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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services – a revised text of the Model Law

Note by the Secretariat

Contents

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law") (A/49/17 and Corr.1, annex I) is set out in paragraphs 8 to 88 of document A/CN.9/WG.I/WP.65, which is before the Working Group at its fifteenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments in public procurement.

2. At its fourteenth session, the Working Group agreed that its first priority would be to finalize its work on the text of the Model Law. Thus, it was agreed that a complete version of the revised Model Law would be presented to the Working Group for consideration at its next session. It also agreed that its aim was to submit the text of a revised Model Law, further revised to reflect the deliberations of the Working Group at its fifteenth session, to the Commission for consideration at its forty-second session, in 2009.[1]

3. This note has been prepared further to these decisions of the Working Group. It first provides an overview of the Working Group's work on the revision of the Model Law pursuant to the mandate given to the Working Group by the Commission, highlighting issues that have already been addressed in the work, and the outstanding issues. A complete text of the revised Model Law is set out in the addenda to this note. It incorporates the amendments considered to different extent by the Working Group as of the date of this note as well as the Secretariat's drafting suggestions aimed at simplification and standardization of the Model Law pursuant to the mandate given to the Working Group by the Commission (see chapter II of this note for more details). A table indicating correlation of the articles in the revised Model Law set out in the addenda to this note to the articles of the 1994 Model Law and new articles considered by the Working Group to date is contained in the last addendum to this note.

4. As was noted at the Working Group's fourteenth session, revisions to the Guide to Enactment of the Model Law for benefit of legislators would be drafted as the Working Group's second priority, and the Secretariat would, to the extent possible, provide a working draft of a revised Guide to the Commission at its session when a revised Model Law is considered.[2]

II. Overview of the Working Group's work on the revision of the Model Law

Original mandate

5. At its thirty-seventh session, in 2004, the Commission mandated its Working Group I (Procurement) to update the Model Law, to reflect new practices, in particular those that resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform, without departing from the basic principles of the Model Law. It gave

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[1] A/CN.9/664, para. 113.

[2] Ibid., para. 115.

the Working Group a flexible mandate to identify the issues to be addressed in its considerations (A/59/17, paras. 80-82).

List of topics

6. The Working Group began its work at its sixth session (Vienna, 30 August-3 September 2004), at which it decided to proceed with the in-depth consideration of the following topics in sequence: (a) electronic publication of procurement-related information; (b) the use of electronic communications in the procurement process; (c) controls over the use of electronic communications in the procurement process; (d) electronic reverse auctions (ERAs); (e) the use of suppliers' lists; (f) framework agreements; (g) procurement of services; (h) evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies; (i) remedies and enforcement; (j) alternative methods of procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; and (m) legalization of documents (A/CN.9/568, para. 10).

7. The Working Group continued the work at eight subsequent sessions[3] at which it added topics of abnormally low tenders (ALTs) and conflicts of interest to the list of topics to be considered in its work (A/CN.9/575, para. 76, as regards ALTs; and A/CN.9/615, paras. 11 and 82-85, as regards conflicts of interest).

Topics considered

8. The Working Group considered and preliminarily approved the drafting proposals for the Model Law on topics (a) electronic publication of procurement-related information, (b) the use of electronic communications in the procurement process, (c) controls over the use of electronic communications in the procurement process, (d) ERAs, and ALTs. A revised text of the Model Law set out in the addenda to this note reproduces in the relevant parts the preliminarily approved draft provisions on these topics. The outstanding issues still to be considered by the Working Group in connection with these provisions are highlighted in the accompanying footnotes.

9. As regards topic (e) the use of suppliers' lists, at its thirteenth session, the Working Group decided that the topic would not be addressed in the Model Law, because the flexible provisions addressing framework agreements were sufficient to provide for the uses to which suppliers' lists might be put, and also because of the acknowledged risks that suppliers' lists raised. These reasons would be set out in the Guide to Enactment (A/CN.9/648, para. 14).

10. The drafting proposals on topic (f) framework agreements were considered by the Working Group at its twelfth to fourteenth sessions. At its fourteenth session, the Working Group requested the Secretariat to separate provisions addressing closed framework agreements from those addressing open framework agreements. The draft provisions prepared by the Secretariat pursuant to that request have been included in the revised text of the Model Law set out in the addenda to this note.

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[3] For the reports of the seventh to the fourteenth sessions of the Working Group, see A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648 and A/CN.9/664.

The provisions are new and have replaced the drafting provisions on this topic submitted earlier.

