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Report of Working Group I (Procurement) on the work of its nineteenth session (Vienna, 1-5 November 2010)

Contents

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006, New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects.

3. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders.

4. At its thirteenth and fourteenth (New York, 7-11 April 2008, and Vienna, 8-12 September 2008) sessions, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat. At its thirteenth session, the Working Group also discussed the issue of suppliers' lists and decided that the topic would not be addressed in the revised Model Law, for reasons that would be set out in the Guide to Enactment. At its fourteenth session, the Working Group also held an in-depth consideration of the issue of remedies and enforcement and addressed the topic of conflicts of interest.

5. At its fifteenth session (New York, 2-6 February 2009), the Working Group completed the first reading of the draft revised model law and although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed upon. It also noted that further research was required for some

provisions in particular in order to ensure that they were compliant with the relevant international instruments.

6. At its sixteenth session (New York, 26-29 May 2009), the Working Group considered proposals for article 40 of the revised model law, dealing with a proposed new procurement method — competitive dialogue. The Working Group agreed on the principles on which the provisions should be based and on much of the draft text, and requested the Secretariat to review the provisions in order to align the text with the rest of the draft revised model law. The Secretariat was also entrusted with revising the draft provisions for chapter I.

7. At its seventeenth and eighteenth sessions (Vienna, 7-11 December 2009, and New York, 12-16 April 2010), the Working Group completed a second reading of all chapters of the draft revised model law and had begun a third reading of the text. The Working Group settled many of the substantive issues and requested the Secretariat to redraft certain provisions to reflect its deliberations at the sessions. The Working Group, at its eighteenth session, agreed to address the remaining outstanding issues throughout the draft revised model law with a view to finalizing the text at its nineteenth session and presenting the draft revised model law for adoption by the Commission at its forty-fourth session, in 2011. It also agreed to undertake work on a draft revised guide to enactment.

8. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the revised Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17 (Part one), para. 170, and A/63/17, para. 299). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised Model Law (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part one), para. 170). Pursuant to that recommendation, the Working Group adopted the timeline for its deliberations at its twelfth and thirteenth sessions (A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17, para. 307).

9. At its forty-second session, in 2009, the Commission considered chapter I of the draft revised model law and noted that most provisions of that chapter had been agreed upon, although some issues remained outstanding. The Commission noted that the draft revised model law was not ready for adoption at that session of the Commission. It entrusted the Secretariat to prepare drafting suggestions for consideration by the Working Group to address those outstanding issues. At that session, the importance of completing the revised model law as soon as reasonably possible was highlighted (A/64/17, paras. 283-285).

10. At its forty-third session, in 2010, the Commission requested the Working Group to complete its work on the revision of the Model Law during the next two sessions of the Working Group and present a draft revised model law for finalization and adoption by the Commission at its forty-fourth session, in 2011. The Commission instructed the Working Group to exercise restraint in revisiting issues on which decisions had already been taken (A/65/17, para. 239).

II. Organization of the session

11. The Working Group, which was composed of all States members of the Commission, held its nineteenth session in Vienna, from 1 to 5 November 2010. The session was attended by representatives of the following States members of the Working Group: Argentina, Belarus, Bolivia (Plurinational State of), Botswana, Canada, China, Colombia, Czech Republic, Fiji, France, Germany, India, Iran (Islamic Republic of), Italy, Mexico, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

12. The session was attended by observers from the following States: Belgium, Dominican Republic, Guatemala, Indonesia, Kuwait, Panama, Romania, Slovakia, Sweden, Tunisia and Yemen.

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

(a) *United Nations system*: United Nations Office on Drugs and Crime (UNODC) and the World Bank;

(b) *Intergovernmental organizations*: European Bank for Reconstruction and Development (EBRD), European Union (EU), International Development Law Organization (IDLO), and Organization for Economic Cooperation and Development (OECD);

(c) *International non-governmental organizations invited by the Working Group*: Forum for International Conciliation and Arbitration (FICACIC) and International Federation of Consulting Engineers (FIDIC).

14. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON (Sweden)[1]

Rapporteur: Mr. Seung Woo SON (Republic of Korea)

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

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.74);

(b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law (A/CN.9/WG.I/WP.75 and Add.1-8).

[1] Elected in his personal capacity.

16. The Working Group adopted the following agenda:

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

III. Deliberations and decisions

17. At its nineteenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/WG.I/WP.75/Add.1-8)

A. Chapter VIII. Review (A/CN.9/WG.I/WP.75/Add.8)

18. The Working Group was informed about the results of inter-session consultations on draft chapter VIII. It noted that the following proposals for amendment during those consultations would affect the drafting of the entire chapter: (a) excluding procuring entities and approving authorities from the group of review bodies, the latter term being used only with respect to courts and administrative review bodies outside the procuring entity; (b) limiting the possibility of procuring entity to consider complaints only until the award of the procurement contract; (c) giving the discretion to the procuring entity to decide on suspension of the procurement proceedings; (d) leaving the power to overturn the concluded contracts to courts; and (e) referring in the Guide to systems, alternative to the one in the revised Model Law. The Working Group was also invited to reconsider the need for references to "approving authority" throughout the chapter, taking into account their very infrequent use in the draft revised Model Law as compared to the 1994 text.

19. It was agreed that specific changes proposed to be made to draft chapter VIII during inter-session consultations should be introduced to the Working Group by the Secretariat article by article.

Article 61. Right to review

20. The Working Group had before it the following suggestion for article 61:

"**Article 61. Right to seek reconsideration or review**

(1) A supplier or contractor that claims to have suffered or claims that it may suffer, loss or injury due to alleged non-compliance with the provisions of this Law may seek a reconsideration or review of the alleged non-compliance, in accordance with articles [62 to 66] of this Law or with other provisions of applicable law of this State.

(2) A supplier or contractor may appeal any decision taken by a procuring entity or by a review body in proceedings initiated pursuant to paragraph (1) of this article, or may institute proceedings if no decision is issued within the prescribed time-limits, or if the procurement proceedings are not suspended as required by article [65 (1)] of this Law."

21. The point was made that the provisions of paragraph (1) should be conformed to article 64 (2) as regards suppliers that would have the right to file a complaint or appeal (see para. 57 below).

Article 62. Review by the procuring entity or the approving authority

22. The Working Group had before it the following suggestion for article 62:

"**Article 62. Application for reconsideration by the procuring entity or the approving authority**

(1) A supplier or contractor may apply to procuring entity[, or where applicable, to the approving authority], to have a decision or step in the procurement proceedings reconsidered.

(2) Applications for reconsideration shall be submitted in writing and shall be submitted within the following time periods:

(a) Applications for reconsideration as regards the terms of solicitation, pre-qualification or pre-selection or arising from the pre-qualification or pre-selection proceedings shall be submitted no later than the deadline for presenting submissions;

(b) All other applications for reconsideration arising from the procurement proceedings shall be submitted prior to the entry into force of the procurement contract.

(3) Promptly after the timely submission of an application under paragraph (2) of this article, the procuring entity [or approving authority] may suspend the procurement proceedings. The procuring entity[, or approving authority] may take no decision or step to award the procurement contract until [its decision on the application has been communicated to the supplier or contractor submitting the application].

(4) The procuring entity [or approving authority] may overturn, correct, vary or uphold any decision or step in the procurement proceedings that is the subject of the application.

(5) The procuring entity [or the approving authority] shall issue a written decision on the application within … working days (the enacting State specifies the period) after the submission of the application. The decision shall state the reasons for the decision, and the action taken.

(6) If the procuring entity [or the approving authority] does not communicate its decision to the supplier or contractor submitting the application and to any other participant in the application by the time specified in paragraph (2) of this article, the supplier or contractor submitting the application is entitled immediately thereafter to institute proceedings under article [63 or 66]. Upon the institution of such proceedings, the competence of the procuring entity [or the approving authority] to entertain the complaint ceases."

23. The Working Group recalled its earlier decision not to refer in the article to "the head of the procuring entity" (as in the 1994 text), and to provide for an optional recourse by aggrieved suppliers to the procuring entity. The formal nature of the procedures covered by the article was highlighted.

