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**United Nations Commission
on International Trade Law
Working Group I (Procurement)
Sixteenth session
New York, 26-29 May 2009**

Annotated provisional agenda for the sixteenth session of Working Group I (Procurement)

I. Provisional agenda

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

II. Composition of the Working Group

1. The Working Group is composed of the following States: Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Benin, Bolivia, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt, El Salvador, Fiji, France, Gabon, Germany, Greece, Guatemala, Honduras, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Latvia, Lebanon, Madagascar, Malaysia, Malta, Mexico, Mongolia, Morocco, Namibia, Nigeria, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Serbia, Singapore, South Africa, Spain, Sri Lanka, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.



2. States not members of the Commission and international governmental organizations may attend the session as observers and participate in the deliberations. In addition, invited international non-governmental organizations may attend the session as observers and represent the views of their organizations on matters where the organization concerned has expertise or international experience so as to facilitate the deliberations at the session.

III. Annotations to agenda items

Item 1. Opening of the session

3. The sixteenth session of Working Group I (Procurement) is scheduled to be held at the United Nations headquarters in New York, from 26-29 May 2009 (a four day session is scheduled since 25 May is an official holiday in New York). Meeting hours will be from 10 a.m. to 1 p.m., and from 3 p.m. to 6 p.m., except on Tuesday, 26 May 2009, when the session will commence at 10.30 a.m.

Item 2. Election of officers

4. In accordance with its practice at previous sessions, the Working Group may wish to elect a Chairman and a Rapporteur.

Item 4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

1. Documentation for the sixteenth session

5. The Working Group will have before it notes by the Secretariat addressing (a) outstanding issues in the proposals for revising the 1994 Model Law (by reference to the drafting history of the provisions and to equivalent provisions in applicable international instruments) (A/CN.9/WG.I/WP.68 and Add.1), and (b) a revised text of the Model Law (A/CN.9/WG.I/WP.69 and addenda).¹ As indicated at the fifteenth session of the Working Group (A/CN.9/668, para. 278), one delegate may present additional proposals on provisions for procurement methods involving negotiations, and any such proposals will be made available at the session (see, further, para. 89 below).

6. In addition, States and interested organizations in planning the attendance of their representatives may wish to note the following relevant background documents, all of which have previously been distributed and remain available in electronic format on the UNCITRAL website, and will not be reprinted for distribution:

(a) The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its accompanying Guide to Enactment (1994); the UNCITRAL Model

¹ Due to resource constraints, environmental considerations and the volume of the document, a limited number of copies of this document will be reprinted and made available in the meeting room. Therefore, delegates and observers are kindly requested to bring their own copies as well as other background documents mentioned in the provisional agenda to the meeting and limit requests for additional copies. The documents may be downloaded from the UNCITRAL website (<http://www.uncitral.org>).

Law on Electronic Commerce (1996); the UNCITRAL Model Law on Electronic Signatures (2001); the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003); and the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000);

(b) Reports of Working Group I (Procurement) on the work of its sixth to fifteenth sessions (A/CN.9/568, 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, A/CN.9/664 and A/CN.9/668);

(c) Notes by the Secretariat on: (i) issues arising from the increased use of electronic communications in public procurement (A/CN.9/WG.I/WP.31); (ii) issues arising from recent experience with the UNCITRAL Model Law on Procurement of Goods, Construction and Services (A/CN.9/WG.I/WP.32); (iii) issues arising from the use of electronic communications in public procurement (A/CN.9/WG.I/WP.34 and Add.1 and 2); and (iv) remedies, conflicts of interest and services procurement in the Model Law (A/CN.9/WG.I/WP.64);

(d) Comparative studies by the Secretariat addressing: (i) practical experience with the use of electronic (reverse) auctions in public procurement (A/CN.9/WG.I/WP.35 and Add.1); (ii) abnormally low tenders (A/CN.9/WG.I/WP.36 and Corr.1); (iii) national, regional and international practices with the publication of procurement-related information not covered by the Model Law (A/CN.9/WG.I/WP.39 and Add.1); and (iv) issues arising from the use of suppliers' lists (A/CN.9/WG.I/WP.45 and Add.1); and

(e) Drafting materials prepared by the Secretariat on: (i) the use of electronic communications in public procurement and publication of procurement-related information (A/CN.9/WG.I/WP.38 and Add.1; A/CN.9/WG.I/WP.42 and Add.1; and A/CN.9/WG.I/WP.47); (ii) the use of electronic reverse auctions in public procurement (A/CN.9/WG.I/WP.40 and Add.1; A/CN.9/WG.I/WP.43 and Add.1; A/CN.9/WG.I/WP.48, 51, 55 and 59); (iii) the use of framework agreements and dynamic purchasing systems in public procurement (A/CN.9/WG.I/WP.44 and Add.1; A/CN.9/WG.I/WP.52 and Add.1; and A/CN.9/WG.I/WP.62) (related thereto is a note by the Secretariat transmitting a proposal by the United States regarding issues of framework agreements, dynamic purchasing systems, and anti-corruption measures (A/CN.9/WG.I/WP.56)); (iv) the use of electronic communications in public procurement, publication of procurement-related information, and abnormally low tenders (A/CN.9/WG.I/WP.50, 54 and 58); (v) the use of electronic communications in public procurement, publication of procurement-related information, electronic reverse auctions and abnormally low tenders (A/CN.9/WG.I/WP.61); (vi) Guide to Enactment text addressing the use of framework agreements in public procurement (A/CN.9/WG.I/WP.63); and (vii) a revised text of the Model Law (A/CN.9/WG.I/WP.66 and Add.1-5).