11. The Working Group considered topic (i) remedies and enforcement at its fourteenth session. It decided to delete the list of exceptions to the review process contained in article 52 (2) of the Model Law, to revise the provisions and procedures contained in articles 53-56 of the Model Law and to introduce a standstill period in article 36 (A/CN.9/664, paras. 14-15). The draft provisions prepared by the Secretariat pursuant to these decisions have been included in the revised text of the Model Law set out in the addenda to this note. The provisions are submitted for consideration by the Working Group for the first time.

12. The Working Group discussed the issues of conflicts of interest at its fourteenth session, and agreed to consider expanding articles 4, 15 and 54 of the Model Law to address the relevant requirements of the United Nations Convention against Corruption (A/CN.9/664, para. 17). The draft provisions prepared by the Secretariat to reflect the Working Group's decisions on the topic taken at that session have been included in the revised text of the Model Law set out in the addenda to this note. The provisions are submitted for consideration by the Working Group for the first time.

Outstanding topics

13. The Working Group has not considered in depth the following topics: (g) procurement of services; (h) evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies; (j) alternative methods of procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; and (m) legalization of documents.

14. In the following sections, the Secretariat provides information about preliminary conclusions on these topics reached at the Working Group's sixth session and, based on consultations with experts, suggests a course of action with respect to each outstanding topic. Where appropriate, the Secretariat has reflected those suggestions in the revised Model Law set out in the addenda to this note.

15. The Working Group is invited to consider the suggestions with respect to each outstanding topic and determine which of them should be implemented and at which stage, taking into account considerations of resources and time and its decision to submit the text, further revised to reflect the deliberations at its fifteenth session, to the Commission for consideration at its forty-second session, in 2009. The Working Group's attention is brought in this regard to the practice in UNCITRAL to circulate a draft instrument for comment by States and interested international organizations before the draft is considered by the Commission. The comments received are compiled and transmitted by the Secretariat to the Commission for consideration together with the draft. If such practice is followed, the Secretariat would not have time to make significant revisions to the draft text of the Model Law attached to this note after the Working Group's fifteenth session, and the comments would be considered only at the Commission session.

A. Procurement of services

16. At its sixth session, the Working Group preliminarily agreed that the Model Law should retain all the various options in methods for the procurement of services currently provided. However, the Working Group also agreed on the need to formulate guidelines in the Guide for the use of each method, depending on the type of services at issue and the relevant circumstances (A/CN.9/568, para. 93).

17. At the same time, as regards topic (j) alternative methods of procurement, the Working Group agreed to reconsider conditions for the use of some methods of procurement and the usefulness of retaining all of them (see para. 32 below). In addition, as regards topic (l) simplification and standardization of the Model Law, the Working Group agreed to consider ways of simplifying and streamlining the Model Law, in particular by removing repetitions, inconsistencies or unnecessarily detailed provisions, with the desired result being a more user-friendly Model Law where all essential elements would be preserved and presented in an improved structure and in a simpler way (see paras. 51 and 52 below).

18. The Secretariat reviewed the provisions of the Model Law taking into account these decisions of the Working Group. It found that a number of provisions of the Model Law could be streamlined, including those on alternative methods of procurement and on the procurement of services, so as to provide a cohesive and more user-friendly approach to the selection of a method of procurement other than tendering under the Model Law. The suggestions as regards alternative methods of procurement and other aspects of simplification and standardization are presented in sections C and E, respectively. This section addresses the provisions on procurement of services under chapter IV of the Model Law.

19. The Working Group may wish to consider a degree of overlap between two of the selection procedures in the principal method for the procurement of services described in articles 42 and 43 of chapter IV and the request for proposals procedure described in article 48 in chapter V. The services selection procedure without negotiation (article 42) is identical to the request for proposals procedure if the latter proceeds without negotiations (a possible occurrence as, under article 48 (7), the request for proposals procedure contains an option, and not an obligation, to hold negotiations). The services selection procedure with simultaneous negotiations (article 43) is identical to the request for proposals procedure if the latter includes negotiation stage(s). All these three selection procedures (that is, the two services selection methods under articles 42 and 43 and the request for proposals procedure under article 48) can be used for procurement of services. In addition, in all three:

(a) Open or direct solicitation may be held;

(b) Proposals are submitted against a single set of specifications made known at the outset of the procurement and not changed subsequently;

(c) Evaluation criteria may concern the relative managerial and technical competence of the supplier or contractor; and

(d) Price is considered separately and only after completion of the technical evaluation.

