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## **Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in public procurement**

**Note by the Secretariat**

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## I. Introduction

1. The UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereafter “the UNCITRAL Model Procurement Law” or “the Model Law”),<sup>1</sup> which the Commission adopted in 1994, is intended to serve as a model for States wishing to modernize their procurement legislation and to promote procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process. The Model Law has influenced legislation in a large number of jurisdictions, and its use has contributed to increasing harmonization of procurement rules and procedures.

2. At its thirty-sixth session, in 2003, the Commission expressed strong support for the inclusion of procurement law in its current work programme, *inter alia*, so as to allow novel issues and practices that have arisen since the adoption of the UNCITRAL Model Procurement Law to be considered.<sup>2</sup> At its thirty-seventh session, in 2004, the Commission indicated that the Working Group entrusted with the consideration of that topic should focus on two main areas in respect of which the Model Law might benefit from some revision: first, issues arising from the use of electronic communications in public procurement, and, secondly, issues that have arisen during the application of the Model Law itself.<sup>3</sup>

3. Working Group I (Procurement) 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) on the basis of two studies prepared by the Secretariat. The first study discussed issues that had arisen from the increasing use of electronic communications and technologies in public procurement, including the use of procurement methods based on the Internet (A/CN.9/WG.I/WP.31). The second study presented issues arising from recent experience in the application of the UNCITRAL Procurement Model Law (A/CN.9/WG.I/WP.32).

4. At that session, the Working Group noted that the use of electronic procurement offered many potential benefits, including improved value for money and enhanced transparency in the procurement process. The Working Group noted that those potential benefits were consistent with the main aims and objectives of the Model Law. The Working Group proceeded to consider the extent to which the Model Law might need to be reviewed so as to enable full advantage of electronic procurement to be taken by enacting States. The Working Group identified three key principles that should form the basis for accommodating in the Model Law the use of electronic communications and technologies in public procurement: (a) the Model Law should, to the extent possible, encourage the use of those communications and technologies in procurement; (b) it should make appropriate provisions for that purpose in a technologically neutral manner; and (c) further and more detailed guidance might be provided in the Guide to Enactment,<sup>4</sup> as appropriate. The Working Group agreed that any advice to be provided should cover all means of communication and offer guidance on the controls that are needed for their use (A/CN.9/568, paras. 12-18).

5. It was observed that the main policy issues concerning the use of electronic procurement arose in the following areas: advertisement of procurement-related information, including invitations to participate in procurement and contract awards, the use of electronic communications in the procurement process, and the use of

electronic reverse auctions (A/CN.9/568, para. 19). This note and the addenda thereto consider the scope of future work in respect of the first two of those areas and propose draft amendments to relevant articles of the Model Law. Issues related to the use of electronic reverse auctions are discussed in a separate document (A/CN.9/WG.I/WP. 35).

## **II. General legislative principles and policy approaches for dealing with electronic communications and technologies in the procurement process**

6. The UNCITRAL Model Procurement Law was adopted at a time when it could be anticipated that information technology and electronic communications, even if not very widely used then, would eventually become widespread. Accordingly, some provisions of the Model Law show the concern to accommodate electronic or similar types of communications, such as the reference, in article 9(1) to a form of communication that “provides a record” of the content of communication (rather than an obvious reference to “written communication”). Nevertheless, the Model Law is not primarily concerned with legal issues related to the use of new technologies, and the wording of a number of provisions indicates that they were conceived against the background of communications, record-keeping and evidentiary systems that were largely based on information recorded on tangible media (essentially, written on paper). Examples include references to “documentary evidence” and similar concepts (see articles 6(2), 7(3)(a)(iii), 10, 27(c), 36, 38(f)), or the rules on preparation, modification, withdrawal, submission and opening of tenders, particularly in view of the requirements that tenders be submitted in a “sealed envelope” (see articles 27(h), (q), (r), and (z); 30, 31(2) and 33).

7. At the Working Group’s sixth session, it was suggested that the Working Group’s work should as much as possible draw on the provisions of the UNCITRAL Model Law on Electronic Commerce<sup>5</sup> (A/CN.9/568, para. 43). Indeed, a number of principles of the UNCITRAL Model Law on Electronic Commerce may be helpful to modernize the UNCITRAL Model Procurement Law. In some instances, however, the differences in purpose between those model laws may call for solutions tailored to the particular context of public procurement.