7. UNCITRAL documents are posted on the UNCITRAL website (<http://www.uncitral.org>) upon their issuance in all the official languages of the United Nations. Delegates may wish to check the availability of the document referred to in paragraph 5 above by accessing the Working Group's page in the "Commission and Working Groups Documents" section of the UNCITRAL website. The documents referred to in paragraph 6 (b) to (e) are available on the same webpage. The documents referred to in paragraph 6 (a) are available on the

“Procurement and Infrastructure Development” page in the “UNCITRAL Texts and Status” section of the UNCITRAL website.

2. Previous deliberations

8. At its thirty-seventh session, in 2004, the Commission decided that the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”)² would benefit from being updated 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. The Commission entrusted the elaboration of proposals for the revision of the Model Law to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations (A/59/17, paras. 80-82).

9. The Working Group began its work at its sixth session (Vienna, 30 August-3 September 2004). The Working Group continued the work at ten subsequent sessions 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 as agreed upon at its sixth session (see paras. 11, 15 and 64 below).

10. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, the Commission took note of the reports of the sixth (Vienna, 30 August-3 September 2004), seventh (New York, 4-8 April 2005), eighth (Vienna, 7-11 November 2005), ninth (New York, 24-28 April 2006), tenth (Vienna, 25-29 September 2006), eleventh (New York, 21-25 May 2007), twelfth (Vienna, 3-7 September 2007) and thirteenth (New York, 7-11 April 2008) sessions of the Working Group (A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648, respectively). It commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, paras. 170-172, A/61/17, paras. 190-192, A/62/17, Part one, paras. 166-170, and A/63/17, para. 307). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and its Guide to Enactment (the “Guide”),³ should take into account issues of conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192) (for the Working Group’s decision in this regard, see para. 64 below). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its

² 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 the Yearbook of the United Nations Commission on International Trade Law, 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/pdf/english/texts/procure/ml-procurement/ml-procure.pdf>.

³ For the text of the Guide, see document A/CN.9/403, reproduced in the Yearbook of the United Nations Commission on International Trade Law, vol. XXV: 1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II. The Guide is available in electronic form at the UNCITRAL website: <http://www.uncitral.org/pdf/english/texts/procure/ml-procurement/ml-procure.pdf>.

forthcoming sessions in order to expedite progress in its work (A/62/17, Part one, para. 170) (for the Working Group's decisions in this regard, see paras. 78, 83 and 87 below). At its forty-first session, the Commission invited the Working Group to proceed expeditiously, with a view to permitting the finalization and adoption of the revised Model Law and Guide within a reasonable time (A/63/17, para. 307).

**(a) Summary of conclusions at the Working Group's sixth session
(Vienna, 30 August-3 September 2004)**

11. The Working Group considered the following 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) 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.

12. With respect to electronic publication of procurement-related information, the Working Group supported optional electronic publication of information that the Model Law currently required States to publish, with guidance in the Guide as to the value of electronic publication (A/CN.9/568, paras. 21 and 27). The Working Group noted that it should further consider whether additional information relevant to potential suppliers might also be addressed (A/CN.9/568, para. 28).

13. Regarding the use of electronic communications in the procurement process, the Working Group agreed to formulate provisions that expressly enabled and, where appropriate, promoted the use of electronic communications, possibly subject to a requirement that the means of communication should not unreasonably restrict access to the procurement (A/CN.9/568, para. 39).

14. With respect to controls over the use of such electronic communications, the Working Group recognized the need for appropriate controls as regards security, confidentiality and authenticity of submissions, and integrity of data, for which special rules and standards might need to be formulated (A/CN.9/568, para. 41).

15. With respect to ERAs, the Working Group confirmed its willingness to consider introducing enabling provisions for their optional use. However, the Working Group agreed that it would be useful to have more information on the existing use of ERAs in practice, including approaches for handling the risk of abnormally low prices (A/CN.9/568, para. 54).

16. With respect to the use of suppliers' lists, recognizing that lists were in use in various States, it was agreed that it would be appropriate to acknowledge their existence and use as optional lists (A/CN.9/568, paras. 61 and 63), even if they were not consistent with the aims and objectives of the Model Law.

17. There was general agreement that the Commission should acknowledge the fact that framework agreements, even if not currently mentioned in the Model Law, were used in practice. However, views differed on how to provide for them (A/CN.9/568, para. 74). It was agreed that the Working Group should first examine

whether and to what extent the Model Law, in its current form, created obstacles to the use of framework agreements (A/CN.9/568, para. 78).

18. With respect to procurement of services, the Working Group 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).

19. With respect to evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies, the Working Group recognized that existing provisions of the Model Law provided sufficient balance between the need for economy and efficiency and allowing an enacting State to address other policy goals through the procurement. However, some of those policy goals listed in the Model Law were outdated and the Working Group would consider whether to retain them at a future session. 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).

20. With respect to remedies and enforcement, the Working Group agreed that: (a) it would be useful to provide further guidance on review provisions that national laws could incorporate; (b) recognizing the fact that there were different systems, some of which favoured review through the courts while others favoured independent administrative review, the Working Group should leave various options open for States; (c) provisions related to the judicial review process should be left for enacting States; and (d) the list of exceptions in article 52 (2) should be deleted. However, the Guide should indicate that enacting States might wish to exclude some matters from the review process (A/CN.9/568, para. 112).