Paragraph (2)

24. With reference to paragraph (2), the following risks of not allowing the procuring entity to consider applications for reconsideration after the procurement contract entered into force were highlighted: (a) in the absence of an independent review body in some jurisdictions, suppliers' recourse would be limited to the courts, which might be burdensome and inefficient; and (b) the system would provide incentives to the procuring entity to rush to conclude procurement contracts to avoid review. The point was made that in some jurisdictions, the law provided that the procuring entity could consider complaints submitted to it after the award of the procurement contract, and the procuring entities had the authority to overturn contracts that had entered into force. Possible reasons for overturning the procurement contract mentioned were termination of an awarded contract where an impropriety had occurred during the award process, for public policy considerations and for preserving the integrity of the process. Support was therefore expressed for article 62 (2) as contained in document A/CN.9/WG.I/WP.75/Add.8.

25. The view prevailed that the article should not deal with justifications for termination of a concluded contract and should not allow the unilateral modification of concluded contracts by the procuring entity. Concern was expressed that the proposed expansion of the period for filing complaints might inadvertently give excessive powers to the procuring entity. The limited scope of the Model Law, which did not cover the contract administration stage, was noted in this respect. Support was expressed therefore for paragraph (2) as contained in paragraph 22 of this report. Safeguards provided for by a standstill period and in chapter VIII of the Model Law, including the possibility of post-award review in a court and where applicable in the independent review body, were considered sufficient.

26. Reservation was expressed about this approach on the understanding that under certain conditions the procuring entity, rather than the court or the independent review body, would be in the best position to deal with post-award

complaints. In such situations, it should be allowed to deal with them without requiring recourse to the independent review body or court. The Working Group agreed that the matter might need to be reconsidered in conjunction with other provisions of the chapter, so that the correct balance between the effective protection of the rights of suppliers, and the need to ensure the integrity of the process, and efficiency was achieved.

Paragraph (3)

27. With regard to paragraph (3), it was questioned whether it would be desirable to provide the procuring entity with complete discretion as regards a decision to suspend the procurement proceedings. Particular concern was expressed about an optional suspension in the case of complaints as regards terms of solicitation. In challenges to pre-qualification or pre-selection decisions, potentially negative impacts on aggrieved suppliers, where there was no suspension, was also noted. The suggestion was therefore made that the first sentence should be deleted and in the second sentence the word "shall" should be used in lieu of the word "may".

28. The alternative view was that the provisions of the first sentence, conferring discretion on the procuring entity to suspend the procurement proceedings, should be retained. It was noted that the provisions for mandatory suspension might be abused by suppliers which might use them for exerting pressure on the procuring entity. The Working Group also noted that article 63 provided safeguards by allowing an appeal against a decision by the procuring entity not to suspend to the independent review body. Some other provisions of the Model Law, such as on extension of deadlines for presenting submissions or on cancellation of the procurement, were also noted as relevant.

29. The view prevailed that the law should confer discretion on the procuring entity to suspend the procurement proceedings. The understanding was that the Guide should refer to cases that would justify a suspension, such as in the case of complaints as regards the terms of solicitation, in which case a suspension would be justified to avoid costs that would arise if the entire procurement proceedings were nullified late in the process. It was decided that the Model Law could not stipulate all situations when suspension would or would not be justifiable and therefore relying on the reasonable judgment of the procuring entity was unavoidable and appropriate.

30. It was agreed that the last sentence of paragraph (3) should be redrafted along the following lines: "The procuring entity[, or approving authority] shall not award the procurement contract until [its decision on the application has been communicated to the supplier or contractor submitting the application]." The Secretariat was requested to amend the provisions in order avoid any unintentional implication that the procurement contract could be awarded immediately after the procuring entity's decision on the application for reconsideration was communicated to the supplier or contractor submitting the application. (For further discussion relevant to the provisions of article 62 on suspension, see paras. 70-73 below.)

Paragraph (4)

31. In response to a query as regards the words "or step", it was clarified that the reference was intended to cover actions other than a decision, such as the means or timeframe of communicating a decision to interested parties. Preference was expressed for reconsidering or deleting the reference to "or step".

Paragraph (5)

32. Questions were raised as regards the requirement to provide a decision in writing. The practice in jurisdictions that allowed for silence on the part of the procuring entity to be taken as an objection or a rejection was noted. The Working Group agreed that the issue would be discussed in the Guide with an indication that best practice was to provide a written, reasoned decision. Reference in this context was also made to paragraph (6) that addressed the consequences of a failure to issue a decision.

33. The Secretariat was requested to replace the provisions throughout the chapter referring to "issuance of the decisions" with provisions reading "giving notice of the decision" and indicating the intended addressees.

Paragraph (6)

34. It was agreed that the paragraph should be redrafted to make it consistent with paragraph (5) as regards the need to give notice of the decision and specify reasons for the decision and the intended addressees. It was also noted that a reference to "participants in the application" should be reconsidered to make it more consistent with the relevant wording found in article 64 (1) in document A/CN.9/WG.I/WP.75/Add.8.

35. The suggestion was made that the provisions of article 62 should envisage an additional period of time after the notice of the decision of the procuring entity to allow an effective appeal. A cross-reference in this regard was made to the relevant provisions in article 65 (5) in document A/CN.9/WG.I/WP.75/Add.8.

Article 63. Review before an independent administrative body

36. The Working Group had before it the following suggestion for article 63:

"**Article 63. Review before an independent review body**[*]

(1) A supplier or contractor seeking review may submit a complaint or an appeal to … (the enacting State inserts the name of the independent review body). Complaints or appeals shall be submitted in writing, and shall be submitted within the following time periods:

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[*] States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit this article and provide only for judicial review (article [66]), on the condition that in the enacting State exists an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption. [States may provide for the system of appeal judicially, or administratively, to reflect the legal system in the jurisdiction concerned.]

(a) Complaints as regards the terms of solicitation, pre-qualification or pre-selection or arising from the pre-qualification or pre-selection proceedings shall be submitted no later than the deadline for presenting submissions;

(b) All other complaints regarding decisions or steps taken in the procurement proceedings shall be submitted prior to the entry into force of the procurement contract;

(c) Complaints submitted on the ground that a decision was not issued in accordance with article 62 (4), or that the procurement proceedings were not suspended in accordance with article [65 (1)], shall be submitted within … working days (the enacting State specifies the period) after the expiry of the prescribed time-limit for issuance of such a decision or within … working days (the enacting State specifies the period) after the submission of the application for reconsideration;

(d) Appeals against a decision of the procuring entity [or approving authority] made under article [62 (3)] of this Law shall be submitted within … working days (the enacting State specifies the period) after the decision was communicated to the supplier or contractor concerned.

(2) Upon receipt of a complaint or an appeal, the … (the enacting State inserts the name of the independent review body) shall give notice thereof promptly to the procuring entity [and to the approving authority where applicable].

(3) The [insert name of review body] may declare the legal rules or principles that govern the subject matter of the complaint or appeal and shall be [empowered/required] to take one or more of the following actions:

(a) Prohibit the procuring entity[, or the approving authority as the case may be,] from acting or deciding unlawfully or from following an unlawful procedure;

(b) Require the procuring entity[, or the approving authority as the case may be,] that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(c) Overturn in whole or in part an unlawful act or decision of the procuring entity, or the approving authority as the case may be, [other than any act or decision as to the award of the procurement contract], [or uphold or overturn in whole or in part a decision of the procuring entity [or the approving authority] on an application made under article 62];

(d) Revise an unlawful decision by the procuring entity, or the approving authority as the case may be, or substitute its own decision for such a decision, other than any act or decision bringing the procurement contract into force, or confirm a lawful decision by the procuring entity or the approving authority;

(e) Order that the procurement proceedings be suspended or terminated;

(f) Dismiss the complaint or appeal;

(g) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint or appeal as a result of an unlawful act or decision of, or procedure followed by, the procuring entity or the approving authority in the procurement proceedings, and for any loss or damages suffered[, which shall be limited to costs for the preparation of the submission, or the costs relating to the complaint and the appeal where applicable, or both]; or

(h) Take such alternative action as is appropriate in the circumstances.

(4) The [insert name of review body] shall within […] days after receipt of the complaint or appeal issue a written decision concerning the complaint or appeal, stating the reasons for the decision and the action taken.

(5) The [insert name of review body] shall communicate its decision to all participants in the review proceedings in accordance with article 64 (5).

(6) The procuring may request the [insert name of review body], in writing, to permit a procurement contract to be awarded before an application under article 62 is determined, on the grounds referred to in paragraph (3) of article 65. The decision of the [insert name of review body] on such a request shall be made a part of the record of the procurement proceedings and shall promptly be communicated to all parties to the application concerned."

37. It was agreed that the reference to an "independent review body" should be replaced with a reference to an "independent body". The former was considered too narrow since the body in question in some jurisdictions, apart from being a review body, might have some advisory function.

