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Report of the United Nations Commission on International Trade Law

Forty-second session
(29 June-17 July 2009)

General Assembly
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Sixty-fourth session
Supplement No. 17

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Note

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Contents

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-second session of the Commission, held in Vienna from 29 June to 17 July 2009.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. The forty-second session of the Commission was opened on 29 June 2009.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the Assembly further increased the membership of the Commission from 36 to 60 States. The current members of the Commission, elected on 17 November 2003 and on 22 May 2007, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: [1] Algeria (2010), Armenia (2013), Australia (2010), Austria (2010), Bahrain (2013), Belarus (2010), Benin (2013), Bolivia (Plurinational State of) (2013), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2010), Czech Republic (2010), Ecuador (2010), Egypt (2013), El Salvador (2013), Fiji (2010), France (2013), Gabon (2010), Germany (2013), Greece (2013), Guatemala (2010), Honduras (2013), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2013), Kenya (2010), Latvia (2013), Lebanon (2010), Madagascar (2010), Malaysia (2013), Malta (2013), Mexico (2013), Mongolia (2010), Morocco (2013), Namibia (2013), Nigeria (2010), Norway (2013), Pakistan (2010), Paraguay (2010), Poland (2010), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Serbia (2010), Singapore (2013), South Africa (2013), Spain (2010), Sri Lanka (2013), Switzerland (2010), Thailand (2010), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2013),

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 30 were elected by the Assembly at its fifty-eighth session, on 17 November 2003 (decision 58/407), and 30 were elected by the Assembly at its sixty-first session, on 22 May 2007 (decision 61/417). By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election.

United States of America (2010), Venezuela (Bolivarian Republic of) (2010) and Zimbabwe (2010).

5. With the exception of Benin, Ecuador, Gabon, Greece, Guatemala, Latvia, Madagascar, Malta, Namibia, Pakistan, Paraguay, Uganda and Zimbabwe, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Argentina, Azerbaijan, Belgium, Brazil, Côte d'Ivoire, Croatia, Dominican Republic, Finland, Indonesia, Jordan, Kazakhstan, Kuwait, Mali, New Zealand, Nicaragua, Panama, Peru, Philippines, Romania, Slovakia, Slovenia, Sweden, Tunisia, Turkey and Yemen.

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

(a) *United Nations system*: Food and Agriculture Organization and World Bank;

(b) *Intergovernmental organizations*: Caribbean Community, East African Community, Eurasian Economic Community, European Commission, International Association of Insolvency Regulators, International Institute for the Unification of Private Law, Organization for Economic Cooperation and Development, Permanent Court of Arbitration and World Trade Organization (WTO);

(c) *Invited non-governmental organizations*: American Bar Association, Center for International Legal Studies, Comité maritime international, European Company Lawyers Association, International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL), International Chamber of Commerce, International Council for Commercial Arbitration, International Federation of Consulting Engineers, International Swaps and Derivatives Association and the Regional Centre for International Commercial Arbitration in Lagos, Nigeria.

8. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

9. The Commission elected the following officers:

Chairperson:	Soo-Geun OH (Republic of Korea)
Vice-Chairpersons:	Susan DOWNING (Australia) Jean Marc MPAY (Cameroon) Maria SZYMANSKA (Poland)
Rapporteur:	Ricardo SANDOVAL LÓPEZ (Chile)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 888th meeting, on 29 June 2009, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of UNCITRAL notes on cooperation, communication and coordination in cross-border insolvency proceedings.
5. Draft UNCITRAL model law on public procurement.
6. Arbitration and conciliation: progress report of Working Group II.
7. Insolvency law: progress report of Working Group V.
8. Security interests: progress report of Working Group VI.
9. Possible future work in the area of transport law: commentary on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.
10. Possible future work in the area of electronic commerce.
11. Possible future work in the area of commercial fraud.
12. Endorsement of texts of other organizations: Uniform Customs and Practice for Documentary Credits (UCP 600) published by the International Chamber of Commerce.
13. Monitoring implementation of the New York Convention.
14. Technical assistance to law reform.
15. Status and promotion of UNCITRAL legal texts.
16. Working methods of UNCITRAL.
17. Coordination and cooperation:
    (a) General;
    (b) Reports of other international organizations.
18. Role of UNCITRAL in promoting the rule of law at the national and international levels.
19. International commercial arbitration moot competitions:
    (a) Willem C. Vis International Commercial Arbitration Moot competition;
    (b) Madrid commercial arbitration moot competition.
20. Relevant General Assembly resolutions.
21. Other business.
22. Date and place of future meetings.
23. Adoption of the report of the Commission.

E. Establishment of the Committee of the Whole

11. The Commission established the Committee of the Whole and referred agenda item 5 to it for consideration. The Commission elected Mireille-France Blanchard (Canada) Chairperson of the Committee. The Committee met from 2 to 10 July and held 14 meetings. At its 892nd meeting, on 10 July, the Commission considered the report of the Committee of the Whole and agreed to include it in the present report (see paras. 49-282 below).

F. Adoption of the report

12. At its 899th and 900th meetings, on 17 July 2009, the Commission adopted the present report by consensus.

III. Finalization and adoption of UNCITRAL notes on cooperation, communication and coordination in cross-border insolvency proceedings

13. The Commission recalled that, at its thirty-ninth session, in 2006, it had agreed that initial work to compile practical experience with respect to negotiating and using cross-border insolvency agreements should be facilitated informally through consultation with judges and insolvency practitioners and that a preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007.[2] The Commission also recalled that, during the first part of its fortieth session, in 2007, the Commission had considered that preliminary report (A/CN.9/629) and had expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency protocols; the Commission had reaffirmed that that work should continue to be developed informally by the Secretariat in consultation with judges, practitioners and other experts.[3]

14. The Commission also recalled that, at its forty-first session, in 2008, it had before it a note by the Secretariat reporting on further progress with respect to that work (A/CN.9/654). At that session, the Commission had noted that further consultations had been held with judges and insolvency practitioners and a compilation of practical experience, organized around the outline of contents annexed to the previous report to the Commission (A/CN.9/629), had been prepared by the Secretariat. Because of timing and translation constraints, that compilation could not be submitted to the Commission's forty-first session.[4]

15. It was recalled that, at its forty-first session, the Commission had expressed its satisfaction with respect to the progress made on the work of compiling practical experience and had decided that the compilation should be presented as a working paper to Working Group V (Insolvency Law) at its thirty-fifth session

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[2] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 209 (c).

[3] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 191.

[4] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 320.

(Vienna, 17-21 November 2008) for an initial discussion. Working Group V could then decide to continue discussing the compilation at its thirty-sixth session (New York, 18-22 May 2009) and make its recommendations to the forty-second session of the Commission, in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in finding solutions for the international treatment of enterprise groups in insolvency.[5]

16. It was noted that the Working Group considered the draft notes on cooperation, communication and coordination in cross-border insolvency proceedings (A/CN.9/WG.V/WP.83) at its thirty-fifth session, when it agreed that the notes should be circulated to Governments for comment prior to its thirty-sixth session (A/CN.9/666, para. 22). That version of the draft notes was circulated in November 2008.

17. The draft notes were revised on the basis of the decisions made by the Working Group at its thirty-fifth session, the comments received from Governments and additional cross-border insolvency agreements that were entered into after the preparation of the first draft.

18. At its current session, the Commission had before it the revised version of the draft notes (A/CN.9/WG.V/WP.86), the comments of States on the draft notes (A/CN.9/WG.V/WP.86/Add.1-3) and the report of the thirty-sixth session of the Working Group at which the draft notes were further considered (A/CN.9/671, paras. 12-15). The Commission heard an oral presentation on the draft notes and noted that some minor updating was required to take account of important cross-border insolvency agreements entered into since the consideration by the Working Group at its thirty-sixth session.

19. The Commission expressed its appreciation for the draft notes and emphasized their usefulness for practitioners and judges, as well as creditors and other stakeholders in insolvency proceedings, particularly in the context of the current financial crisis. In that regard, the notes were viewed as very timely, having application in a number of large, complex cases and being the first document dealing with cross-border insolvency agreements to be prepared by an international organization. The Commission also expressed its appreciation for the incorporation of the suggestions made by Governments following circulation of the draft notes (document A/CN.9/WG.V/WP.83; see paras. 16 and 17 above) and agreed that the document should be entitled “Practice Guide on Cross-Border Insolvency Cooperation”.

20. With respect to the term “court” as used in the draft Practice Guide and as defined in paragraph 13 (f) of A/CN.9/WG.V/WP.86, it was clarified that, consistent with the terminology of the UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL Model Insolvency Law)[6] and the Legislative Guide on Insolvency Law,[7] it included judicial and other authorities, including administrative authorities, competent to control or supervise insolvency proceedings. To avoid any confusion

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[5] Ibid., para. 321.

[6] Ibid., United Nations publication, Sales No. E.99.V.3. See also paragraph 376 (o) below.

[7] Ibid., Sales No. E.05.V.10.

with regard to the use of that term, the Commission agreed to delete the second sentence of paragraph 8 of A/CN.9/WG.V/WP.86.

21. With respect to paragraph 17 of part III A, the Commission agreed to modify the first sentence, so that it would read as follows: "Where parties desire court approval of an agreement, certain jurisdictions may require the court to find appropriate statutory authorization for such approval, as it may not be covered by the court's 'general equitable or inherent powers'."

22. The Commission agreed to modify the second sentence of paragraph 18 of part III A, so that it would read as follows: "As noted above with respect to insolvency representatives, one issue to take into consideration is that since judges must act on the basis of legal authority, acting outside that authority could make them personally liable." The Commission also agreed that, in order to align the third and fourth sentences with the revised second sentence and paragraph 17, the words "formally approve" should replace the words "enter into" in the third sentence and that the words after "familiarity with cross-border agreements" in the fourth sentence should be deleted. It further agreed to remove the references to common and civil law in paragraphs 17 and 18 and replace them with a more generic reference, such as "some" or "certain" jurisdictions.

23. To address the concern that the term "cross-border agreement" was too general, the Commission agreed that those agreements should be referred to as "cross-border insolvency agreements" and, as a short form, as "insolvency agreements" or "agreements".

24. At its 890th meeting, on 1 July 2009, the Commission adopted the following decision:

"*The United Nations Commission on International Trade Law*,

"*Noting* that increased trade and investment leads to a greater incidence of cases where business is conducted on a global basis, and enterprises and individuals have assets and interests in more than one State,

"*Noting also* that where the subjects of insolvency proceedings are debtors with assets in more than one State or are members of an enterprise group with business operations and assets in more than one State, there is generally an urgent need for cross-border cooperation in, and coordination of, the supervision and administration of the assets and affairs of those individual debtors and enterprise group members, including, as applicable, multiple parallel insolvency proceedings,

"*Considering* that cooperation and coordination in cross-border insolvency cases has the potential to significantly improve the chances for rescuing financially troubled individuals and enterprise groups,

"*Acknowledging* that familiarity with cross-border cooperation and coordination and the means by which it might be implemented in practice is not widespread,

"*Convinced* that providing readily accessible information on current practice with respect to cross-border coordination and cooperation for reference and use by judges, practitioners and other stakeholders in insolvency

proceedings has the potential to facilitate and promote that cooperation and coordination and avoid unnecessary delay and costs,

"*Recalling* that the UNCITRAL Model Law on Cross-Border Insolvency provides a legislative framework that facilitates effective cross-border coordination and cooperation,

"1. *Adopts* the Practice Guide on Cross-Border Insolvency Cooperation contained in working paper A/CN.9/WG.V/WP.86 and authorizes the Secretariat to add further information with respect to recently adopted cross-border insolvency agreements and to edit and finalize the text of the Practice Guide in the light of the deliberations of the Commission;

"2. *Requests* the Secretary-General to publish, including electronically, the text of the Practice Guide and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available;

"3. *Recommends* that the Practice Guide be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings;

"4. *Recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency."

IV. Draft UNCITRAL model law on public procurement

A. Introduction

25. The Commission recalled that, at its thirty-seventh session, in 2004, it had agreed that the UNCITRAL Model Law on Procurement of Goods, Construction and Services[8] (the 1994 Model Procurement Law) would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the 1994 Model Procurement Law as a basis for law reform.[9] The Commission also recalled that at that session, it had decided to entrust the drafting of proposals for the revision of the 1994 Model Procurement 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.[10]

26. The Commission noted that the Working Group had begun its work at its sixth session (Vienna, 30 August-3 September 2004), since when it had held 11 one-week sessions to consider revisions to the 1994 Model Procurement Law.[11] The Commission recalled that, from its thirty-eighth session, in 2005, to its forty-first session, in 2008, it had reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in a revised model law on public

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[8] United Nations publication, Sales No. E.98.V.13.

[9] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 81.

[10] Ibid., para. 82.

[11] For the reports of the Working Group on the work of its sixth to sixteenth sessions, see 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, A/CN.9/668 and A/CN.9/672, respectively.

procurement (the revised model law).[12] It also recalled that, at its thirty-ninth session, the Commission recommended that the Working Group, in updating the 1994 Model Procurement Law and the Guide, should take into account issues of conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised model law.[13] At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work.[14] At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised model law, together with its guide to enactment, within a reasonable time.[15]

27. At its current session, the Commission had before it the following: (a) a draft model law on public procurement with an accompanying note by the Secretariat (A/CN.9/WG.I/WP.68 and Add.1 and A/CN.9/WG.I/WP.69 and Add.1-5); (b) the reports of the fourteenth (Vienna, 8-12 September 2008), fifteenth (New York, 2-6 February 2009) and sixteenth[16] (New York, 26-29 May 2009) sessions of the Working Group (A/CN.9/664, A/CN.9/668 and A/CN.9/672, respectively); and (c) further proposals for the revision of the 1994 Model Procurement Law.

B. Report on the progress made by Working Group I (Procurement) in the fulfilment of its mandate

28. The Commission noted that the focus of the early sessions of the Working Group was primarily on the following key subjects, for which the Working Group was recommending entirely new provisions or substantial amendments: (a) the use of electronic communications in public procurement; (b) electronic reverse auctions; (c) abnormally low submissions; and (d) framework agreements. It was reported that the principles for most of those provisions had been agreed upon, but that some drafting issues remained outstanding.

29. It was noted that later sessions had focused on procurement of services, alternative procurement methods, simplification and standardization of the 1994 Model Procurement Law and conflicts of interest, and that new provisions and substantial amendments on those subjects were being considered.

30. The Commission heard a report on the progress achieved in separate areas of work.

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[12] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 172; ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 192; ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 170; and ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 307.

[13] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), para. 192.

[14] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 170.

[15] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 307.

[16] At the request of the Working Group (A/CN.9/668, para. 277) and upon consultation with the Bureau of the Commission, the sixteenth session of the Working Group was convened from 26 to 29 May 2009, at a time initially scheduled for the forty-fifth session of Working Group IV (Electronic Commerce).