20. Taking into account such a significant degree of overlap in all these three selection procedures, their presentation in the Model Law as separate selection procedures may not be justifiable.

21. The only selection procedure in chapter IV (procurement of services) distinct from the other selection procedures of the Model Law is the one described in article 44 (selection procedure with consecutive negotiations). In this connection, the Secretariat draws the Working Group's attention to a similar selection procedure included in the more recently negotiated UNCITRAL instruments on privately financed infrastructure projects (the "PFIPs instruments").[4] Taking into account that the Model Law and these latter instruments deal partly with the same issue, i.e., selection of a supplier or contractor for government contracts, the Working Group may wish to consider to which extent these instruments should be coherent in this area and, if so, how to achieve desired coherence.[5]

22. Currently, the competitive selection procedure in the PFIPs instruments is based largely on the features of the principal method for the procurement of services, in particular the selection procedure with consecutive negotiations, of the Model Law. The competitive selection procedure under the PFIPs instruments are different from the relevant provisions of the Model Law in several important respects:

(a) Prequalification (the PFIPs instruments refer to pre-selection) is mandatory (see model provision 6 (1)). Under article 7 (1) of the Model Law, prequalification is optional;

(b) Under the PFIPs instruments, after prequalification/pre-selection, the procuring entity may invite to participate further in the selection process either all of the pre-selected bidders or only a limited number who best meet the pre-selection criteria (the procuring entity has to disclose at the outset in the pre-selection documents which course of action it will follow) (see model provision 9). Under article 7 (6) of the Model Law, all suppliers or contractors that have been prequalified are entitled to participate further in the procurement proceedings;

(c) Under the PFIPs instruments, there are two types of procedure for requesting proposals: single-stage and two-stage procedures (see model provision 10). In a single-stage procedure under the PFIPs instruments, proposals are submitted against a single set of specifications made known at the outset of the procurement proceedings and not amended thereafter. This is common procedure in all but some procurement methods under the Model Law. A two-stage procedure under the PFIPs instruments, on the other hand, has no equivalent in the Model Law. It resembles the two-stage tendering described in article 46 of the Model Law and like the two-stage tendering is used when it is not feasible to describe in the request

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[4] See model provision 17 of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) (the "PFIPs Model Legislative Provisions"), and recommendations 26-27 and chapter III, paragraphs 83-84, of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) (the "PFIPs Legislative Guide").

[5] The PFIPs instruments, with respect to the selection of the concessionaire, significantly rely on the general legislative framework for the award of government contracts. They therefore extensively cross-refer to the provisions of the Model Law, and some provisions are based largely on the provisions of the Model Law (see footnote 7 of the PFIPs Model Legislative Provisions, and chapter III of the PFIPs Legislative Guide).

for proposals the characteristics of the project in a manner sufficiently detailed and precise to permit final proposals to be formulated. However, unlike the Model Law provisions on the two-stage tendering, the provisions of the PFIPs instruments on the two-stage procedures for requesting proposals (i) do not require exclusion of price in initial proposals, and (ii) allow negotiations subsequent to the submission of the proposals against the final single set of specifications;

(d) Under the PFIPs instruments, final negotiations may concern any contractual terms, except those, if any, that were stated as non-negotiable in the final request for proposals (see model provision 17). In the similar provisions of the Model Law (selection procedure with consecutive negotiations of article 44 of the Model Law), negotiations concern only price;

(e) Finally, under the PFIPs instruments, the criteria for the evaluation and comparison of proposals does not include qualifications criteria (see model provisions 7 and 14), whereas in the Model Law they include such criteria as qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing services (article 39 (1) (a) mostly repeating the provisions of article 6 (1) (b) (i)).

23. Most of the remaining provisions in chapter IV (articles 37-40) repeat the identical provisions in chapter III (tendering) although some inconsistencies between them exist. The Working Group may wish to consider that removing these inconsistencies in the current revision of the Model Law would be timely and would contribute significantly to the simplification and standardization of the Model Law.

24. In the light of the above-given considerations, the Working Group may wish to consider therefore:

(a) A different way of presenting all the various options in methods for the procurement of services currently provided in the Model Law; and

(b) That the additional work should be done to conform the UNCITRAL instruments in the two areas of its work – public procurement and PFIPs.

25. The Secretariat's suggestions as regards a different way of presenting all the various options in methods for the procurement of services currently provided in the Model Law would affect the whole structure of the Model Law. They are therefore to be viewed as suggestions for simplification and standardization of the Model Law and are discussed in the respective section E below.

B. Evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies

Evaluation and comparison of tenders

26. The Working Group may wish to consider formulating a single set of requirements as regards evaluation criteria building on the provisions of articles 27 (e), 34 (4), 38 (m) and 39 and provisions on evaluation criteria in the alternative methods: that they should be relevant to the subject matter of the procurement and, to the extent practicable, be objective and quantifiable, and that they have to be disclosed at the outset of the procurement together with any margins

of preference, relative weights, thresholds, and the manner in which the criteria, margins, relative weights, and thresholds will be applied, so as to enable submissions to be evaluated objectively and compared on a common basis. While important for all procurement methods, these requirements are currently spread across several provisions in the Model Law that are not consistent and complete (for example, they do not obligate the procuring entity to disclose the manner in which the criteria, margins, relative weights, and thresholds will be applied).

27. If the Working Group decides that such a single set of requirements applicable to all procurement methods should be included in the Model Law, it may decide to include it in chapter I of the Model Law that currently sets out general provisions applicable to all procurement methods. The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

The use of procurement to promote industrial, social and environmental policies

28. At its sixth session, no final decision was taken on the need for or desirability of formulating in the text of the Model Law additional control mechanisms to ensure transparency and objectivity in the use of procurement to promote other policy goals. It was agreed that the Working Group might consider formulating additional guidance on the means to enhance transparency and objectivity where other policy goals affected evaluation criteria (A/CN.9/568, para. 101).

29. At that session, the attention of the Working Group was drawn to two overlapping subparagraphs of article 34 (4) of the Model Law: subparagraph (c) (iii), dealing with non-objective factors permitted to be taken into account in determining the lowest evaluated tender; and subparagraph (d), dealing with granting a margin of preference for domestic needs (similar provisions are found in article 39 (1) (d) and (2)). Both of them aimed at promoting the domestic economy and therefore the Working Group was invited to consider consolidating them. No decision was taken by the Working Group on this issue at that time.

30. Finally, at its sixth session, the Working Group viewed as outdated, and therefore did not exclude the possibility of reconsidering, in due course, the desirability of retaining provisions in article 34 (4) (c) (iii) that referred to the balance of payments position and foreign exchange reserves and to the counter-trade arrangements as factors to be taken into account in determining the lowest evaluated tender (similar provisions are found in article 39 (1) (d)). The Working Group's attention in this respect is drawn to provisions of article 22 (2), under which the promotion of policies specified in articles 34 (4) (c) (iii) and 39 (1) (d) may justify recourse to a single-source procurement (see further discussion in paragraphs 45-47 below).

31. The Working Group may wish to formulate its position as regards all these issues deferred since the Working Group's sixth session when it considers the relevant provisions in the revised Model Law set out in the addenda to this note.

C. Alternative methods of procurement

32. At its sixth session, the Working Group agreed to consider whether to circumscribe conditions under which the alternative methods of procurement could

be used, to prevent abuse. The Working Group agreed that it might further consider eliminating some methods and presenting them in a manner that stressed their exceptional, rather than alternative, nature under the Model Law (A/CN.9/568, para. 116).

33. At its tenth session, the Working Group considered a related issue whether the current preference for tendering contained in article 18 of the Model Law should be revisited, so as to take account of evolving procurement techniques and tools (A/CN.9/615, para. 38).

34. The Secretariat reviewed the procedural aspects of all alternative methods listed in chapter V. Each alternative method is tailored to meet particular requirements in procurement. Provided that sound justifications exist for their use, alternative methods are valuable tools for procuring entities. The Working Group may therefore wish to retain all of those methods.

35. However, the Working Group may wish to consider reviewing conditions for the use of alternative procurement methods in chapter II of the Model Law. Currently, some procurement methods may be used under the same conditions, and the Model Law does not set out a hierarchy, for example by requiring the procuring entity in such situations to have recourse to the most competitive method appropriate in the given circumstances. Expert consultants and commentators have also indicated to the Secretariat that some of the existing conditions for use may not be justifiable. Each case is analysed separately below, with recommendations to the Working Group as regards possible course of action.

Two-stage tendering, request for proposals and competitive negotiation

36. Two-stage tendering, request for proposals and competitive negotiation may be used under the same conditions (see article 19 (1)). The Guide to Enactment recognizes that there is an overlap in the conditions for use of these three procurement methods and gives an enacting State the option not to enact in their procurement laws each of those three methods. However, as mentioned, procedurally, all three procurement methods are different and there is value for an enacting State in retaining all of them to accommodate different procurement needs.