38. In paragraph (1) (b), it was agreed to replace "prior to the entry into force of the procurement contract" with the relevant text in article 63 (1) (b) contained in document A/CN.9/WG.I/WP.75/Add.8. In support of this change, it was noted that it would be essential to permit complaints and appeals to be filed shortly after the contract entered into force, so as to eliminate any incentive for the procuring entity to conclude the procurement contract while the complaint of the aggrieved supplier remained unresolved. It was noted, however, that the Guide might draw the attention of enacting States to the fact that not all jurisdictions in fact allowed for complaints or appeals to be filed after the procurement contract had entered into force.

39. As a result of the change agreed to be made in paragraph (1) (b), it was agreed to delete paragraph (1) (c) and replace paragraph (1) (d) with the text of article 63 (1) (c) contained in document A/CN.9/WG.I/WP.75/Add.8.

40. A number of revisions were proposed to the list of actions that might be taken by the independent body, to reflect, in particular, that not all jurisdictions allowed review bodies: (a) to substitute decisions of the procuring entity with their own decisions; and (b) to overturn the procurement contract. It was agreed that the following list of actions might be included in paragraph (3):

"(a) Prohibit the procuring entity[, or the approving authority as the case may be,] from acting or deciding unlawfully or from following an unlawful procedure;

(b) Require the procuring entity[, or the approving authority as the case may be,] that has acted or proceeded in an unlawful manner, or that has

reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(c) Overturn in whole or in part an unlawful act or decision of the procuring entity, or the approving authority as the case may be, [other than any act or decision as to the award of the procurement contract], [or uphold or overturn in whole or in part a decision of the procuring entity [or the approving authority] on an application made under article 62];

(d) Revise an unlawful decision by the procuring entity, or the approving authority as the case may be, or substitute its own decision for such a decision, other than any act or decision bringing the procurement contract into force, or confirm a lawful decision by the procuring entity or the approving authority;

(e) Overturn the award of a procurement contract or the framework agreement that has entered into force unlawfully and, if notice of the award of the procurement contract or the framework agreement has been published, order the publication of notice of the overturning of the award;

(f) Order that the procurement proceedings be suspended or terminated;

(g) Dismiss the complaint or appeal;

(h) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint or appeal as a result of an unlawful act or decision of, or procedure followed by, the procuring entity or the approving authority in the procurement proceedings, and for any loss or damages suffered(, which shall be limited to costs for the preparation of the submission, or the costs relating to the complaint and the appeal where applicable, or both); or

(i) Take such alternative action as is appropriate in the circumstances."

41. With respect to the provisions in subparagraphs (c) to (e), it was agreed that the text should be placed in parenthesis, and that the Guide or a footnote to those provisions should explain that States that did not allow the listed actions to be taken by an independent body might not enact them. With respect to the provisions in parenthesis in subparagraph (h), it was agreed that the Guide would explain that, if the language in parenthesis was deleted, the resulting provisions, by allowing the State to permit compensation for lost profits, might provide appropriate incentives for filing complaints and appeals, which might be appropriate when the concept of an independent review was introduced. With respect to the provisions in subparagraph (i), it was agreed that if the text was included, the Guide would specify that it was intended to accommodate evolving practices as regards actions that might be taken by review bodies, and would discuss the scope of the subparagraph.

42. It was observed that the language of article 63 addressed the question of timing of complaints, but not the manner in which an independent body would determine whether a complaint was receivable. In this context, practical experience in some countries was shared: suppliers had appeared ignorant of procurement law, and complaints without merit had been commonly filed. The manner in which such

complaints were treated could call into question the effectiveness of review proceedings, it was said. It was accordingly suggested, and agreed, that the words "without merit" should be added in subparagraph (g). It was noted that in one jurisdiction the independent body had 5 days to decide whether to take the action referred to in subparagraph (g). It was noted that the Guide would explain that "without merit" in this context was a broad notion intended to cover frivolous or vexatious claims and complaints filed out of time or by persons that had no standing to file a complaint.

43. The need to make consequential changes in paragraph (4) and (5) as regards notices of decisions and intended addressees was noted (see para. 33 above).

44. A query was raised about the possibility of charging suppliers fees for filing complaints or appeals. This was seen as an effective tool to deter abusive practices. It was considered however that the issue of charging fees should be dealt with in other branches of law.

45. The point was also made that the Model Law or the Guide should clarify the meaning of an "independent" body as referred to in article 63. It was agreed that the Guide should explain the concept of independence of a review body and how it could be guaranteed.

46. In the course of its consideration of article 65 (see paras. 59-65 below), the Working Group considered the following proposal for an additional text to be inserted in article 63 as appropriate:

> "(1) The [insert name of the independent body] shall have the power to order the suspension of the procurement proceedings at any time before the entry into force of the procurement contract if and for as long as it finds suspension necessary to protect the interest of a supplier or contractor having submitted an application, complaint or appeal in accordance with article 61, and taking into account the factors listed in paragraph (4) of this article. The [insert name of the independent body] shall also have the power to lift any suspension ordered by the procuring entity or by itself, taking into account the above considerations.
>
> (2) Except in the circumstances set forth in paragraph (4) of this article, suspension of the procurement proceedings shall be automatic for a period of ten (10) working days at the following stages of the proceedings:
>
> (a) Upon receipt of a complaint or appeal under this article prior to the deadline for presenting applications to pre-qualify or submissions, in order to allow the [insert name of the independent body] to decide whether or not to extend the deadline and to take other actions as regards the terms of solicitation, pre-qualification or pre-selection or other issues arising from pre-qualification or pre-selection proceedings; [The Guide would explain in which cases the order of extension of the deadline is sufficient and in which cases the review body should decide on the substance of the complaint or appeal in addition to ordering the extension of the deadline, e.g. whether an additional supplier should be permitted to participate in the restricted tendering or whether a previously disqualified supplier should be allowed to participate further in the procurement proceedings] and

(b) Upon the receipt of a complaint or appeal under this article after presentation of submissions in those cases where there is no standstill period applied by the procurement entity prior to the entry into force of a procurement contract or framework agreement.

(3) (The [insert name of the independent body] shall also have the power subsequent to the entry into force of a procurement contract or framework agreement, to order the suspension of the performance of the procurement contract or framework agreement during the pendency of its review proceedings if and for as long it finds suspension necessary to protect the interest of a supplier or contractor having submitted an application, complaint or appeal in accordance with article 61, and taking into account the factors listed in paragraph (4) of this article.)

(4) Automatic suspension of the procurement proceedings and suspension of performance of a procurement contract or a framework agreement do not apply if:

(a) The [insert name of the independent body] decides that the complaint or appeal is manifestly without merit or the supplier or contractor submitting it is without standing, including based on summary proceedings;

(b) The [insert name of the independent body] decides that the suspension will cause disproportionate harm to the procuring entity or to suppliers or contractors participating in the procurement proceedings; or

(c) The [insert name of the independent body] decides that urgent public interest considerations require the procurement proceedings, the framework agreement, or the procurement contract, as applicable, to proceed.

(5) The [insert name of the independent body] shall lift the suspension at such time as it gives the notice of its decision to the supplier or contractor having submitted an application, complaint or appeal in accordance with article 61 and to other participants in the procurement proceedings if it rejects or dismisses the application, complaint or appeal."

47. The following queries and proposals were made with respect to those provisions:

(a) That the reference to "automatic suspension" should be reconsidered. In this regard, it was observed that the exceptions in paragraph (4) would have to be considered and assessed in order to determine whether a suspension was applicable by virtue of the law. The alternative interpretation was that the exceptions meant that there would be an automatic suspension, but that it would be lifted if any of the determinations listed under paragraph (4) were made by the independent body within the 10 day suspension period;

(b) That the provisions should be reviewed to avoid giving the impression in paragraph (1) and (3) that suspension under those paragraphs was automatic. In this context, it was suggested that the opening phrase in paragraph (2) should be reworded and the order of paragraphs (2) and (3) should be reversed;

(c) That paragraph (4) (b) should be deleted. The point was made that the independent body would not have the means to determine within a short suspension period whether harm existed and the question of proportionality with respect to the

interests of various stakeholders. It was also observed that the issue of disproportionate harm might be subsumed within the notion of "urgent public interest" in paragraph (4) (c). In this respect, it was recalled that a similarly-worded reference to disproportionate harm in article 56 (1) of the 1994 Model Law was made in a different context, in that it did not require a determination by a review body as to the existence and extent of harm;

(d) That how article 61 bis (see paras. 67-69 below) was related to paragraph (1) of the proposed text should be clarified;

(e) That whether the exceptions listed under paragraph (4) were exhaustive should also be clarified. In particular, it was questioned whether there should be an automatic suspension in the cases set out in article 20 (3); and

(f) That whether the provisions should relate to applications for reconsideration should be clarified.