31. As regards general aspects of electronic procurement, it was noted that provisions of the revised model law would allow for the use of electronic communications in the procurement process, in a new article 8, which would address form and means of communications together and would replace article 9 of the 1994 Model Procurement Law (which dealt only with the form of communications). The proposed article 8 would: (a) provide for functional equivalence between paper- and non-paper based communications; (b) contain safeguards addressing confidentiality, traceability and integrity; (c) prevent any form or means of communications from being used to restrict access to procurement; and (d) ensure transparency and predictability by requiring any specific requirements as to the form and means of communications to be specified by the procuring entity at the beginning of the procurement proceedings.

32. As regards electronic reverse auctions, it was explained that the term referred to an online, real-time auction, during which bidders submitted successively improved bids. Recognizing their potential benefits (price savings), the Working Group was recommending provisions for them, but not for auctions in a non-electronic form because of the risks of collusion in the latter. Provisions on electronic reverse auctions would set out (a) conditions for the use of electronic reverse auctions and (b) procedural rules for two types of such auctions: those used as a phase in other procurement methods and those used as a stand-alone procurement method. The revised model law would provide for the type of auction where the best bid according to the award criteria was identified automatically at the end of the auction process. This type of electronic reverse auctions, which did not allow post-auction evaluation, required (a) an automatic re-evaluation of bids as they were revised during the auction and (b) disclosure to all bidders at all times during the auction of sufficient information to allow them to determine whether their bid was the winning one. It was noted that the important issue considered by the Working Group in the context of electronic reverse auctions was the extent to which non-price factors could feature in such auctions. The Working Group noted concerns that such factors could complicate the process, and lead to less transparency.

33. As regards framework agreements, it was explained that the term described two-stage procurements in which a framework agreement between suppliers and the procuring entity was made at the first stage and procurement contracts were issued in the form of orders at the second stage. It was noted that framework agreements were not addressed in the 1994 Model Procurement Law, partly because they were used infrequently at that time. In the light of their increasing use and advantages (mainly reductions in administrative and transactional costs and times and assuring the security of supply), the Working Group provided for them in the draft revised text. Three types were addressed. The first type was a “closed” framework agreement, i.e. one concluded with one or more suppliers in which the specification and all terms and conditions of the procurement were set out in the framework and there was no further opening of competition between the suppliers at the second stage. The second type was also a “closed” framework agreement but it differed in that it would always have more than one supplier as a party, not all terms would be finalized and set out in the framework agreement, and a further competition would take place at the second stage to award a procurement contract. The third type was an “open” framework agreement, i.e. one concluded with more than one supplier to which further suppliers could subsequently become parties. The second stage of

"open" framework agreements would be competitive in the same way as the second type of "closed" framework agreements.

34. The Commission heard that the provisions would include both general conditions for the use of framework agreements and procedures for each type, but that the conditions for use and some other aspects remained outstanding. Further, there would be controls to prevent and limit certain risks that frameworks presented in practice, including risks to effective competition in the longer term, risks of collusion between suppliers and difficulties in monitoring the operation of framework agreements. Thus, for example, States would be required to include in their laws a maximum duration for closed frameworks (to avoid them being used to shut out suppliers from competition for long periods). The Commission also noted that the provisions placed emphasis on ensuring transparency in the operation of framework agreements by requiring a series of public notices to be communicated throughout the process.

35. As regards suppliers' lists, the Working Group had acknowledged that such lists existed and were in use, and that such use in practice should be subject to minimum standards. At its thirteenth session, the Working Group concluded that the topic would not be addressed in the revised model law because the flexible provisions on framework agreements would be sufficient and would avoid some of the risks of lists. The reasons for that conclusion would be set out in the guide to enactment, which would also address concerns related to the use of lists, such as lack of transparency and restrictions on market access, which might arise even where controls such as permanently open and simple registration procedures had been put in place, and even where lists were intended to be optional.

36. As regards abnormally low submissions, which might entail a performance risk, the Working Group had decided that the risk could arise in any procurement procedure (though it had initially considered that the risk arose in the context of electronic reverse auctions). It therefore recommended provisions in the revised model law to require the procuring entity to investigate a potentially abnormally low submission. Only after such an investigation, and where the procuring entity concluded that the submission was abnormally low and a performance risk existed, could the procuring entity reject the submission. The limitation on this ability was noted to be important for ensuring fair and equal treatment of suppliers.

37. The Working Group had reconsidered the provisions addressing the procurement of services, alternative procurement methods and their impact on simplification and standardization of the 1994 Model Procurement Law. The preliminary decision of the Working Group was to retain all options for the procurement of services, with enhanced guidance for their use. In the course of consideration, it became apparent however that services procedures contained in different articles of the 1994 Model Procurement Law were substantially the same and that only one services selection procedure – the selection procedure with consecutive negotiations – was distinct. In the light of such a significant overlap, the Working Group had reconsidered whether all methods should be retained. The review of all procurement methods therefore became one main element of simplification and standardization of the 1994 Model Procurement Law.

38. Some delegations had formulated a proposal for a negotiated procurement method to be used for any type of procurement, to be called "Request for proposals

with competitive dialogue", the results of which were presented to the Commission as a new procurement method. The Commission noted that the main issues in that method included: providing sufficient flexibility in the method (considered to facilitate achieving best value for money) while building in procedures to avoid the risk that the discretion conferred would be abused; ensuring sufficient transparency without removing all flexibility; and specifying ways for the procuring entity to control the number of suppliers with which it would negotiate (for example, through pre-selection, an assessment of responsiveness or exclusion of solutions). The Commission also heard about the importance of establishing the aspects of the procurement that could be negotiated during the dialogue phase.

39. The Commission noted that other methods from the 1994 Model Procurement Law (including competitive negotiations, two-stage tendering, and perhaps consecutive negotiations) might be retained in specific circumstances (such as competitive negotiations in the case of urgent procurement) and that the need for such methods would be assessed based on the extent to which they differed and the extent to which they addressed circumstances that were distinct from that proposed in the new procurement method.

40. In addition, the Working Group had reconsidered the conditions for use of alternative methods, and recommended a requirement to use the most competitive method available. Thus, open (international) solicitation should take place by default unless restricted or domestic tendering was justified and competitive negotiations, for example, should be preferable to single-source procurement in cases of urgency wherever possible. The reformulations, it was said, would be finalized after the various procurement methods had been examined and their uses had been completed. The Commission heard that such an examination would also entail a consideration of whether the resulting number of procurement methods was optimal.

41. Other aspects of the Working Group's work in simplifying and standardizing the 1994 Model Procurement Law were described. First, as not all procurement in the defence and national security arena was considered to be sensitive or confidential, the blanket exemption of those sectors from the scope of the 1994 Model Procurement Law had been revisited. The aim was to bring national defence and national security sectors, where appropriate, into the general ambit of the revised model law, to promote a harmonized legal procurement regime across various sectors in enacting States. However, appropriate modifications, for example to transparency obligations, would be required and were proposed in the draft revised text, drawing on provisions of the 1994 Model Procurement Law, to accommodate sensitive or confidential types of procurement.

42. The Commission heard that the general provisions in chapter I had been expanded in the draft revised model law contained in the addenda to document A/CN.9/WG.I/WP.69 (the draft revised model law) to include rules that under the 1994 Model Procurement Law were applicable only to tendering proceedings, but that were, in fact, of general application. The Commission noted that those rules addressed the choice of procurement method and open or direct solicitation, the description of procurement (specifications and other terms), evaluation criteria, tender securities, prequalification proceedings, confidentiality and the acceptance of tender and entry into force of procurement contract. Other topics, such as requests

for expression of interest and general rules on clarifications and modifications of solicitation documents might also be included in chapter I.

43. It was noted that the 1994 Model Procurement Law distinguished between the procurement of goods and construction on the one hand, and services on the other hand. The Commission heard that the draft revised model law had adopted a different approach, one that focused on whether the procurement was straightforward or more complex. For example, one of the determining factors in the choice of an appropriate procurement method would be whether the subject of the procurement could easily be identified and evaluated, regardless of whether that subject was goods, construction or services. The default method of tendering (which required specifications and evaluation criteria to be specified in advance) would not be changed, but if it were not possible to formulate detailed specifications or characteristics at the outset of the procurement and to evaluate tenders through quantifiable criteria, the procurement might involve dialogue with the market or negotiations (using two-stage tendering or request for proposals with competitive dialogue). Procurement of low-value, simple or standardized items could be undertaken through a request for quotations procedure or an electronic reverse auction. Importantly, it was noted that a fundamental provision of the 1994 Procurement Model Law, according to which only exceptional circumstances would justify recourse to single-source procurement, remained and the Commission would be invited to consider strengthening safeguards to ensure that those circumstances would be objectively assessed.

44. As regards the evaluation and comparison of tenders, the Working Group had formulated a single set of requirements as regards evaluation criteria that would replace several inconsistent, incomplete provisions in the 1994 Model Procurement Law. The essence of the provisions was that such criteria should: be relevant to the subject matter of the procurement; to the extent practicable, be objective and quantifiable; and be disclosed (together with their relative weights, thresholds, and any margins of preference, and with information on the manner in which the criteria, margins, relative weights and thresholds would be applied) at the outset of the procurement. The aim, it was observed, was to enable submissions to be evaluated objectively and compared on a common basis.

45. The Working Group had reviewed the manner in which the use of procurement to promote industrial, social and environmental policies (notably to protect the domestic economy) was addressed in the 1994 Model Procurement Law. The Commission, it was noted, would consider the issue, including the matter of whether socio-economic factors should be treated as evaluation criteria with all the transparency and objectivity rules then applicable to them and/or as qualification criteria (as was the practice in some jurisdictions with set-asides programmes), with reference to the relevant documents before it at the current session.

46. As regards remedies in procurement, the Working Group had decided to strengthen the provisions to ensure that they were consistent with the United Nations Convention against Corruption,[17] providing for a mandatory system of independent review and deleting the exemptions from review contained in the 1994 Model Procurement Law. The Working Group had also recommended the introduction of a standstill period between the identification of the successful

[17] United Nations, *Treaty Series*, vol. 2349, No. 42146.

submission and entry into force of a procurement contract in order to ensure an effective review procedure. The extent of relief that may be granted in administrative proceedings, it was noted, had not yet been finalized.

47. As regards other issues identified for consideration in the review of the 1994 Model Procurement Law, it was reported that:

(a) Although the question of community participation in procurement fell outside the scope of the 1994 Model Procurement Law as it related primarily to the planning and implementation phases, given the growing importance of local community participation and the possible need for enabling legislation, the Working Group had ensured that the revised model law would not pose obstacles to such participation in project-related procurement and that further guidance in the guide would be given;

(b) It was recalled that the 1994 Model Procurement Law permitted procuring entities to call for the legalization of documents from all suppliers, 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. Hence, the Working Group recommended an amendment to the provisions contained in the 1994 Model Procurement Law to allow the procuring entity to require the legalization of documentation only from a successful supplier;

(c) Noting that the Convention against Corruption required procurement systems to address conflicts and declarations of interest and that the 1994 Model Procurement Law did not address them, the draft revised model law had been expanded to make appropriate provision.

48. The Commission endorsed the suggestion made as regards the establishment of a committee of the whole to consider the draft revised model law at the current session. It also decided that the committee in its work should address the issues of defence sector procurement and consider socio-economic factors in public procurement. It heard statements about the importance of the guidance provided by UNCITRAL, in particular the guidance on how to protect domestic interests and treat sensitive procurement without undermining the objectives of the 1994 Model Procurement Law.

C. Report of the Committee of the Whole on its consideration of the draft revised model law

Article 1. Scope of application

49. The Committee noted that the draft article had been revised pursuant to the Working Group's decision to bring defence sector procurement within the scope of the revised model law. No comments specific to the article were made. However, a proposal was made to amend several articles of the draft revised model law to accommodate types of procurement that involved sensitive issues.

50. The Committee decided to consider that proposal in conjunction with specific relevant articles. (See further paras. 100-119, 123-137 and 253-266.)

Article 2. Definitions

51. It was noted that the purpose of article 2 was to provide definitions of recurrent terms rather than to provide an exhaustive list of all terms used in the revised model law. It was the understanding that the article would be supplemented with a more comprehensive glossary.

52. Support was expressed for setting out the definitions contained in article 2 in alphabetical order, as appropriate in each respective language.

53. Caution was expressed for substituting terms that were well known and widely used in many jurisdictions with new terms. It was also noted that an excessively long list of definitions should be avoided.

Subparagraph (a)

54. It was noted that it was important for the title and the definition in subparagraph (a) to be consistent. It was therefore proposed that the word "procurement" should be replaced with the phrase "public procurement" and that the latter term should be used consistently throughout the text of the revised model law. In response, it was explained that the term "procurement" was intended only to refer to the procurement process and therefore no distinction was drawn between public and private procurement in this context. It was noted, in addition, that this distinction was built into the definition of the "procuring entity". The suggestion was therefore made to address the matter in a glossary rather than in article 2. The Committee agreed to that suggestion.

Subparagraph (e): "[submission] security"

55. With respect to subparagraph (e), concern was expressed about the use of the term "submission security" instead of "tender security". It was explained that the latter term was well known in procurement circles while the former might be confusing and meaningless. The other view was that the term "submission security" should be retained given that the term "submission" had been introduced in subparagraph (g) (see paras. 58-60 below). The need to ensure consistency and coherence in the use of terms throughout the revised model law was highlighted. It was suggested that, in order to ensure more clarity and logical sequence of definitions, the definition "submission" should be placed before the definition "submission security".

56. Some delegates preferred the term "tender or other security" to the term "submission security". Another proposal was to use the term "guarantee to carry out the procurement contract." A compromise solution was suggested to use the term "[submission] [tender or other] security" with an option to the enacting State to choose the definition as appropriate in its jurisdiction. (See para. 176 below.)

57. Concern was also expressed that the wording in subparagraph (e), when read together with subparagraph (g), could imply that multiple securities might be required in any single procurement proceeding where several bids, proposals or offers were presented. It was proposed that the guide could clarify that the provisions did not intend to convey any such meaning.

Subparagraph (g): "submission(s)"

58. Support was expressed for introducing a new collective and generic term that would refer to tenders, proposals, offers, quotations or bids.

59. A query was made about the desirability of using for such purposes the term "submission". Difficulties with the use and translation of the new suggested term "submission" were highlighted. The term preferred might be "tender", which in many jurisdictions was used as a collective and generic term. Another suggestion was to consider the term "supply". The prevailing view was that the text would not be further amended.

60. In the course of subsequent deliberations, it was considered that, in the light of the compromise solution to use the term "[submission] [tender or other] security" in lieu of the term "submission security" (see para. 56 above), the term "submission(s)" should be replaced with the term "tender or other submission(s)". Some delegations however expressed reservations about the proposed change since in their view the use of this proposed definition throughout the revised model law would distort the meaning of some provisions.