8. The purpose of the UNCITRAL Model Law on Electronic Commerce is to offer national legislators a set of internationally acceptable rules for removal of a number of legal obstacles to the use of modern means of communication which may result from uncertainty as to their legal effect or validity. For that purpose, the Model Law relies on what has been called a “functional equivalent approach”, which is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques. The UNCITRAL Model Law on Electronic Commerce does not attempt to define a computer-based equivalent to any kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function. Consistent with that approach and the aim of ensuring technological neutrality, the

Model Law does not attach legal consequences to any particular format or technique used to create a data message. In the system of the Model Law, questions as to whether a particular data message is indeed “accessible so as to be usable for subsequent reference” would need to be answered on a case-by-case basis.

9. Another important aspect that the Working Group may wish to bear in mind is the prominent role of party autonomy in the system of the UNCITRAL Model Law on Electronic Commerce. That Model Law is based on the recognition that, in practice, solutions to the legal difficulties raised by the use of modern means of communication can to some extent be established by contract. Thus, the parties may exclude or modify the provisions of chapter III of the Model Law (dealing with formation and validity of contracts, recognition by parties of data messages, attribution of data messages, acknowledgement of receipt and time and place of dispatch and receipt of data messages).

10. In summary, the UNCITRAL Model Law on Electronic Commerce could be described as containing a set of principles that (a) provide general criteria for functional equivalence in flexible manner so as to accommodate evolving and varying technologies or (b) offer default rules to be applied when the parties have not provided otherwise.

11. While the principle of functional equivalence may be used to offer solutions in the procurement area, it should be recognized that procuring entities may have an interest in establishing conditions for the use of electronic communications taking into account their respective levels of sophistication, security concerns and other relevant factors. The high degree of flexibility, which is inherent in the UNCITRAL Model Law on Electronic Commerce—and arguably essential in the area of private law—may not be entirely suitable to achieve the high level of certainty required for public procurement.

12. In practice, countries that have adopted legislation on electronic transactions dealing with the types of issues covered by the UNCITRAL Model Law on Electronic Commerce do not seem to rely exclusively on this general legal framework to introduce the use of electronic communications in the procurement process or, more generally, on the use of electronic communications in government functions. In some countries, general rules on electronic communications may be excluded in connection with procurement activities of public bodies,<sup>6</sup> or have been incorporated into the existing framework for private law in such a way that they do not seem to apply automatically to government functions.<sup>7</sup> Other countries and regions have enacted both rules governing the use of electronic communications in Government (including procurement), and general legislation on electronic commerce, some of which is declared to apply to the public sector, while other aspects do not seem to have been conceived for Government use.<sup>8</sup> In a number of other countries, however, general legislation on electronic commerce and electronic transactions is expressly intended to bind Government, except for a number of specifically excluded areas,<sup>9</sup> but even in countries that follow this approach electronic commerce legislation often contains specific rules for the use of electronic communications in governmental functions,<sup>10</sup> or contemplate the enactment of specific regulations for that purpose.<sup>11</sup> Where specific provisions exist, they typically empower Government agencies to specify matters such as the manner and format in which the electronic records shall be filed, created, kept or issued; whether the electronic records have to be signed and what signature creation

methods may be used; control processes and procedures appropriate to ensure adequate integrity, security and confidentiality of electronic records or payments. Lastly, some countries—not all of which have adopted a general framework for electronic commerce and electronic transactions<sup>12</sup>—have enacted detailed provisions on electronic communications in the procurement process.<sup>13</sup>

13. The Working Group may therefore wish to consider that an appropriate treatment of issues raised by electronic communication under the UNCITRAL Model Procurement Law may require more than simply cross-referencing to the relevant provisions of the UNCITRAL Model Law on Electronic Commerce or the UNCITRAL Model Law on Electronic Signatures.<sup>14</sup> Accordingly, it is proposed that the Working Group should include provisions based on the electronic commerce texts prepared by UNCITRAL but amend them so as to be appropriate to public procurement in the revised Model Law.