21. The Working Group agreed to consider whether to circumscribe conditions under which 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).

22. 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).

23. With respect to simplification and standardization of the Model Law, the Working Group agreed that there was some room for reordering or 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 (A/CN.9/568, para. 126).

24. With respect to the legalization of documents, the Working Group agreed that it would be desirable to limit the power of procuring entities to require 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, para. 128).

(b) Summary of conclusions at the Working Group's seventh session (New York, 4-8 April 2005)

25. The Working Group proceeded with the in-depth consideration of issues arising from the use of electronic communications in the procurement process, including in the course of ERAs, and issues related to ALTs, on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.34 and 35 and their addenda and A/CN.9/WG.I/WP.36 and Corr.1). It requested the Secretariat to prepare drafting suggestions for its eighth session, reflecting the relevant deliberations of the Working Group at the session. The Working Group decided, time permitting, to take up the topic of framework agreements at its eighth session (A/CN.9/575, para. 9).

(i) The use of electronic communications in the procurement process

26. The Working Group agreed to continue its consideration of new provisions to be incorporated in the Model Law, applying general principles of functional equivalence and technological neutrality. It was agreed that: (i) these provisions would not stipulate the conditions for functional equivalence between electronic and written tenders, to be treated in general law on electronic commerce; (ii) provisions regarding electronic communications would be included in the Model Law as needed for procurement itself; and (iii) the Guide would provide necessary guidance for enacting States (A/CN.9/575, paras. 12 and 34).

27. The Working Group agreed that the procuring entity should be able to select any form of communication, without being required to justify its choice, provided that the chosen form (i) should not represent an obstacle to access to the procurement process, (ii) would be justified to promote economy and efficiency in the procurement process and (iii) would not result in discrimination among potential suppliers or contractors or otherwise substantially limit competition. The Working Group also agreed that the supplier should not be able to select the means of communication to be used, and that the principles regarding the use of communications should apply to the form of communications as set out in article 9 of the Model Law (A/CN.9/575, paras. 25 and 32-33).

(ii) The electronic publication of procurement-related information

28. The Working Group agreed: (i) that the scope of article 5 of the Model Law should be expanded to cover all procurement-related information that the Model Law required to be published, including legal texts; (ii) to consider whether further procurement-related information that the Model Law did not currently require to be published should fall within the scope of article 5; (iii) to consider the results of a study of relevant publication practices in national and international systems to be presented to the Working Group at its eighth session; (iv) that the main principle would be that any means of publication could be selected provided that it complied with the "accessibility standards" referred to in paragraph 27 above; and (v) that this principle applied to all procurement-related information that the Model Law would require or permit to be published (A/CN.9/575, paras. 24-27).

(iii) *Electronic opening and acceptance of tenders*

29. The Working Group requested the Secretariat to provide drafting materials for its consideration with respect to article 33 to accommodate any system for opening tenders, whether electronic or traditional (A/CN.9/575, para. 42).

30. The Working Group concluded that no specific provision to enable the acceptance of tenders and entry into force of a procurement contract electronically would be required, but the Guide would address relevant requirements (A/CN.9/575, para. 50).

(iv) *Record of procurement proceedings*

31. The Working Group agreed to consider an expanded article 11 to be incorporated in the Model Law, based on the broader concepts of dissemination of information and accessibility standards, and that procurement regulations might establish procedures for maintaining and accessing electronic records, including measures to ensure the integrity, accessibility and confidentiality of information (A/CN.9/575, paras. 45-47).

(v) *Electronic reverse auctions*

32. Taking account of the increasing use of ERAs and the twin aims of harmonization and promotion of best practice, the Working Group agreed: (i) to include in the revised Model Law a general enabling provision providing the key principles for the use of ERAs, notably the conditions for and limitations to the use of ERAs; (ii) to confine ERAs under the Model Law to the procurement of goods, works and services whose non-price criteria could be quantified; (iii) to address in the Guide the use of ERAs in detail; and (iv) to continue its deliberations taking into account the approach of the multilateral Government Procurement Agreement of the World Trade Organization as regards the use of ERAs, and that goods, services or construction to be procured by ERAs should be capable of clear specification, that the types of purchases might need to be restricted, and that there be a requirement for a competitive market (A/CN.9/575, paras. 60-62, 66 and 67).

33. The Working Group deferred any decision on the question of whether non-electronic reverse auctions should be provided for in the Model Law (A/CN.9/575, para. 65).

(vi) *Abnormally low tenders*

34. The Working Group agreed to: (i) allow procuring entities to investigate possible ALTs through a price justification procedure; and (ii) provide guidance in the Guide taking into consideration discussions in document A/CN.9/WG.I/WP.36 and Corr.1 (A/CN.9/575, paras. 76 and 82).

(c) Summary of conclusions at the Working Group's eighth session (Vienna, 7-11 November 2005)

35. The Working Group continued the in-depth consideration of issues arising from the use of electronic communications in the procurement process as well as of ERAs and ALTs, on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.38, 39 and 40 and their addenda). It requested the Secretariat to revise the presented

drafting materials for further consideration at its ninth session and provide further information on pre-qualification, qualification and ranking of bidders in the context of ERAs and on the use of tender securities in ERAs (A/CN.9/590, paras. 10, 49, 85 and 100).