Subparagraph (m): "direct solicitation"

61. Concern was expressed about the fact that the definition "direct solicitation" might imply that the procuring entity would have unlimited discretion in deciding from whom it might solicit submissions. In response, it was suggested that the definition should be rephrased to read "solicitation from supplier(s) or contractor(s) chosen by the procuring entity".

62. Another suggestion that gained substantial support in the Committee was to remove that definition from article 2 in order to avoid direct solicitation being put on an equal footing with open solicitation rather than being treated as an exceptional matter.

63. Subsequently, however, it was decided that the suggested amended definition of "direct solicitation" (see para. 61 above), with the addition of a reference to the exceptional nature of direct solicitation, should be retained in article 2. It was stated that it would be in accordance with standard drafting techniques to keep all definitions in one article, and that so doing would facilitate the understanding of the subsequent articles in which the term "direct solicitation" appeared, such as in article 7 (6).

Subparagraphs (n) to (s): definitions related to framework agreements

64. Support was expressed for retaining the definitions related to framework agreements in article 2 as doing so would allow users of the revised model law to familiarize themselves from the outset with terminology used in the context of the new procedure of the revised model law.

65. The other view was that those definitions should be moved from article 2 to the section of the draft revised model law dealing with framework agreements. Another proposal was to retain in article 2 only the definition in subparagraph (n) and move definitions in subparagraphs (o) to (s) to the section dealing with framework agreements. It was noted in that respect that it was usual practice to put all definitions in one place at the beginning of a legal instrument rather than to

spread them throughout the text. Another approach suggested was to set out subparagraphs (o) to (s) as sub-subparagraphs to subparagraph (n).

66. A willingness to be flexible about all the suggested options was expressed. It was proposed that the Committee, in order to expedite its work, might decide to refer such and similar non-substantive issues to a drafting group that it might create. The UNCITRAL practice with establishing drafting groups and mandates usually given to them was recalled, in particular that drafting groups were created to address purely drafting issues, mainly to ensure parity between various language versions of an instrument.

Subparagraph (t): "material change in the description of the subject matter of the procurement or all other terms and conditions of the procurement"

67. Support was expressed for retaining the definition in the revised model law and the use therein of the word "would" not "could". The word "would", it was felt, conveyed better an idea that one meant not a theoretical possibility that a change might produce the result specified in the definition but rather that it would inevitably lead to such a result.

68. Another suggestion was to use the term "fundamental change", not the term "material change". The Committee noted that differences between the two terms had been discussed in the Working Group, which had opted for the use of the term "material change" because in its view it allowed for more flexibility, as was appropriate in the context envisaged.

69. It was noted that a similar concept was found in the proposed article 32 (2) (b) but in a different context. It was therefore queried whether it would be advisable to refer in article 2 to "material change" only in the context of framework agreements. In response, it was noted that the definition would have to be redrafted to make it generally applicable to all situations where discretion was given to the procuring entity to change the terms and conditions of the procurement. A relevant discussion in the context of the most recently introduced competitive dialogue procedure was recalled in this respect. Preference was expressed for addressing the concept "material change" in each case in the relevant context rather than for trying to define it generically in article 2.

70. In response to another query, it was confirmed that situations identified in the definition were supposed to be listed alternatively, not cumulatively, and that such an understanding should be conveyed in all language versions.

71. The Committee deferred consideration of that definition until after redrafting when, it was proposed, the Committee would consider whether the definition of "material change" should be retained in article 2 or whether it would be better addressed in other provisions.

Additional definitions

72. The view was expressed that it would be desirable to add in article 2 a definition of an electronic reverse auction as well as any other recurrent terms used in connection with this new procurement technique.

73. In response to the suggestion that not only electronic reverse auctions but also conventional auctions should be defined in article 2, the Committee was reminded

that the Working Group had decided not to regulate the latter type of auctions, which posed high risks of collusion among bidders (see para. 32 above).

74. The Secretariat was requested to propose a list of additional terms that it would be desirable to have defined in article 2 in the light of the consideration by the Committee of the draft revised model law. It was the understanding in the Committee that the substance of any additional definitions would have to be decided upon by the Committee. Opposition was expressed to adding new definitions if that would jeopardize the progress of the Committee's work on the draft revised model law. The understanding was that no new definitions would be added in article 2 unless necessary and taking into account the impact of doing so on the achievement of the desired goal of completing the project at the current session of the Commission.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

75. A query was raised about the square brackets in the title of the article, which had also appeared in the 1994 Model Procurement Law. The point was made that the text in square brackets was relevant to the provisions of paragraph (c) of the article, which, however, did not appear in square brackets. It was noted that internal consistency should be achieved within the provisions. If the intention was to restrict them to international obligations, then the square bracketed text in the title, together with paragraph (c), should be removed as both were dealing with the purely domestic issue of a federal State. If however, the intention remained to deal in the article with both international agreements and agreements between a federal State and its subjects, then paragraph (c) and the corresponding text in the square brackets in the title should be put in square brackets. It was noted that the guide might explain that the provisions within the square brackets were relevant to, and intended for consideration by, federal States.

76. The appropriateness of the entire article was questioned. It was stated that the article addressed issues dealt with in the constitution of an enacting State and therefore were not of a legislative nature and should not appear in the revised model law. In response, it was observed that those issues had been discussed at the time of the preparation of the 1994 Model Procurement Law and that it had been decided that the provisions should nevertheless be included in the Model Law because of their operational value. It was recalled that, in authorizing the review of the 1994 Model Procurement Law, the Commission had instructed not to depart from its basic principles. It was considered that article 3 contained such a principle. It was suggested that the guide or a footnote accompanying this article might alert enacting States of the fact that the provisions of the article might need to be adapted to constitutional requirements. With reference to paragraph (b) in particular, it was noted that "agreements entered" might need to be not only signed but also ratified by parliament, in order for them to be binding in an enacting State.

77. While several delegations supported that suggestion, some others were of the view that the approach did not address the concern expressed, i.e. that the content of article 3 as it stood was inappropriate for a procurement law, in that it strayed into constitutional matters. It was stressed that it was inappropriate for a model law to regulate hierarchy between procurement law and international treaties or bilateral obligations.

78. The prevailing view was that the provisions should be retained in the revised model law, but that the guide should alert enacting States that they should not enact this article if its provisions conflicted with their constitutional law. It was the understanding in the Committee that the square brackets would remain in the title of the article and that paragraph (c) would also be put in square brackets to indicate that these provisions were relevant only in the context of federal States.

Articles 4 and 5

79. No comment was made with respect to articles 4 and 5, which were found to be generally acceptable.

Article 6. Information on planned procurement activities

80. Support was expressed for replacing the word "obligate" with the word "oblige" in the text of article 6.

81. The Committee had before it the following proposal for an additional paragraph in article 6:

> "(2) A procuring entity may issue a request for expressions of interest before commencing procurement proceedings under this Law. [Such a request shall be published in ... (the enacting State specifies the official gazette or other official publication in which the request is to be published). The request shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or relevant technical or professional journal of wide international circulation.[, except where the procurement proceedings are intended to be limited to domestic suppliers or contractors under article [7 (6) (c) (i) and (ii)] of this Law].] Neither the request nor any response shall confer any rights on suppliers or contractors, including any right to have a submission evaluated; nor does the notice oblige the procuring entity to issue a solicitation."

82. A query was made about the location of the provisions in this article rather than in articles regulating requests for proposals procedures where the stage of request for expression of interests was common (the notion of a request for an expression of interest being found in the 1994 Model Procurement Law (articles 37 and 48)). The Committee was informed about the discussion that took place on this subject at the sixteenth session of the Working Group (New York, 26-29 May 2009), in which it was decided that requests for expressions of interests might be relevant to any other procurement method, although they might be more common in requests for proposals procedures. To avoid confusion with the terminology already widely used in the context of requests for proposals procedures, a suggestion that eventually gained support was to consider replacing in the proposed paragraph the term "request for expression of interest" with the term "notice seeking interest" or other similar term.

83. The view was expressed that the proposed article 6 should remain as it was, without adding new provisions (which were in any case optional and created no legal obligations). This view was underscored because the phrase in the draft article 6 on information on planned procurement activities could be interpreted very broadly to encompass the intended meaning of the newly proposed paragraph (2).

Considerable overlap between the existing provisions of the proposed article 6 and the newly proposed paragraph (2) above was noted.

84. The alternative view, which eventually prevailed, was that the newly proposed paragraph (2) had a distinct application and should be added to draft article 6, and that the guide should clarify how the resulting paragraphs (1) and (2) of article 6 would operate in practice. It was explained that, in some jurisdictions, the steps described in both paragraphs could be part of the procurement proceedings, could immediately precede the procurement proceedings or could simply be a step in a long or medium-term plan.

85. A reservation was expressed against the suggestion to retain draft article 6 if proposed paragraph (2) were added. The optional nature of both paragraphs in draft article 6 was stressed. It was therefore observed that it would be more appropriate to move them from the draft revised model law to the guide, as examples of best practice in procurement planning and investigation of the market. Another suggestion was to put the provisions in square brackets for further consideration. Opposition to this latter proposal was raised, since it was felt that the provisions had been duly considered on several occasions and reflected the prevailing view among delegations.

86. The prevailing view was to retain the provisions of both proposed paragraphs of article 6 in the text of the revised model law with the amendments agreed at the current session (see paras. 80 and 82 above). The value of retaining these provisions in the revised model law was emphasized with reference to the Convention against Corruption, as ensuring transparency throughout the process and eliminating any advantageous position of suppliers or contractors that might otherwise gain access to procurement planning phases in a non-transparent way. It was understood that this point and the reasons for including these provisions as a matter of general application to all procurement methods in chapter I should be explained in the guide.

87. Concern was expressed about the burden on procuring entities of publishing the text in paper form. The wording proposed was "to make this information accessible" rather than to specify that such information should be published in a newspaper. In response, it was noted that under article 8, which provided for functional equivalence between various publication media, reference to a newspaper would already imply paper or non-paper means. Ultimately, it was decided to remove the second and third sentences from the proposed paragraph (2) to the guide.

Article 7. Rules concerning methods, techniques and procedures for procurement and type of solicitation

Paragraph (3)

88. It was recalled that the agreement in the Working Group was to use the term "economic efficiency" in paragraph (3) of the article. It was suggested that since one of the objectives of the revised model law as set out in its preamble was "maximizing economy and efficiency in public procurement" the choice of the term to be used should be considered in conjunction with this preamble provision.

89. Some delegates expressed difficulty in understanding the term "economic efficiency" and said that the terms "economy or efficiency" or "economy and efficiency" would be preferable. In the view of one delegation, a reference to

"economy" meant that the use of a procurement method would be less costly, while the term "efficiency" meant that the use of a procurement method would involve less time. Satisfaction of either of these considerations, it was said, should be sufficient to justify recourse to alternative procurement methods set out in chapter III of the draft revised model law. While this understanding was shared by another delegation, the suggestion was made to use the term "economic efficiency" as achieving the desirable ratio between time and cost considerations. It was suggested that further explanations might be provided in the guide.

90. The view was expressed that whichever term would be used to convey the intended meaning, it should appear either only in article 7 (3) or, in addition, in all articles of chapter III. Preference was expressed for the former approach since, it was said, article 7 (3) set out the general requirements justifying recourse to chapter III provisions. Consequently, whatever the terms of those requirements, they would be applicable to all procurement methods in that chapter.

91. The general view was that specific conditions for use of different procurement methods should not be set out in article 7 but retained in the articles regulating each relevant procurement method. It was understood that article 7 should set out the general conditions justifying recourse (a) to chapter III procurement methods in lieu of tendering and (b) to chapter IV procurement methods in lieu of tendering and chapter III procurement methods.

92. Economic efficiency was considered by some delegations to be the main condition for recourse to procurement methods set out in chapter III in lieu of tendering, while the inability to define specifications and/or establish evaluation criteria in quantifiable or monetary terms was considered to be the main condition for recourse to chapter IV procurement methods.

93. The Committee considered the proposal that the following principle should be reflected in the revised paragraph (3): "Where the procuring entity would be required to use tendering proceedings under paragraph (1) of this article, but considers for reasons of economic efficiency that it would be appropriate to use a method specified in chapter III, it may do so [if the conditions for use of the relevant procurement method in chapter III are satisfied] [only in accordance with the conditions specified for each such procurement method]." The understanding was that the guide would provide guidance on the relationship between paragraph (3) and paragraphs (1) and (4).

94. It was queried whether the idea proposed to be reflected in paragraph (3) of the article would eliminate the main difference between conditions for recourse to procurement methods set out in chapter III and conditions for recourse to procurement methods set out in chapter IV. It was considered to be essential to retain the idea that both tendering and the procurement methods alternative to tendering set out in chapter III were subject to the same criterion, that it was feasible to provide a detailed description of the subject matter of the procurement and to establish the evaluation criteria in quantifiable or monetary terms, and that this criterion would not be fulfilled in the case of procurement methods set out in chapter IV.

95. In the view of some delegations, economic efficiency was not the main reason for recourse to all procurement methods set out in chapter III. For example, recourse to two-envelope tendering was justified by other considerations, and recourse to

request for quotations was justified by considerations of economic efficiency only by implication. Therefore, it was considered whether specifying in article 7 (3) economic efficiency as a general condition for recourse to all procurement methods in chapter III would be appropriate. A proposal was therefore made to delete from the paragraph the following wording: "but where the use of tendering proceedings would not be appropriate for reasons of economic efficiency [economy and efficiency] [economy or efficiency]." The paragraph would then read as follows:

> "Where it is feasible to provide detailed description of the subject matter of the procurement and to establish the evaluation criteria in quantifiable or monetary terms, a procuring entity may use a method of procurement referred to in chapter III of this Law provided that the conditions for the use of the method concerned, as specified in the relevant provisions of chapter III, are satisfied."

96. It was decided, in the light of the mutual impact of the provisions in paragraph (3) and those in chapter III, to consider the paragraph at a later stage together with the relevant provisions of chapter III.

Paragraph (4)

97. It was decided, in the light of the mutual impact of the provisions in that paragraph with those in chapter IV, to consider the paragraph at a later stage together with the relevant provisions of chapter IV.

Paragraph (5)

98. It was decided that the term "stand-alone" should be retained and that the term "as appropriate" should be deleted.

Paragraph (6) (a) chapeau

99. The prevailing view was that the phrase "without prejudice to article 24" should be removed from the text.

Paragraph (6) (a) (ii)

100. It was acknowledged that the provisions were intended to accommodate sensitive types of procurement that usually took place in the defence sector. The proposal was made to remove any ambiguity in the term "confidentiality" by changing the text to read as follows: "Direct solicitation is required by reasons of essential national security or essential national defence purposes." It was noted that the proposal would also be relevant to paragraph (7) (a) (iv), which involved the same considerations.