### **III. Electronic publication of procurement-related information**

14. At its sixth session, the Working Group was informed that electronic publication of procurement-related information may provide wider dissemination of such information than would be achieved through traditional paper means by making it more accessible to a potentially larger group of suppliers. The Working Group expressed the view that the Model Law should encourage the electronic publication of information that the Model Law currently requires States to publish. (A/CN.9/568, para. 21).

15. Given the aim of promoting the use and implementation of the Model Law, it was agreed that flexibility should be retained, and that the Working Group in its work should achieve a balance between the provisions in the Model Law, which would address the issues from the standpoint of the policies and principles, and the Guide to Enactment, which would address them in more detail, where appropriate. Consequently, the Working Group considered that there should be limited regulation beyond appropriate statements of the governing principles in the Model Law itself, but that appropriate further guidance might usefully be provided in the Guide to Enactment. (A/CN.9/568, para. 24).

16. The Working Group noted that a significant issue was the extent to which electronic publication should be mandatory or optional, that is, in a particular case effected by electronic means alone, or by electronic means as an addition to traditional paper-based means. Strong support was expressed for the view that electronic publication should be permitted, but on an optional basis, notably so as to preserve the principle of flexibility and reflecting differing situations prevailing in enacting States. (A/CN.9/568, paras. 25-26). In conclusion, the Working Group took the view that the use of electronic publication under the Model Law should remain optional. Nonetheless, the Working Group agreed that the Guide to Enactment might set out considerations to assist legislators in establishing thresholds of technological maturity and market access after which they might wish to consider the mandatory electronic publication of information (A/CN.9/568, para. 27).

## A. Notion of “electronic” and related terms

17. In view of its procedural nature, several provisions of the UNCITRAL Model Procurement Law refer to various types of communications between procuring entities and suppliers or actions taken by them in connection with procurement proceedings and the form in which they should be made.<sup>15</sup> Although in most cases the expressions used are not in and of themselves linked to any particular medium, the Working Group may wish to consider that it would be appropriate to include, where appropriate, references intended to enable the use of communications by “electronic means”.

18. For that purpose, it may be necessary to indicate in the Model Law what is meant by the word “electronic” in connection with the form of communications. Such a definition is important because the word “electronic”, which is commonly used to refer to any information that is not contained in a tangible medium, strictly speaking relates to one particular technology (i.e. using electrical impulses). For example, digital imaging, which in common usage is understood as an “electronic” technique, relies on optical storage, which is technically not “electronic”.

19. The UNCITRAL Model Law on Electronic Commerce does not contain a definition of “electronic”. In the context of that Model Law, which focuses on the legal value of “information” such a definition was not necessary, as it was subsumed in the notion of “data message”. Indeed, article 2, subparagraph (a), of the Model Law defines the term “data message” as “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.” The notion of “data message” in the Model Law on Electronic Commerce, as explained in paragraph 30 of its Guide to Enactment, is not limited to communication but is also intended to encompass computer-generated records that are not intended for communication.

20. It is suggested that, although the notion of “data message”, as used in the general context of the UNCITRAL Model Law on Electronic Commerce, provides useful indication as to the techniques that should be covered by any enabling provision aimed at promoting the use of electronic communications in public procurement, that notion may not be immediately suitable for use in the context of the UNCITRAL Model Procurement Law. Rather, it might be preferable to insert a general definition of “electronic”, which could be used to qualify either the medium used to store the information (for instance “electronic document”) and the means for transmitting the information (“publication by electronic means”).

21. Another important element to take into account is the notion of “writing” or “record”. The UNCITRAL Model Law on Electronic Commerce does not define those terms, since it relies on the existing understanding given to them under other laws. A definition of “writing” or “record” in the UNCITRAL Model Law on Electronic Commerce was further not necessary since that Model Law does not establish any requirements as to form.<sup>16</sup> In some countries, the law contemplates authorizing the use of electronic communications whenever a written document is required.<sup>17</sup> To the extent, however, that several provisions of the UNCITRAL Model Procurement Law, in turn, establish a number of form requirements and that procuring entities may not always be in a position to accept electronic forms as a

substitute for all of them or some of them, it may be important to preserve in the UNCITRAL Model Procurement Law a distinction between “paper documents” or “paper-based communications” and their electronic equivalents.