48. The Working Group agreed to include the proposed additional text in article 63 with some revisions. The Working Group agreed to delete paragraph (4) (b) and to note in the Guide that the deleted provisions would in practice be subsumed under the exception "urgent public interest". In response to a suggestion that the requirement for an "urgent" public interest might not encompass the full scope of the exception in paragraph 4 (b) it was considered that the term "urgent" was sufficiently broad to encompass not only urgency in terms of time but also the extent of the public interest. The need to ensure consistency with the wording in article 20 (3) (c) that referred to the same exception (in the context of the standstill period) was noted. The Working Group also agreed that a reference to "urgent public interest" in the proposed text would sufficiently cover the situations listed in article 20 (3).

49. The Working Group also agreed: (a) to add in the beginning of paragraph (1) the words "upon receipt of a complaint or appeal"; (b) to replace in the second sentence of paragraph (1) the words "to lift" with the words "to extend or lift"; (c) to move reference to "during the pendency of its review" in paragraph (3) to the beginning of that paragraph; (d) to delete references to automatic suspension throughout the provisions by replacing them as appropriate with the text stating that "the procurement shall be suspended"; and (e) to ensure consistency of the presentation of the provisions as regards timing of the actions concerned.

50. In response to certain other concerns raised about the provisions, the point was made that the goal of the provisions was to ensure quick decisions on whether suspensions should or should not be applied, even if the results were less than perfect. It was recognized that there might be various grounds for not applying a suspension other than those specifically mentioned in the provisions, which would have to be considered in practice. The key safeguard against abuse was considered to be the requirement to put on the record all decisions in relation to suspension and the reasons for them, so that ultimately they could be scrutinized by the court. The Working Group emphasized that the 1994 approach to the issue of suspension was no longer applicable in the revised Model Law, in particular since the exemptions from review contained in article 52 (2) of the 1994 text had been deleted. This deletion, it was noted, would lead to a considerably greater number of complaints and appeals, which might cause significant disruption to the procurement proceedings.

Article 64. Certain rules applicable to review proceedings under articles [62 and 63]

51. The Working Group had before it the following suggestion for article 64:

"**Article 64. Certain rules applicable to review proceedings under articles [62 and 63]**

(1) Promptly after the receipt of an application under article [62], a complaint under article [63], or an appeal under article [63] of this Law, the procuring entity or [insert name of review body] shall notify all suppliers or contractors participating in the procurement proceedings to which the application, complaint or appeal relates as well as any governmental authority whose interests are or could be affected about the submission of the application, complaint or appeal and its substance.

(2) Any such supplier or contractor or governmental authority has the right to participate in the application or review proceedings. A supplier or contractor or a governmental authority that fails to participate therein is barred from subsequently making the same or equivalent application, complaint or appeal.

(3) The participants to the application or review proceedings shall have access to all proceedings and shall have the right to be heard prior to a decision being made on the application, complaint or appeal, the right to be represented and accompanied, the right to request that the proceedings take place in public and the right to present evidence, including witnesses.

(4) In cases before [an approving authority or] the [insert name of the independent body], the procuring entity shall provide to body concerned all documents pertinent to the application, complaint or appeal, including the record of the procurement proceedings, in timely fashion.

(5) A copy of the decision of the procuring entity, approving authority or [insert name of the independent body] shall be communicated to the participants in the proceedings within … working days (the enacting State specifies the period) after the issuance of the decision. Promptly thereafter, the application, complaint or appeal and the decision thereon shall be made available to the public.

(6) No information under paragraphs (3) to (5) of this article shall be disclosed and no public proceedings shall take place if so doing would be against the protection of essential security interests of the State or contrary to law, would impede law enforcement, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition.

(7) The decision by the procuring entity[, approving authority] or [insert name of review body] and the reasons and circumstances therefor shall be made part of the record of the procurement proceedings."

Title

52. It was agreed that the title should read: "Certain rules applicable to applications for reconsideration under article 62 and review proceedings under article 63".

Paragraph (1)

53. It was agreed that the paragraph should be amended to provide expressly that the body to which an application for reconsideration or review was submitted was the body required to fulfil the notice requirement contained in the paragraph.

54. The reference to "any governmental authority whose interests are or could be affected" was queried. In reply, it was noted that such governmental authorities were granted the right to participate in reconsideration application or review proceedings under paragraph (2), and therefore that they should be provided with notice of those proceedings, in order to ensure that they could avail themselves of the right. On the other hand, it was noted that the Model Law should not regulate internal government communications, and therefore that this issue would be better addressed in the Guide. After consideration, it was agreed to remove the reference from the paragraph and to include appropriate discussion in the Guide.

55. It was queried whether the procuring entity would be notified of the proceedings in the same way as suppliers or contractors. It was agreed that the procuring entity should be afforded the same rights to be notified and to participate as suppliers or contractors, and therefore that appropriate references should be made in this paragraph and in paragraph (2). A suggestion that the procuring entity should be able to make an application to the independent body other than as provided for in article 63 (6) contained in paragraph 36 above was not taken up by the Working Group.

Paragraph (2)

56. Following the deletion of the reference to "any governmental authority whose interests are or could be affected" from paragraph (1) (see para. 54 above), it was agreed that the phrase "any governmental authority" should be replaced by the phrase "any governmental authority whose interests are or could be affected" in the first sentence of the paragraph.

57. It was noted that a supplier or contractor that received notice of the reconsideration application or review proceedings was not automatically entitled to seek review under article 61 (1). It was therefore agreed to explain in the Guide the relationship between article 64 (2) and article 61 (1).

Paragraph (5)

58. The reference to provision of a copy of the decision of the procuring entity or independent body was queried, in that it implied a bureaucratic procedure of sending out individual notices. It was suggested, therefore, that reference should be made to notification of the decision to appropriate suppliers, contractors and other bodies; it was also observed that those bodies should be all those that participated in the procurement proceedings and not just in the reconsideration application or review proceedings, and that until the notification had been provided, the procuring entity was not permitted to enter into the procurement contract. These suggestions were agreed upon, noting also that drafting changes to ensure consistency with articles 62 and 63 regarding notification of decisions would be made (see para. 33 above).

Article 65. Suspension of procurement proceedings, the framework agreement or the procurement contract

59. The Working Group had before it the following suggestion for article 65:

"**Article 65. Suspension of the procurement proceedings, the framework agreement or the procurement contract**

(1) Promptly after the timely submission of a complaint or appeal under article [63] of this Law, the [insert name of review body] shall suspend the procurement proceedings, the framework agreement or the procurement contract, for a period to be determined by the [insert name of review body], except as provided for in paragraph (2) of this article.

(2) The [insert name of review body] need not suspend the procurement proceedings if it decides that the complaint or appeal is manifestly without merit.

(3) The [insert name of review body] may lift the suspension applied in accordance with paragraph (1) of this article if it decides that the suspension will cause or has caused disproportionate harm to the procuring entity or to other suppliers or contractors, or that urgent public interest considerations require the procurement proceedings, or the procurement contract or framework agreement, to proceed.

(4) The [insert name of review body] may extend the originally determined period of suspension in order to preserve the rights of the supplier or contractor submitting an application, complaint or appeal or commencing an action [before the courts] pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed the period required for the procuring entity[, approving authority] or [insert name of review body] to take a decision in accordance with article [62 or 63] as applicable, plus a period thereafter sufficient to allow a supplier or contractor to file any appeal against the decision of the procuring entity[, the approving authority] or [insert name of review body].

(5) The fact of the suspension and the duration of the suspension or a decision by the [insert name of review body] not to suspend the procurement proceedings or the procurement contract or the framework agreement, as the case may be, shall be included in the notification of the submission of the complaint or appeal issued in accordance with article [64 (1)] of this Law, which shall be promptly communicated by the [insert name of review body] to the supplier or contractor submitting the complaint or appeal.

(6) A decision on an extension of the suspension indicating the duration of the extension or a decision to lift the suspension and all other decisions taken by the [insert name of review body] pursuant to this article, and the reasons therefore, shall be promptly communicated to all participants in the proceedings.

(7) The fact of the suspension and the duration of the suspension and any decision by the [insert name of review body] under this article and the reasons

and circumstances therefor shall be made part of the record of the procurement proceedings."