101. Reference in this context was made to article XXIII (1) of the 1994 WTO Agreement on Government Procurement,[18] and article III of the Agreement as revised in 2006.[19] Both of these articles, it was stated, allowed exceptions to transparency for the protection of essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable

[18] Available at http://www.wto.org/english/tratop_E/gproc_e/gp_gpa_e.htm.
[19] Available at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

for national security or for national defence purposes. It was considered important to take into account these provisions.

102. However, the Committee noted that the proposed wording might be insufficiently broad to cover sensitive procurements outside the defence sector, such as the procurement of a vaccine in the case of a pandemic. It was noted that both versions of the Agreement distinguished between measures necessary for national security and national defence, and measures necessary, for example, for public order or safety. An alternative view was that the wording could be interpreted more flexibly and that the guide could provide examples of situations intended to be covered by the notion of "essential national security" (such as procurement in the case of a pandemic or the procurement of sensitive items for medical tests or experiments).

103. Some delegates supported flexibility as regards retaining a reference to "confidentiality" in the text, on the condition that the guide would clarify that it did not refer to confidentiality in the sense of preserving commercially sensitive information (such as trade secrets). All procurement was considered to be confidential in this sense. It was suggested therefore that the text should limit the scope of the term "confidentiality" to State secrets arising from considerations of national security or national defence.

104. The prevailing view was that the text should be revised as proposed in paragraph 100 above.

Paragraph (6) (b)

105. A proposal was made to delete paragraph 6 (b) in the light of the changes to be made to paragraph (6) (a) (ii).

106. Concern was expressed that such a deletion would remove mention of exemptions from transparency requirements in the revised model law that could be essential in the context of the sensitive nature of certain types of procurement.

107. Support was expressed for the view that the provisions should remain but be redrafted in the light of the changes agreed to be made in paragraph (6) (a) (ii). It was suggested, for example, that the opening phrase should be replaced with the following wording: "if direct solicitation is used in situations referred to in paragraph (6) (a) (ii)."

108. It was noted that such a phrase would be excessively broad as it would justify exemptions from transparency in all cases of procurement involving essential national security or essential national defence. It was therefore suggested that it should be narrowed only to those procurements referred to in paragraph (6) (a) (ii) that were considered by the procuring entity to be confidential.

109. The following wording was proposed to replace the opening phrase in paragraph (6) (b) (which would limit exemptions from disclosure requirements to strictly justifiable cases): "if direct solicitation is used in the situations referred to in paragraph (6) (a) (ii), and where the procuring entity determines for considerations of confidentiality that the whole or part of the provisions as regards public disclosure of this Law should not apply, it shall include …" It was noted that the same considerations would be applicable in the context of article 7 (7) (c).

110. While some support was expressed for the idea intended to be conveyed by the proposed wording, the prevailing view was that the term "confidentiality" should be avoided in any revised text, since this term could justify unlimited exemptions and lead to abuses. The following wording was therefore suggested: "if direct solicitation is used in the circumstances set out in paragraph (6) (a) (ii) and where these circumstances make it necessary not to disclose the relevant information, the procuring entity may decide not to apply articles […] of this Law." The alternative view was that the originally suggested opening phrase "if direct solicitation is used in situations referred to in paragraph (6) (a) (ii)" (see para. 107 above) was sufficient and should not be expanded.

111. In the light of the implications of the proposed provisions on enacting States, the strong view was expressed that the scope of the provisions setting out exemptions from transparency requirements of the revised model law should be very clear and should limit any subjectivity on the part of the procuring entity to what was absolutely necessary.

112. A query was made as to whether all the cross-references conferring exemptions to the transparency requirements of the revised model law contained in the text were appropriate. It was noted that the Committee should express its position as regards each exemption. The Committee was therefore invited to consider which of the following exemptions should remain or be added: (a) exemption from open solicitation (article 24 and article 15 (2) (providing for public notification of prequalification proceedings)); (b) exemption from public notification about pre-qualified suppliers or contractors (article 15 (9)); (c) exemption from public notice of the award of the procurement contract (article 20); and (d) exemption from public access to the relevant records of procurement proceedings (article 22 (2)).

113. The inclusion of cross-references to article 15 (2) and (9) (prequalification) was queried, since it was considered that direct solicitation, as per the proposed definition in article 2 (see paras. 61 and 63 above), involved the solicitation from chosen suppliers rather than prequalification. The alternative view was that it would be desirable to preserve flexibility in this matter and, thus, that cross-references to these provisions should remain.

114. In the view of some other delegations, it would not be necessary to set out any specific exemptions in paragraph (6) (b), since these exemptions were already implicit in the term "direct solicitation" read together with paragraph (6) (a) (ii). In the view of yet other delegations, exemptions should be set out but taking into account the need to achieve a balance between the interests of the procuring entity in exempting some sensitive information from the public disclosure requirement on justifiable grounds and the need to provide minimum information to the public to ensure public oversight and review even in cases of sensitive procurement.

115. A query was made as to whether the procuring entity should have the right to choose which of the provided exemptions it could invoke in particular circumstances. One view was that the wording proposed in paragraph 109 above, in referring to "the whole or part of the provisions as regards public disclosure of this Law", gave the procuring entity the flexibility to decide whether to invoke all or some public disclosure exemptions.

116. The importance of preserving in the text safeguards against abuse of the exemptions was highlighted, such as the requirement that the procuring entity must include in the record of procurement proceedings a statement of the grounds and circumstances on which it relied to justify its determination. It was also proposed that the guide should provide detailed explanations of the provisions, in particular the significance of the exemptions, and should highlight that it is the procuring entity that determines whether sufficient grounds exist to treat a relevant procurement as confidential.

117. The general feeling was that the provisions would have to be redrafted to envisage all appropriate alternatives to open solicitation. The view was expressed that the term "direct solicitation" might better be avoided altogether in any revised text.

118. In the course of subsequent deliberations, support was expressed for the following wording to replace paragraph (6) (b): "If solicitation proceeds pursuant to article 7 (6) (a) (ii), the procuring entity shall determine which provisions of this Law calling for public disclosure shall not apply, and shall include in the record required by article 22, a statement of the [grounds and circumstances] [reasons] which justified such determination."

Paragraph (7)

119. It was proposed that subparagraph (a) (iv) and the reference to "national interest" in subparagraph (c) should be revised by the Secretariat in the light of the deliberations of the Committee on procurement in the defence sector (see paras. 100-104).

Paragraph (8)

120. It was proposed that the words "or the use of direct solicitation" should be deleted. The alternative proposal, which gained support, was to redraft the paragraph to ensure that any decision by the procuring entity to use a procurement method other than tendering and any decision not to use open solicitation in other procurement methods would have to be reflected and justified in the record. The Committee deferred consideration of the paragraph and the remaining paragraphs of article 7 to a later stage.

Article 8. Communications in procurement

Paragraph (2)

121. The Committee had before it the following proposal for a revised paragraph (2):

> "(2) Communication of information between suppliers or contractors and the procuring entity referred to in articles [14 (1) (d), 15 (6) and (9), 19 (4), 30 (2) (a), 32 (1), …, and in the case of direct solicitation in accordance with article 7 (6) (a),] may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference."

122. With reference to a query set out in footnote 61 of document A/CN.9/WG.I/WP.69/Add.1, the prevailing view was that a cross-reference to article 19 (4) should be deleted. The Secretariat was entrusted to ensure accuracy of the remaining cross-references in these provisions.

New paragraph (3)

123. The Committee had before it the following proposal for a new paragraph (3):

> "When the procurement involves, requires and/or contains classified information as regards national defence or national security, the procuring entity shall specify in solicitation documents measures and requirements needed to ensure the security of such information at the requisite level."

124. The proponents explained that additional provisions would be needed in the text to accommodate the particular issues arising from the inclusion of defence procurement within the scope of the revised model law. In response to a query as to whether the security concerns were already addressed in paragraph (5), the proponents pointed to the different scopes of the proposed new text and paragraph (5).

125. It was explained that the requirements or measures referred to in the proposed text concerned technical requirements addressed to suppliers or contractors to ensure the integrity of information, such as encryption requirements, and would allow the procuring entity to stipulate, for example, the level of the officer tasked with receiving the information concerned. Paragraph (5), on the other hand, addressed internal requirements with which the procuring entity had to comply.

126. Several delegates strongly supported including those provisions in the revised model law because not doing so, it was said, would make the that model law unusable in the national security and defence sectors.

127. Opposition to including the proposed provisions in the revised model law was expressed. It was considered that the proposed provisions would complicate chapter I, which was supposed to set out provisions of general application to public procurement. The provisions were considered unnecessary also because enacting States might already have specific regulations addressing classified information in the national defence or national security sector. In response, it was observed that the proposed text had been crafted broadly to avoid including details that might conflict with other regulations and that it was the understanding of the proponents that the guide would specify that the provisions were subject to applicable regulations in each enacting State.

128. A proposal to have a special article or chapter dedicated to procurement in the defence and security sectors did not gain support. It was explained that defence and national security procurement, among other kinds of procurement, of a sensitive nature, would be exempted from certain general principles of the revised model law. Treating them separately and distinctly in the revised model law would, in the view of some delegations, result in a departure from the general premise on which the draft revised model law was based – that is, the complexity of the procurement in question rather than its subject matter or the sector in which it took place. At the same time, support was expressed for the view that a general review of the draft revised model law, to accommodate sensitive procurement where appropriate

through exemptions from general rules, was unavoidable. (See paras 253-266 below.)

129. It was agreed that article 8 would be the appropriate location for the proposal as it addressed communications, but flexibility was expressed as regards the best paragraph within that article for the provisions to be set out. Suggestions to merge the proposed text with paragraph (5) did not gain support given their substantially different scopes (see paras 124 and 125 above). Substantial support was expressed for the suggestion to add the proposed text as a new subparagraph (b) in paragraph (3).

130. Concern was expressed about this suggestion since relocating the provisions to paragraph (3) might imply that they were of general rather than exceptional application. It was cautioned that expanding the application of measures justifiable in national defence and national security sectors to other sectors might lead to discriminatory practices. A preference was therefore expressed for stand-alone provisions on this subject with the replacement of the words "shall specify" with the words "shall have the right to specify".

131. Since the proposal essentially addressed the information that the procuring entity must specify in solicitation documents, the view prevailed that the following text based on the proposal should be set out not separately but as a new subparagraph (b) in paragraph (3) as follows:

> "Where the procurement involves, requires and/or contains classified information as regards national defence or national security, measures and requirements needed to ensure the security of such information at the requisite level;"

132. In connection with this text, it was queried whether protection should be given to classified or similar information only in the defence or other national security sectors. Support was expressed for a suggestion to broaden the scope of the proposal. The following suggestions were considered to that end:

(a) To refer to "protected" or "sensitive" information rather than "classified" information;

(b) To broaden the scope of the classified information, by adding the words "or in any other instance" after the words "national defence or national security";

(c) Alternatively, to refer to "classified information [either] as regards national defence or national security, or any other information requiring protection";

(d) Alternatively, to refer to "classified information [such] as regards national defence or national security";

(e) To refer to "national defence or the national interest" rather than "national defence or national security".

133. In considering the alternative formulations given above, the view was expressed that the reference to "classified" information might be too restrictive and that an alternative term, such as "sensitive" or "protected" information, might better convey the type of information concerned. On the other hand, it was observed that the term "classified" information was a term of art well understood in relevant circles. Caution against too broad an expansion of the concept of "classified

information" was urged. Support was expressed for the inclusion in the text of the words "or any other information requiring protection" as set out in paragraph 132 (c) above, as an appropriate way of resolving these issues.

134. In this context, it was recalled that, in the light of the earlier deliberations in the Committee on article 7 (6) (a) (ii) (see paras. 100-104 above), the references to "national security" were intended to be interpreted broadly, so that the protection of public health in cases of (for example) a pandemic would fall within the provisions. On the one hand, concern was expressed about the fact that, notwithstanding the understanding reached, a reference to "national defence or national security", even where broadly construed, might not allow for the protection of classified or similar information not in the national defence or national security domain, such as information on public health. On the other hand, concern was expressed about the fact that the use of the phrase "or any other instance" would confer an open-ended discretion that might lead to abuse. In response, it was said that this provision addressed the protection of classified or similar information only, and not the broader question of the use of direct solicitation or other transparency measures.

135. Other views expressed were that the guide should explain the scope of the provisions, and that they were linked to the scope of article 7 (6) (a) (ii). It was also stressed that the provisions should make it clear that the protection was afforded to classified or similar information, and not to information that the procuring entity might simply wish to protect.

136. A query was made as to how the protection would affect the obligation of the procuring entity to maintain a comprehensive record of the procurement and to make certain parts thereof available to the public.

137. The Committee decided that future considerations of the new provisions for article 8 should be based on the following wording that would be considered together with the related provisions of the deferred article 7 (see paras. 100-120 above):

> "(3) (b) Where the procurement involves, requires, and/or contains [sensitive] [classified] information [such] [either] [as] [regards] national defence or national security [or national interest] [or other information requiring protection], and if the procuring entity considers it necessary, measures and requirements needed to ensure the security of such information at the requisite level;"

Paragraph (3), new subparagraph (c), old subparagraph (b)

138. The Committee had before it the following proposal for a new subparagraph (3) (c):

> "(c) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf."

139. No objection was raised to the proposal, which was found to be generally acceptable.

Paragraph (4)

140. The Committee had before it the following proposal for paragraph (4):

> "(4) The procuring entity shall use means of communication that are in common use by suppliers or contractors in the relevant context. In addition, the procuring entity shall hold any meeting of suppliers or contractors using means that ensure that suppliers or contractors can fully and contemporaneously participate in the meeting."

141. It was suggested that the phrase "any meeting of suppliers or contractors" should be replaced with the phrase "any meeting with suppliers or contractors." No objection was raised to this suggestion or the remainder of the proposal. The proposal with this amendment was found to be generally acceptable.

Paragraph (5)

142. The Committee had before it the following proposal for paragraph (5):

> "(5) The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned."

143. No objection was raised to the proposal, which was found to be generally acceptable.

Article 11. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement

144. The Committee had before it the following proposal for paragraph (1) of article 11:

> "(1) The procuring entity shall set out in the solicitation documents the description of the subject matter of the procurement that it will use in the examination of tenders or other submissions. Where thresholds are set by the procuring entity for identifying non-responsive submissions, the procuring entity shall also set out the thresholds and the manner in which they are to be applied in the examination in the solicitation documents."

145. Concern was expressed about using the term "threshold" without it being defined in article 2 or in the guide in the specific context of article 11 as referring to minimum technical requirements. The point was made that this term had different connotations in many jurisdictions and in some international texts, such as the WTO Agreement on Government Procurement and European Union directives on procurement,[20] where the term usually referred to monetary thresholds that might dictate the use of particular procurement methods. The technical meaning assigned

[20] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*Official Journal of the European Union*, No. L 134, 30 April 2004, pp. 114 and 1, respectively. Both available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).

to the term in the context of various articles of the draft revised model law was noted.