(i) *Scope and extent of revisions of the Model Law and the Guide*

36. The Working Group deferred its consideration of whether the Model Law should address the procurement planning and contract administration phases (A/CN.9/590, para. 13) and whether the Guide should provide greater detail of matters to be addressed in regulations or for draft regulations themselves (A/CN.9/590, paras. 13-15).

(ii) *The use of electronic communications in the procurement process*

37. The Working Group decided that it would continue to address “functional equivalence” in communicating, publishing, exchanging or storing information or documents on the basis of a draft revised by the Secretariat (A/CN.9/590, para. 26). The Working Group requested the Secretariat to prepare a revised draft for the “accessibility standards”, based on the alternative text proposed at the session (A/CN.9/590, para. 33).

38. The Working Group also: (i) requested the Secretariat to revise drafting suggestions for article 9 of the Model Law (Form of communication) in the light of the close interaction between those provisions and the provisions on “functional equivalence” and “accessibility standards” (A/CN.9/590, para. 42); (ii) concluded that the text of the Model Law should not include a definition of the term “electronic” or related terms and instead the Guide should describe those concepts (A/CN.9/590, para. 43); (iii) agreed to the proposed text addressing the legal value of procurement contracts concluded electronically (A/CN.9/590, para. 44); and (iv) made proposals for the revision of draft provisions addressing requirements to maintain a record of the procurement proceedings (A/CN.9/590, para. 45), as well as for the revision of draft provisions addressing electronic submission (A/CN.9/590, para. 47) and opening of tenders (A/CN.9/590, para. 50).

39. The Working Group made some suggestions for the revision of the proposed text for the Guide (A/CN.9/590, paras. 17, 18, 33, 40-43 and 45) and deferred the consideration of the remaining parts of the Guide until after it had considered the revised drafting suggestions for the Model Law (A/CN.9/590, paras. 48 and 51).

(iii) *Electronic publication of procurement-related information*

40. The Working Group considered revisions to the proposed text (A/CN.9/590, paras. 57-59 and 62) and deferred the consideration of some issues arising from the publication of procurement-related information by electronic means (A/CN.9/590, para. 63).

(iv) *Electronic reverse auctions*

41. The Working Group made drafting suggestions with respect to the proposed new articles 19 bis (Conditions for use of electronic reverse auctions) (A/CN.9/590, paras. 74, 75 and 79), 47 bis (Conduct of electronic reverse auctions in the pre-auction period) (A/CN.9/590, para. 86) and 47 ter (Conduct of electronic

reverse auctions during the auction itself) (A/CN.9/590, paras. 88-91), and to the proposed revisions to articles 11, 25, 27, 31 and 34 of the Model Law (A/CN.9/590, paras. 94, 96, 97, 99, 101 and 102).

42. The Working Group noted that it would not be possible to finalize its deliberations on the remaining provisions until the resolution of the following issues: (i) whether ERAs should be allowed in the revised Model Law as a procurement method or as a phase in other procurement methods (A/CN.9/590, para. 65); (ii) the desirability of approval by a third party of the use of ERAs (article 19 bis (1)) (A/CN.9/590, para. 68); (iii) types of procurement suitable for ERAs (A/CN.9/590, para. 73); (iv) evaluation criteria suitable for ERAs (A/CN.9/590, para. 78); (v) options available to a procuring entity should the successful bidder fail to enter into a procurement contract (A/CN.9/590, para. 92); and (vi) location in the Model Law of provisions on ERAs (A/CN.9/590, paras. 103-105) (A/CN.9/590, paras. 81, 86, 87 and 102).

43. Some drafting suggestions were made for the revision of some parts of the proposed text for the Guide (A/CN.9/590, paras. 66, 78, 83, 89, 91, 93, 97 and 100). The consideration of other parts of the proposed text for the Guide was deferred (A/CN.9/590, paras. 86 and 93).

(v) *Abnormally low tenders*

44. The Working Group decided that minimum provisions would be included in the Model Law, supplemented by detailed discussion in the Guide on safeguards necessary to prevent arbitrary decisions and abusive practices (A/CN.9/590, para. 109). The Working Group gave general instructions for preparing the revised provisions (A/CN.9/590, para. 109) and specific drafting suggestions for article 34 (A/CN.9/590, para. 110) and the accompanying Guide text (A/CN.9/590, paras. 107, 109 and 111).

**(d) Summary of conclusions at the Working Group's ninth session
(New York, 24-28 April 2006)**

45. The Working Group continued the in-depth consideration of the use of electronic communications and ERAs in the procurement process on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.42 and Add.1, and A/CN.9/WG.I/WP.43). Consideration of the remainder of A/CN.9/WG.I/WP.43, and A/CN.9/WG.I/WP.43/Add.1 (some aspects of ERAs and ALTs), A/CN.9/WG.I/WP.44 (framework agreements) and A/CN.9/WG.I/WP.45 (suppliers' lists), and their addenda, was deferred to the Working Group's tenth session (A/CN.9/595, para. 9).

(i) *The use of electronic communications in the procurement process*

46. The Working Group confirmed the procuring entity would select the means and form of communications. It was decided that the text of the Model Law should expressly allow more than one means of communications to be selected (A/CN.9/595, paras. 59 and 60). The Working Group preliminarily agreed on the wording regarding the form and use of communications in the procurement process (A/CN.9/595, paras. 36, 37, 39, 40 and 44). A number of drafting suggestions were

made for provisions of the Guide related to these articles (A/CN.9/595, paras. 11, 12, 14, 18 to 22, 30, 34, 38, 43 and 61).