60. The Working Group considered a proposal to remove the requirement for automatic suspension in review proceedings before an independent body. In support of the proposal, it was observed that the rights of suppliers would be adequately protected if the procuring entity were constrained from entering into the procurement contract as had been agreed under article 62 (3) (see para. 30 above; for further consideration of this issue, see the discussion on article 61 bis in paras. 67-69 below). It was also considered that providing for automatic suspension would be a cumbersome and rigid approach, which would allow suppliers to submit abusive requests that would needlessly delay the procurement proceedings. An automatic suspension, it was further stressed, would risk causing serious damage to the procurement proceedings, and suppliers would be able to impose heavy pressure on the procuring entity with significant economic consequences. From this perspective, as was explained, only in exceptional circumstances would a suspension be required, under the safeguard that no procurement contract could come into force while the review proceedings continued. The safeguards contained in paragraphs (2) and (3) were considered inadequate. It was noted that the independent body should be empowered to make its own decision on a request for suspension presented to it, hearing both parties before taking its decision if necessary. In this regard, it was emphasized that the supplier or contractor would have the burden of demonstrating why a suspension should be granted.

61. Objection was raised to this approach, and a system of presumptive suspension was urged. Presumptive suspension in this context was explained to mean that an initial suspension would apply for a short, defined period, and a further suspension could be denied or the initial suspension lifted, such as for the reasons set out in paragraphs (2) and (3). The comment was made that this approach would be consistent with the 1994 text, and would lead to a more efficient and effective process, which ultimately could be less disruptive of the procurement process because it could avoid the need to undo steps in the procurement process if a decision was ultimately made against the procuring entity. In addition, it was underscored that an approach that was cost-effective and easy to follow (such as this alternative proposed) would provide the appropriate degree of incentive for suppliers to submit complaints. Another reason for this approach, it was said, was that when a review was first sought, the supplier or contractor would have only an outline understanding of what had gone awry in the procurement proceedings, and it would be when the record of the procurement had been made available that the supplier or contractor would be able to substantiate its complaint. In response, caution was urged to avoid suppliers engaging in a fishing expedition to find grounds for review through such a mechanism.

62. An alternative suggestion was that, taking into account the requirement for the independent body to act "promptly" after the submission of a complaint, the independent body need not suspend the procurement proceedings in either of the circumstances envisaged in paragraphs (2) and (3). Those circumstances, it was recorded, could also justify the lifting of any suspension granted during the review proceedings, which the independent body would be able to do at any stage.

63. The Working Group heard the following suggestions as regards the principles that could form the basis of a revised draft article 65:

(a) That the combined use of a standstill period and a prohibition against a contract entering into force until a complaint was resolved would cover many situations that could be expected to arise;

(b) That issues relating to the period prior to the commencement of the standstill period, to situations where there was no standstill period (as envisaged by article 20 (3)) and situations arising once the procurement contract had entered into force might require additional provisions;

(c) The additional provisions might involve some form of presumptive suspension;

(d) That in practical terms, once the procuring entity had decided on the award of the procurement contract, the standstill period and an automatic suspension would provide the same safeguard;

(e) That if the procurement involved considerations that would justify not imposing a standstill, an automatic suspension or any suspension would also not be appropriate;

(f) That if a complaint were filed during the standstill period, and assuming that it might most frequently be filed towards the end of that standstill period, an automatic suspension would effectively be required in order to give effect to the prohibition against entering into the procurement contract until the complaint was resolved. In this regard, it was emphasized that the provisions should ensure that they gave the means to exercise the rights provided in the chapter in practice, which would involve an automatic suspension to prevent the contract coming into force in some cases;

(g) That the risk that a procurement contract could be held in abeyance for an extended period while a complaint was taken through the various bodies should be taken into account. While the procuring entity could request the independent body to grant it permission to enter into the procurement contract on urgent public interest grounds under article 63 (6) as contained in paragraph 36 of this report (subsequently replaced by article 61 bis (2), see paras. 67-69 below), and could presumably make an equivalent request to the court, it was observed that procurements that did not involve urgent public interest considerations could be delayed for lengthy periods. It was added, in this regard, that the procuring entity would be able to cancel the procurement and recommence the procedure if it considered that this would be a more appropriate course of action, and so review bodies need not necessarily be constrained by these issues;

(h) That the flexibility conferred by article 63 (including as regards the powers granted to the independent body) should not be constrained by excessively rigid provisions in article 65 (1), and a particular issue to be considered was whether the article should be permissive as regards suspension;

(i) That paragraph (1) might provide for the right of the independent body to decide on a suspension taking into account the subject matter and other substantive terms and conditions of the procurement in question.

64. It was noted that once the provisions of article 65 were agreed, articles 62 to 65 should be considered and if necessary reorganized, in order to avoid repetition and to ensure that all provisions that applied to reconsideration applications under article 62 were located together, and all those that applied to review proceedings under article 63 also appeared together. In this regard, the need for a separate article on suspension in review proceedings was questioned.

65. Further consideration of the provisions of article 65 took place in the context of the new provisions proposed to be included in article 63 (see paras. 46-50 above). As a result of the changes agreed to be made in those new provisions for article 63 (see paras. 48-49 above), the Working Group agreed that article 65 (4) and (5) should be deleted, and the provisions from article 65 (6) and (7) should be placed in article 63, with changes consequent upon the deliberations at the current session to be reflected as necessary.

Article 66. Judicial review

66. The point was made that consistency in references to judicial review and judicial authorities throughout chapter VIII should be ensured.

Article 61 bis. Effect of an application for reconsideration, request for review or appeal

67. The Working Group had before it the following proposal for a new article 61 bis:

"**Article 61 bis. Effect of an application for reconsideration, request for review or appeal**

(1) The timely receipt by the procuring entity, the [insert the name of the independent body] or judicial authority of an application for reconsideration, request for review or appeal (collectively referred to in this chapter as a "challenge") prohibits the procuring entity from entering into a procurement contract or framework agreement resulting from the procurement proceedings concerned while the challenge is outstanding before the procuring entity, the [insert the name of the independent body] or judicial authority. This prohibition remains in force until after sufficiently long period has expired after giving notice of the decision on the challenge to all participants in the procurement proceedings in accordance with article [64 (…)] to allow appeal of the decision.

(2) The procuring entity may request the [insert name of the independent body], in writing, to permit it to enter into a procurement contract or framework agreement notwithstanding the prohibition in paragraph (1) of this article on the grounds referred to in article [63 (4) (a) to (c)]. The [insert the name of the independent body], upon consideration of such request, may authorize the procuring entity to take the steps necessary to make the procurement contract enter into force in the circumstances set forth in article [63 (4) (a) to (c)]. The decision of the [insert name of independent body] on such a request shall be made a part of the record of the procurement proceedings. Notice of the decision shall promptly be given to all participants in the procurement proceedings."

68. The following queries and suggestions were made as regards that article:

(a) Whether the words "or judicial authority" were appropriate or necessary in paragraph (1); if so whether the same words should also appear in paragraph (2);

(b) Whether the provisions presumed that the decision would always be against suppliers and therefore an appeal was inevitable;

(c) That the Guide text to paragraph (2) should explicitly refer to the fact that there could be a further appeal to the court against the independent body's decision on an application under that paragraph;

(d) That the words "to allow appeal of the decision" in paragraph (1) should be reconsidered to make it clearer that the reference was to the time required for filing an appeal, and not to that required for the consideration of an appeal by the independent body or the court;

(e) That the article should indicate how the prohibition would lapse in practice, such as following the filing of an appeal;

(f) That the reference to "sufficiently long" should be reconsidered, since it might imply a lengthy period for filing an appeal, whereas the aim was to provide for a short period; instead, it was proposed to provide that enacting States should specify the applicable time period (with the Guide indicating that it should be within a time frame of 1 to 8 working days);

(g) That the provisions should be reviewed with a view to avoiding an excessively long and indefinite suspension under the default principle contained in the first sentence of paragraph (1). This suspension would cover the entire period during which the challenge was outstanding, whether it was outstanding before the procuring entity, the independent body or the court; and

(h) The words "at any time" should be added after the word "request" in the first sentence of paragraph (2).

69. The Working Group agreed to revise article 61 bis as follows:

"**Article 61 bis. Effect of an application for reconsideration, request for review or appeal**

(1) The timely receipt by the procuring entity, [insert name of independent body] or judicial authority, as the case may be, of an application for reconsideration, request for review or appeal (collectively referred to in this chapter as a "challenge") prohibits the procuring entity from entering into a procurement contract [or framework agreement] resulting from the procurement proceedings concerned. The prohibition referred to in this article shall lapse after the expiry of […] working days (the enacting State specifies the period) after notice of the decision was given to all participants in the procurement proceedings in accordance with article [62 (5)] and [63 (4)].