146. In order to stress the distinct meaning intended to be conveyed in this article, alternative terms were proposed to be used in lieu of the term "threshold", such as "benchmark", "minimum requirements", "minimum level of" or "minimum criteria". It was suggested that whichever term was used in the context of these provisions, it might need to be defined in article 2 in order to eliminate any ambiguity as to its intended meaning.

147. A consensus emerged to substitute the term "threshold" with an alternative term. Support was expressed for the use of the term "minimum requirements". Some reservation was expressed about the use of another alternative term proposed – "minimum criteria", as it might create unnecessary confusion since the word "criteria" was also used in the context of assessment of qualifications or evaluation.

148. The Secretariat was entrusted with finding the appropriate term to replace the term "threshold". It was recalled that a glossary of terms would be prepared and it was considered more appropriate to explain the term used in the context of article 11 there rather than in article 2.

Article 12. Rules concerning evaluation criteria [the evaluation of submissions]

Structure and general issues

149. Concern was expressed about the structure of the article. It was proposed that the article should be restructured with the following three elements: first, principles applicable to the evaluation criteria; second, the obligation to publish the evaluation criteria and related information in the solicitation documents; and third, the manner in which the evaluation criteria and other related evaluation aspects were to be applied in the evaluation process. Support was expressed for that suggestion.

150. Other structural changes were proposed, such as reordering paragraphs 2 and 3. The alternative view was that the article as proposed was coherent and no structural changes would be required.

151. A preference was expressed for using the term "evaluation criteria" rather than "criteria" throughout the article and in other provisions of the revised model law according to the context. It was also the understanding that amendments would be required in the text in the light of the proposed definition of "tender or other submission(s)" (see para. 60 above).

Paragraph (1), chapeau provisions

152. The Committee had before it the following proposal for the title and chapeau of paragraph (1):

> **"Article 12. Rules concerning evaluation criteria**
>
> (1) In examining, evaluating and comparing tenders or other submissions and determining the successful submission (the evaluation procedure), the procuring entity shall:"

153. A preference was expressed for replacing the proposed chapeau provisions with the phrase "In order to determine the successful submission, the procuring entity shall:".

Paragraph (1) (a) to (c)

154. Concern was expressed about the inclusion of an essential principle, that "the evaluation criteria must be relevant to the subject matter of the procurement", only in paragraph (1) (a). It was noted that this paragraph addressed the evaluation and comparison of submissions, at which stage the procuring entity would have to apply the criteria set out in the solicitation documents. It was considered essential that all requirements governing the evaluation criteria, including this one, be established very early in the procurement process and set out in the solicitation documents. It was therefore proposed that the principle should be set out without a link to any stage of the procurement proceedings as an overarching requirement, such as in paragraph (3). In a similar vein, it was suggested that all such requirements be placed at the beginning of the article.

155. It was suggested that the provisions of subparagraphs (1) (a) to (c) should be merged with the chapeau provisions in order to avoid repetitions and to set out the essential principles applicable to the evaluation criteria. These principles included that the evaluation criteria and all other information related to the evaluation process must be set out in the solicitation documents and that the evaluation criteria must be relevant to the subject matter of the procurement. It was also proposed that the notion that the evaluation criteria should correspond to the market conditions be included.

156. The Committee agreed that subsequent consideration of paragraph (1) of the article would be based on the following wording:

> "[In order to determine the successful tender or other submission] [In evaluating and comparing tenders or other submissions and determining the successful tender or other submission], the procuring entity shall use only those evaluation criteria that have been set out in the solicitation documents, [and which shall relate to the subject matter of the procurement] and shall apply them in the manner that has been disclosed in those solicitation documents."

Paragraph (2)

157. The Committee had before it the following proposal for paragraph (2):

> "(2) Any non-price evaluation criteria shall, to the extent practicable, be objective and quantifiable. All evaluation criteria shall be given a relative weight in the evaluation procedure and, wherever practicable, shall be expressed in monetary terms."

158. No objection was raised to the proposal, which was approved.

Paragraph (3)

159. The Committee had before it the following proposal for paragraph (3):

"(3) (a) The evaluation criteria must relate to the subject matter of the procurement.

(b) The evaluation criteria may [concern] [consider] only:

(i) The price, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article;

(ii) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the functional characteristics of goods or construction, the terms of payment and of guarantees in respect of the subject matter of the procurement, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article;

(iii) Where the procurement is conducted in accordance with article … [two-envelope tendering] or with chapter IV, and where relevant, the qualifications, experience, reputation, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the services, subject to any margin of preference applied pursuant to paragraph (4) (b) of this article."

160. It was proposed that the following revisions be made to the suggested new wording for paragraph (3), and the view was reiterated that the paragraph should appear before paragraph (2) (see para. 150 above):

(a) In subparagraph (b), to delete the words "consider" and "only". No objection was raised to the deletion of the word "consider". In support of the proposal to delete the word "only", it was observed that it might not be possible to set out exhaustively all the possible evaluation criteria. This deletion was supported on the condition that all criteria would be published in the solicitation documents for transparency reasons and be relevant to the subject matter of the procurement. In opposing the deletion, it was commented that the reason for including the word "only" was to avoid the introduction of subjective criteria. It was added that there was a clearly defined structured approach to the paragraph, making the aim of an exhaustive set of criteria clear. It was suggested, therefore, that the word "only" either be retained or included in square brackets with an explanation of the policy considerations in the guide. It the light of disagreement on this point, it was proposed that the word should be retained in the provisions in square brackets for enacting States to choose whether to delete or retain it. This approach was preferred to another proposal to replace the word "only" with the words "in particular". The Committee decided to retain the word "only" in square brackets pending further deliberations;

(b) In subparagraph (b) (i), to add a reference to socio-economic factors after the reference to margins of preference and replace a cross reference to paragraph (4) (b) with a reference to paragraph (4). The importance of bringing socio-economic factors within the ambit of paragraph (3) was emphasized in order to clarify how such factors were supposed to be taken into account in a transparent and objective manner in the evaluation and comparison of submissions. Both support and opposition to this proposal were voiced. It was noted that the provisions were based on the corresponding provisions in the 1994 Model Procurement Law, and that the intention was to require objective and transparent adjustments in price

according to a margin of preference to be set out and disclosed to suppliers and contractors in advance of the procurement. Reference to socio-economic factors in this context, it was suggested, could make the provisions non-transparent and subjective. It was suggested that the proposal should be considered at a later stage together with all other proposed provisions relevant to the consideration of socio-economic factors in the evaluation and comparison of submissions;

(c) In subparagraph (b) (iii), to delete references to "qualifications, experience, reputation". It was noted that the provisions were based on article 39 of the 1994 Model Procurement Law, which addressed services procurement. A concern was raised about converting them to evaluation criteria relevant to all types of procurement. The inherent subjectivity of the term "reputation" raised particular concern on the part of some delegations, and substantial support was expressed for its deletion. The Committee agreed to a suggestion to replace the term "reputation" with the term "references", as being more objective. The Committee also agreed to delete the reference to "qualifications", with the resulting provisions that had originally been proposed to be deleted reading "experience, references";

(d) Also in subparagraph (b) (iii), to replace the reference to "services" with a reference to "subject matter of the procurement", in line with the decision not to differentiate procurement under the revised model law on the basis of whether goods, construction or services were being procured;

(e) To add a new subparagraph referring to "performances in environmental protection". Support was expressed for this suggestion and eventually it was agreed that a reference to ecological considerations should be added.

Paragraph (4)

161. The proposal was made to replace subparagraph (a) with the phrase "consider socio-economic factors" and to list the examples of socio-economic factors from the 1994 Model Procurement Law in the guide. Support was expressed for this approach as it would appropriately provide for more flexibility in an area that was constantly evolving and involved politically sensitive issues.

162. Strong objection was expressed to the amendment of these provisions of the 1994 Model Procurement Law. A reference in this respect was made to the accompanying guide text, which was considered to be broadly consistent with the WTO Agreement on Government Procurement, explaining the exceptional nature of the provisions and stating that they should be available only to developing countries. Concern was expressed that amending the text would distort the balance achieved in 1994, might open the door to protectionism in various countries and would not be consistent with trends in international regulation of procurement. Strong support was therefore expressed for retaining the provisions as they appeared in the 1994 Model Procurement Law together with the cautionary wording in the accompanying guide.

163. The alternative proposal was to amend subparagraph (a) to read as follows: "consider socio-economic factors, such as", on the understanding that an illustrative list of socio-economic factors could be provided in the revised model law or be omitted with the result that it would be up to an enacting State to specify the relevant socio-economic factors according to the circumstances on the ground. The prevailing view was that it would be helpful to provide for an illustrative list of

socio-economic factors in the revised model law and that such a list could be based on the provisions of the 1994 Model Procurement Law, updated as necessary.

164. It was suggested that an updated illustrative list might refer to such socio-economic factors as: "specific industrial sector development, development of small and medium-sized enterprises, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, environmental improvements, improvement in the rights of women, the young and the elderly, people who belong to indigenous and traditional groups, as well as economic factors, such as balance of payment position and foreign exchange reserves." Support was expressed for including this updated illustrative list in the revised model law.

165. In response to a concern about transparency and objectivity in applying socio-economic factors in the evaluation and comparison of submissions, the general understanding was that the requirement of the 1994 Model Procurement Law that these factors and the manner of their application would have to be addressed in procurement regulations would be retained. In addition, it was suggested that paragraph 4 (a) might explicitly require the socio-economic factors to be applied in an objective and transparent manner, with the guide explaining how such transparency and objectivity could be achieved in practice. The importance of keeping a comprehensive record was highlighted in this respect.

166. It was suggested that: subparagraph (a) should start with the phrase "in establishing non-price criteria"; subparagraph (b) should start with the phrase "in establishing price criteria"; and subparagraph (c) should be deleted. No objection was raised to this suggestion.

167. It was decided that consideration of the paragraph with all proposed revisions thereto should be deferred to a later stage.

Paragraph (5)

168. No comments were made with respect to the paragraph.

Paragraph (6)

169. Support was expressed for retaining the term "lowest evaluated tender" in the revised model law.

170. Some delegations, however, did not find the drafting history of the term (A/CN.9/WG.I/WP.68, paras. 21-27) so convincing as to justify the retention of the term. Concern was reiterated about the term as implying that the supplier receiving the lowest rating at the end of the evaluation process would be the successful supplier. In response, it was observed that, from the practitioner's point of view, the term did not raise any difficulty. Reference in this respect was made to provisions of paragraph (2) of the article that helped to understand the intended meaning of the concept of the lowest evaluated tender.

171. The alternative terms, such as "most advantageous tender", used in the WTO Agreement on Government Procurement, "most economical tender" or "best evaluated tender", were suggested for consideration. Another solution proposed was to retain the term "lowest evaluated tender" with an explanation in the guide

about the origin of the term and the drafting history provided in document A/CN.9/WG.I/WP.68.

172. Another suggestion, which, it was noted, might also assist in resolving problems with terminology, was to delete subparagraphs (a) to (e). It was considered more appropriate to include these provisions in the articles addressing specific procurement methods.

173. The Committee decided to delete subparagraphs (a) to (e) and retain in paragraph (6) the following text: "The evaluation procedure shall be conducted by applying the evaluation criteria in the manner set out in the solicitation documents, to determine the [successful tender or other successful submission] [most advantageous tender or other successful submission]".

174. A general remark was made that the drafting history of the 1994 Model Procurement Law might be irrelevant in many aspects since the entire philosophy of the revised model law should reflect the changes that had taken place in procurement since 1994. The revised model law would be viewed as a more complex document that was not only concerned with the issue of opening up markets, which was the major concern of the 1994 version. In particular, it was pointed out that the basic premise expressed in the 1994 Model Procurement Law that some States were not ripe for certain sophisticated procurement methods or techniques should be removed, since many States had made considerable progress in their procurement administration and it could be said that the same principles and concerns preoccupied developed and developing countries alike. How to achieve the best value for money was cited as an example of the issues that remained valid for all jurisdictions.

Article 14. Submission securities

175. It was the understanding that, in the light of the proposal to change to the definition "[submission] security" to "[submission] [tender or other] security" in article 2 (see para. 56 above), consequential amendments would be required throughout the revised model law in the relevant context, including in this article.

176. Concern about the proposed changes in the definition "[submission] security" was raised in the specific context of article 14, where the use of the newly suggested term "tender or other security", it was said, might distort the content of the article. Additional concerns were raised about this new term, in particular its exact scope and the absence of a reference therein to "other submission security" in line with the newly proposed definition "tender or other submission(s)" (see paras. 55-60 above).

Article 15. Prequalification proceedings

177. The decision of the Working Group not to provide for pre-selection in this article was recalled. It was therefore suggested that the term describing the proceedings of article 15 in various languages should not inadvertently convey any such meaning.

178. It was proposed that the last words in paragraph (7) should read "the invitation to prequalify", in the light of the content of paragraph (3) of the article. No objection was raised to this suggestion.

Article 16. Rejection of all submissions

179. It was noted that, although consequential changes would be made in the provisions to reflect the proposed definition "tender or other submission(s)" (see para. 60 above), some difficulties with the use of that definition persisted. Provisions containing the anticipated amendments, it was said, would be unnecessarily complicated and difficult to understand.

180. The Committee was informed about the drafting history of the article preceding the adoption of the 1994 Model Procurement Law and consideration of the article in the Working Group, with reference to document A/CN.9/WG.I/WP.68/Add.1 (paras. 25-36). The Committee noted that discussion of the article should take into account decisions made in the Working Group in the course of the revision of the 1994 Model Procurement Law that had an impact on some provisions of the article, such as the Working Group's decision to strengthen review provisions. It was recalled that under the 1994 Model Procurement Law, many decisions of the procuring entity, including a decision to reject all submissions, were exempted from review, and that it was proposed to remove this exemption (article 52 (2) (d)), among others, from the revised model law.

181. The Committee had before it the following proposals:

(a) To delete in paragraph (1), the words in square brackets "cancel the procurement" and "but is not required to justify those grounds". The latter deletion, it was explained, was proposed in the light of the provisions in paragraph (2) of the article. It was further proposed that other provisions in square brackets should be retained in the text without square brackets;

(b) To delete in paragraph (2) the words "towards suppliers or contractors that have presented submissions";

(c) To replace paragraphs (1) and (3) of the article with the following text: "In case the procurement is cancelled by the procuring entity prior to the acceptance of the successful submission, notice of cancellation of the procurement and those grounds should be given promptly to all suppliers or contractors that presented submissions". Some support was expressed for this proposal with some modification (see para. 186 below);

(d) To replace the article with a text that provided for (i) the right to cancel the procurement at any stage of the procurement proceedings, (ii) a notification of the cancellation being provided in the same manner as the initial solicitation, (iii) an additional notification with grounds to suppliers or contractors that had presented submissions, and (iv) no liability on the side of the procuring entity.