37. The Working Group may wish to consider revising the guidance on this issue. If it decides to recommend that an enacting State retain all these three alternative procurement methods, it may also wish to formulate a general principle in the Model Law that the most competitive method appropriate in the given circumstances should be used in the case of overlap of the conditions for use of different procurement methods. The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

Restricted tendering (article 20 (a)) and direct solicitation (article 37 (3) (a))

38. The provisions state that restricted tendering or direct solicitation in case of services can be used when the goods, construction or services, by reason of their highly complex or specialized nature, are available only from a limited number of suppliers or contractors. The experts consulted by the Secretariat question whether this condition fosters the objectives of the Model Law: it is based on the subjective assessment of a procuring entity, which may be a simple error or may reflect a desire to favour some suppliers or contractors over others. It is suggested, therefore,

that it would be consistent with the aims and objectives of the Model Law to require the procuring entity under the conditions referred to in articles 20 (a) and 37 (3) (a) to hold open tendering with prequalification (the latter is in any event recommended by the current Guide to Enactment for goods, construction or services of a highly complex or specialized nature).

39. In addition, considering article 20 (a) together with the provisions of article 47 that sets out procedures for restricted tendering, it is not clear how the implementation of article 20 (a) works in practice. Article 47 (1) (a) requires the solicitation of tenders from all suppliers or contractors from whom the goods, construction or services to be procured are available (equivalent provisions are found in article 37 (3) (a) addressing direct solicitation in the case of services). Article 47 (2) requires a notice of the restricted tendering proceedings to be published (no equivalent provisions are found in article 37 or other provisions in chapter IV related to services). Article 47 (3) explicitly excludes the application of article 24 on open solicitation of tenders or applications to prequalify to restricted tendering. In effect, however, when a supplier or contractor expresses its interest to participate in the proceedings in response to the published notice of the restricted-tendering proceedings, the procuring entity would have to allow such a supplier or contractor to participate under article 47 (1) (a). Thus, although not intended, a notice of the restricted tendering proceedings will have in practice the effect of notice of soliciting tenders, and the difference between open and restricted tendering is therefore blurred. (It should be noted that, in the case of request for proposals through public notice, article 48 (2) explicitly states that the notice shall not confer any rights on suppliers or contractors, including any right to have a proposal evaluated.)

40. The Working Group may wish to clarify these provisions of the Model Law. The Guide to Enactment currently provides little guidance on them and would have to be amended to reflect clearly the position of the Model Law. The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

Single-source procurement

41. Some of the conditions for use of two-stage tendering, request for proposals and competitive negotiation, such as seeking to enter into a contract for the purpose of research, experiment, study or development (article 19 (1) (b)) and procurement involving national defence or national security (article 19 (1) (c)), may also justify recourse to single-source procurement (see article 22 (1) (e) and (f)). To prevent abuses in the use of single-source procurement, the Working Group may wish to clarify in the Model Law that recourse to single-source procurement under these overlapping conditions must be exceptional, and only in situations where the use of another procurement method is not appropriate. This would be in line with the general principle proposed in paragraphs 35 and 37 above. The Secretariat's drafting suggestions to this effect are presented in the revised text of the Model Law set out in the addenda to this note.

42. Furthermore, under article 19 (2), competitive negotiation can be used when:

> "(a) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings would therefore be impractical, provided

that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,

"(b) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods."

43. Similar conditions are found in article 22 (1) (b) and (c). In addition to prioritizing under these conditions recourse to competitive negotiation as the more competitive method, the Working Group may wish to consider whether it is justifiable to present the conditions as distinct and separate conditions, since both deal with an urgent and unforeseeable need for the goods, construction or services, either due to a catastrophic event or otherwise. The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

44. The Working Group may also wish to consider article 22 (1) (a) that justifies the recourse to single-source procurement if the goods, construction or services are available only from a particular supplier or contractor. The Working Group may wish to consider that the concerns expressed in paragraph 38 above with respect to the condition for use of restricted tendering in article 20 (a) (availability of goods, construction or services only from a limited number of suppliers or contractors) equally apply to the similar condition in article 22 (1) (a). The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

45. Finally, the Working Group may wish to reconsider the condition for use of single-source procurement listed in article 22 (2), which reads:

"(2) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, a procuring entity may engage in single-source procurement when procurement from a particular supplier or contractor is necessary in order to promote a policy specified in article 34 (4) (c) (iii) or 39 (1) (d), provided that procurement from no other supplier or contractor is capable of promoting that policy."