(2) The procuring entity may at any time request the [insert name of independent body] or judicial authority, as the case may be, to permit the procuring entity enter into the procurement contract [or framework agreement] on the grounds referred to in article [63 (4) (a) and (b)]. The [insert name of independent body], upon consideration of that request, may authorize the

procuring entity to enter into the procurement contract [or framework agreement] where it is satisfied that such circumstances exist. The decision of the [insert name of independent body] shall be made a part of the record of the procurement proceedings, and notice thereof [in accordance with article […]] shall promptly be given to all participants in the procurement proceedings."

Concluding remarks as regards chapter VIII

70. The proposed deviation from the approach taken in the 1994 text that provided for an automatic suspension in proceedings both before the procuring entity and in those before the independent body was noted. Concern was expressed that this revised approach to the regulation of suspension procedures in articles 62 and 63 was undesirable, as it would lead to a dual challenge system that would compromise the incentive to seek to resolve disputes first before the procuring entity. An additional concern raised was that since recourse to the procuring entity was optional, more complaints could be expected to be filed directly with the independent body under the envisaged framework, which in turn raised issues of capacity. In this regard, it was considered whether a short period of automatic suspension before the procuring entity would be an effective tool to redress the balance.

71. In response, it was observed that the incentive to seek to resolve a dispute first with the procuring entity was still present, in that so doing would be advantageous from the perspectives of efficiency and good long-term relations between the parties. It was also pointed out that the role of the procuring entity in the challenge process was distinct from that of the independent body: it was the party whose decisions were at issue, and because the procuring entity was aware of all circumstances of the case, it would be in a better position than an independent body to handle disputes. In addition, giving the procuring entity discretion in deciding whether to apply a suspension was entirely consistent with the toolbox approach under the Model Law. The provisions, it was added, did not exclude the possibility that the procuring entity could apply a suspension: they merely provided more flexibility than was granted to the independent body.

72. Objection was raised to any proposals including automatic suspension provisions in article 62, even if the period of suspension was short. The preferred approach was to set out optional language in the Guide for the use of enacting States that wished to provide for automatic suspension of the procurement proceedings in an application for reconsideration filed with the procuring entity. It was also noted that the Guide might reflect that, in some countries, decisions subject to review might be made by the approving authority, and that conferring unfettered discretion to suspend the procurement proceedings upon the procuring entity might therefore be inappropriate.

73. It was agreed that, although the approach taken in chapter VIII would be maintained, the Guide would highlight the concerns expressed and provide options for those enacting States that might consider enacting provisions different from those set out in the text, to meet the practice in particular of multilateral development banks. The importance of ensuring that the procuring entity conducted a serious and effective review of any application for reconsideration under all approaches was highlighted.

B. Chapter II. Methods of procurement and their conditions for use. Solicitation and notices of the procurement (A/CN.9/WG.I/WP.75/Add.3)

Article 24. Methods of procurement, an accompanying footnote

74. It was suggested that the existing footnote accompanying the article should be expanded to state that enacting States may wish to provide that recourse to some procurement methods should be subject to a high-level approval. As a consequence, the reference to a high-level approval should be deleted in some provisions of the Model Law. Support was expressed for this suggestion, and it was proposed that the relevant wording in the footnote might draw on the opening phrase in article 27 (2) and accompanying footnote 5.

75. Alternative suggestions were that reference to high-level approval might be excluded from the Model Law and the Guide. The negative consequences of a high-level approval requirement on the procurement proceedings, such as delays and additional reasons for challenges, were highlighted.

76. The Working Group's earlier consideration of this issue was recalled. Objection to including references to a high-level approval in the text of the Model Law other than in articles 20, 27 (2) and 27 (5) (e) was reiterated.

77. A specific suggestion was made that the following wording should be included in the end of the footnote: "States may consider whether, for certain methods of procurement, to include a requirement of a high-level approval by a designated organ. On this question see the Guide to Enactment (A/CN.9/…)." No objection was raised to this suggestion. It was also agreed that the Guide would explain that with the decentralization of procurement that had been effected in many systems, the use of high-level approval had been reduced and might no longer be necessary. An additional point made was that a requirement for a high-level approval might be particularly inappropriate in certain circumstances, such as in the use of two-stage tendering, in the context of the precise conditions for use of that procurement method, and in some instances of single-source procurement (for example in urgent situations). It was observed that the Guide should draw this point to the attention of enacting States.

78. Concern was expressed about the part of the footnote that referred to "open tendering". It was agreed that this part should be amended to read as follows: "though an appropriate range of options, including open tendering, should be always provided for".

Article 25. General rules applicable to the selection of a procurement method

79. The point was made that the conditions for use of procurement methods were elastic and that the Guide should emphasize the principle of maximizing competition contained in article 25. It was stressed that this principle would be used as a ground to challenge the selection of a procurement method.

80. It was proposed that the Guide should explain that the meaning of the principle "maximizing competition" in the context of different procurement methods would be different (for example, in the context of auctions, it could be appropriate to state that maximizing a number of bidders could be an appropriate means to achieve the

goal of maximizing competition but the same means would not be appropriate in the context of the request for proposals with dialogue proceedings).

Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)

81. It was suggested to reflect the content of footnote 2 in the Guide. No objection was raised to that suggestion.

Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)

82. With reference to footnote 8, support was expressed for reflecting the provisions of paragraph (2) (d) also under paragraph (1) as a condition justifying recourse to two-stage tendering. The relevant provisions of the 1994 text (article 19 (1) (d)) were recalled in this context. Concern was expressed that including such provisions only in paragraph (2) would imply that request for proposals with dialogue would be a default option in the case of the failure of open tendering. This concern was widely shared in the Working Group and it was agreed that the proposed changes would avoid giving this unintentional interpretation.

83. Another suggestion to address this concern was that the provisions of paragraph (2) (d) might be formulated as a general principle and placed in article 25. This was on the understanding that following a failure of an open tendering procedure, the procuring entity would be able to use any procurement method provided that the conditions for its use were met. The need for such provisions (which were considered redundant by some delegations) was questioned.

84. Another suggestion was to include the relevant provisions within article 27, so that the procuring entity would have a choice among all procurement methods listed in article 27. Concern was expressed that this approach would confer discretion on the procuring entity to have automatic recourse to single-source procurement where open tendering failed. A query was also raised as to whether recourse to competitive negotiations and consecutive negotiations in these circumstances would be appropriate.

85. A further suggestion was to delete the provisions of paragraph (2) (d) and to explain the consequences of the failure of open tendering only in the Guide.

86. Opposition was expressed to deleting these provisions. They were considered essential as justifying recourse to more flexible procurement methods where open tendering had failed. In this respect, it was explained, they set out an additional condition for the use of request for proposals with dialogue and two-stage tendering, which would apply only in the case of a failed open tendering procedure, and without which there could be no recourse to these flexible methods in such circumstances.

87. The prevailing view was that the provisions of paragraph (2) (d) should appear also in paragraph (1) with the understanding that both two-stage and request for proposals with dialogue were options following a failed open tendering procedure, but they were not the only further option. The understanding was that the procuring

entity would be required to assess reasons for the failure of the open tendering procedure and decide whether the situation could be rectified so that a new open tendering procedure could be held, or where that was not feasible, to assess whether the procurement should be abandoned altogether or whether using other procurement methods would be appropriate. It was agreed that the Guide should explain the reasoning for including provisions of paragraph (2) (d) also in paragraph (1) of article 27.

88. The Working Group agreed to replace the word "and" at the end of paragraph (4) (b) with the word "or".

89. With reference to paragraph (5), the point was made that the Guide should encourage the procuring entity not to draft its description of the subject matter of the procurement in a way that artificially limited the market concerned to a single source, and the experience in one jurisdiction in using functional descriptions to support this approach was shared.

Article 28. Conditions for use of an auction

90. The Working Group agreed to defer the consideration of some issues raised in conjunction with the definition of "auction" until it took up article 2 on definitions.

Article 29. Conditions for use of a framework agreement procedure

91. The preference was expressed for using the word "indefinite" rather than the word "repeated" in paragraph (1) (a). No objection was raised to this suggestion.

92. Views were expressed both in favour of and against the suggestion contained in footnote 21 to include an open-ended condition for the use of framework agreements in addition to the conditions set out in paragraph (1) (a) and (b).

