systems, it was pointed out that, because of the particular nature of those systems, special rules and procedures were being developed in practice for their procurement.

84. Disagreement was also expressed with the feature of the request for proposals method, contained in the formulation agreed to by the Working Group, that the competence of contractors and suppliers was to be evaluated together with the effectiveness of the proposal. It was stated that the competence of contractors and suppliers should be evaluated separately, and in accordance with precise and objective criteria of the type presently contained in article 8. It was said that to permit the procuring entity to evaluate the competence of contractors and suppliers together with the effectiveness of the proposal could introduce a subjective element in the evaluation of the effectiveness of the proposals, which would be undesirable.

Competitive negotiation

85. It was agreed that a procuring entity should be entitled to engage in procurement by means of competitive negotiation in the following circumstances:

(a) when, due to the nature, scope or volume of goods or construction, and in order to obtain the most satisfactory solution to its procurement needs, it is necessary to negotiate with contractors or suppliers in order to enable the procuring entity to evaluate their responses to its needs and to obtain the solution which represents the best value;

(b) when there is an urgent need for the goods and tendering would therefore be impossible or imprudent;

(c) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods and quantities sufficient to establish their commercial viability or to recover research and development costs; or

(d) when, for reasons of national defence or national security, there is a need for secrecy in respect of the procuring entity's procurement needs.

86. Disagreement was expressed with the circumstances referred to in subparagraphs *(a)* and *(b)* of paragraph 85, above. It was proposed that those circumstances should be narrowed so as to permit competitive negotiation to be used:

(a) when no other method of procurement was applicable, or the use of another method of procurement failed to result in a procurement contract because of a lack of responsive tenders or offers by qualified contractors or suppliers, or the selected contractor or supplier failed to enter into a procurement contract;

(b) when there was a special emergency, not created or suffered by the procuring entity, resulting in an urgent need for the goods or construction and it would not be possible to satisfy that need by any other methods of procurement.

87. It was said that such a formulation defined more concretely and clearly the circumstances in which competitive negotiation could be used, and would help ensure that that method of procurement, which was subject to few controls, would be used only when it was appropriate. It was also stated that the proposed formulation was in line with the stricter conditions for the use of competitive negotiation found in the directives issued by the Commission of the European Communities concerning procurement of supplies and public works. The proposal was not adopted. The formulation in the proposal of the circumstances in which competitive negotiation could be used was found to be too restrictive. The circumstances enumerated in paragraph 85, above, were found to be more consistent with practice in several countries and to meet the needs of procuring entities more satisfactorily. With respect to the circumstances mentioned in paragraph 86*(a)*, above, it was pointed out that, in some situations, competitive negotiation might not be the only method of procurement available, but it might be the most appropriate method. It was said to be more desirable for those situations to be dealt with by the ranking system referred to in paragraph 79 than to prevent the competitive negotiation method from being used altogether. It was also said that the conditions for engaging in competitive negotiation

should relate to the nature of the procurement rather than to the failure of some other procurement method.

88. An objection was also raised to the formulation of the "emergency" situation in paragraph 86*(b)*, above. It was said that preventing the procuring entity from using competitive negotiation when the emergency was imputable to the procuring entity was not in the public interest, and would make the Model Law unacceptable in some States.

89. It was agreed that the provisions of the Model Law concerning the procedures to be used for competitive negotiation should be along the lines of article 34 of the present draft.

Request for quotations

90. It was agreed that the request for quotations method should be used for the procurement of readily identifiable goods for which there was a commercial market. It would typically be used where the goods were of a relatively low total quantity and value.

91. With respect to the procedures to be followed in that method, the procuring entity would request quotations from several contractors and suppliers. It was suggested that, for procurements above a specified value, the procuring entity be obligated to advertise for price quotations. Each contractor and supplier would give one price quotation and would not be permitted to change its quotation. The procuring entity would not be permitted to negotiate with contractors and suppliers. The contract would be awarded to the contractor or supplier quoting the lowest price.

Single source procurement

92. The Working Group expressed general agreement with the conditions for the use of single source procurement set forth in article 7(3), and the procedures set forth in article 35.

Article 8
Qualifications of contractors and suppliers

New paragraph (1)

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

Paragraph (1)

94. Support was expressed for the approach of paragraph (1)*(a)*(i), which specified the national law that would govern the legal capacity of the contractor or supplier to enter into the procurement contract. That approach enabled the contractor or supplier to know whether or not it met the requirement of legal capacity and to submit the proper documentation to prove its capacity. As to the question of which State's law should apply, support was expressed for the law of the State of which the contractor or supplier was a national, as presently provided within square brackets in paragraph (1)*(a)*(i). According to another view, the paragraph should refer to the law of the place of procurement.

95. The prevailing view, however, was that the paragraph should not specify the law of a particular State, but should leave that issue to be resolved by relevant conflict of laws rules, and that the words that presently appeared within square brackets in paragraph (1)*(a)*(i) should be deleted. In support of that view, it was pointed out that the law governing capacity to enter into a contract varied under the conflict of laws rules of different legal systems. It was stated that the Model Law should not attempt to unify those conflict of laws rules. It was also pointed out that it was not sufficient merely to designate the law of a particular State to govern the issue of capacity to enter into the contract, since it would be uncertain whether or not the designation included the conflict of laws rules of that State. If the designation did include conflict of laws rules, those rules might point to the law of some other State as governing the issue, and the question of whether or not a contractor or supplier had legal capacity might be resolved differently in the two States. It was also stated that not specifying which law was to govern the issue was unlikely to create any problems for contractors and suppliers, since disputes rarely arose concerning the question of capacity to enter into the contract. It was agreed that the commentary to the Model Law should discuss the various issues and problems that arose in connection with that question.

96. It was agreed that the word "receivership" within square brackets in paragraph (1)*(a)*(ii) should be retained.

97. The Working Group found paragraph (1)*(a)*(iii) to be generally acceptable.

98. A proposal was made that paragraph (1)*(a)*(iv) should be deleted for the reason that it was not possible in some countries for a contractor or supplier to obtain official certification that it had not been convicted of a criminal offence or held liable in civil proceedings. In response, it was noted that a contractor or supplier might submit to the procuring entity an affidavit to that effect. The utility of such an affidavit, however, was questioned, particularly if the procuring entity could not verify the information contained in it.

99. The Working Group decided to retain the reference in paragraph (1)*(a)*(iv) to convictions of contractors and suppliers of criminal offences, and the words within square brackets, "or based on the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract". It was proposed that reference should also be made to false statements or misrepresentations concerning the products of contractors and suppliers. The proposal was not adopted. The meaning of "products" was found to be uncertain and it was pointed out that some States had laws concerning misrepresentation and false advertising which dealt with the issue adequately.

100. A view was expressed that it should be clarified whether the reference in paragraph (1)*(a)*(iv) to criminal

convictions referred to convictions of the contractor or supplier itself, or also of its principal personnel and officers.

101. The Working Group decided to delete from paragraph (1)*(a)*(iv) the words, "and have not been held liable in civil proceedings for loss arising from the performance or failure to perform a procurement contract". That criterion for disqualification was found to be too broad, as the fact that a contractor or supplier had been held liable in civil proceedings did not necessarily impugn its qualifications to perform the procurement contract.