46. The Guide to Enactment explains that this provision refers to cases of serious economic emergency in which single-source procurement would avert serious harm (for example, where an enterprise employing most of the labour force in a particular region or city is threatened with closure unless it obtains a procurement contract). While the examples given in the Guide are very specific and narrow in scope, the provisions of the Model Law themselves are drafted very broadly. By reference to provisions of article 34 (4) (c) (iii) or 39 (1) (d), they may cover any situations where procurement involves such considerations as the balance of payments position and foreign exchange reserves of an enacting State, the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic-development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific

and operational skills. The list is not exhaustive since the enacting State may expand article 34 (4) (c) (iii) by including additional criteria.

47. Thus the Working Group may wish to reconsider the wording of article 22 (2) by replacing the broad references to articles 34 (4) (c) (iii) and 39 (1) (d) with the specific reference from the Guide to Enactment to cases of serious economic emergency in which single-source procurement would avert serious harm (and retain in the Guide the example given to illustrate practical situations covered by this Model Law provision). The Secretariat's drafting suggestions are presented in the revised text of the Model Law set out in the addenda to this note.

48. In addition, the Working Group may also wish to consider providing additional guidance in the Guide as regards some other aspects of the provisions. For example, the provisions refer to a public notice and an "adequate opportunity to comment", without clarifying whose comments are sought and the purpose or the effect of comments if received. The provisions are unusual for the Model Law and presumably may be linked to the role of local communities in public procurement. At its sixth session, the Working Group expressed the intention of highlighting the role of local communities in public procurement where appropriate, in particular at the procurement planning and contract implementation phases (see section D immediately below). If the Working Group decides to provide guidance as regards these provisions, the work on formulating such guidance in the revised Guide to Enactment will be deferred to a later stage, for the reasons set out in paragraph 4 above.

D. Community participation in procurement

49. At its sixth session, it was felt that most issues raised by community participation in procurement related primarily to the planning and implementation phases of a project. Given its growing importance and the possible need for enabling legislation, the Working Group agreed that it should review the provisions of the Model Law with a view to ensuring that they did not pose obstacles to the use of community participation as a requirement in project-related procurement. The Guide, it was further agreed, might provide additional guidance on the matter (A/CN.9/568, para. 122).

50. In reviewing the provisions of the Model Law in this context, the Working Group may wish to consider whether the provisions on evaluation criteria may pose obstacles to the use of community participation as a requirement in project-related procurement. Alternatively, the Working Group may wish to consider that any provisions addressing the topic should be included only in the Guide in the context of discussion of the procurement planning and contract implementation phases and as relevant to some specific provisions of the Model Law (for example, article 22 (2), see paragraph 48 above). If the Working Group decides to take this approach, the work on the relevant guidance in the revised Guide to Enactment will be deferred to a later stage for reasons set out in paragraph 4 above.

E. Simplification and standardization of the Model Law

1. Consideration in the Working Group

51. At its sixth session, the Working Group agreed that there was some room for improving the Model Law's structure and for simplifying its contents, by some reordering or by eliminating unnecessarily detailed provisions or moving them to the Guide. It was felt that the desired result should be a more user-friendly Model Law where all essential elements would be preserved and presented in an improved structure and in a simpler way. Recognizing that, in the process of introducing new topics into the Model Law, changes would inevitably have to be made in its structure, the Working Group was of the view that it would be preferable to revert to the proposals for simplification of the Model Law at a later stage (A/CN.9/568, para. 126).

52. At the following sessions, the Working Group touched upon various aspects of simplification and standardization of the Model Law, such as restructuring of the Model Law,[6] ensuring consistency in various provisions dealing with the same matters[7] and revising some articles of the Model Law on other grounds.[8] Some proposals for simplification and standardization of the Model Law involve issues of substance. The Working Group deferred taking decisions on any aspects of simplification and standardization of the Model Law until a later stage, after new procurement techniques and other substantive revisions to the Model Law had been considered.

53. The Secretariat held extensive consultations with various experts on various aspects of the simplification and standardization of the Model Law. In the section below, the Secretariat makes suggestions as regards each aspect of simplification and standardization discussed during those consultations.