22. Subject to any additional definitions or clarifications that may become necessary in view of the deliberations of the Working Group, the Working Group may wish to consider inserting in article 2 of the UNCITRAL Model Procurement Law the additional definitions. The proposed text is set out in the addendum to this note contained in document A/CN.9/WG.I/WP.34/Add.2.

## **B. Publication of the laws, rules and regulations governing procurement**

23. At its sixth session, the Working Group considered: (a) electronic publication of legal texts referred to in article 5 of the Model Law; and (b) whether any additional information not covered by article 5, such as internal policies or guidance, should be brought within the scope of the Model Law.

### **1. Electronic publication of legal texts referred to in article 5 of the Model Law**

24. Article 5 of the Model Law envisages a general principle of accessible publication for the law itself as well as “procurement regulations and all administrative rulings and directives of general application in connection with procurement covered by this Law”, such that the information should be “promptly made accessible to the public and systematically maintained”. At its sixth session, the Working Group noted that this provision appears to be sufficiently broad in scope as to encompass publication in any manner—electronic or by paper means—as it addresses the issue from the standpoint of accessibility (A/CN.9/568, para. 22).

25. Nevertheless, it may be useful to clearly state in the Model Law that the dissemination of such information may be made by electronic means. In keeping with the general wish of the Working Group that electronic communications should be permitted, but not mandated, and that they should not generally substitute for other means of publication, the Working Group may wish to consider whether article 5 of the UNCITRAL Model Procurement Law could be amended so as to include a reference to possible simultaneous dissemination of information through electronic means (proposed draft amendments are set out in the addendum to this note contained in document A/CN.9/WG.I/WP.34/Add.2).

26. A number of countries are in fact making increased use of electronic means to publish legislation, regulations and related materials of general interest.<sup>18</sup> Typically, laws, regulations, and sometimes court decisions and related information of general interest are posted on databases available through the Internet. However, the extent of dissemination of information, the quality and level of access and the amount of information provided varies greatly. In the majority of cases, all information is available free of charge, while in other countries access is granted only to subscribers to a services provider.<sup>19</sup> The supporting technology is also not uniform: while most are Internet-based solutions developed by public bodies, others rely on other types of network.<sup>20</sup>

27. In view of the above, the Working Group may wish to consider using a general term not specifically linked to any particular technology or device such as “publicly accessible electronic information system”, which could cover various means such as Intranet, Internet sites or internal electronic databases accessible to the public. The proposed expression would also have the advantage of drawing on terminology used in the UNCITRAL Model Law on Electronic Commerce and incorporated into legislation of several countries that have implemented that Model Law. “Information system” is defined in article 2 (f) of the UNCITRAL Model Law on Electronic Commerce, as “a system for generating, sending, receiving, storing or otherwise processing data messages.”<sup>21</sup> A proposed draft definition is set out in the addendum to this note contained in document A/CN.9/WG.I/WP.34/Add.2. Alternatively, the Working Group may wish to leave the term undefined and prefer to explain its meaning in the Guide to Enactment.

28. Another issue that the Working Group may also wish to consider is whether it would be desirable to provide guidance in the Guide to Enactment as to the value of electronic publication of laws and regulations. The current stage of electronic publications is such that universal access is not yet guaranteed. As noted above, a subscription fee may also hinder access to information. Furthermore, even in technologically advanced countries legislative databases are sometimes incomplete and only reach back to a certain number of years. Entities maintaining such databases often make disclaimers to the effect that texts of legislation and other texts provided in electronic form, in particular where the electronic file is not a facsimile reproduction of the original printed text, are not authoritative texts.<sup>22</sup> Electronic publication of laws and regulations is made in most cases for information purposes only, although some countries contemplate making the electronic and the paper publication legally equivalent.<sup>23</sup>

## **2. Additional information to be published**

29. As regards the content of information to be published, the Working Group noted that it should further consider whether additional information relevant to potential suppliers that the Model Law does not currently require to be published, such as internal policies or guidance on the conduct of procurement proceedings (see A/CN.9/568, para. 28), might be brought within the scope of any new provision or guidance given.