102. A proposal was made that paragraph (1)*(a)*(vi) should be located more prominently in the article, as it set forth the most important criteria with respect to the qualifications of contractors and suppliers. The Working Group decided to retain the words "managerial capability, reliability, experience and reputation" that appeared within square brackets in the paragraph.

103. Objections were raised to the right of the procuring entity to inspect the books of contractors and suppliers, provided for within square brackets in paragraph (1)*(b)*. In support of that provision, it was stated that the ability to inspect the books can provide the procuring entity with sound and reliable information concerning the qualifications of a contractor or supplier. It was noted that contractors and suppliers were safeguarded by the *chapeau* of paragraph (1), which contained the proviso, "subject to the right of contractors and suppliers to protect their intellectual property or trade secrets". After discussion, the Working Group agreed that the ability to inspect the books of contractors and suppliers should be deleted from paragraph (1)*(b)*, and that, instead, contractors and suppliers should be required to provide such verification of their statements concerning their qualifications as the procuring entity may reasonably require.

Paragraph (2)

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

Paragraph (2 bis*)*

105. The Working Group found paragraph (2 *bis*) to be generally acceptable.

Paragraph (2 ter*)*

106. A view was expressed that the prohibition of discrimination against foreign contractors and suppliers in connection with the criteria and procedures for evaluating their qualifications was formulated too broadly. It was said that the paragraph could be interpreted so as to prevent differential treatment of foreign and domestic contractors and suppliers to achieve socio-economic objectives, and to prevent a State from requiring contractors and suppliers to be incorporated in that State as a condition for participation in procurement proceedings. In response, it was stated that socio-economic factors should play no role in evaluating the qualifications of contractors and suppliers, and that the paragraph would not prohibit laws requiring contractors and suppliers to be incorporated in the State as a condition for participation in procurement proceedings if foreign contractors and suppliers were given a reasonable opportunity to become incorporated there.

107. The Working Group decided that paragraph (2 *ter*) should be retained in its present form and that the concerns that had been expressed in opposition to the formulation of the paragraph should be addressed when the Working Group considered article 11. It also agreed that the reference to "foreign" contractors and suppliers would have to be modified to accord with the decision of the Working Group concerning the definition of "international tendering proceedings" in article 2*(e)*, and that the words "discriminates against" foreign contractors and suppliers should be changed to "discriminates against or among".

Paragraph (3)

108. It was agreed that the words within square brackets, "subject to the efficient operation of the procurement system", should be deleted, as they provided too much scope for arbitrary exclusion of contractors and suppliers from procurement proceedings.

109. It was agreed that paragraph (3) should be modified so as to preclude its application where prequalification proceedings had been engaged in, since a contractor or supplier that was not prequalified should not be able to participate in procurement proceedings under this paragraph.

110. It was observed that the paragraph as presently formulated was ambiguous as to whether it applied only to contractors and suppliers that met the qualification criteria but had merely been unable to supply the requisite proof, or also to contractors and suppliers that did not meet the criteria but wished to take steps to do so during the procurement proceedings. The Working Group agreed that the formulation should be clarified so that the paragraph would apply only to contractors and suppliers that met the qualifications criteria but had been unable to supply the requisite proof, perhaps by replacing the word "demonstrate" with "provide proof". It was also agreed that the paragraph should clarify that the contractor or supplier must submit the proof prior to the end of the procurement proceedings.

Article 10
Rules concerning documentary evidence provided by contractors and suppliers

111. Views were expressed that article 10 should be deleted. The article was said to be too detailed, and presented the danger of being used by a procuring entity to exclude a contractor or supplier from participation in the procurement proceedings on the basis of a failure by the contractor or supplier to comply with a formality specified in the article. In addition, it was observed that many States had laws concerning the legalization of documents, and those States could not be expected to adopt separate rules for documents used in procurement proceedings. It was

suggested that the issues dealt with in the article should be discussed in the commentary.

112. Support was expressed for the article in principle, as it would help prevent the procuring entity from excluding a contractor or supplier unfairly on the basis of a formality. However, paragraphs (2) and (3) were found to be too detailed. In addition, it was observed that the notarial function, referred to in paragraph (2), did not exist in all States, and that the paragraph lacked reference to various other categories of persons who had authority to certify documents, such as accountants. The utility of paragraph (3)*(b)* was also questioned.

113. The Working Group decided to retain paragraph (1), including the words "when the procuring entity requires that the documentary evidence be legalized". Those words ensured that the article would not be interpreted as requiring all documents provided by contractors and suppliers to be legalized, and clarified that the rules in the article would apply only when the procuring entity required a document to be legalized. In substitution for paragraphs (2) and (3), it was agreed that the article should provide that the procuring entity did not have the authority to impose any requirements as to the legalization of documentary evidence of the qualifications of contractors and suppliers other than requirements provided for in laws of the State enacting the Model Law relating to the legalization of documents of that type.

Article 11
International tendering proceedings

114. Support was expressed for the approach presently reflected in article 11, according to which the decision of whether or not to engage in international tendering proceedings was left to the discretion of the procuring entity. According to other views, however, the procuring entity should be required to engage in international tendering proceedings in certain cases, such as when the goods or construction to be procured exceeded a certain monetary value, or when engaging in such proceedings was necessary in order to achieve economy and efficiency in the procurement.

115. It was noted that the first draft of article 11 had contained an additional paragraph stipulating that the procuring entity was required to engage in international tendering proceedings when the goods or construction to be procured exceeded a certain monetary value, unless it obtained approval not to engage in international proceedings (A/CN.9/WG.V/WP.24, article 11(2)). It was said that, with the deletion of that paragraph pursuant to the decision of the Working Group at its eleventh session (A/CN.9/331, para. 58), the article was deprived of much of its function, namely, to establish when the procuring entity was to engage in international tendering proceedings. In its present form, the article merely stated the obvious, i.e., that the procuring entity "may" engage in international tendering proceedings. It was also said that the article could be given the undesirable interpretation that domestic tendering proceedings were the norm and the procuring entity had to justify the use of international tendering proceedings as an exception.

116. The prevailing view favoured an approach to article 11 whereby there would be a presumption in favour of the use of international tendering proceedings, except where engaging in international proceedings would be contrary to the objectives of economy and efficiency or could be avoided on grounds specified in the procurement regulations. Each State enacting the Model Law would be able to specify its own grounds based upon its needs and circumstances. The requirement that the grounds had to be specified in the procurement regulations would promote transparency. A view was expressed that the presumption favouring the use of international proceedings should apply not only to tendering proceedings but also to other methods of procurement provided for in the Model Law.

117. A concern was expressed that the approach agreed upon did not provide sufficient guidance to States or procuring entities in determining when international tendering proceedings should be used. It was noted that the Model Law was being prepared for use by States worldwide, and such guidance was said to be of particular importance to countries that had little experience with international procurement. To meet that concern, it was stated that guidance could be provided in the commentary.

118. In connection with its discussion of article 11, the Working Group further considered the definition of "international tendering proceedings" in article 2*(e)*. It was suggested that the difficulties with respect to the definition that had been raised during the earlier discussion of article 2*(e)* (see paragraphs 35 to 38 above) might be avoided by reformulating article 11 in a manner that did not involve the use of the term "international tendering proceedings". Accordingly, the Working Group decided that there was no need to retain the definition in article 2*(e)*.