182. The Committee subsequently focused on the following issues in conjunction with these proposals: (a) whether the term "rejection of all submissions" accurately described the intended meaning of the article; (b) whether the procuring entity should have the right to cancel the procurement and at which stage of the procurement proceedings; (c) the time frame intended to be covered by the article; (d) whether a notice of cancellation should always be provided and in which manner it should be provided; (e) whether grounds and justifications for cancellation must always be provided and, if so, whether they should be provided in the same way as a notice of cancellation or only to participating suppliers or contractors;

and (f) safeguards against the improper use of the right given to the procuring entity under the article.

Whether "rejection of all submissions" accurately described the intended meaning of the article

183. Support was expressed for the view that the term "rejection of all submissions" was problematic and should be replaced with "annulment of the procurement proceedings", "cancellation of the procurement proceedings" or "termination of the procurement proceedings". The term "rejection" was seen as too closely linked to the examination, evaluation and comparison of submissions and the rejection, for example, of unresponsive submissions. Concern was raised about the use of the term "annulment" and a general preference was expressed for the use of the term "cancellation" or "termination". Other delegations were of the view that the term "rejection of all submissions" should be retained.

184. The Committee decided that the Secretariat should find an appropriate term that would convey more accurately the intended meaning of article 16 and would avoid confusion with other provisions of the revised model law that allowed rejection of individual submissions on various grounds (for example, on the ground of inducement, conflicts of interest, as being non-responsive or not achieving the required threshold).

185. In the course of subsequent deliberations, it was agreed to use the term "cancellation of the procurement" and to amend the article accordingly.

Whether the procuring entity should have the right to cancel the procurement and at which stage of the procurement proceedings

186. Support was expressed for the view that the procuring entity should have an unconditional right to cancel the procurement at any stage of the procurement proceedings. It was therefore suggested that the following sentence should replace the opening phrase in the proposal reproduced in paragraph 181 (c) above: "the procuring entity shall have the right to cancel the procurement at any stage of the procurement proceedings."

The time frame intended to be covered by the article

187. Views differed as regards the time frame that should be covered in article 16. Some inconsistency between the first and second sentences of paragraph (1) of the proposed article 16, which was also found in the 1994 Model Procurement Law, was noted in this regard. A view was expressed that the provisions should permit cancellation up to the deadline for presenting submissions. Two other main options considered were to allow cancellation (a) up to the acceptance of the successful submission or (b) up to the stage of conclusion or entry into force of the procurement contract.

188. In explanation of the first option, it was stated that the purpose of the article was to provide protection to suppliers or contractors that presented submissions. Thus the period that preceded the presentation of submissions and the period after the acceptance of the successful submission would not be relevant. The acceptance of the successful submission would be the appropriate cut-off point in the light of article 19, which provided sufficient safeguards to the suppliers or contractor whose

submission was accepted but the procurement was cancelled subsequently. It was explained that in such a case, the safeguards provided for in article 19 would apply, not those in article 16.

189. A compromise emerged that the provisions should concern the entire procurement process covered by the revised model law, in other words until the conclusion of the procurement contract, after which general provisions of contract law were applicable.

Whether a notice of cancellation should always be provided and in which manner it should be provided

190. Support was expressed for the view that a notice of cancellation should always be provided. Views varied whether it should be provided individually to participating suppliers or contractors alone, or whether it should be issued in the same way and in the same media in which the original notice of procurement is published.

191. The prevailing view was that if the procurement were cancelled before submissions were presented or if the submissions were presented but not opened, the notice of cancellation was to be published in the same way and in the same media in which the original notice of procurement had been published and any unopened submissions would be returned unopened to participating suppliers and contractors. A public notice of cancellation of the procurement was considered essential for the oversight by the public. It was further explained that in the case of opened submissions, the notice of cancellation should also be given individually to each supplier or contractor that had presented a submission.

192. The view was reiterated that, as explained in paragraph 188 above, the stage preceding the presentation of submissions would be irrelevant and should therefore not be regulated by the article.

Whether grounds and justifications for cancellation must always be provided and, if so, whether they should be provided in the same way as a notice of cancellation or only to suppliers or contractors concerned

193. Support was expressed for the view that if the procurement were cancelled before submissions were presented or if the submissions were presented but not opened, the procuring entity should not be required to provide any grounds or justifications for cancellation. If, however, the procurement were cancelled during subsequent stages of the procurement proceedings, grounds should be provided in the notice of cancellation issued individually to each supplier or contractor concerned.

194. The view was reiterated that, as explained in paragraph 188 above, the stage preceding the presentation of submissions would be irrelevant and should therefore not be regulated by the article.

195. Some delegations were of the view that the obligation to notify grounds for cancellation should not be automatic but should arise following a request from the suppliers or contractors concerned. This limitation was seen as important for not increasing the bureaucratic burden. It was also suggested that the guide should

highlight, in the same vein, that the grounds provided could be short but should nonetheless be comprehensible.

196. Other delegations did not share these views. They considered that imposing such an obligation on the procuring entity would be the only way to ensure transparency and meaningful review. They therefore proposed that the words "upon request" in paragraph (1) of the proposed article be deleted. It was also noted that under the law of some jurisdictions, the procuring entity would in any case have to communicate the grounds to all suppliers or contractors affected by a decision to reject all submissions. In response, the point was made that requirements of national laws of any individual country should not become a determining factor for revisions of the 1994 Model Procurement Law.

197. An understanding was expressed that justification should not be required, as any such requirement would be inconsistent with paragraph (2) of the article (which itself provided that the procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of the article). At the same time, there was a general understanding that the procuring entity might decide to provide justifications.

198. In the light of these discussions, it was proposed that a distinction between "grounds" and "justifications" should be eliminated in the provisions, by replacing these two terms with the word "reasons".

Safeguards against improper use of the right given to the procuring entity under the article

199. In the light of the unconditional right given to the procuring entity to cancel the procurement, it was considered essential to provide for safeguards against any abuse of this right. It was noted, in this regard, that the provisions could be used for corruptive practices.

200. The Committee in this respect recalled the Working Group's decision to delete the exception from review of a decision to cancel the procurement, which had been set out in article 52 (2) (d) of the 1994 Model Procurement Law. Provisions on the record of procurement proceedings that would require including in the record the fact of and grounds for the decision under article 16 were also noted. The obligation on the part of the procuring entity to provide affected suppliers or contractors with reasons for the decision was also cited as an important safeguard. It was also recalled that under the review provisions of the revised model law, the affected suppliers would be able to seek recovery of the costs of preparing and presenting submissions.

201. It was proposed that the revised model law or the guide might provide for additional safeguards by, for example, listing exceptional circumstances that would justify the cancellation of the procurement (for example, budgetary considerations). Opposition was expressed to the suggestion that any specific conditions governing the procuring entity's right to cancel the procurement under article 16 should be provided in the revised model law, as they could not be exhaustive. Instead, it was considered sufficient to list in the guide possible circumstances that would justify exercise by the procuring entity of its right under article 16. Such circumstances, it was pointed out, would arise mainly from public interest considerations, as had already been highlighted in the 1994 Guide. An observer informed the Commission that cancellation of the procurement in practice often took place after submissions

had been examined, evaluated and compared either because all the submissions had turned out to be unresponsive, effective competition was missing or the proposed prices substantially exceeded the available budget.

202. Requiring a higher-level approval for taking a decision under article 16 and reserving the right in the solicitation documents to cancel the procurement were also mentioned as possible safeguards. In response to an enquiry as to why provisions of the 1994 Model Procurement Law to such effect had been deleted from the proposed article, the relevant Working Group's decisions were recalled, including a strong view expressed in that Group that these provisions created an unnecessary bureaucratic burden (with reference to a higher-level approval) or were superfluous (as regards reserving the right in the solicitation documents) particularly in the light of administrative law provisions giving the right to the procuring entity to cancel the procurement in any case (A/CN.9/668, paras. 112 and 113).

203. Among other possible safeguards, some delegations noted that laws in their jurisdictions required that possible grounds for cancellation should be specified in the solicitation documents. Another safeguard proposed for consideration was that the procuring entity should be prohibited from resorting to direct solicitation or single-source procurement on the same subject matter following the cancelled procurement.

204. A query was raised as to whether the procuring entity should incur liability as a result of its decision to cancel the procurement. In this respect and in the light of the decision by the Working Group to delete the exemption of the decision of the procuring entity to cancel the procurement from review, the need for the provisions of paragraph (2) was questioned. Varying views were expressed on this point.

205. The general understanding was that the provisions of paragraph (2) addressed issues distinct from the right to review the decision of the procuring entity to cancel the procurement proceedings. It was stated that the right would exist and could be exercised but whether liability on the part of the procuring entity would arise would depend on the factual circumstances of each case (in particular, the extent to which the procuring entity complied with applicable procedures such as the requirement to provide a prompt notice of the cancellation and reasons for cancellation where applicable).

206. A preference was expressed for retaining paragraph (2). It was explained that the paragraph was important because it provided protection to the procuring entity from unjustifiable protests and, at the same time, safeguarded against an unjustifiable cancellation of the procurement proceedings by the procuring entity.

207. The other view was that paragraph (2) was superfluous and might be deleted with suitable explanation in the guide. Yet another view was that paragraph (2) should be deleted in order to allow for review of the decision concerned. It was explained that the issue of liability was linked to the right of review and the right to seek compensation for damages, such as recovery of costs incurred for preparing and presenting a submission (as envisaged, for example, in the WTO Agreement on Government Procurement).

208. An additional view was that the issue of liability should be addressed differently depending on when a decision to cancel the procurement proceedings was made: if it was made before the submissions were presented and opened, the

issue of liability should not arise; otherwise, liability should be envisaged. In this regard, reference was made to the wording of the provisions, which allowed limited interpretation since it restricted liability towards suppliers or contractors having presented submissions.

Article 17. Rejection of abnormally low submissions

209. The Committee noted that changes would be made to the title and text of this article in the light of the newly proposed definition "tender or other submission(s)" (see para. 60 above).

210. It was proposed that the words "and/or" in square brackets in paragraph (1) be deleted.

211. A query was raised about the meaning of the term "constituent elements of a submission", in response to which it was noted that the term referred to the aspects of a tender or other submission other than price, notably the quality of the subject matter of the procurement. A subsequent query was whether an abnormally low submission could be identified by reference to price alone, by reference to all elements of the submission without price or by reference to price in conjunction with the other constituent elements of the submission. It was proposed that the phrase "the submitted price with the constituent elements of a submission" should be replaced with "the submitted price and/or the constituent elements of a submission" if it were intended to provide for all three possibilities. Another view was that price must always be analysed in the context of other constituent elements of the submissions concerned. The latter view prevailed, as a result of which the proposal to delete in paragraph (1) the words in square brackets "and/or" was accepted. The amended paragraph was found to be generally acceptable. It was also proposed that relevant explanations should be provided in the guide.

212. As regards the use of the word "reasonable" in paragraph (1) (b), the view was expressed that the phrase set out in footnote 23 of document A/CN.9/WG.I/WP.69/Add.2 be used in lieu of the word "reasonable", as it was a more objective formulation. This view was accepted and it was noted that consequent drafting changes to avoid repetition would be made in due course.

Article 18. Rejection of a submission on the ground of inducements from suppliers or contractors or on the ground of conflicts of interest

213. The Committee noted that changes would be made to the title and text of this article 18 in the light of the newly proposed definition "tender or other submission(s)" (see para. 60 above).

214. As regards new paragraph (b), the link between a conflict of interest and an unfair competitive advantage was queried. It was stated that those two concepts could arise independently of each other and support was expressed for separating the two concepts in the provisions as follows:

> "(b) The supplier or contractor has [gained] an unfair competitive advantage [created by conflicts of interest or otherwise] or has a conflict of interest, in violation of the applicable standards."

215. It was pointed out that, although an unfair competitive advantage might be expected to arise from a conflict of interest, this would not necessarily always be the

case (for example, where the same lawyer represented both sides in the case). At the same time, it was explained that an unfair competitive advantage might be gained under unrelated circumstances (such as consolidation of businesses or a prior business relationship).

216. It was queried whether the concepts of an "unfair competitive advantage" or a "conflict of interest" as set out in the text should be qualified by the word "material" or by another term that indicated that the conflict or advantage could be mitigated. It was stressed that some conflicts could not be mitigated, such as those that might arise if a consultant who had participated in formulating the terms and conditions of the procurement subsequently presented a submission. Although it was added that some other conflicts or advantages could be mitigated through the provision of information to other suppliers, there was no support for the suggestion that either concept should be qualified as suggested.

217. Different views were expressed as to whether to retain the word "gained" in the provisions. One view was that retaining it would create an additional, potentially superfluous, element. The contrary view was that it was necessary to retain the word to indicate how an unfair competitive advantage had arisen. The view prevailed that the word should be deleted.

218. It was queried whether both references to conflicts of interest in the proposal were necessary. After debate, it was concluded that only one such reference should be made, and the prevailing view was to remove the phrase "created by a conflict of interest or otherwise" from the provisions, explaining the notion concerned in the guide. It was also agreed that the guide should explain the term "unfair competitive advantage".

219. It was agreed to replace paragraph (1) (b) with the following two subparagraphs:

> "(b) The supplier or contractor has an unfair competitive advantage in violation of the applicable standards;
>
> (c) The supplier or contractor has a conflict of interest in violation of the applicable standards."

220. It was understood that references to the standards in both subparagraphs would be explained in the guide, which would highlight that those standards might evolve over time. It was also understood that changes would be required in the title of the article to reflect the distinct concepts of conflict of interest and unfair competitive advantage.

221. In the view of one delegation, it would be desirable to incorporate procedures and safeguards against any unjustifiable rejection in cases referred to in newly proposed subparagraphs (b) and (c), drawing on the provisions of article 17 (1). In response, it was suggested that it would be sufficient for the guide to encourage a dialogue between the procuring entity and an affected supplier or contractor.

222. The article as amended was found to be generally acceptable.

Article 19. Acceptance of submissions and entry into force of the procurement contract

223. The Committee noted that changes would be made to the title and text of article 19 in the light of the newly proposed definition "tender or other submission(s)" (see para. 60 above).

Paragraph (2)

224. The Committee had before it the following proposal for paragraph (2):

> "(2) The procuring entity shall promptly notify all suppliers or contractors whose tenders or other submissions were evaluated of its intended decision to accept the successful tender or submission. The notice shall contain, at a minimum, the following information
>
> (a) The name and address of the supplier or contractor presenting the successful tender or submission;
>
> (b) The contract price or, where necessary, a summary of other characteristics and relative advantages of the successful tender or submission, provided that the procuring entity shall not disclose any information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors or would impede fair competition;
>
> (c) The period before the entry into force of the procurement contract during which the suppliers or contractors concerned may seek review of the decisions of the procuring entity related to the ascertainment of the successful tender or submission (the standstill period shall be […] (to be determined by an enacting State))."