30. In view of the fact that any such additional information is substantive in nature, rather than merely a consequence of the use of electronic communications, the Secretariat is currently reviewing the relevant practice under domestic procurement regimes and will include the results of its review in information to be provided to the Working Group in due course. It is anticipated, however, that no specific provision may be required for the electronic publication of such additional information (as distinct from other form of publication), which the Secretariat suggests could be addressed by adding appropriate references in the current article 5 of the UNCITRAL Model Procurement Law, once the Working Group has agreed on the nature of further information, if any, that would need to be published.

## **C. Publication of contract opportunities**

31. In view of the varying level of use of electronic means to disseminate procurement-related information, it may be useful for the Working Group to distinguish between two types of publications relating to contract opportunities, namely: (a) general information on forthcoming procurement opportunities, on the one hand, and (b) invitations to participate in specific procurement proceedings, on the other.

32. The reason for this distinction is that information under (a) above is typically of a non-binding nature and serves general purposes such as to promote better planning of Government procurement or to allow potential suppliers to make advance arrangements for participation in forthcoming procurement processes. The Model Law currently does not require the publication of such information. Invitations under (b), in turn, differ significantly from general information about forthcoming contract opportunities in that they form the basis for the conduct of procurement proceedings and give rise to enforceable rights and obligations, both to procuring entities and suppliers. It is recognized, however, that in practice, legislative provisions or recommendations from international organizations on the electronic publication of contract opportunities, which are often formulated in general terms, do not always distinguish between those two types of publications.

### **1. General information on forthcoming procurement opportunities**

33. At its sixth session, the Working Group noted that article 24 of the Model Law addresses the publication of invitations to participate in specific procurement proceedings by means of invitations to tender or to prequalify, but that there is no equivalent provision in the Model Law governing steps in the procurement process earlier in time, such as general information on forthcoming procurement opportunities (A/CN.9/568, para. 28).

34. Several countries frequently issue advance information about forthcoming projects or general information about contract opportunities with particular entities. Typically, procuring entities issue periodically (e.g. once every year) general information on their forecasted procurement needs for the relevant period, without any commitment on their part to actually procure the goods or services indicated. This information is being increasingly disseminated through electronic publication, and may appear on both procurement entities' individual websites, or in centralized electronic systems covering many entities.

35. The European Union operates a centralized publication and translation system for all member States that must be used for all regulated contracts, notice of which appears in the Official Journal of the European Union, available only in electronic form (Internet and on CD-ROM). However, entities may publish additional notices in other publications and usually do so (often in hard copy form and in additional electronic media). The European Union regime currently<sup>24</sup> requires entities to publish general notices of opportunities when their purchases in certain product or service areas exceed a specified amount (that is, equal to or greater than EUR 750,000), plus advance notice of major works projects.<sup>25</sup>

36. The Agreement on Government Procurement negotiated under the auspices of the World Trade Organization (WTO) (hereinafter "GPA")<sup>26</sup> and the

North American Free Trade Agreement (“NAFTA”)<sup>27</sup> list for each State the publications in which States must advertise for their contracts, without any specific requirements or general principles concerning the medium of advertisement.

37. The Asia-Pacific Economic Cooperation (APEC) non-binding principles on government procurement suggest that information on opportunities should be available through a readily accessible medium at no or reasonable cost and gives the Internet as an example of such a medium.<sup>28</sup> It also suggests that publishing procurement information through the Internet is one way of ensuring compliance with the Group’s principle of non-discrimination, since it allows information to be available instantaneously to all interested suppliers.<sup>29</sup>

38. Publication of advance information regarding forthcoming projects, and general information about contract opportunities is not limited to procuring entities whose procurement activities are governed by a multilateral or regional regime. Nor is it limited to developed countries. Indeed, developing countries are making increased use of electronic publication of procurement-related information. In some cases, the information appears on procurement entities’ individual websites, and in others, on centralized electronic systems.<sup>30</sup>

39. The capabilities of electronic publication systems varies greatly. It ranges from countries that offer summaries only to countries that have developed information resources that include searchable websites with specific links to procurement opportunities.<sup>31</sup>

40. If the Working Group decides that the UNCITRAL Model Procurement Law should promote the publication of information on forthcoming contract opportunities, the following questions will need to be considered:

(a) Whether the Model Law should require the publication of such notices or treat it as optional;

(b) Whether there should be a threshold for the publication of information on forthcoming contract opportunities;

(c) Whether publication in electronic form should be mandated or only encouraged.