47. The Working Group preliminarily agreed on the wording of article 30 (5) (a) dealing with submission of tenders (A/CN.9/595, para. 63). A number of drafting suggestions were made for the revision of accompanying Guide text (A/CN.9/595, paras. 53, 57, 58 and 61).

48. The Working Group preliminarily agreed on amendments to the final part of the proposed article 33 (4) dealing with electronic opening of tenders (A/CN.9/595, para. 65). Drafting suggestions were made for the revision of draft Guide provisions related to the legal value of procurement contracts concluded electronically and to requirements to maintain a record of the procurement proceedings (A/CN.9/595, paras. 47-51).

(ii) *Electronic publication of procurement-related information*

49. The prevailing view was that the current scope of article 5 should be maintained and that all proposed additions (A/CN.9/WG.I/WP.42, para. 38) should be reflected only in the Guide. The Working Group considered the option of splitting the article into two paragraphs (A/CN.9/595, paras. 67, 71, 72 and 74).

50. The Secretariat was requested to revise draft provisions addressing publication of information on forthcoming procurement opportunities, for consideration and decision by the Working Group at its tenth session (A/CN.9/595, para. 76).

51. Drafting suggestions were made to the proposed provisions for the Guide related to article 5 and to the publication of forthcoming procurement opportunities (A/CN.9/595, para. 79).

(iii) *Electronic reverse auctions*

52. The Working Group preliminarily agreed on the wording of draft article 36 bis, to be included in the end of chapter III “Tendering proceedings”, as a new section IV “Electronic reverse auctions” (A/CN.9/595, para. 95). The Working Group’s understanding was that ERAs would essentially be a part of tendering proceedings, while not excluding the possibility of using it as a stand-alone method or a phase in multi-stage framework agreements. It was also agreed that no approval of a third party would be required for ERAs to be used (A/CN.9/595, para. 103). Drafting suggestions were made to the proposed text of draft article 36 bis and the accompanying Guide text (A/CN.9/595, paras. 98, 100-102 and 104).

53. The Working Group requested the Secretariat to redraft the proposed article 47 ter so that it would contemplate distinct types of ERAs and the withdrawal of suppliers from an ERA before its closure, with sufficient safeguards against fraud and abuse (A/CN.9/595, para. 108). The Working Group agreed to include an effective competition safeguard (A/CN.9/595, para. 110). Consequential changes were agreed for the Guide (A/CN.9/595, para. 109). The Working Group agreed to consider at its next session whether the procuring entity should have the option, or be required, to withdraw the ERA if there was a risk to effective competition, in the light of whether or not suppliers should be permitted to withdraw from the ERA. The Working Group considered that the Guide text should address when and how

suppliers might withdraw from the ERA process before its closure (A/CN.9/595, para. 111).

(iv) *Scope and extent of revisions of the Model Law and the Guide*

54. The Working Group agreed to continue at a future session its consideration of the nature of the Guide and the scope and extent of revisions of the Model Law and the Guide, taking into account the suggestions made at the session, including on whether the Model Law and/or the Guide should address the procurement planning and contract administration stages. As regards the nature of the Guide, it was agreed that drafting regulations as part of more general guidance addressed to the audience broader than legislators would not be feasible since it would require a level of specificity even higher than that required for the Model Law, and would need to reflect divergent systems. A preference was expressed for using the verb “may”, not “will”, in the Guide, when referring to general legislative issues to be addressed by enacting States (A/CN.9/595, paras. 85 and 86).

(e) **Summary of conclusions at the Working Group’s tenth session
(Vienna, 25-29 September 2006)**

55. The Working Group considered the issues related to: (i) the use of electronic means of communication in the procurement process; (ii) aspects of the publication of procurement-related information, including revisions to article 5 of the Model Law and the publication of forthcoming procurement opportunities; (iii) ERAs; (iv) ALTs; and (v) framework agreements. It used the notes by the Secretariat (A/CN.9/WG.I/WP.43 and 44 and their addenda, and WP.47 and 48) as a basis for its deliberations. The Working Group requested the Secretariat to revise the drafting materials reflecting the deliberations at the session. The Working Group deferred consideration of A/CN.9/WG.I/WP.45 and its addendum dealing with the issues of suppliers’ lists to a future session (A/CN.9/615, paras. 10-11).

(i) *The use of electronic communications in the procurement process*

56. The Working Group decided that its future consideration of general conditions for communications in public procurement should be based on a consolidated article addressing both form and means of communications. A number of drafting suggestions were made as regards provisions of such a consolidated article as well as to articles 30 (5) (Submission of tenders) and 33 (4) (Opening of tenders) and to accompanying Guide texts (A/CN.9/615, paras. 17-26, 28, 30 and 32).

(ii) *Publication of procurement-related information*

57. The Working Group agreed to split the current text of article 5 of the Model Law into two paragraphs to address different types of information, with appropriate safeguards (A/CN.9/615, para. 33).

58. The Working Group agreed that enabling provisions on publication of information on forthcoming procurement opportunities should be included in the Model Law, based on the wording of the text contained in paragraph 33 of document A/CN.9/WG.I/WP.47. Drafting suggestions were made as regards Guide text that should accompany such provisions (A/CN.9/615, para. 36).