93. The Working Group decided to retain the provisions without change. The Working Group noted the utility of the use of framework agreements for centralized purchasing, which had proved in many jurisdictions to be an effective means in ensuring economy and efficiency in procurement, and noted that the Guide would explain that the existing wording indeed accommodated centralized purchasing.

C. Chapter III. Open tendering (A/CN.9/WG.I/WP.75/Add.3)

94. The Working Group noted the need for consequential changes in this and subsequent chapters as a result of amendments agreed to be made in chapter VIII. It also noted that consistency throughout the Model Law, to the extent permitted by different procurement methods, should be ensured in provisions that required the procuring entity to provide information "to the extent known" in the solicitation documents or their equivalent.

Article 37. Examination and evaluation of tenders

95. With reference to footnote 61, support was expressed for deleting paragraph (8) in the light of the separate article that addressed the issues of confidentiality (article 22 of the current draft). No objection was raised to that proposal.

D. Chapter IV. Procedures for restricted tendering, request for quotations and request for proposals without negotiation (A/CN.9/WG.I/WP.75/Add.4)

Article 41. Request for proposals without negotiation

96. The suggestion was made that the heading of the article should be changed to "Two-envelope tendering". The Working Group recalled that that title was suggested for use in the earlier drafts but was considered to be inaccurate and not sufficiently technologically neutral.

E. Chapter V. Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement (A/CN.9/WG.I/WP.75/Add.5)

Article 43. Request for proposals with dialogue

97. It was proposed that the word "maximum" should appear before the words "effective competition" in paragraph (3) (b). It was decided that the provisions should remain unchanged.

Article 44. Request for proposals with consecutive negotiations

98. It was agreed to use the term "ranking" in the article. The Working Group also confirmed the understanding that no pre-selection should be used in this procurement method for the reasons set out in footnote 22.

99. With respect to the provisions of footnote 21, proposed to be included in the Guide, the suggestion was made that the Guide should first set out benefits of using the procurement method under appropriate conditions and subsequently should discuss means to mitigate possible risks with its use. It was noted that the same approach should be followed in describing other procurement methods in the Model Law. It was also proposed that the Guide should highlight the widespread use of request for proposals with consecutive negotiations in the situations envisaged by the Model Law.

Article 45. Competitive negotiations

100. The Working Group agreed to include in paragraph (3) provisions prohibiting negotiations after the best and final offers (BAFO) were submitted, drawing on similar provisions in article 43 (12). In response to the point made that some jurisdictions allowed post-BAFO negotiations, the understanding in the Working Group was that it was not good practice to do so. It was noted that the Guide should elaborate on this point.

F. Chapter VI. Auctions (A/CN.9/WG.I/WP.75/Add.6)

Article 47. Procedures for soliciting participation in procurement by means of an auction

101. With reference to paragraph (1) (l), several delegations reported that there was no practice in their jurisdictions to limit the number of bidders. The point was made that technological constraints that were present when the relevant provisions were first considered in the Working Group a few years ago were generally no longer present. It was nevertheless decided to retain the provisions in paragraph (1) (l) and related provisions of paragraph (2), possibly in parenthesis, with an indication to enacting States that they might consider omitting these provisions if they viewed them irrelevant in the light of prevailing circumstances.

102. It was suggested that, if the provisions were retained, their drafting could be simplified to provide for limiting the number of bidders using only the "first come first served" principle.

103. The provisions were retained without change on the understanding that other procedures and criteria for limiting the number might be applicable.

104. With reference to paragraph (1) (q), the point was made that it would not be always possible to establish the criteria for closing the auction at the outset of the procurement proceedings, rather after when the number of bidders registered for the auction and other information having impact on the structure of the auction (whether it would be held in one round or several subsequent rounds) were known. It was suggested that it would be appropriate for the law to require the general criteria to be set out at the outset of the procurement proceedings, leaving specific criteria to be defined later in the process.

105. The Working Group confirmed its understanding that the Model Law would provide for two types of auctions: simple auctions, and more sophisticated ones that might involve pre-auction examination or evaluation of initial bids. Although a suggestion was made to refer to "pre-auction bids" instead of "initial bids", that suggestion was subsequently withdrawn in the light of the need to ensure consistency with the use of the terms throughout the Model Law (such as with article 42 (2) where reference was made to initial tenders).

106. The Working Group heard various reasons for the need to hold pre-auction examination or evaluation of initial bids, including that in some more complex auctions, no bidding could start before ranking was established and the relevant information was communicated to bidders as required under paragraph (4) (c). It was also noted that more complex auctions might receive initial bids that significantly exceeded the minimum requirements, particularly where suppliers would be permitted to offer items with different technical merits and correspondingly different price levels.

G. Chapter VII. Framework agreements procedures (A/CN.9/WG.I/WP.75/Add.7)

Article 53. Requirements of closed framework agreements

107. With respect to provisions in article 53 (1) (a), the preference was expressed for retaining the provisions in the second set of square brackets. While support was expressed for this suggestion, it was proposed that the wording should be changed to make it clearer that the reference to a maximum duration of a closed framework agreement should not necessarily preclude there being more than one maximum for all framework agreements. The point was made that the maximum duration might vary not only by subject matter of the procurement but also by region or sector of economy, reflecting the specific circumstances in an enacting State.

108. The alternative suggestion was that the wording in the first set of square brackets should be retained and a specific maximum duration should be set out as an indication to enacting States as to what should be considered the best practice. The Working Group recalled its earlier consideration of the issue and that it was agreed not to fix any definite maximum in the Model Law, on the understanding that it would be impossible to set the one for all types of procurement.

109. A further suggestion was that instead of setting a maximum in either law or procurement regulations, the Model Law should envisage a mechanism for adapting long-term closed framework agreements to evolving needs in the market. In response, it was observed that such a flexible mechanism could be considered present in the wording in the second set of square brackets or might be envisaged in the framework agreements themselves.

110. Yet other suggestions were to replace the text in the second set of square brackets with the wording along the following lines: “the maximum duration established by this State” or “the maximum duration established in accordance with provisions of law of this State”. In response, it was considered best practice to keep all procurement-related legal provisions in the law and regulations on public procurement.

111. The question was therefore whether the relevant provisions should be in procurement law or in procurement regulations. The prevailing view in the Working Group was that the matter should be addressed only in procurement regulations since they allowed more flexibility in addressing the issue reflecting the prevailing conditions in an enacting State at any particular time. The understanding was that this approach did not interfere in the hierarchy of legal acts of the enacting State and methods used to ensure coherence of the legal framework. It was suggested that the Guide might therefore elaborate on the implication of other branches of law, such as State budgeting, on provisions of procurement regulations that would regulate a maximum duration of closed framework agreements.

112. After discussion, it was agreed to retain the text in the second set of square brackets without brackets and to provide necessary explanations in the Guide as regards the need to take into account provisions of other branches of law, such as State budgeting, in establishing any maximum duration of closed framework agreements.

Article 56. Second stage of a framework agreement procedure

113. The Working Group agreed that the text in square brackets in paragraph (4) (b) (x) should be deleted for the reasons provided in footnote 28.

Article 57. No material change during the operation of a framework agreement

114. The point was made that the accompanying Guide text to the first sentence of the article should make reference to the possibility of product modifications and technology substitutions.

H. Chapter I. General provisions (A/CN.9/WG.I/WP.75/Add.1 and 2)

Article 2. Definitions

(a) Auction

115. In response to comments made that the scope of the definition covered only limited types of auctions, the Working Group confirmed that the Model Law should regulate only those electronic reverse auctions in which the procuring entity acted as a buyer and where the process involved presentation of successively lowered bids. It was agreed that, while the Model Law provisions would remain unchanged in this respect, the Guide might discuss other auctions existing in practice and explain why the decision was made in UNCITRAL not to regulate them in the Model Law.

116. Concern was also expressed about the use of the term "auction" in the current draft instead of the term "electronic reverse auction" used in earlier drafts. It was highlighted that this change would involve difficulties in enacting States that had already enacted legislation using the earlier terminology. In addition, it was pointed out that the use of the term "auction" might be confusing as it implied features of the traditional auctions, such as that they were usually price-only and presupposed the physical presence of bidders. Concern that the previously used term was not technologically neutral was considered irrelevant since the Model Law provided for only online auctions.