119. It was noted that the term was used in the Model Law as, in essence, a convenient way to refer to various special procedures, provided for in the Model Law, designed to make tendering proceedings conducive to participation by foreign contractors and suppliers. Those special procedures were to be used in tendering proceedings in the cases mentioned in article 11.

120. Based on the general approach upon which it had agreed with respect to article 11, the Working Group decided to reformulate the article along the following lines. The article would specifically refer to all special procedures that were encompassed within the term "international tendering proceedings" and would require the procuring entity to employ those special procedures in tendering proceedings, except where their use would be contrary to the objectives of economy or efficiency or to other grounds specified in the procurement regulations. Contractors and suppliers would be permitted to participate in those tendering proceedings without regard to nationality, except where, upon the grounds mentioned above, the procuring entity decided to permit only domestic contractors and suppliers to participate. Each enacting State would define "domestic" in accordance with its own

laws concerning nationality. Contractors and suppliers from particular States could also be excluded for other lawful reasons.

121. It was agreed that the Model Law should require the procuring entity to specify in the invitation to prequalify or in the invitation to tender whether the tendering proceedings were open to participation by contractors and suppliers regardless of nationality, or whether there were any restrictions with respect to the nationalities of the contractors and suppliers. Furthermore, it was agreed that the procuring entity should not be able to change a declaration that the tendering proceedings were open to participation by contractors and suppliers without regard to nationality and that the entity should be required to conduct the tendering proceedings in accordance with the declaration. It was agreed that article 14 was the appropriate location for such a provision.

Article 12
Solicitation of tenders and applications to prequalify

Paragraph (1)

122. It was agreed that the term "notice of proposed procurement", which in the present draft of the Model Law referred both to the medium by which applications to prequalify were solicited and the medium by which tenders were solicited, should be replaced by the separate terms "invitation to prequalify" and "invitation to tender".

123. It was agreed that the first sentence of paragraph (1) should be reformulated so as to avoid the implication that an invitation to prequalify and an invitation to tender must be published simultaneously, perhaps by using the words "solicit tenders or, where applicable, applications to prequalify". It was noted that, where prequalification proceedings were used, no invitation to tender would be needed since contractors and suppliers that were prequalified would automatically receive the tender solicitation documents and would be entitled to submit tenders.

124. A view was expressed that the phrase "language customarily used in international trade" was vague, and that greater precision should be provided with respect to the language in which the invitation to prequalify or the invitation to tender must be published when tendering proceedings were open to contractors and suppliers regardless of nationality. It was proposed that each State should specify in the procurement regulations the languages to be used. In opposition, it was stated that the proposed approach was unsatisfactory because a State might specify languages that were not widely understood. It was stated that the question of which language was to be used did not result in problems in practice, since it was in the interest of the procuring entity to use a language that was widely understood and that was appropriate for the procurement in question. After discussion, the Working Group agreed that the reference to "a language customarily used in international trade" should be retained and that issues concerning the languages of publication, including the desirability of widespread dissemination and understanding of invitations to tender and invitations to prequalify, should be discussed in the commentary.

125. A view was expressed that the words "of wide international circulation" were an insufficiently precise categorization of the types of newspapers and other publications in which invitations to prequalify or invitations to tender were to be published. A proposal that the publications in which the invitations were to be published should be specified by an enacting State in an annex to the Model Law was not adopted, as it was found to be difficult to implement and potentially too rigid. Accordingly, the Working Group decided to retain the words "of wide international circulation", but to clarify that they referred both to newspapers and to trade publications and technical journals.

126. The Working Group decided that the sentence within square brackets at the end of paragraph (1) that read, "The foregoing provisions do not preclude the use of additional means of bringing the notice of proposed procurement to the attention of contractors and suppliers", should be deleted, and that the purport of the words should be expressed by stating that the invitations must be published, "at a minimum", in the publications referred to in the second sentence of the paragraph.

127. It was understood by the Working Group that nothing in article 12 or elsewhere in the Model Law prevented an enacting State from restricting, pursuant to international agreements of the enacting State, participation in procurement proceedings to contractors or suppliers from certain States or regions or from excluding contractors and suppliers from certain States, and that article 3 *bis* adequately gave effect to that understanding.

Paragraph (2)

128. A suggestion was made that the word "communicating" should be changed to "given" in order to avoid an implication that the invitation to prequalify or the invitation to tender must be received by the contractors and suppliers.

129. It was observed that both alternative versions of subparagraph *(a)* combined, on the one hand, the circumstances in which participation in tendering proceedings could be limited to certain contractors and suppliers, and, on the other hand, the rules concerning the selection of contractors and suppliers to participate and the manner in which tenders were to be solicited from them. It was proposed that the circumstances in which participation could be limited should be dealt with in article 7.

130. The Working Group decided to adopt alternative 1 of subparagraph *(a)*. Alternative 2 was found to be too detailed and complex, and its content was adequately covered by alternative 1. It was agreed that the substance of alternative 2 should be discussed in the commentary. A proposal was made to use the words "limited participation", rather than "restricted participation," in order to avoid an unintended implication that the subparagraph dealt with restrictions on participation in tendering

proceedings to contractors or suppliers from certain States (see paragraph 6 above).

131. It was agreed that subparagraph *(b)* should be retained, subject to certain drafting improvements, e.g., with regard to the word "communication", and deletion of the reference to services.

Article 14
Contents of notice of proposed procurement

132. It was noted that the terminology used in article 14, such as "notice of proposed procurement" and "solicitation documents", would have to be changed in accordance with previous decisions of the Working Group.

133. It was agreed that subparagraphs *(i)* and *(j)* should be deleted from paragraph (1).

134. It was noted that the declaration as to whether or not the tendering proceedings were open to contractors and suppliers regardless of nationality (see paragraph 121 above) would have to be added to the listing in paragraph (1) of the information to be included in the invitation to prequalify and the invitation to tender.

135. While paragraph (2) was found to be generally acceptable, it was questioned whether it was necessary or appropriate to require certain of the types of information listed in paragraph (1), and incorporated by reference into paragraph (2), to be included in the invitation to prequalify. Some of that information, such as the deadline for submitting tenders, might not yet be known when the invitation to prequalify was issued. The necessity to state in the invitation to prequalify the price of the tender solicitation documents was also questioned. The Secretariat was requested to review paragraph (2) in light of those observations.

Article 16
Prequalification proceedings

136. A view was expressed that the placement of article 16 should be reconsidered, since, chronologically, prequalification proceedings took place prior to the solicitation of tenders, which was dealt with in article 12. According to another view, the Model Law should provide for prequalification proceedings not only in connection with tendering proceedings, as was the case in the present draft, but also in connection with other methods of procurement, such as competitive negotiations and requests for proposals. The views expressed were referred to the Secretariat for further consideration.

137. An observation was made that the cross-references that appeared in this and other articles complicated the text, and their usefulness was questioned. It was also stated that the wording of some cross-references should be reconsidered. It was generally agreed that the cross-references were useful and should be retained, and the Secretariat was requested to ensure consistency by including cross-references wherever relevant in the text.

138. It was stated that a degree of duplication existed among articles 8, 14 and 16, and the Secretariat was requested to consider the possibility of consolidating duplicated provisions.