2. Suggestions collated by the Secretariat

Scope of the Model Law

54. The Working Group may wish to reconsider the scope of the Model Law, notably as regards the defence and national security blanket exemptions (article 1 (2)). First of all, not all procurement in these sectors is so sensitive as to justify blanket exemptions from the provisions of the Model Law. Where, however, sensitive issues of national interest, security or defence are involved, the Model Law may provide special treatment, such as recourse to appropriate procurement methods that ensure confidentiality in the procurement proceedings. The importance of preserving confidentially should not however be interpreted as leading necessarily to single-source procurement: the procuring entity must still seek effective competition in such cases, for example by recourse to direct solicitation from a sufficient number of suppliers or contractors (see in this regard article 37 (3) (c)). Some provisions of the Model Law are already designed to accommodate sensitive procurement involving national defence or national security (see for example, articles 19 (1) (c), 22 (1) (f), 34 (4) (c) (iv), and 39 (1) (e)).

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[6] A/CN.9/615, paras. 37-38.
[7] A/CN.9/623, para. 102.
[8] A/CN.9/640, para. 37, A/CN.9/648, para. 94, and A/CN.9/664, paras. 75 and 88.

Bringing national defence and national security sectors in the general ambit of the Model Law would lead to the promotion of a harmonized procurement legal regime across various sectors in enacting States.

55. If the Working Group decides to take this approach, it would involve making a number of consequential changes to various provisions of the Model Law. This work would have to be deferred to a later date for reasons explained in paragraph 15 above. At this stage, the Working Group may wish to consider some alternative wording for article 1 in the revised Model Law set out in the addenda to this note.

General rules: chapter I

56. The Working Group deferred to a later stage its consideration of the steps described in tendering proceedings (chapter III) that might be considered to be issues that should be addressed from the perspective of general rules applicable to all procurement methods (A/CN.9/623, para. 102). This was on the understanding that any additional general rules would be located in chapter I of the Model Law.

57. The Secretariat identified the following issues that may be considered by the Working Group in this regard:

(a) Acceptance of tender and entry into force of procurement contract (article 36 in lieu of the current article 13, which is limited in scope and does not address acceptance of submissions in procurement methods other than tendering). The Secretariat's drafting suggestions are reflected in the revised Model Law set out in the addenda to this note;

(b) A single set of requirements as regards evaluation criteria (see paragraphs 26-27 above). The Secretariat's drafting suggestions are reflected in the revised Model Law set out in the addenda to this note;

(c) Optional recourse to tender securities in all procurement methods. The Secretariat's drafting suggestions are reflected in the revised Model Law set out in the addenda to this note;

(d) Prequalification proceedings: provisions relating thereto found in articles 24 and 25 should be consolidated with article 7 so that all provisions related to the prequalification proceedings are located in one place. The Secretariat's drafting suggestions are reflected in the revised Model Law set out in the addenda to this note.

58. In addition, and as regards article 7 (prequalification proceedings), the Working Group may wish to consider setting out the distinct purposes of article 7 and of article 6 in a clearer way. Currently, an overlap between the two articles exists. Article 6 (1) (a) refers to the ascertainment of the qualifications of suppliers or contractors at any stage of the procurement proceedings while article 7 (1) refers to the ascertainment of qualifications of suppliers and contractors prior to the submission of tenders. Both articles deal with specific procurement proceedings. The Working Group may wish to consider the suggested relevant changes in the revised Model Law set out in the addenda to this note.

59. Furthermore, as mentioned in section A above, the Working Group may wish to consider that article 7 and provisions on pre-selection in the PFIPs instruments

should be conformed (see paragraph 22 above). The Working Group may wish to consider the suggested changes in the revised Model Law set out in the addenda to this note.

60. Additionally, at its thirteenth and fourteenth sessions, the Working Group considered revisiting at a future session the information to be published under article 14 (public notice of procurement contract awards). Particular reference was made to the disclosure of the names of supplier(s) or contractor(s) selected to become the party or parties to the procurement contract or a framework agreement (A/CN.9/648, para. 94, and A/CN.9/664, para. 88). The Working Group may wish to consider the suggested changes in the revised Model Law set out in the addenda to this note.

61. The Working Group also deferred the consideration of article 11 (record of procurement proceedings) as a whole until after all other revisions to the Model Law had been agreed upon (A/CN.9/640, para. 37) as well as article 12 (1) (A/CN.9/623, para. 36). No changes, other than consequential changes in the light of other revisions to the Model Law, are suggested to these articles at this stage pending their review by the Working Group.

62. Moreover, during the Working Group's deliberations, a view has often been voiced that some long and repetitive references commonly used in the Model Law, such as references to "tenders, proposals, offers, quotations or bids" in articles 12, 12 bis and 15, should be replaced by more generic terms that could be defined in article 2 of the Model Law (see also references to "solicitation documents and other documents for solicitation of proposals, offers or quotations"). The Working Group deferred its decision as regards any revisions to article 2 (definitions), including whether any new definitions would be justifiable (e.g. A/CN.9/664, para. 75). The Working Group may wish to consider the suggested additional definitions for article 2 in the revised Model Law set out in the addenda to this note.