117. The Working Group agreed to reinsert the term "electronic reverse auction" in the text.

118. The proposal was made that the definition should refer to what was considered a distinct feature of this purchasing technique — the possibility of seeing bids submitted in the course of the auction. In this regard, it was said that the absence of such a feature in the course of an auction would be a ground for a challenge in that transparency and integrity might be absent in the process. In response, it was observed that the extent of disclosure of information relevant to bids would vary from auction to auction and was regulated in article 50. The Working Group recalled its earlier consideration of avoidance of collusion and the need to preserve confidentiality of commercially sensitive information.

119. It was agreed that, with the exception of the change agreed to be made in the term used (see para. 117 above), the definition would remain unchanged.

(e) Framework agreement procedure

120. It was agreed that the text in subparagraphs (i) to (v) should remain in the text of the Model Law as providing helpful guidance as regards the newly introduced procedure.

(i) Procurement involving classified information

121. Support was expressed for reflecting the content of footnote 14 in the Guide.

(m) Socio-economic policies

122. Support was expressed for the definition as it was presented in the text.

123. It was proposed, and agreed, that the text in the first set of parenthesis in footnote 21 should not be included in the Guide.

124. A question was raised about the second sentence of footnote 22, which referred to the costs that might arise from the pursuit of socio-economic policies. The issue was noted to be politically sensitive and thus more appropriate for consideration by the Commission.

(p) Standstill period

125. It was proposed that the definition should be amended to refer to the point in time from which the standstill period would run and to reflect that no contract or framework agreement could be awarded during the standstill period.

126. In response, the following wording was proposed: "'Standstill period' means the period starting when the notice is dispatched in accordance with article 20 (2) of this Law during which the procuring entity cannot enter into the procurement contract and during which suppliers or contractors whose submissions were examined can challenge the decision so notified under articles 62, 63 and 66."

127. It was agreed that the text "whose submissions were examined" should be deleted from this proposed definition, and that the definition should refer to the acceptance of the successful submission rather than to the entry into force of the procurement contract. It was agreed that the pool of suppliers entitled to initiate a challenge during the standstill period should be regulated in article 20 (2) and in the relevant provisions of chapter VIII rather than in the definition, and consistency on this matter throughout the Model Law should be ensured.

128. The Working Group agreed to revise the definition along the following lines: "'Standstill period' means the period starting when the notice referred to in article 20 (2) is dispatched in accordance with that article, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge the decision so notified under chapter VIII of this Law."

Article 8. Participation by suppliers or contractors

129. It was proposed to add in the end of footnote 43 for subsequent reflection in the Guide that multilateral development banks, in particular, did not allow participation in procurement to be limited on the basis of nationality, except for a very few cases mandated for example by public international law. Instead, it was

noted, the banks would not require international solicitation in some procurement proceedings, but international participation in such proceedings would not be excluded per se.

Article 11. Rules concerning evaluation criteria and procedures

130. The Working Group agreed to delete the text in parenthesis in paragraph (4) (a) and the text in square brackets in paragraph (4) (b).

131. The importance of explaining in the Guide the link between the provisions on margins of preference in subparagraph (b) and those on socio-economic policies, and in particular their possible cumulative effect, was emphasized.

Article 20. Acceptance of the successful submission and entry into force of the procurement contract

132. The Working Group agreed to:

(a) Retain references to "contract price" and "price" currently in square brackets throughout chapter I without square brackets and ensure consistency in those references;

(b) Conform the text in paragraph (2) (c) with the chapeau provisions of paragraph (2) with the aim of ensuring that all suppliers or contractors that presented submissions should receive the notice referred to in paragraph (2);

(c) Retain provisions on the threshold value in paragraph 3 (b);

(d) Delete the text in square brackets from paragraph 3 (c) in the light of the amendments agreed to be made in chapter VIII and the aim of preventing the procuring entity from failing to apply a standstill period for abusive reasons.

133. Some concerns about the provisions of article 20 (6) and (8) and the related provisions of article 17 (1) were noted, in particular that these provisions could imply that a separate written contract was the norm in all procurement methods. This indication, it was said, combined with the ability to cancel the procurement in the case of a failure by suppliers to sign the contract, could be open to abuse (such as the inappropriate use of procurement methods other than open tendering). In response it was noted that article 17 (3) already contained appropriate safeguards. It was agreed that the Guide should stress that the solicitation documents should require a written contract only when it was strictly necessary.

Article 22. Confidentiality

134. The Working Group agreed to retain the proposed wording in square brackets in paragraph (1) without square brackets.

135. It was noted that the same wording appeared in square brackets in certain other provisions of the Model Law, such as in article 23 (4) (a), and it was agreed that it also should be retained in those provisions without square brackets.

Article 23. Documentary record of procurement proceedings

136. The Working Group agreed with the deletion of paragraph (1) (f) for the reasons set out in footnote 47, in particular because the issue was already adequately covered in paragraph (1) (e).

V. Other business

137. The Working Group recalled that UNCITRAL practice was to circulate the final text as recommended by its working groups to all Governments and relevant international organizations for comment. It was noted that the same practice would be followed with respect to the draft Model Law emanating from the current session, and it was anticipated that the comments received would be before the Commission at its forty-fourth session next year. It was emphasized that no amendments would be made to the draft Model Law after the text was circulated for comment and before the Commission considered it.

138. The understanding was that the Working Group, at its twentieth session, would focus on the revised draft Guide. The Working Group noted that efforts were under way to present a working draft of the Guide to the next session of the Working Group and the subsequently amended draft of the Guide for the Commission session next year, to assist the latter with the consideration of the draft revised Model Law. For this purpose, inter-session consultations were expected. It was emphasized that the Commission was not expected to adopt the Guide at its next session. It was assumed that the Commission would have five to eight days to consider the draft revised Model Law, but that the assumption could be revised if circumstances warranted.

139. The Working Group recalled that it had deferred a number of issues for discussion in the Guide and that decisions on them should be maintained, unless they were superseded by subsequent discussion in the Working Group. It was also recalled that additional sections addressing issues of procurement planning and contract administration, a glossary of terms and table of correlation with the 1994 Model Law were agreed to be included in the Guide. The understanding was that, for the lack of time, it would not be feasible to prepare any expanded Guide for implementers or end-users, and thus the Guide would be addressed to legislators.

140. It was agreed that repetitions between the general part of the revised Guide and article-by-article commentary should be minimized to the extent possible; where they were unavoidable, consistency ought to be ensured. It was agreed that the relative emphasis between these two sections should be carefully considered. The Secretariat was requested to follow the following guidelines in preparing the revised Guide: (a) to produce an initial draft of the general introductory part of the Guide, which would ultimately be used by legislators in deciding whether the revised Model Law should be enacted in their jurisdictions; (b) in preparing that general part, highlight changes that had been made to the 1994 Model Law and reasons therefor; (c) to issue a draft text for the Guide on a group of articles or a chapter at or about the same time, to facilitate the discussions on the form and structure of the revised Guide; (d) ensure that the text was user-friendly and easily understandable by parliamentarians who were not procurement experts; theoretical discussion should therefore be eliminated; and (e) sensitive policy issues, such as

best value for money, should be addressed with caution. The Secretariat was further requested, in order to expedite the work on the revised Guide, to circulate to experts and interested delegations for comment as soon as possible the text of the Guide already available, such as on e-procurement and framework agreements, which had already been before the Working Group.

141. As regards the publication of the Model Law with the Guide, various options were considered, including the use of electronic media. Features, such as hyper-linking the relevant provisions, were suggested to make the use of e-text of the Model Law and the Guide more user-friendly. The pressing need to allow the immediate use of particular provisions of the Model Law, such as on e-procurement, framework agreements and remedies, was noted. The need to finalize the accompanying Guide to these provisions first and the option of posting them at least on the UNCITRAL website were therefore highlighted.

142. The Working Group noted that some issues in the areas of public-private partnerships and sustainable procurement had been brought to the attention of the Secretariat as potential future work for UNCITRAL. It was also noted that the Commission might wish to consider which steps to take to ensure consistency between the revised Model Law and UNCITRAL instruments on privately financed infrastructure projects.

143. The Working Group heard the statement by a representative of the United Nations Office on Drugs and Crime (UNODC) regarding the relevance of the work by this Working Group to the work of UNODC and intergovernmental mechanisms established under the United Nations Convention against Corruption on the issues of prevention of corruption in public procurement. The Working Group noted that the first meeting of a Conference of States Parties' working group on the prevention of corruption was expected to be held in Vienna from 13 to 15 December 2010, which would address, among others, issues related to public procurement and conflicts of interest. The UNODC representative invited delegations and observers of the Working Group to participate at that session.