225. It was explained that subparagraph (b) should be expanded to accommodate national defence and national security considerations, to reflect the provisions that would be included in article 7 (6) (a) (ii). The need to ensure consistency in any resulting provisions and draft article 21 was stressed.

226. It was also explained that the newly proposed subparagraph (c) did not contain the following wording that appeared in the proposed article 19 (2) (c) in document A/CN.9/WG.I/WP.69/Add.2: "The standstill period shall be sufficiently long, to allow the suppliers or contractors concerned to seek where necessary the effective review in accordance with chapter VII of this Law, and shall run from the date of the dispatch of the notice to all the suppliers or contractors concerned in accordance with this paragraph." It was suggested that this wording should be moved to the guide. The newly proposed wording would allow an enacting State, it was said, to specify the duration of the standstill period with a view to ensuring effective review in accordance with local circumstances. It was confirmed that the intention was to apply the same standstill period in the context of framework agreements.

227. A preference was expressed for reinstating the following words at the end of the proposed subparagraph (c): "and shall run from the date of the dispatch of the notice to all the suppliers or contractors concerned in accordance with this paragraph." The other view was that it would be better for provisions suggested for

reinstatement to be reflected in the guide, as such provisions were closely connected to the administrative review systems of each enacting State that would determine when a standstill period should start.

228. A query was made as to whether a standstill period could have any other logical starting point. It was felt that, according to best procurement practice, there could not be a better starting point than the point in time at which all the suppliers or contractors concerned were appropriately notified about the outcome of the evaluation process. While some delegations expressed flexibility as regards the location of the provisions, other delegations insisted that they were sufficiently important to be reflected in the revised model law itself.

229. It was noted that certainty for suppliers and contractors on the one hand and the procuring entity on the other hand as to the beginning and end of the standstill period was critical for ensuring both that the suppliers and contractors could take such action as was warranted and that the procuring entity could award the contract without risking an upset. For this reason, it was said, the date of dispatch would create the highest level of certainty and should be retained as the starting point for the standstill period. The discussions that had taken place in 1994 on the question of effectiveness of the notification and that had been reflected in the 1994 Guide, to the effect that the date of dispatch was the date that provided for the most certainty, were recalled. Another view was that the date of receipt should be the relevant date, because the standstill period should reflect the time available to the recipient to consider whether to lodge a request for review, and that some systems operated on this principle. A further view was that the issue of determining whether the standstill period should start from the date of dispatch or receipt of the relevant notice should be left to enacting States. A broad reference to the concept of "notification taking effect" to replace reference to the time of dispatch or receipt was also mentioned. However, concern was expressed that this concept would not be recognized in some jurisdictions.

230. A consensus emerged to reinsert the following words at the end of the proposed subparagraph (c): "and shall run from the date of the dispatch of the notice to all the suppliers or contractors concerned in accordance with this paragraph."

231. The importance of sending a notice individually to each supplier or contractor concerned was highlighted. Putting a notice on the website was considered to be insufficient.

232. A concern was expressed about the deletion from the proposed subparagraph (c) of the provisions that required the standstill period to be sufficiently long to allow suppliers or contractors an effective review. A preference was expressed for reinstating this idea.

233. The other view was that paragraph (c) as proposed in paragraph 224 above was sufficient in that respect. It was observed that the concept "standstill period" had proved to be a difficult issue because of differences between review provisions in enacting States. Those States that had an effective administrative review system, it was recalled, were reluctant to introduce a standstill period because it was considered to cause delays in the process without bringing about a commensurate benefit. The newly proposed paragraph (c) was considered as a good compromise for accommodating the needs of States with various administrative review systems,

in that it gave enacting States the discretion to determine the duration of the standstill period according to local requirements.

234. It was proposed that the revised model law might leave it up to enacting States to specify in their procurement law a minimum duration, rather than a fixed duration, for the standstill period. The understanding was that the procuring entity should then have flexibility in determining the exact duration of the standstill period appropriate for each procurement, subject to that statutory minimum. The provisions of the new article 8 were recalled in this context, which gave the discretion to the procuring entity to choose the means of communication in the procurement proceedings. It was noted that the appropriate duration of the standstill period would depend to a considerable extent upon the main means of communications used and whether procurement was domestic or international.

235. It was noted that the discretion of the procuring entity to determine the exact duration of the standstill period in the light of the specific factors of individual procurement (while within the prescribed minimum) should be coupled with an obligation upon the procuring entity to disclose the exact duration of that period in the solicitation documents. The importance of disclosing such information from the outset of the procurement was highlighted given the impact that such information would have on suppliers or contractors.

236. The other view was that the greater need was to ensure certainty, which, it was said, would only be achieved by the use of a defined period in the text. In addition, it was queried what the impact would be if the standstill period were lengthy, because the overall objectives of the revised model law included certainty, transparency and efficiency. In this regard, it was suggested that enacting States would need flexibility to stipulate the period itself.

237. The Committee entrusted the Secretariat to revise the provisions in relevant part along the following lines: "The standstill period shall be at least (…[specific number of days to be determined by the enacting State]) days," on the understanding that article 27 would stipulate that the exact standstill period applicable for each procurement had to be included in the solicitation documents. It was noted that the reference in the text to "at least" would be consistent with the wording in the WTO Agreement on Government Procurement and the European Union remedies directive.[21]

238. It was considered that the guide should explain the impact that the duration of the standstill period would have on overall objectives of the revised model law as regards transparency, accountability, efficiency and equitable treatment of suppliers or contractors. It was also understood that the guide would explain the impact of a lengthy standstill period on the costs that would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate.

239. A query was raised as regards the guidance that should be provided to enacting States on the duration of the standstill period. In response, it was explained that the aim of the standstill period was to allow suppliers or contractors sufficient time to

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[21] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council directive 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, available at http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm.

decide whether to protest the procuring entity's intended decision to accept the successful submission. The standstill period was, therefore, supposed to be relatively short. It was also explained that once the protest had been submitted, the provisions on review proceedings would address a suspension of the procurement procedure. Local and regional regulation of the duration of the standstill period was mentioned. For example, it was noted that in the European context it was considered that a period of around 10 days should be provided to suppliers to decide whether to initiate review proceedings. Local regulations therefore provided for a standstill period of 10 calendar days in cases where the notice was sent electronically and for a period 15 calendar days in other cases. The reason for the difference, it was said, was to ensure equality of treatment, by allowing for the additional time that would be required for a notice sent by traditional mail to reach overseas suppliers. It was suggested that these considerations should be reflected in the guide.

240. A query was made as to whether the provisions include an express requirement for the procuring entity to notify unsuccessful suppliers or contractors of the fact that they had not been successful and of the grounds for that decision. In response, it was observed that providing a full statement of the grounds to each supplier or contractor might be burdensome. In this context, the Committee was informed of positive experience with debriefing in some jurisdictions and it was observed that debriefing would represent best practice. At the same time, the difficulty of providing for a mandatory and enforceable regulatory regime for debriefing was highlighted, particularly in the light of the widely varying scope of debriefing from one procurement to another. It was therefore suggested that it would be useful to address the issues of debriefing only in the guide.

241. In order to remove a perceived ambiguity in the provisions as regards the reference to "suppliers or contractors concerned", the suggestion was made to refer consistently in subparagraph (c) either to "suppliers or contractors that did not win" or to "suppliers or contractors whose submissions were evaluated". The latter formulation was preferred as being consistent with the chapeau provisions of paragraph (2) (while, it was said, the former would exclude from the group of recipients of the notice the winning supplier, which would contradict the intention of the provisions).

Paragraph (3)

242. Support was expressed for retaining the wording of paragraph (3) as it appeared in A/CN.9/WG.I/WP.69/Add.2. It was suggested that in the course of considering paragraph (11) and the related provisions of article 55 (3) (e), the Committee might consider referring in paragraph (3) to open framework agreements and deleting paragraph (11).

243. The Committee deferred consideration of paragraph (3).

244. The Committee proceeded with consideration of paragraphs (8) and (11) of the article, noting that other provisions of the article did not raise any outstanding issues.

Paragraph (8)

245. It was suggested that the following words should be deleted from the proposed text: "that [are in force] [remain valid]", and that the guide should explain that the

award under the provisions in these circumstances should be to the next lowest priced or the lowest evaluated submission. The point was made that the provisions should be redrafted to provide more clarity.

246. No objection was raised to these suggestions.

Paragraph (11)

247. Having noted the connection between paragraph (11) and draft article 55 (3) (e) and a statement made by a delegation in connection with paragraph (3) (see para. 242 above), the Committee deferred consideration of the paragraph.

Article 21. Confidentiality

248. It was proposed that: in paragraph (1) the word in square brackets "inappropriate" should be deleted; in paragraph (2) the words "except as provided in chapter IV" should be inserted and the words "pursuant to articles in chapter IV of this Law" should be deleted; and a new paragraph (3) should be added reading "the procuring entity may impose on suppliers or contractors requirements aimed at protecting the classified information with regards national defence or national security they communicate throughout the tendering and contracting procedure. It may also request these suppliers or contractors to ensure compliance with such requirements by their subcontractors."

Paragraph (1)

249. General support was expressed for deleting the word "inappropriate".

Paragraph (2)

250. The proposals as regards paragraph (2) (see para. 248 above) were stated to be unacceptable to some delegations, as they excluded the provisions of chapter IV from the application of the article. It was noted that draft article 21 was based on repetitive provisions of the 1994 Model Procurement Law regulating procurement methods involving negotiations. It was stressed that provisions of paragraph 2 were particularly valid in the context of chapter IV, which dealt with such procurement methods.

251. The relevance of the article to all procurement methods was highlighted. The essence of the article was seen as preserving the comparative advantage that a supplier might have over another (such as technical excellence), which should not be compromised during the process, and which might be at particular risk where negotiations took place.

252. Some drafting improvements were suggested, such as that provisions should be redrafted: (a) to ensure consistency with the provisions of article 19 (2) (b) (the broader formulation in article 19 (2) (b) being preferable to some delegations, though it was also questioned whether it would be appropriate to repeat all references in that article in article 21); (b) to reflect the introduction of a new procurement method – request for proposals with competitive dialogue – by referring where appropriate to dialogue; (c) to covey the idea that a confidentiality requirement would also apply to information exchanged in the course of negotiations or dialogue; and (d) to use the phrase appearing at the beginning of

paragraph (2) with an added reference to dialogue throughout the article, as appropriate.

New paragraph (3)

253. Support was expressed for including a new paragraph (3) as proposed in paragraph 248 above. Other delegations opposed the inclusion of the suggested provisions in article 21 while yet other delegations questioned the need for a new paragraph (3) in article 21 in the light of proposed relevant changes to article 8. It was also pointed out that the proposed wording for a new paragraph (3) was facilitative, not mandatory, and thus might be inappropriate for the revised model law.

254. A preference was expressed for locating the proposed provisions in article 7 (6) or 8. The understanding was that article 21 had a broad scope, was applicable to all procurement regardless of the sector in which it took place, and was intended to protect parties in the procurement proceedings rather than the subject matter of the procurement (which para. (3) addressed). The other view was that the location of the provisions in article 21 was appropriate.

255. While flexibility was expressed as regards their location, the need for the provisions was emphasized in the light of the Working Group's decision to expand the scope of the 1994 Model Procurement Law to include procurement in the national defence and national security sectors. It was considered that this expanded scope would have to be reconsidered if the particular characteristics of defence and national security sectors were not accommodated.

256. It was suggested that there were several possible solutions to the question of principle. The first would be to adopt the solution of the 1994 Model Procurement Law to exclude defence procurement, which was a solution that this Committee and the Working Group before it had rejected. Such a solution was not accepted by some delegations on the ground that their jurisdictions sought guidance from UNCITRAL as regards procurement in the defence sector.

257. It was not questioned that the decision of the Working Group to expand the scope of the 1994 Model Procurement Law to include national defence and national security was a significant achievement. There was also no dispute about the need to provide for special treatment in the light of specific features of this sector procurement. However, questions were raised about the desirability of including provisions in article 21 and, more broadly, about ways of accommodating this sector in the revised model law (a question that required in-depth consideration and involved taking account of which entities would undertake such procurement).

258. The alternative to a blanket exclusion, it was said, was to address the procurement in this sector in one of the following ways. The first way would be to treat defence procurement as procurement with piecemeal exceptions where necessary, i.e. the current approach. It was noted that the experience at the current session showed that this method of work would be time-consuming and might ultimately not be productive.

259. The second way would be to introduce provisions in a separate chapter or a new model law on defence procurement, an approach that had been taken in the European Union and at least one of its member States. It was noted that that had

been a significant task, one that had taken several years of work. This approach also presupposed detailed regulation of an area that had traditionally been considered to fall within the sovereign prerogative of enacting States to regulate, independently, according to their own national defence policy. Finally, it was noted that such a chapter would be limited in scope as it would not take into account sensitive procurement outside the defence sector.

260. An alternative solution would be to provide a general or partial exemption from the provisions of the revised model law in article 1, by narrowing the ambit of the 1994 Model Procurement Law exemption to ensure that it addressed strictly defence procurement and could not be abused. Alternative suggestions were to place issues arising as regards confidentiality and defence procurement in a single location rather than including repetitious references to national defence and national security procurement. A preference was expressed for article 7 for such a provision or to bring the relevant provisions of article 8 to article 21.

261. After deliberation, consensus was reached on the need for appropriate provisions to address confidentiality in defence procurement and on the fact that this was one aspect of a larger debate about how to accommodate the special nature of defence procurement.

262. Although some delegations were of the view that the Secretariat should be entrusted to draft appropriate provisions to accommodate sensitive procurement, primarily in the defence sector, other delegations did not consider it feasible for the Secretariat to fulfil this task without clear guidance from the Committee on how defence sector and other sensitive procurement should be approached in the revised model law.

263. The point was made that a comprehensive consideration of the topic was unavoidable and it would be preferable to hold such consideration without reference to each provision of the draft revised model law. The following questions were identified for comprehensive consideration of the defence sector procurement: (a) the specific needs of this sector, such as the treatment of classified information; and (b) ways to accommodate such needs. In that regard, it was noted that the specific needs of procurement in the defence sector might arise from either the sensitive nature of the subject of the procurement or from the treatment of classified information even if the subject was not sensitive (for example, when the need arose to ensure confidentiality of information about a delivery schedule or the location of delivery), or both.

264. The other suggestion was that, instead of considering the topic separately and comprehensively, the Committee should continue examining provisions of the draft revised model law and look into issues pertaining to defence sector procurement in conjunction with relevant articles of the draft revised model law. That approach, it was said, would assist delegations in obtaining a comprehensive picture of the exemptions needed to be provided for in the revised model law, in order to accommodate sensitive procurement. The view was reiterated that such a review should not be limited to defence procurement alone but, rather, should address sensitive procurement in general.