41. The addendum to this note (document A/CN.9/WG.I/WP.34/Add.2) contains a draft additional provision to the Model Law in which options have been included to address these questions.

## **2. Invitations to participate in specific procurement**

42. In domestic practice, the extent to which procuring entities may use electronic means to give notice of their intention to procure certain goods or services to meet a particular need varies according to the stage of use of information technology in the procurement process (this topic is further developed in the addendum to this note as contained in document A/CN.9/WG.I/WP.34/Add.1 in the context of the consideration of the use of electronic communications in the procurement process).

43. In the Model Law, the following articles deal with the publication of invitations to participate in specific procurement: as regards tendering proceedings, article 24 (procedures for soliciting tenders or applications to prequalify); as regards the principal method for procurement of services, article 37.1 and 2 (notice of

solicitation of proposals); and as regards the alternative methods of procurement, articles 46.1 (two-stage tendering), 47.2 (restricted tendering) and 48.2 (request for proposals).

44. At its sixth session, the Working Group noted that the provisions of article 24 of the Model Law implied that the publication of those invitations would be made in paper form. Bearing in mind the potential benefits of disseminating information on procurement opportunities through electronic means, the Working Group agreed that it should consider options for making appropriate revisions to that article to remove obstacles to electronic publication of the information referred to therein (A/CN.9/568, para. 23). The Secretariat understands that the Working Group's agreement with respect to article 24 applies *mutatis mutandis* to other relevant articles of the Model Law referred to in paragraph 43 above.

45. Given the close relationship between the form of invitations to participate in procurement and the conduct of the procurement proceedings, and the fact that the form of invitations, in particular as regards the intended addressees, is closely related to the method of procurement to be used, the Working Group may wish to consider this matter and possible amendments to article 24 and other relevant articles of the Model Law in connection with its consideration of the use of electronic communications in the procurement process (see A/CN.9/WG.I/WP.34/Add.1).

#### **D. Publication of contract awards and other information**

46. Article 14 of the Model Law requires procuring entities to publish notices of contract awards above a threshold specified by the enacting State, and further states that regulations may provide for the manner of publication. This article appears to be sufficiently broad in scope as to encompass publication in any manner—electronic or otherwise. Nevertheless, with a view to encouraging the use of electronic publication of contract awards, which has been found to contribute to enhanced transparency, the Working Group may find it useful to include express reference to electronic publication in article 14 of the Model Law, along the lines of what has been proposed for article 5 (see above, paras. 24-28). Proposed draft amendments to article 14 of the Model Law are set out in the addendum to this note as contained in document A/CN.9/WG.I/WP.34/Add.2.

47. The Working Group may wish to consider whether there should be some provision in the UNCITRAL Model Procurement Law for publishing in electronic form other information that the Model Law currently does not require States to publish (such as information on the status of ongoing procurement proceedings), or refer to the value of such publication in the Guide to Enactment.