139. It was agreed that the sentence within square brackets that read, "However, prequalification proceedings shall not be engaged in where participation in tendering proceedings is restricted pursuant to article 12(2)" should be deleted, since the procuring entity should be able to use prequalification proceedings even in the case of limited tendering.

140. A proposal to delete the final sentence, which appeared within square brackets, was regarded as a matter of drafting, and was left to be considered at the final drafting stage.

Paragraph (2)

141. Paragraph (2) was found to be generally acceptable, subject to possible consideration, at the final drafting stage, of the necessity of the words "a set of".

Paragraph (3)

142. Concern was expressed about the degree of detail that was contained in this paragraph and in other provisions of the Model Law. It was said that excessive detail could prejudice enactment of the Model Law in some States and thus defeat the objective of uniformity of law.

143. There was general agreement that the detailed requirements that had been included in the present draft, such as those in paragraph (3), were necessary in order to achieve economy and efficiency, fairness and other objectives of the Model Law. They were essential elements of the procurement system established by the Model Law and therefore should be implemented by enacting States in a mandatory and normative form. However, it was stated that, in order to simplify the text and thus enhance its worldwide acceptability, it was preferable for those detailed requirements to be deleted from the text of the Model Law and left to be implemented by enacting States in the procurement regulations. The commentary could provide guidance to States in implementing those requirements in the regulations. According to a further view, the Commission could, in the commentary, strongly urge enacting States to implement the requirements in a mandatory and normative form.

144. The prevailing view was that the detailed requirements should not be deleted from the text of the Model Law. To do so would leave many provisions of the Model Law with little more than precatory language. If the requirements were not set forth in the Model Law itself, they might not be adopted in some States, and might not be adopted in a satisfactory manner in other States, defeating the objectives of the Model Law and prejudicing uniformity of law. The commentary, which would not have a normative legal status, could not ensure that the requirements would be adopted as expected by the Commission.

145. It was noted that retaining the detailed requirements in the text of the Model Law would not preclude a State from enacting those requirements in the form of regulations if it wished to do so, as long as the requirements were enacted in the form set forth in the Model Law. To assist such States, a suggestion was made that the text of the Model Law might somehow indicate which provisions might be suitable to be transposed into procurement regulations. The Secretariat was requested to consider possibilities along those lines.

146. It was observed that certain types of information required by paragraph (3) to be included in the prequalification documents were also required by article 14 to be contained in the tender solicitation documents. The Working Group reaffirmed the decision at its eleventh session that such duplication was useful and should be retained (A/CN.9/331, para. 74).

147. It was generally agreed that the opening words of the *chapeau* of paragraph 3, requiring that the prequalification documents contain "all information", be changed to "the" information. Requiring that the prequalification documents contain "all" information would give rise to the possibility of claims by contractors or suppliers that certain information had been omitted from the documents. It was suggested that wording should be used in the *chapeau* to the effect that the information listed in paragraph (3) was the minimum information to be given in the documents.

148. It was agreed that the word "plus" that appeared towards the end of the *chapeau* be changed to "including". It was noted that the words "except subparagraph *(e)* thereof" should be changed to read "except subparagraph *(e)* or *(g)* thereof", to correct a typographical omission. A proposal to terminate paragraph (3) after the phrase "submit applications to prequalify" in the *chapeau* was not adopted.

149. The Working Group agreed that subparagraph *(b)* should be deleted. It was said that the provision was dangerous, in that it would give rise to the possibility of claims by contractors and suppliers that certain information claimed to be encompassed by the provision had not been given in the prequalification documents. It was also said that, with the change of the word "all" to "the" in the *chapeau*, the substance of the provision was covered by the *chapeau*. A view was also expressed that the information called for by the provision was not necessary in prequalification proceedings.

150. In other respects, the Working Group found paragraph (3) to be generally acceptable.

Paragraph (3 bis)

151. It was generally agreed that the word "promptly" should be deleted from the first sentence, and that the sentence should be reformulated to require the contractor or supplier to make its request for clarification and the procuring entity to respond to the request within a reasonable time prior to the deadline for the submission of applications to prequalify, so as to enable the contractor or supplier to take account of the response in its application prior to the deadline. To that effect, wording along the following lines was suggested: "The procuring entity shall respond to any request by a contractor or supplier for clarification of the prequalification documents, made within a reasonable time prior to the deadline for the submission of applications to prequalify, so as to enable the contractor or supplier to make a timely submission of its application to prequalify."

Paragraphs (4) and (5)

152. The Working Group agreed that the procuring entity should be required to inform each contractor and supplier whether or not it had been prequalified, as presently provided in the first sentence of paragraph (4). It was agreed, however, that the relevant portion of the sentence should be reworded so as to require the procuring entity to notify "each" contractor and supplier whether or not "it" had been prequalified.

153. Competing considerations were noted with respect to disclosure of the names of contractors and suppliers that had been prequalified. On the one hand, it was said that disclosure of that information to the general public would enable members of the public to provide the procuring entity with information that might be relevant to the qualifications of a contractor or supplier. It was stated, however, that disclosure of the information after the acceptance of a tender, as provided by the words within square brackets in paragraph (4), would be too late to enable members of the public to come forward with potentially relevant information. Furthermore, it was important for contractors and suppliers that had not been prequalified by the procuring entity to know at an early stage those contractors and suppliers that had been prequalified, since that information was relevant for a possible challenge of the decision of the procuring entity denying prequalification.

154. On the other hand, it was said that disclosure at an early stage of the names of contractors and suppliers that had been prequalified could facilitate collusion among contractors and suppliers in the tendering proceedings. Pursuant to that consideration, it was said that disclosure should not be made until after a tender had been accepted or, at the earliest, after the deadline for submission of tenders. In response, it was doubted whether non-disclosure of the information would prevent collusion. Furthermore, it was observed that there existed in several countries laws relating to fair competition which could deal with the problem of collusion, although it was pointed out that the law in that area was not well developed in all countries.

155. Based on the foregoing considerations various proposals were made. One proposal was to terminate paragraph (4) after the words, "whether or not they have been prequalified", allowing each enacting State to determine what further information should be disclosed, to whom and at what time. A second proposal was to delete the words within square brackets, "after a tender has been accepted", so as to require disclosure to the general public of the names of contractors and suppliers that had been prequalified. However, each enacting State should be

allowed to specify when that disclosure should be made. A third proposal was to require the procuring entity to provide the information on request to each contractor and supplier submitting a prequalification application, and to require the disclosure of the information to the general public only after a tender had been accepted. A fourth proposal was to allow the procuring entity flexibility with respect to the disclosure of the information, but to require it to specify in the prequalification documents what information would be disclosed, to whom and at what time. A fifth proposal was that the names of contractors and suppliers that had been prequalified should be disclosed only to those that had not been prequalified. The rationale of the proposal was to provide unsuccessful contractors and suppliers with information they might need to challenge the prequalification proccedings, and to prevent collusion among contractors and suppliers that had been prequalified. It was said, however, that such a solution could lead to undesirable practices, such as the sale of the information by an unsuccessful contractor or supplier to a successful one. The Working Group requested the Secretariat to present those various possible approaches as alternatives in the next draft of the Model Law.