(iii) Electronic reverse auctions

59. The Working Group agreed on a preliminary basis to include provisions stipulating the conditions for the use of ERAs to chapter II and provisions on procedural matters of ERAs to chapter V of the Model Law, enabling the use of ERAs on a stand-alone basis and in appropriate procurement methods and techniques (A/CN.9/615, paras. 37 and 50).

60. Drafting suggestions were made to the text on conditions for the use of ERAs, and to accompanying provisions of the Guide (A/CN.9/615, paras. 41-47). No common understanding in the Working Group was reached as regards whether ERAs were to be used exclusively in procurement where all criteria for determining a successful tender can be expressed in monetary terms and evaluated automatically, or also in more complex procurement (A/CN.9/615, paras. 44, 45, 51, 54 and 55).

61. The understanding of the Working Group was that provisions on pre-auction and auction procedures should be revised to ensure consistency with the conditions for the use of ERAs and as contemplated in paragraph 59 above (A/CN.9/615, paras. 49, 58 and 59). Drafting suggestions were made to the provisions on pre-auction and auction procedures, and to Guide text that would accompany such provisions (A/CN.9/615, paras. 52-56 and 61-63). The Working Group considered possible consequential revisions to the relevant Model Law provisions (A/CN.9/615, paras. 65-71) and deferred decisions on some outstanding issues to a future session (A/CN.9/615, paras. 52 (viii), 60, 61 (iii) and (iv), 63, 65, 67 (ii), 69 and 71).

(iv) Abnormally low tenders

62. Drafting suggestions were made as regards provisions on ALTs and the accompanying Guide text (A/CN.9/615, paras. 73, 74 and 76-78). The Secretariat was requested to propose the appropriate location for the provisions on ALTs in the Model Law, taking into account that the issue should not be limited to tendering proceedings, and that risks of ALTs should be examined and addressed by the procuring entity at any stage of the procurement, including through qualification of suppliers (A/CN.9/615, para. 75). The Working Group deferred taking position on whether any decision regarding ALTs by the procuring entity should be open to review (A/CN.9/615, para. 74).

(v) Framework agreements

63. The Working Group, recognizing the widespread use of framework agreements and noting positive experience with their use in some jurisdictions (and trends towards their express regulation), entrusted the Secretariat with the preparation of drafting materials for the Model Law and the Guide that would set out conditions for the use of framework agreements and provide necessary safeguards against commonly encountered problems in their use, such as risks of collusion among suppliers, corruption and anti-competitiveness (A/CN.9/615, paras. 11 and 81).

(vi) Other business

64. The Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide (A/CN.9/615, paras. 11 and 82-85).

65. The Working Group considered the project timetable and expressed its desire to complete its work on the preparation of the revised text of the Model Law in 2008 (A/CN.9/615, para. 13). Noting that the revised Guide might contain not only guiding principles for legislators and regulators but also practical guidance for operators (such as procurement officials), the Working Group requested the Secretariat to prepare first, with assistance of experts, the guidance to legislators and regulators, which would be considered together with the revised Model Law text by the Working Group at its final session before they were presented to the Commission. The Secretariat would subsequently be entrusted with drafting any remaining aspects of the Guide for consideration by the Working Group (A/CN.9/615, para. 14).

**(f) Summary of conclusions at the Working Group's eleventh session
(New York, 21-25 May 2007)**

66. The Working Group continued consideration of the issues related to the topics enumerated in paragraph 55 above, on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.50-52), as well as the question of simplification and standardization of the Model Law by reference to the example of article 36. It requested the Secretariat to revise the drafting materials contained in the notes by the Secretariat (A/CN.9/WG.I/WP.50 and 51), reflecting the deliberations at the session. It deferred consideration of documents A/CN.9/WG.I/WP.45 and its addendum dealing with the issues of suppliers' lists and A/CN.9/WG.I/WP.52/Add.1 dealing with the issues of dynamic purchasing systems, to a future session. The Working Group noted that any time frame to be agreed for the completion of the project should take into account the time necessary to consider and address issues of conflicts of interest in revisions to the Model Law and the Guide (A/CN.9/623, paras. 12 and 13).

67. As regards aspects of the use of electronic means of communication in the procurement process, amendments were proposed to draft articles 5 bis (Communications in procurement) and 30 (5) addressing submission of tenders (A/CN.9/623, paras. 15 to 24), and the Working Group preliminarily agreed on the wording of draft article 33 (2) addressing presence at the opening of tenders (A/CN.9/623, para. 25). Suggestions were made for Guide text that would accompany the relevant provisions (A/CN.9/623, paras. 15, 19, 21, 23, 24 and 25).

68. As regards aspects of the publication of procurement-related information, amendments were proposed to draft article 5 and to the provisions on publication of information on forthcoming procurement opportunities, including incorporation of these provisions as a new paragraph 3 of draft article 5 (A/CN.9/623, paras. 26, 27, 30 and 31). Suggestions were made for Guide text that would accompany an expanded article 5 (A/CN.9/623, paras. 29 and 32).

69. As regards the topic of ALTs, amendments were proposed to a new draft article 12 bis containing provisions on ALTs (A/CN.9/623, paras. 33 to 41) and to the Guide text to accompany these provisions (A/CN.9/623, paras. 42, 48 and 49). No agreement was reached on whether the procuring entity's right to reject an ALT under draft article 12 bis had to be reserved in the solicitation or equivalent documents, and the Working Group agreed to continue considering that issue at its next session (A/CN.9/623, para. 39).