63. In addition, the Working Group may wish to consider supplementing article 2 with an expanded glossary of terminology in the Guide. If the Working Group agrees that such a glossary should be included in the Guide, this work would have to be deferred to a later stage for the reasons set out in paragraph 4 above.

64. Finally, the Working Group deferred taking decisions on changing the location of some provisions in chapter I, for example by putting provisions dealing with a similar cluster of issues, such as articles 12, 12 bis and 15, closer together. The Working Group may wish to consider the suggested structural changes in the revised Model Law set out in the addenda to this note.

Procurement methods: chapters II-V

65. As regards purely structural changes to these chapters, the Working Group decided to consider at a future time:

(a) Whether the conditions for use and procedures to be applied in particular procurement methods should appear in different chapters of the Model Law as is the case at present or should be put together;

(b) The location of new provisions on ERAs and framework agreements and consequential addition and naming of sections and renaming of titles of the existing chapters.

66. The Working Group may wish to consider the suggested structural changes in the revised Model Law set out in the addenda to this note.

67. As regards more substantive changes, the Working Group may wish to reconsider one basis on which the choice of a procurement method is currently made in the Model Law (article 18, being whether goods, works or services are procured). This approach is not always justifiable (for example, the selection procedure for services without negotiations (article 42) may be equally appropriate for procurement of more complex goods and construction). It also leads to repetitions and inconsistencies in many provisions (such as in chapters III and IV, see para. 23 above).

68. An alternative approach that would be more consistent with the aims and objectives of the Model Law and that would also significantly simplify and standardize the Model Law would be to base a choice of procurement methods on the consideration of complexity in identifying and evaluating subjects being procured, regardless whether the subject is goods, construction or services. Goods, construction or services which detailed specifications or characteristics can be formulated at the outset of the procurement and which can be evaluated through quantifiable criteria can be procured through straightforward procedures that do not involve negotiations (such as through open or restricted tendering (one-envelope system), open or restricted request for proposals without negotiation (two-envelope system, equivalent to the selection procedure in article 42 of the Model Law) and request for quotations). Procurement of more complex goods, construction or services, which specifications or characteristics have to be identified through negotiations or which cannot be evaluated through quantifiable criteria but rather by such non-quantifiable criteria as the effectiveness of a proposal or the most satisfactory solution to the procuring entity's needs, can only be procured through procurement methods involving negotiations (two-stage tendering, open or restricted request for proposals with simultaneous or consecutive negotiations, which may involve a single stage or two stages for requesting proposals as in the PFIPs instruments, and competitive negotiation).

69. In straightforward procurement not involving negotiations, the Working Group may wish to require the procuring entity to choose the most competitive method. Thus open (international) solicitation should take place by default unless restricted or domestic tendering is justified on the grounds specified in the Model Law, as currently envisaged by the default rules in chapters I and II. In the procurement methods involving negotiations, the Working Group may consider that more discretion should be given to the procuring entity to decide which method is the most appropriate for achieving the desired outcome. Only exceptional circumstances identified in the Model Law would justify recourse to single-source procurement.

70. The revised Model Law set out in the addenda to this note follows this approach which is a more detailed application of the current principles of the Model Law. It sets out provisions for procurement methods not involving negotiations. Further work on procurement methods involving negotiations will be deferred to a later date for reasons explained in paragraph 15 above. In particular, additional work would need to be done to harmonize the Model Law provisions on procurement methods involving negotiations and the provisions of the PFIPs instruments as regards selection procedures.

F. Legalization of documents

71. At its sixth session, the Working Group noted that article 10 of the Model Law provided that if the procuring entity required the legalization of documents, it should not impose any requirements other than those provided by the general law for the type of documents in question. However, that article imposed no restrictions on the power of procuring entities to call for legalization of documents. In practice, it was said, procuring entities sometimes required the legalization of documents by all those who needed to demonstrate their qualifications to participate in a procurement procedure, which could be time-consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers might be passed on to procuring entities. The Working Group agreed that it would be desirable to limit the power of procuring entities by requiring the procuring entity to ask legalization of documentation from a successful supplier alone. In doing so, the Working Group agreed that it could consider in due course whether article 10 could be combined with article 6 (5) (A/CN.9/568, paras. 127-128).

72. The Working Group may wish to consider the Secretariat's relevant changes in the revised Model Law set out in the addenda to this note.