156. It was agreed that paragraph (5) should be reformulated so as to clarify and amplify the distinction between "grounds" for the denial of prequalification and "reasons to substantiate those grounds".

Paragraph (6)

157. It was noted that the issue addressed in paragraph (6) was also addressed in article 28(8 *bis*). However, paragraph (6), which referred to "re-evaluating" the qualifications of "contractors and suppliers that have been prequalified", was inconsistent with article 28(8 *bis*), which referred only to the contractor or supplier submitting the most economic tender and under which that contractor or supplier would be required "to reconfirm" its qualifications.

158. It was proposed that paragraph (6) should be deleted, as its purpose was more satisfactorily achieved by article 28(8 *bis*), particularly in view of the stipulation in article 28(8 *bis*) that the criteria to be used for the reconfirmation had to be the same as those used in the prequalification proceedings.

159. It was stated, however, that article 28(8 *bis*) was unclear as to whether the contractor or supplier would merely have to update information previously submitted with respect to its qualifications, or whether its qualifications would be completely re-evaluated. In addition, a view was expressed that, when prequalification proceedings were used, article 28(8 *bis*) should merely give the procuring entity the right to require the successful tender to reconfirm its qualifications; the procuring entity should not be obliged to do so, as was presently the case under article 28(8 *bis*). It was noted that, if the Model Law were to provide for prequalification proceedings in connection with methods of procurement in addition to tendering, the provisions concerning the reconfirmation of qualifications would have to be made applicable to those other methods as well.

160. It was said that paragraph (6) might have some utility if it were reformulated so as to give the procuring entity the right to revise its decision that a contractor or supplier was qualified if it subsequently appeared that the contractor or supplier was not qualified.

161. The prevailing view was that paragraph (6) was unacceptable in its present form. The Working Group decided to defer its decision on the necessity for the paragraph or its formulation of the paragraph until its consideration of article 28(8 *bis*).

Article 17
Provision of solicitation documents to contractors and suppliers

162. The Working Group found article 17 to be generally acceptable.

Article 18
Contents of solicitation documents

163. The discussion and decision of the Working Group on the subject of cross-references in connection with article 16, reflected in this report in paragraph 137, above, also applied in respect of article 18.

164. The Working Group decided to change the word "all", appearing within square brackets in the *chapeau*, to "the". A proposal that the final words of the *chapeau*, "including, but not limited to, the following information", should be changed to "namely", was not adopted, as that change was said to reduce the scope of the information required by the *chapeau*. It was decided that the words within square brackets, "and information concerning the procedures for the opening, examination, comparison and evaluation of tenders", should be retained.

165. The Working Group found subparagraphs *(a)*, *(i)*, *(k)*, *(m)*, *(o)*, *(q)*, *(r)* and *(t)* to be generally acceptable.

166. In subparagraph *(b)*, in the reference to criteria for "the evaluation of the qualifications of contractors and suppliers or relative to the reconfirmation of qualifications", the Working Group decided to replace the word "or" with the word "and" in order to make clear that the criteria set out in article 8 are to govern evaluation of qualifications at any stage of the procurement proceedings.

167. The Working Group decided to delete the words within square brackets in subparagraph *(d)*, since they were not needed in view of the change to article 10 that had been agreed upon by the Working Group.

168. In connection with subparagraph *(e)*, it was agreed that the cross-reference to article 20 should be relocated so as to more clearly relate to "technical and quality characteristics".

169. A proposal was made that, in the opening words of subparagraph *(f)*, the word "required" in reference to the

terms and conditions of the procurement contract should be changed to "mandatory". The word "mandatory" was said to have a more precise meaning than "required". According to another view, however, the use of words such as "required" or "mandatory" gave rise to unintended and undesirable implications, e.g., that some terms or conditions of the contract might not be mandatory, or that certain aspects of tenders could be subject to negotiations.

170. A further view was that subparagraph *(f)* should require the tender solicitation documents to contain all the terms and conditions of the contract. In addition, it was proposed that the documents should contain a form of the contract that was to be signed by the successful tenderer. In response, it was observed that the successful tenderer would not necessarily be called upon to sign a written procurement contract; in some cases, the contract might be formed simply by the notification to the tenderer that its tender had been accepted. In that connection, a proposal was made to change the words "of the procurement contract" to "of any procurement contract". It was also stated that it should not be necessary for the tender solicitation documents to contain all of the contractual terms and conditions, since the procuring entity might not be in a position to finalize certain terms and conditions (i.e., those not relating to the essence of the contract) when the tender solicitation documents were issued. It was suggested that subparagraph *(f)* require the documents to contain the "essential" contractual terms and conditions. In response to that suggestion, however, it was stated that it was difficult to distinguish between essential and non-essential terms and conditions.

171. In the light of the foregoing discussion, the Working Group decided to omit any characterization of the contractual terms and conditions to be included in the tender solicitation documents, and to avoid an implication that a contract document must be signed in all cases, by changing the opening words of subparagraph *(f)* to refer to "the terms and conditions of the procurement contract and the contract form, if any, to be signed by the parties".

172. Views were expressed in favour of retaining the material within square brackets in subparagraph *(f)*. According to that view, it was important to maintain the reference to the allocation between the parties of the risk of higher costs of performing the contract. Retention of the reference was said to be important in view of the deletion by the Working Group, at its eleventh session, of article 21, which dealt with the same subject. In opposition, it was stated that retention of the reference would be inconsistent with the decision to delete article 21. A further view was that the references to certain additional terms and conditions, such as the means of settling disputes, were useful and should be retained.

173. The decision of the Working Group was that the material within square brackets in subparagraph *(f)* should be deleted in its entirety, since the choice of examples of types of contractual terms and conditions to be mentioned was arbitrary and, in any event, the examples mentioned were already covered by the opening words of the subparagraph.

174. It was agreed that the word "solicited" in subparagraph *(g)* should be changed to "permitted", in view of the decision by the Working Group at its eleventh session that the Model Law should not deal with the solicitation of alternative tenders.

175. It was agreed that the word "designation" in subparagraph *(h)* should be changed to "description".

176. In connection with subparagraph *(k)*, a suggestion was made that article 12(1) should be divided into two subparagraphs in order to differentiate in a clear manner the rule of general application, contained in the first sentence, from the rule applicable only in the case of international tendering proceedings, contained in the remainder of the paragraph.

177. The Working Group decided to delete the words at the end of the first sentence of subparagraph *(l)*, relating to any choice offered by the procuring entity with respect to the tender security, since that subject-matter was covered by the preceding wording of the subparagraph. It was also agreed that subparagraph *(l)* should include references to any other types of security, such as securities for the performance of the contract and other securities such as labour and materials bonds, that the procuring entity required.

178. It was agreed that the reference in subparagraph *(n)* to the time and place of a meeting of contractors and suppliers should be reformulated so as to require the procuring entity to stipulate in the tender solicitation documents only whether or not it planned to hold such a meeting. It was noted that the time and place might not be known when the tender solicitation documents were prepared.

179. The Working Group agreed to consider subparagraph *(n bis)* when it considered article 22(2) (see paragraph 199 below).