70. As regards the topic of ERAs, after lengthy discussion, the view prevailed that the Model Law should permit ERAs with non-price award criteria (A/CN.9/623, paras. 66-69) and that pre-auction evaluation would be mandatory in such ERAs (A/CN.9/623, paras. 70-72). Amendments were suggested to draft articles 22 bis on conditions for use of ERAs (A/CN.9/623, paras. 53, 62 (b) and 69 to 72), 51 ter on pre-auction procedures (A/CN.9/623, paras. 62 and 73), 51 quinquies on requirement of effective competition (A/CN.9/623, paras. 78, 81 and 82), 51 sexies on requirements during the auction (A/CN.9/623, paras. 84, 85 and 89) and 51 septies on award of a procurement contract as a result of the auction (A/CN.9/623, paras. 91-93 and 95) and to article 11 of the Model Law to adapt provisions on record of procurement proceedings to ERAs (A/CN.9/623, para. 100). The Working Group agreed to delete draft article 51 bis (A/CN.9/623, para. 77) and to redraft draft article 51 quater to provide for general possibility of the use of ERAs in other procurement methods envisaged by the Model Law without referring to any particular procurement method (A/CN.9/623, paras. 74 and 76). Suggestions were made as regards Guide text that should accompany the relevant provisions (A/CN.9/623, paras. 53, 55, 62 (d), 67, 76, 83, 88, 89 and 94). No consensus was reached on whether the Guide should exclusively recommend the use of ERAs with price-only award criterion, and the Working Group agreed to continue considering the issue at its next session (A/CN.9/623, para. 66).

71. As regards the topic of framework agreements, the Working Group held a preliminary exchange of views on document A/CN.9/WG.I/WP.52 and decided to consider the document in depth at its next session (A/CN.9/623, paras. 12 and 101).

72. As regards the question of simplification and standardization of the Model Law, the Working Group agreed that, at a future session, it would consider which provisions currently applicable only to tendering proceedings under the Model Law should be reformulated to become general rules applicable to all procurement methods (A/CN.9/623, para. 102).

**(g) Summary of conclusions at the Working Group's twelfth session
(Vienna, 3-7 September 2007)**

73. The Working Group continued consideration of the issues related to the topics enumerated in paragraph 55 above, on the basis of the notes by the Secretariat (A/CN.9/WG.I/WP.52, 54 and 55). It also heard an introduction of the first part of the proposal contained in document A/CN.9/WG.I/WP.56, and considered the time frame for completion of the project. The Working Group requested the Secretariat to revise the drafting materials contained in documents A/CN.9/WG.I/WP.54 and 55, reflecting the deliberations at the session, for its consideration at the next session. It deferred consideration of document A/CN.9/WG.I/WP.45 and Add.1 to a future session (A/CN.9/640, paras. 12-16).

74. As regards the use of electronic means of communication in the procurement process, the Working Group preliminarily agreed on the wording of draft articles 5 bis, 30 (5) and 33 (2) (A/CN.9/640, paras. 17, 23, 24, 28 and 38) and suggested revisions to the accompanying draft texts for the Guide (A/CN.9/640, paras. 27, 29, 39 and 41). As regards aspects of the publication of procurement-related information, revisions were made to the proposed article 5 and text for the Guide (A/CN.9/640, paras. 30 and 33-36). The Working Group deferred consideration of an expanded article 11 on the record of procurement proceedings

and Guide texts to accompany that article and article 36 (A/CN.9/640, paras. 37 and 42). The Working Group agreed that issues of potential liability of a procuring entity for failures of its automatic systems should be addressed only in the Guide (A/CN.9/640, para. 40).

75. As regards provisions on ALTs, the Working Group preliminarily agreed on the wording of draft article 12 bis as amended at the session and suggested reflecting additional points in accompanying Guide text (A/CN.9/640, paras. 48 and 52-55).

76. As regards provisions on ERAs, the Working Group preliminarily agreed on the wording of draft article 22 bis and an accompanying Guide text, as amended at the session (A/CN.9/640, paras. 56-61). Drafting suggestions were made to draft articles 51 bis to sexies, the accompanying Guide texts and the proposed revisions to article 11 of the Model Law (A/CN.9/640, paras. 62-92).

77. As regards provisions on framework agreements, support was expressed for the drafting approach in document A/CN.9/WG.I/WP.52, applying the transparency and competition safeguards of the Model Law to all stages of procurement involving framework agreements (A/CN.9/640, para. 93). Views were exchanged on the proposed provisions of draft article 51 octies setting out general provisions on a framework agreement, and on whether the procuring entity should be permitted to purchase outside the framework agreement (A/CN.9/640, paras. 94-95).

78. As regards the time frame for completion of the project, the Working Group agreed that it would need time beyond 2009 to complete the project. It adopted the timeline for its thirteenth to fifteenth sessions and agreed to bring it to the attention of the Commission at its forty-first session and update it on a regular basis (A/CN.9/640, para. 16 and annex).