#### *Notes*

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

- <sup>2</sup> *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 229.
- <sup>3</sup> *Ibid.*, *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 81-82.
- <sup>4</sup> For the text of the Guide to Enactment of the UNCITRAL Model Procurement Law, see document A/CN.9/403, reproduced in: United Nations Commission on International Trade Law, *Yearbook*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II.
- <sup>5</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>).
- <sup>6</sup> United States (Electronic Signatures in Global and National Commerce Act, Public Law 106-229, June 30, 2000, sect. 102(b)).
- <sup>7</sup> This is the case, for example, in France (see Loi n° 2000-230, of 13 March 2000, *Journal officiel*, 14 March 2000) and Mexico (see *Decreto por el que se reforman y adicionan diversas disposiciones del Código Civil para el Distrito Federal* of 26 April 2000).
- <sup>8</sup> Within the European Union, electronic commerce, including electronic signatures, and public procurement are subject to a harmonized regime under Directives issued by the European Parliament and the Council. Rules on electronic commerce and electronic signatures are contained in two different directives (Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“the E-Commerce Directive”), *Official Journal of the European Communities*, No. L 178, 17 July 2000, p. 1; and Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures (the “E-Signatures Directive”), *Official Journal of the European Communities*, No. L 13, 19 January 2000, p. 12). While the latter directive expressly refers to the use of electronic signatures by public bodies, subject to “possible additional requirements” (see article 3, paragraph 7), the extent to which the provisions of the first directive may be used in Government functions is unclear. The newly adopted harmonized procurement regime, in turn, expressly contains provisions on electronic procurement (see Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 114), articles 33, 36(3), 42, 54).
- <sup>9</sup> Australia (Electronic Transactions Act 1999); Ireland (Electronic Commerce Act, 2000); and New Zealand (Electronic Transactions Act 2002).
- <sup>10</sup> India (Information Technology Act, 2000, sect. 4-10); Ireland (Electronic Commerce Act, 2000, sect. 12); Mauritius (Electronic Transactions Act 2000, sect. 40); Philippines (Electronic Commerce Act 2000, sect. 27-29); and Singapore (Electronic Transactions Act 1998, sect. 47).
- <sup>11</sup> Republic of Korea (Framework Law on Electronic Commerce 1999, art. 27); Thailand (Electronic Transactions Act 2001, sect. 35); and Venezuela (*Decreto n° 1024 de 10 de febrero de 2001—Ley sobre mensajes de datos y firmas electrónicas*, art. 3).
- <sup>12</sup> E.g. Brazil does not have general legislation on electronic commerce or the legal value of electronic communications, but has enacted specific legislation on certain procurement application of information technologies, such as electronic reverse auctions and on electronic catalogues under *Lei n° 10.520*, of 17 July 2002 (available at [https://www.planalto.gov.br/ccivil\\_03/Leis/2002/L10520.htm](https://www.planalto.gov.br/ccivil_03/Leis/2002/L10520.htm)) and *Decreto n° 3.697*, of 21 December 2000 (available at [https://www.planalto.gov.br/ccivil\\_03/decreto/D3697.htm](https://www.planalto.gov.br/ccivil_03/decreto/D3697.htm)).

- <sup>13</sup> In the Philippines, in addition to general legislation on electronic commerce (Electronic Commerce Act 2000), there are specific rules concerning the use of electronic communications in the procurement process under Republic Act No. 9184 (known as “The Government Procurement Reform Act”, available at <http://www.procurement-service.net/English/AboutEPS/RepublicAct9184-GPRA.pdf>) and its Implementing Rules and Regulations (available at [http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184\(July%2011,%202003\).pdf](http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184(July%2011,%202003).pdf)).
- <sup>14</sup> For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II. The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.02.V.8, and are available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf>).
- <sup>15</sup> For instance, “accept”, “address to”, “ask”, “approve”, “notify”, “require”, “communicate”, “solicit”, “extend opportunity”, “declare”, “give”, “decide”, “reject”, “record”, “obtain”, “modify”, “issue addendum/decision”, “invite”, “inform”, “institute proceedings”, “dispatch”, “provide”, “return” (late tenders), “receive”, “confirm”, “procure”, “withdraw”, “terminate”, “transmit”, “seek”, “permit”, “grant”, “recommend”, “dismiss”, “annul”, “revise”, “order”, “participate”, “furnish”, “make available”, “disclose”, “commencing ... action”, “certify”, “promptly”. Additional terms are concepts such as “document”, “documentary evidence”.
- <sup>16</sup> The Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce recognizes, however, that a definition of “record” in line with the characteristic elements of “writing” in article 6 may be added in jurisdictions where that would appear to be necessary (*Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (United Nations publication, Sales No. E.99.V.4), para. 30).
- <sup>17</sup> In Lithuania, article 2, paragraph 16, of the Law on Public Procurement, No. IX-1217, of 3 December 2002, which authorizes the use of electronic communications in public procurement, has introduced a definition of “writing” which is intended to accommodate information that is stored and transmitted by electronic means. A similar provision can be found in article 3 of the Public Procurement Law of the Republic of Montenegro (*Official Gazette of Montenegro*, No. 40/2001). An English translation of both laws is available from the Secretariat.
- <sup>18</sup> A comprehensive set of links to online editions of official gazettes worldwide can be found in <http://www.lib.umich.edu/govdocs/gazettes/>. For links to European official sites, see <http://forum.europa.eu.int/irc/opoce/ojf/info/data/prod/html/gaz1.htm>.
- <sup>19</sup> E.g. South Africa ([http://origin.sundayobserver.lk/2001/pix/gov\\_gazette.html](http://origin.sundayobserver.lk/2001/pix/gov_gazette.html)).
- <sup>20</sup> E.g. Sri Lanka ([http://origin.sundayobserver.lk/2001/pix/gov\\_gazette.html](http://origin.sundayobserver.lk/2001/pix/gov_gazette.html)) and Thailand (<http://library2.tu.ac.th/gazette/index.html>).
- <sup>21</sup> As explained in the Guide to Enactment, depending on the factual situation, an information system may indicate “a communications network, and in other instances could include an electronic mailbox or even a telecopier” (*Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (United Nations publication, Sales No. E.99.V.4), para. 40).
- <sup>22</sup> The home page of the Portuguese gazette (*Diário da República-DRE*), for example, states that “reading of the DRE databases does not substitute for reading the original” (<http://dre.pt/>).
- <sup>23</sup> In India, for instance, sect. 8 of the Information Technology Act, 2000, provides that “where any law provides that any rule, regulation, order, bye-law, notification or any other matter shall be published in the Official Gazette, then, such requirement shall be deemed to have been satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette.”