180. It was agreed that subparagraph *(p)* should terminate immediately after the reference to article 28(7)*(c)*. The material following that reference was found to be unnecessary, as its subject matter was already covered by the preceding wording of the subparagraph. Including that material was said to present the danger of inconsistency with article 28. A proposed addition to the subparagraph, that the tender documents should state how solicited and unsolicited alternative tenders would be treated, was not adopted, since that issue was covered by the portion of the subparagraph that the Working Group had decided to retain.

181. Objections were raised to subparagraph *(s)* in its entirety. The subparagraph was said to put too onerous a burden on the procuring entity to identify the laws referred to in the subparagraph. It was noted that laws pertinent to the performance of the procurement contract, in particular, were potentially wide-ranging, and the procuring entity might not be aware of all of them. A particular problem was noted in the case of States with federal systems, where it was sometimes difficult to ascertain whether the national law or the law of subdivisions of the federation

applied. It was also stated that contractors and suppliers should be expected to obtain their own competent professional legal advice with respect to the relevant laws. Furthermore, subparagraph (ii) was said to be outside the proper ambit of the Model Law, as it dealt with laws pertinent to the performance of the procurement contract, rather than to the tendering proceedings. A view was expressed that subparagraph *(s)* in its present form should be replaced by the formulation used in article 16(3 *bis*).

182. According to an opposing view, it was reasonable to expect the procuring entity to be aware at least of the laws and regulations pertinent to the procurement proceedings in which it was engaging. The information required by subparagraph *(s)*(i) was said to be useful to contractors and suppliers and it was stated that the provision should be retained, subject to the removal of the reference to "other laws and regulations . . . directly pertinent to the tendering proceedings" and the relocation of that reference to subparagraph *(s)*(ii). Subparagraph *(s)*(ii) was also said to be useful, and a proposal was made to retain that provision, subject to deletion of the words "of itself" so that an omission of a law or regulation referred to in the provision would not constitute grounds for review under any circumstances. A further proposal was to retain subparagraph *(s)*(i) subject to deletion of the word "all" from the phrase "all other laws and regulations", but to delete subparagraph *(s)*(ii).

183. The decision of the Working Group was to retain subparagraph *(s)*(i), to delete the word "all", to add a proviso to the effect that "the omission of any such reference shall not constitute grounds for review under article 36 or give rise to liability on the part of the procuring entity", and to delete subparagraph *(s)*(ii).

184. It was agreed that, instead of referring only to countertrade commitments, subparagraph *(u)* should refer to all commitments to be made by the contracts or supplier outside the contract, such as commitments relating to countertrade and to the transfer of technology. It was said to be important for contractors and suppliers to be aware that such commitments would be required, as they could alter the balance of the commercial relationship between the parties.

185. It was agreed that subparagraph *(v)* should be deleted, as the subject-matter of the subparagraph was sufficiently addressed in the Model Law itself and required no further elaboration in the tender solicitation documents.

186. A view was expressed that the information required by subparagraph *(w)* was of fundamental importance to contractors and suppliers and that the subparagraph should be retained. In opposition, it was stated that the subject-matter of the subparagraph was already covered by subparagraph *(s)*. Another view was that the right of review would be dealt with in the section of the Model Law dealing with review, and that it was unnecessary for the right to be mentioned in the tender solicitation documents. The Working Group decided to defer its decision with respect to the subparagraph until it discussed the section on review.

187. The Working Group decided to retain subparagraph *(x)*, on the grounds that it was important for tenderers to know that the procuring entity had the right to reject all tenders.

188. With respect to subparagraph *(y)*, the Working Group agreed that it was important for a tenderer to know what formalities would be required for the contract to enter into force. It was also agreed that the commentary should mention what formalities were envisaged by this subparagraph, including such formalities, where applicable, as the signing of a contract document and approval of the contract by a supervisory body.

Article 19
Charge for solicitation documents

189. A view was expressed that it would be preferable for article 19 to provide that the charge for the tender solicitation documents must "not exceed" the cost of printing the documents and providing them to contractors and suppliers, rather than, as in the present draft, that the charge "shall reflect only" that cost. In support of the present wording, it was observed that accounting practices for determining such costs were not uniform and differed among States, and that it was not practicable to require the procuring entity to calculate the costs precisely. The Working Group decided to retain the article in its present form.

Article 20
Rules concerning description of goods or construction in prequalification documents; language of prequalification documents and solicitation documents

190. A view was expressed that the present title was too lengthy and that the title of the article in the first draft (A/CN.9/WG.V/WP.24), which read, "Rules concerning formulation of prequalification documents and procurement documents", was preferable. The Working Group decided to retain the present title.

191. The Working Group decided to delete the word "unnecessary", which appeared within square brackets in paragraph (1), as it was said that the word contained a subjective element and that its use could lead to disputes as to whether or not obstacles to participation were "necessary".

192. A proposal was made to delete the word "objective", used in paragraph (2) in reference to technical and quality characteristics of the goods or construction to be procured. Its meaning was said to be uncertain. It was also said that the word was not needed since technical and quality characteristics were inherently objective. Various proposals were made with a view towards expressing more satisfactorily the intent of the word "objective" in the context of paragraph (2), namely, to prevent the use of subjective terms in describing the technical and quality characteristics of the goods or construction. After

discussion, the Working Group decided to retain the word "objective".

193. The Working Group found subparagraphs *(a)* and *(b)* of paragraph (3) to be generally acceptable. It was noted that, at its eleventh session, the Working Group had decided to delete the rule that had appeared in article 20(3)*(c)* of the first draft to the effect that, in international procurement proceedings, international standards should be used, where available, in the formulation of the prequalification documents and the tender solicitation documents. A view was expressed that the rule should be reintroduced into paragraph (3), since the use of national standards by the procuring entity might create difficulties for foreign contractors and suppliers, who might be unfamiliar with those standards or who might not be able to comply with them. There was insufficient support in the Working Group for revising its previous decision to delete the preference for the use of international standards.

194. It was agreed that the final sentence of paragraph (4), which appeared within parentheses and read, "In the event of a variation or conflict between language versions, the version in the language customarily used in international trade shall prevail", should be deleted. It was said that a State enacting the Model Law would be unlikely to agree to a provision according to which another language was to prevail over its own official language. It was also agreed that the commentary should discuss the problems and issues arising from conflicts between different language versions of the prequalification documents and the tender solicitation documents. It was further agreed that the commentary should suggest that the different language versions of the tender solicitation documents should be issued separately, as the issuance of tender solicitation documents in bilingual versions was reported to cause difficulties in practice.

Article 22
Clarifications and modifications of solicitation documents

Paragraph (1)

195. A proposal was made to delete the word "promptly". Instead, the second sentence of paragraph (1) should specify a period of time prior to the deadline for submission of tenders by which the procuring entity must respond to a request for clarification of the tender solicitation documents. In response, it was said to be impossible to stipulate a specific period of time that would be appropriate in all cases of procurement and for conditions in all regions of the world. The Working Group agreed that the sentence should be reformulated so as to accord with the decision taken by the Working Group in connection with article 16(3 *bis*) (see paragraph 151 above).

196. With respect to the final sentence of paragraph (1), a view was expressed that the response by the procuring entity to a request for clarification of the tender solicitation documents should have to be communicated to all contractors and suppliers that were provided with the tender solicitation documents only if the response affected all such contractors and suppliers, and not just the contractor or supplier that made the request. In response, it was said that the sentence as presently formulated ensured equal treatment of all contractors and suppliers, and avoided the necessity for the procuring entity to make a judgment as to whether or not a response to a request for clarification had general applicability.