**(h) Summary of conclusions at the Working Group's thirteenth session
(New York, 7-11 April 2008)**

79. The Working Group continued its consideration of the issues related to the use of framework agreements, on the basis of notes by the Secretariat (A/CN.9/WG.I/WP.52 and Add.1), an alternative proposal contained in document A/CN.9/WG.I/WP.56, and alternative proposals presented to the Working Group at the session. The Working Group agreed to provide for three types of framework agreements (closed framework agreements with and without second stage competition, and open framework agreements), addressing common features applicable to them together, and their distinct features separately. The Working Group also agreed that the accompanying Guide to Enactment text would address the issues that the use of framework agreements might raise, including risks to competition, the use of parallel framework agreements, the use of framework agreements in construction and services procurement, their maximum duration, and appropriate procedures to ensure effective competition. The Working Group requested the Secretariat to revise the drafting materials contained in these documents, reflecting the deliberations at the session, for its consideration at the next session (A/CN.9/648, para. 13).

80. The Working Group also discussed the issue of suppliers' lists on the basis of a summary of its deliberations at its sixth session and the notes by the Secretariat (A/CN.9/568, paras. 55-68, A/CN.9/WG.I/WP.45 and A/CN.9/WG.I/WP.45/Add.1). 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' agreements 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).

81. The Working Group considered the drafting materials relating to electronic communications in procurement, publication of procurement-related information, and ALTs (A/CN.9/WG.I/WP.58) and the use of ERAs in public procurement (A/CN.9/WG.I/WP.59), and suggested revisions to those materials (A/CN.9/648, para. 15).

82. The Working Group took note of the contents of A/CN.9/WG.I/XIII/INF.2 (United Nations Convention against Corruption: implementing procurement-related aspects), and noted that it would form a basis for assessing the legislative requirements of the Convention, notably as regards the topic of conflicts of interest (A/CN.9/648, para. 16).

83. The Working Group recalled the remaining topics on its agenda and considered an updated timeline for completion of its work on them at its fourteenth and fifteenth sessions (A/CN.9/648, para. 17 and annex).

(i) Summary of conclusions at the Working Group's fourteenth session (Vienna, 8-12 September 2008)

84. The Working Group considered review provisions contained in chapter VI of the Model Law and confirmed the decision taken at its sixth session to delete the list of exceptions to the review process contained in article 52 (2) of the Model Law (see para. 20 above). The Working Group agreed to revise articles 52-56 (A/CN.9/664, para. 14) and make consequential amendments to other provisions of the Model Law, including introduction of a standstill period in article 36 to apply between the identification of the successful supplier and entry into force of the procurement contract (A/CN.9/664, paras. 15, 24, 27 and 55). Suggestions were made for Guide text that would accompany the revised provisions (A/CN.9/664, paras. 19, 23, 24, 27-29, 32, 35, 50, 55-58, 68 and 70).

85. The Working Group considered the drafting materials relating to framework agreement procedures (A/CN.9/WG.I/WP.62 and A/CN.9/WG.I/WP.63) and suggested revisions to those materials in the light of its decision to separate provisions in the Model Law addressing open and closed framework agreements (A/CN.9/664, para. 16).

86. The Working Group also discussed the issues of conflicts of interest (A/CN.9/WG.I/WP.64) and agreed to consider expanding articles 4, 15 and 54 of the Model Law to address the requirements on the subject in the United Nations Convention against Corruption, and to explain in the Guide the different approaches taken in various countries towards regulating conflicts of interest in public procurement (A/CN.9/664, para. 17).

87. As regards the time frame for completion of the project, 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, a complete version of the revised text of the Model Law would be presented to the Working Group for consideration at its fifteenth session. The Working Group also agreed that its aim was to submit the text, further revised

to reflect the deliberations of the Working Group at the fifteenth session, to the Commission for consideration at its forty-second session, in 2009 (A/CN.9/664, para. 113).

**(j) Summary of conclusions at the Working Group's fifteenth session
(New York, 2-6 February 2009)**

88. The Working Group completed the first reading of the revised text of the Model Law contained in a note by the Secretariat (A/CN.9/WG.I/WP.66/Add.1-4) and noted that although a number of issues were outstanding, including the entire chapter IV, the conceptual framework had been agreed upon. It also noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments (A/CN.9/668, para. 11).

89. The Working Group requested the Secretariat to revise the drafting materials, reflecting its deliberations at the fifteenth session, for further consideration (A/CN.9/668, para. 12). The Working Group noted difficulties with the completion of the outstanding research and drafting by the anticipated sixteenth session of the Working Group (May 26-29, 2009), and with the presentation of documents flowing from that session to the forty-second session of the Commission (see para. 87 above). One delegation agreed to present proposals on procurement methods involving negotiations (A/CN.9/668, paras. 276-279).

Item 6. Adoption of the report

90. The Working Group may wish to adopt, at the close of its session, on Friday, 29 May 2009, a report for submission to the forty-second session of the Commission. The main conclusions reached by the Working Group at its seventh half day meeting (that is, on the morning of Friday, 29 May 2009) will be summarily read out for the record by the Chairman at the eighth half-day meeting and subsequently incorporated into the Working Group's report.

IV. Scheduling of meetings

91. The Working Group's sixteenth session will last for four working days (see para. 3 above). There will be eight half-day meetings available for consideration of the agenda items. The Working Group may wish to note that the Working Group is expected to hold substantive deliberations during the first seven half-day meetings (that is, from Tuesday to Friday morning), with a draft report on the entire period being prepared by the Secretariat for adoption at the eighth and last meeting of the Working Group (on Friday afternoon).