- <sup>24</sup> Under article 35 of the Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 114), which member States of the European Union have to implement until 31 January 2006, advance notice of procurement opportunities which value is equal to or greater than a specified threshold may continue to be published through the *Official Journal of the European Union* but such publication will only be compulsory if the procuring entities have taken the option to shorten the time limit for receipt of tenders laid down in article 38(4) of the Directive.
- <sup>25</sup> Such an advance notice does not represent a commitment to actually procure the estimated amount. In Germany, § 17a of the *Bekanntmachung der Neufassung der Verdingungsordnung für Leistungen* of 17 September 2002 clarifies the purpose of this requirement as follows: “Procuring entities shall publish as soon as possible after the begin of the relevant fiscal year, non-binding notices containing information on all intended contracts for the following twelve months, with an individual value of at least 750,000 Euro” (*Bundesanzeiger* No. 216a, 20 November 2002).
- <sup>26</sup> Text available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf). At the time of writing (December 2004), the following were parties to GPA: Canada, the European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong SAR of China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland and United States. According to information provided by WTO, there are countries negotiating accession to the GPA as well as a number of observer governments and intergovernmental organizations (see [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm)).
- <sup>27</sup> Text available at [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=78](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78). NAFTA is comprised of Canada, Mexico and the United States.
- <sup>28</sup> APEC Government Procurement Experts Group, non-binding Principles on Government Procurement, paras. 3 and 7 (available at [http://www.apecsec.org.sg/content/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement.downloadlinks.0001.LinkURL.Download.ver5.1.9](http://www.apecsec.org.sg/content/apec/apec_groups/committees/committee_on_trade/government_procurement.downloadlinks.0001.LinkURL.Download.ver5.1.9)).
- <sup>29</sup> *Ibid.*, para 72.
- <sup>30</sup> In the Philippines, for instance, Section 8 of Republic Act No. 9184 provides that “there shall be a single portal that shall serve as the primary source of information on all government procurement” (available at <http://www.procurement-service.net/English/AboutEPS/RepublicAct9184-GPRA.pdf>). Section 8.2.1 of the Implementing Rules and Regulations of Republic Act No. 9184 (available at [http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184\(July%2011,%202003\).pdf](http://www.neda.gov.ph/references/RAs/Approved%20IRR-A%20of%20R.A.%209184(July%2011,%202003).pdf)) provide further that the Government Electronic Procurement System (“G-EPS”) contemplated by the Act shall have “a centralized electronic bulletin board for posting procurement opportunities, notices, awards and reasons for award. All procuring entities are required to post all procurement opportunities, results of bidding and related information in the G-EPS bulletin board.”
- <sup>31</sup> For example, the United States (<http://www.gpoaccess.gov/about/services.html>).