Paragraph (2)

197. In connection with paragraph (2), the Working Group engaged in a discussion concerning the right of the procuring entity to modify the tender solicitation documents. Views were expressed that some limits should be imposed on that right in order to protect contractors and suppliers that had invested considerable amounts of time and money in preparing their tenders. One proposal was that the procuring entity should not be able to make "substantive" modifications to the tender solicitation documents. Another proposal was that the procuring entity should be permitted to modify the documents only "within a reasonable time", with the intent that modifications would not be permitted at a late stage in the preparation of tenders. It was also proposed that remedies, such as compensation, should be provided to contractors and suppliers who suffered loss as a result of the modifications if the modifications were occasioned by factors attributable solely to the procuring entity. It was said that such a provision would provide greater balance with respect to the rights of the parties.

198. The prevailing view was that the right of the procuring entity to modify the tender solicitation documents should not be restricted in the Model Law. It was accordingly decided that the words in paragraph (2), "provided that the right to do so has been specified in the solicitation documents", and the companion provision in article 18*(n bis)*, should be deleted. In support of that view, it was stated that the right of the procuring entity to modify the tender solicitation documents was fundamental and necessary in order to enable the procuring entity to obtain goods or construction that met its needs. That right should not be restricted to non-substantive modifications. It was also agreed, however, that contractors and suppliers should be given reasonable notice of the modifications and an opportunity to take the modifications into account in their tenders. The possibility that the tender solicitation documents might be modified was said to be a normal commercial risk that was generally accepted by contractors and suppliers as a normal part of doing business. It was observed that, under articles 25(3) and 26(2)*(d)*, contractors and suppliers could withdraw their tenders without forfeiting their tender securities if they did not wish to accommodate their tenders to modifications in the tender solicitation documents. It was also pointed out that, if the procuring entity encountered a need to modify the tender solicitation document but was unable to do so under the Model Law, its only other possible course of action would be to reject all tenders and recommence procurement proceedings, which would work a greater hardship on contractors and suppliers than modification of the documents. The Working Group also agreed, however, that the commentary advise the procuring entity to try to avoid modifying the documents.

199. A proposal was made to reformulate article 18*(n bis)* in such a manner that the statement to be included in the tender solicitation documents concerning the right of the procuring entity to modify those documents would merely constitute information given to contractors and suppliers, and that inclusion of the statement would not be a condition to the exercise of that right. The proposal was not adopted. It was said that such a formulation could be misinterpreted to mean that inclusion of the statement would be a condition to the exercise of the right to modify the documents. In addition, specification in the tender solicitation documents of the right of the procuring entity to modify the documents was encompassed by an earlier decision of the Working Group that matters adequately dealt with in the Model Law itself need not be reflected in the tender solicitation documents.

Paragraph (3)

200. A view was expressed that the words contained within square brackets in paragraph (3) could give the erroneous impression that, when a procuring entity responded by telephone to a request for clarification from a contractor or supplier, a written confirmation of the response was to be given only to the contractor or supplier that made the request. It was agreed that the paragraph should be reformulated so as to clarify that the written confirmation must be given to all contractors and suppliers to which the procuring entity sent the tender solicitation documents. A view was expressed that paragraph (3) might be merged with paragraph (1).

Paragraph (4)

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

Article 23
Language of tenders

202. It was stated that the present formulation of article 23 was ambiguous as to whether or not the procuring entity could permit tenders to be submitted in languages other than those in which the tender solicitation documents had been issued. In order to remedy that ambiguity, it was agreed that the words "or in any other language which the procuring entity specifies in the tender solicitation documents" should be added at the end of the article.

Article 24
Submission of tenders

Paragraphs (1) and (2)

203. A view was expressed that the portion of paragraph (1) making particular reference to foreign contractors and suppliers should be deleted, in order to avoid an impression that those contractors and suppliers should receive special treatment. In conformity with that view, the Working Group decided to reformulate the second sentence of the paragraph so as to read along the following lines: "The deadline shall allow sufficient time for all interested contractors and suppliers to prepare and submit their tenders." It was further agreed that the deleted portion of the sentence, making special reference to foreign contractors and suppliers, should not be added to the commentary.

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

Paragraph (2 bis)

205. A view was expressed that the words "unforeseen circumstances" were ambiguous in that it was uncertain whether foreseeability was to be ascertained according to an objective or a subjective standard. It was accordingly agreed that the words should be replaced by a reference to circumstances beyond the control of contractors and suppliers. It was also agreed that the commentary should explain that, under the paragraph as thus amended, the determination as to the existence of circumstance beyond the control of contractors and suppliers, and the decision to extend the deadline for submission of tenders, rested with the procuring entity.

Paragraph (2 ter)

206. It was agreed that the final sentence of paragraph (2 *ter*), contained within square brackets, should be reformulated so as to clarify that any notice of extension of the deadline for submission of tenders given by telephone had to be given by telephone to all contractors and suppliers to which the procuring entity had provided the tender solicitation documents. To that end, it was agreed to add, after the words "provided that", words along the following lines: "such telephone notice is given to all such contractors and suppliers and provided that . . .". It was agreed that the same addition should be made in other provisions of the Model Law containing the same wording in reference to notices or other communications by telephone.

Paragraphs (3) and (4)

207. It was agreed that the second sentence of paragraph (4), contained within square brackets, should be deleted, since the submission of tenders by means other than in writing and in sealed envelopes would be inconsistent with the principle that tenders must remain secret until their opening. In consequence of that decision, it was agreed that the words "or considered" in paragraph (3) were no longer necessary and should be deleted.

Article 25
Period effectiveness of tenders; modification and withdrawal of tenders

Paragraph (1)

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

Paragraph (2)

209. In connection with subparagraph *(a)*, the Working Group decided to delete the words "in exceptional

circumstances", since they created a potential for disputes. It was agreed that the final sentence of the subparagraph, contained within square brackets, should be retained, subject to alignment with changes made by the Working Group to the same wording used in other provisions of the Model Law (see, e.g., paragraph 206 above).

210. With respect to subparagraph *(b)*, it was generally agreed that, for the protection of the procuring entity, a contractor or supplier that agreed to an extension of the period of validity of its tender should also be required to extend its tender security. However, making it mandatory for the procuring entity to require such contractors and suppliers to extend their tender securities was found to be unsatisfactory. It was said to be inconsistent with the general tenor of the Model Law, which was directed mainly to the relationship between the procuring entity and contractors and suppliers to it. The obligation imposed on the procuring entity by the subparagraph as presently formulated was not directed at that relationship. It was accordingly agreed that the subparagraph should be reformulated so as to provide that a contractor or supplier that agreed to extend the period of validity of its tender should also extend the validity of its tender security.

Paragraph (3)

211. A view was expressed that modifications of tenders should have to be submitted in writing and in sealed envelopes.

212. A drafting suggestion was made that all provisions in the Model Law using similar wording concerning the form in which notices or other information was to be communicated should be consolidated into a single provision so as to avoid duplication.

213. It was agreed that paragraph (3) should be retained, but that the words "but not thereafter" should be inserted after the words "deadline for the submission of tenders", appearing towards the beginning of the paragraph, in order to clarify that a tender may not be modified or withdrawn after the deadline.

Article 26
Tender securities

Paragraph (1)

214. The Working Group found subparagraph *(a)* to be generally acceptable.

215. Subparagraph *(b)* was found to be unsatisfactory in its present form. The drafting of the subparagraph was found to be difficult to understand, and the meaning of certain terms, such as "foreign institution or entity", was said to be unclear. With respect to the substance of the paragraph, it was observed that many States had laws governing various aspects of securities and guarantees of the nature dealt with in article 26. It was said that the acceptability of the Model Law to States would be prejudiced if the subparagraph required a procuring entity to accept a tender security that it would not otherwise be permitted to accept under the law of that State, or if the subparagraph were otherwise inconsistent with that law.

216. It was stated that subparagraph *(b)*, which restricted the ability of the procuring entity to reject a tender security on the ground that it was issued by a foreign institution, seemed inconsistent with the principle, presently contained in subparagraph *(c)*, that the tender security should be from an institution that was acceptable to the procuring entity. That principle was said to be important in order to enable the procuring entity, for example, to reject a tender security from an institution that was not creditworthy.

217. According to another view, subparagraph *(b)* served no useful purpose as, in essence, it did little more than provide that the tender security must conform with the law of the State of the procuring entity. In response, it was noted that underlying the subparagraph was the principle of non-discrimination against foreign contractors and suppliers with respect to tender securities. When subparagraph *(b)* was considered in connection with subparagraph *(c)*, the general principle emerged that, subject to there being no discrimination against foreign contractors and suppliers, the tender security must be acceptable to the procuring entity. The Working Group agreed with that general principle and requested the Secretariat to find a means to express it in a more satisfactory manner, either in two subparagraphs, as in the current draft, or in a single paragraph. For the possibility of expressing it in a single paragraph, wording along the following lines was proposed:

> "In international tendering proceedings, a contractor or supplier shall not be precluded from providing a tender security issued by a foreign institution or entity from which such security is acceptable to the procuring entity, unless the issuance of the security would be in violation of a law of (this State) relating to the issuance of securities of the type in question."

218. After the foregoing discussion, the Working Group examined subparagraph *(c)* in greater detail. It was noted that, in some countries, a tender security issued by a foreign institution must be confirmed by a local institution. The Working Group agreed to a proposal that wording should be added to the effect that not only the institution or entity issuing the tender security, but also the confirming institution or entity, if any, must be acceptable to the procuring entity.

219. According to another view, however, the Model Law should not encourage the requirement of confirmation by a local institution of a foreign tender security. It was said that such a requirement could constitute an obstacle to the participation by foreign contractors and suppliers in tendering proceedings, since they could have difficulty in obtaining the confirmation in time for the submission of tenders. It was also pointed out that the requirement of a confirmation could add to the tender prices of foreign tenderers a cost that did not have to be incurred by local tenderers. It was said that, as long as the foreign institution was creditworthy and otherwise acceptable to the procuring entity, local confirmation of the

tender security should not be required. The Working Group agreed that the problems of requiring local confirmation of a tender security issued by a foreign institution should be discussed in the commentary.

220. It was noted that, with the use of the word "shall" in the *chapeau* of subparagraph *(d)*, the subparagraph in effect provided that, if the procuring entity required a tender security, it must require that the security contain the terms stipulated in the subparagraph. That approach was regarded by the Working Group as inappropriate. It therefore agreed that the word "shall" should be changed to "may". In order to avoid an implication that the procuring entity could not require the tender security to contain terms other than those stipulated in the subparagraph, it was agreed that words should be inserted at the beginning of the *chapeau* along the following lines: "Without limiting its right to stipulate other circumstances under which it shall be entitled to claim the amount of the tender security".

221. It was agreed that subparagraph *(d)*(i) should be clarified by reformulating it along the following lines: "withdraws or modifies its tender after the deadline for submission of tenders." It was agreed that subparagraph *(d)*(ii) should be deleted, as forfeiture of the tender security was regarded as too harsh a consequence for a refusal to accept a correction of an arithmetical error. The rejection of the tender on that ground pursuant to article 28(2)*(b)* was regarded as sufficient. It was also stated in that connection that whether or not a correction was "arithmetical" was sometimes questionable.

222. The Working Group found subparagraph *(d)*(iii) to be generally acceptable.

Paragraph (2)

223. The Working Group found paragraph (2) to be generally acceptable, subject to the redrafting of subparagraph *(d)* to read along the following lines: "the withdrawal of the tender in connection with which the tender security was supplied prior to the deadline for the submission of tenders".

Article 27
Opening of tenders

Paragraph (1)

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

Paragraph (2)

225. It was generally agreed that the right under paragraph (2) of tenderers or their representatives to be present at the opening of tenders should not apply in cases of national security or national defence. It was noted that, although those cases were excluded from the scope of application of the Model Law by article 1, a procuring entity would nevertheless have the option to apply the Model Law in such cases (see paragraph 14 above). The exception to the right of contractors and suppliers or their representatives to be present at the opening of tenders was said to be needed for procurement proceedings in which the procuring entity exercised that option. A proposal was also made that the Model Law should deal with questions of procurement involving national security and national defence in a separate omnibus provision, rather than in individual articles. The Secretariat was requested to consider those proposals in redrafting the Model Law.

226. A view was expressed that the concepts of "national security" and "national defence" should not be introduced into the Model Law, since they were given different meanings and content in different countries, and sometimes led to disagreement (see also paragraph 13 above).

227. It was noted that the Model Law could not deal with the problem of the inability of a contractor or supplier to attend the opening of tenders due to the denial of a visa or other action over which the procuring entity had no control. In that connection, it was agreed that the paragraph should be reformulated so as to specify that the contractors and suppliers or their representatives should be permitted "by the procuring entity" to be present at the opening of tenders.

Paragraph (3)

228. The requirement in paragraph (3) that the procuring entity had to communicate the names and addresses of tenderers and their tender prices to all contractors or suppliers who were not present or represented at the opening of tenders was found to impose too heavy a burden on the procuring entity and to be contrary to practice. It was noted, however, that some contractors or suppliers might not be able to attend for various legitimate reasons. It was agreed, therefore, that the procuring entity should be required to communicate that information on request to tenderers who were not present or represented at the opening. In addition, the Working Group agreed that the words contained within square brackets, "and recorded immediately in the records of the tendering proceedings required by article 33", should be retained, subject to changing the reference to read "article 33(1)".

II. FUTURE WORK AND OTHER BUSINESS

229. The Working Group decided that at its next session it would complete its consideration of the draft articles of the Model Law set forth in A/CN.9/WG.V/WP.28 by taking up articles 28 through 35, and would consider A/CN.9/WG.V/WP.27, dealing with the review of acts and decisions of, and procedures followed by, the procuring entity. For the next session of the Working Group, the Secretariat was requested to revise articles 1 through 27 of the Model Law to take into account the discussions and decisions concerning those articles at the current session. The Working Group noted that, according to the decision of the Commission at its twenty-third session (A/45/17, para. 79), the thirteenth session of the Working Group would be held from 15 to 26 July 1991 in New York and the fourteenth session would be held from 2 to 13 December 1991 at Vienna.