265. The prevailing view was that the decision of the Working Group to include procurement in the defence sector within the scope of the revised model law, on the basis of the views expressed within the Working Group to justify inclusion, should

be endorsed, and that the Secretariat should be entrusted with preparing drafting suggestions for further consideration by the Working Group taking into account the following considerations: (a) in this sector, recourse to direct solicitation and procurement methods alternative to tendering should be allowed; (b) special measures for protecting classified information should be envisaged; (c) the specific characteristics of procurement in this sector should be reflected in the provisions regulating the content of the record of procurement proceedings and access to the record; and (d) in drafting provisions to accommodate the procurement in the defence sector, repetitions should be avoided.

266. It was also the understanding that the provisions in the revised model law on procurement in the defence sector would be accompanied by the provisions in the guide, explaining grounds for special measures that might be taken by the procuring entity to protect classified information, including in the supply chain.

Article 22. Record of procurement proceedings

Paragraph (1)

267. It was proposed that:

(a) Subparagraphs (b) and (e) should be revised to provide for the possibility of more than one procurement contract resulting from procurement proceedings;

(b) Reference to socio-economic factors and the manner of their consideration in the evaluation process should be added to subparagraph (f);

(c) In subparagraph (g), the Committee's agreement to use the term "cancellation of the procurement" (see para. 185 above) should be reflected;

(d) In subparagraph (k) the words "and [any other information that the Working Group decides to add]" should be deleted;

(e) In subparagraph (l), the words "of services" and "on which the procuring entity relied to justify the selection procedure used" should be deleted, and that the subparagraph would remain in square brackets pending consideration of chapter IV.

Paragraph (2)

268. It was proposed that the paragraph should be revised to provide for the possibility that more than one procurement contract might result from procurement proceedings.

Paragraph (4)

269. The proposal was that the beginning of the paragraph should be expanded to read "except when ordered to do so by a competent court or competent authority". It was further proposed that the suggested additional reference to competent authority should be explained in the guide (in particular that a competent authority might include the parliament or auditor general and might vary among enacting States). Another view was that the wording should read "except when ordered to do so by a competent authority", with an explanation in the guide that the term "competent authority" referred to both the court and to competent administrative authorities, including oversight bodies.

270. Strong support was expressed for retaining the provisions as they were. It was highlighted that the provisions referred to exceptional cases when disclosure should be authorized (for example, when such disclosure would be "contrary to law"). It was clarified that in such exceptional cases, any competent authority might request disclosure but that the final decision as to whether such disclosure must take place should be a judicial one. The impartiality of the judiciary and the risk that other branches might not be independent were highlighted in this respect.

271. A further suggestion was to keep the text as it was, with an explanation in the guide that other competent authorities might be authorized under applicable local regulations to order disclosure of information in the cases specified in subparagraphs (a) and (b). Opposition was expressed to that suggestion. It was felt that the revised model law should provide minimum essential requirements.

272. Support was expressed for the suggestion that the opening words should read "except when ordered to do so by a competent court or administrative organ referred to in article 58 of this Law". It was explained that this wording restricted the pool of administrative authorities that could be authorized to order disclosure in the exceptional cases referred to in the paragraph.

273. Another suggestion was to add the following words "and/or competent authority or administrative agency" in square brackets, so that the enacting State could select the text according to the local circumstances.

274. No consensus on the provisions was reached and it was decided to include the various proposals in square brackets for further consideration. It was also noted that the wording chosen for paragraph (4) (a) might also affect similar provisions in paragraph (3), and therefore consistency would need to be ensured for similar circumstances.

275. It was also suggested that the opening words in paragraph (4) (a) should be redrafted to read "information from the record of the procurement proceedings". Another suggestion was to redraft the chapeau provisions and paragraph (a) in positive terms to add clarity since, it was felt, the current wording could be interpreted in different ways.

Paragraph (5)

276. A query was made as to whether the wording of paragraph (5) might imply that there was no obligation to maintain the record, contrary to the provisions of paragraph (1). It was proposed that the words "without prejudice to chapter VII" should be added at the beginning of the paragraph in order to avoid such an interpretation.

277. An alternative proposal was made for paragraph (5) to be deleted in the light of chapter VII, in particular article 56, of the draft revised model law. It was pointed out that the suppliers or contractors might seek damages against the procuring entity under these provisions for not maintaining the record as required under article 22. In this regard, it was noted that the supplier or contractor would be obliged to demonstrate loss or injury in order to substantiate a claim for damages under the review provisions. The fact of an insufficient record, it was stated, could not, in and of itself, be grounds for the claim.

278. The other view was that the provisions should be retained for the same reasons as those expressed with regard to paragraph (2) of article 16 (see paras. 205 and 206 above), notably that they made it clear that the failure of the procuring entity to maintain the record in accordance with article 22 did not automatically give rise to liability on the part of the procuring entity. The provisions indicated, it was further explained, that the burden of proof as regards liability was on the supplier or contractor. The provisions were considered to be of assistance to the procuring entity as a safeguard against unjustifiable protests.

279. Consensus was that the provisions should be deleted. It was proposed that the guide should explain that the consequences of a failure to maintain the record might be regulated by other rules applicable in enacting States.

Period of time during which the record had to be preserved

280. A proposal to include a minimum or maximum period for retention of the record, to reflect (for example) contractual limitation periods, did not gain support since there would be no universally acceptable period. This was considered to be a question to be addressed within the enacting State.

Future work

281. The understanding in the Committee was that the Secretariat should be requested to prepare new draft provisions of the revised model law to reflect deliberations at the current session. The idea of holding inter-session informal consultations was supported. The importance of ensuring inclusiveness and as wide a geographical representation of participants as possible in such consultations was highlighted. The Secretariat was requested to make all efforts within available resources to provide the relevant documents in the six official languages of the United Nations.

Report of the deliberations

282. The Committee considered the draft report of its deliberations and proposed amendments thereto. It agreed to recommend to the Commission the adoption of the report as amended.

D. Decisions by the Commission with respect to agenda item 5

283. The Commission took note of the report of the Committee of the Whole. In particular, the Commission noted the Committee's conclusion according to which the revised model law was not ready for adoption at this session of the Commission. The Commission further noted that the Committee was able to consider only chapter I of the draft revised model law and, although some issues were still outstanding from this chapter, most provisions thereof had been agreed upon. The Commission also noted that the Committee had requested that the Secretariat be entrusted with preparing drafting suggestions, for consideration by Working Group I (Procurement), to address those outstanding issues. The Commission further noted that the Committee had recommended the adoption of the report.

284. The Commission adopted the report of the Committee of the Whole as recommended. It also took note of the reports of Working Group I on the work of its fourteenth to sixteenth sessions (A/CN.9/664, A/CN.9/668 and A/CN.9/672) and requested the Working Group to continue its work on the review of the 1994 Model Procurement Law.

285. The importance of completing the revised model law as soon as reasonably possible was highlighted. It was emphasized that the revised model law would have considerable impact on ongoing procurement law reforms at the local and regional levels. Guidance from UNCITRAL in the procurement field was in particular sought on such issues as electronic reverse auctions, framework agreements, e-procurement in general, competitive dialogue and procurement in the defence sector. The importance of UNCITRAL outreach activities was also underscored and the UNCITRAL secretariat was encouraged to increase its promotional efforts for a more widespread use of its uniform law standards in procurement and other areas. (For the two forthcoming sessions of the Working Group, see subpara. 437 (a) below).

V. Arbitration and conciliation: progress report of Working Group II

286. The Commission recalled that, at its thirty-ninth session, in 2006, it had agreed that Working Group II (Arbitration and Conciliation) should undertake a revision of the Arbitration Rules of the United Nations Commission on International Trade Law[22] (the UNCITRAL Arbitration Rules).[23]

287. It was also recalled that at that session, the Commission had noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were widely recognized as a very successful text, having been adopted by many arbitration centres and used in many different instances, for example in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the Rules should not alter the structure of the text, its spirit or its drafting style and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to define carefully the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.[24]

288. It was further recalled that, at its fortieth session, in 2007, the Commission had noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the

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[22] United Nations publication, Sales No. E.93.V.6.

[23] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 187.

[24] Ibid., para. 184.

Working Group in its deliberations to date and should continue to be a guiding principle for its work.[25]

289. The Commission further recalled that, at its forty-first session, in 2008, the Commission had noted that the Working Group had decided, at its forty-eighth session, to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take (A/CN.9/646, para. 69).[26]

290. It was further recalled that, after discussion at that session, the Commission had agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes that the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission had agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission had agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. Written observations regarding that issue had been presented by one delegation (A/CN.9/662) and a statement had also been made on behalf of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Commission had been of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency as a desirable objective in investor-State arbitration should be addressed by future work. As to the form that any future work product might take, the Commission had noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission had decided that it was too early to make a decision on the form of a future instrument on treaty-based arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission had requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission had urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration. It had been emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.[27]

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[25] Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 174.
[26] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 313.
[27] Ibid., para. 314.

291. At its current session, the Commission had before it the reports of the forty-ninth (Vienna, 15-19 September 2008) and fiftieth (New York, 9-13 February 2009) sessions of the Working Group (A/CN.9/665 and A/CN.9/669, respectively). The Commission commended the Working Group for the progress made regarding the revision of the UNCITRAL Arbitration Rules and the Secretariat for the quality of the documentation prepared for the Working Group.

292. The Commission noted that the Working Group had discussed at its forty-ninth session a proposal aimed at expanding the role of the Secretary-General of the Permanent Court of Arbitration at The Hague under the UNCITRAL Arbitration Rules (A/CN.9/665, paras. 47-50). The 1976 version of the Rules included a mechanism whereby the Secretary-General of the Permanent Court of Arbitration should, if so requested by a party, designate an appointing authority to provide certain services in support of arbitral proceedings. The appointing authority would appoint members of an arbitral tribunal under articles 6 and 7 of the Rules and might also be called upon, under article 12 of the Rules, to decide on challenges to arbitrators. Under articles 39 and 41 (respectively) of the Rules, the appointing authority might also assist the parties in fixing the arbitrators' fees and the arbitral tribunal in fixing the deposit for costs. The Secretary-General of the Permanent Court of Arbitration, despite the Court being neither a United Nations body, nor a body created to deal with commercial, non-governmental disputes, agreed to act as the designating authority under the Rules and thus to play a role that was clearly more limited than, and qualitatively different from, that of an appointing authority. A proposal was made in the Working Group to replace the existing mechanism by a provision to the effect that where parties were unable to agree on an appointing authority, the Secretary-General of the Permanent Court of Arbitration should act directly as the appointing authority subject to the parties' right to request the him or her to designate another appointing authority, and to the discretion of the Court's Secretary-General to designate another appointing authority, if it considered it appropriate. The Commission noted that that proposal had initially been made at the forty-sixth session of the Working Group (A/CN.9/619, paras. 71-74), where it had been considered a major and unnecessary departure from the existing UNCITRAL Arbitration Rules and where it had been decided that the mechanism on the designating and appointing authorities as designed under the 1976 version of the Rules should be preserved (A/CN.9/619, para. 74, and A/CN.9/665, para. 49). The Commission further noted that, at the forty-ninth session of the Working Group, diverging views had been expressed as to whether that question should be debated again in the Working Group and the view had been expressed that, whether or not consensus could be reached in the Working Group regarding a possible default rule, the matter was of a political nature and could only be settled by the Commission (A/CN.9/665, paras. 49-50). At its current session, the Commission had before it a note on the designating and appointing authorities under the UNCITRAL Arbitration Rules (A/CN.9/677).

293. After discussion, the Commission agreed that the existing mechanism on designating and appointing authorities, as designed under the 1976 version of the Rules, should not be changed. It was recalled that the mechanism regarding designating and appointing authorities under the 1976 version of the Rules was not considered to be a problematic area by the Working Group, when defining matters for revision at its forty-fifth session. That mechanism was generally not reported as having created delays for the parties or difficulties in the functioning of the Rules. It

was further said that since the provision on designating and appointing authorities under the 1976 version of the Rules did not cause any significant burden and offered benefits, there was no need to alter the structure of the Rules in that respect. In the context of that discussion, the Commission recognized the expertise and the sense of accountability of the Permanent Court of Arbitration, as well as the quality of the services it rendered under the UNCITRAL Arbitration Rules.

294. The two-stage process defined under the 1976 version of the Rules was said to offer flexibility (by allowing the designation of a wide range of appointing authorities to suit the needs of particular cases) that a default appointing authority would preclude. It was observed that the Rules could easily be adapted for use in a wide variety of circumstances covering a broad range of disputes and that one measure of the UNCITRAL Arbitration Rules' success in achieving broad applicability and in their ability to meet the needs of parties in a wide range of legal cultures and types of disputes had been the significant number of independent arbitral institutions that had declared themselves willing to administer (and that, in fact, administered) arbitrations under the UNCITRAL Arbitration Rules, in addition to proceedings under their own rules. It was also said that the proposal to expand the role of the Permanent Court of Arbitration under the Rules, if adopted, would constitute not a mere technical adjustment, but a change in the nature of the Rules and would run contrary to the guiding principles set by the Commission, that any revision of the Rules should not alter the structure of the text, its spirit or its drafting style and should respect the flexibility of the text rather than make it more complex.

295. It was further said that the Permanent Court of Arbitration had been established by the Convention for the Pacific Settlement of International Disputes[28] to deal with disputes involving States and not to handle disputes arising in the context of commercial relations among private parties, which were said to be the primary focus of the UNCITRAL Arbitration Rules. Expanding the role of the Permanent Court of Arbitration, it was said, would appear as favouring the Court over other arbitral organizations, despite the Court having little experience in the area of private commercial disputes, as compared with other arbitration organizations that had jurisdiction over such cases.

296. The Commission was of the view that the establishment of any central administrative authority under the Rules would create a need for providing (in the Rules or in an accompanying document) guidance on the conditions under which such a central authority would perform its functions. The Commission agreed that the work on the revision of the Rules should not be delayed by additional work that would need to be done in that respect if the proposal to expand the role of the PCA were to be pursued.

297. In light of those policy principles, it was emphasized that the UNCITRAL Arbitration Rules should not contain a default rule, to the effect that one institution would be singled out as the default appointing authority and would be identified in the Rules as a provider of direct assistance to the parties.

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[28] See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

298. The Commission noted that the Working Group, at its fiftieth session, agreed to request the Commission for sufficient time to complete its work on the UNCITRAL Arbitration Rules in order to bring the draft text of revised Rules to the level of maturity and quality required (A/CN.9/669, para. 120). The Commission agreed that the time required should be taken for meeting the high standard of UNCITRAL, taking account of the international impact of the Rules, and expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-third session of the Commission, in 2010. The Commission heard a proposal that the Working Group should discuss the extent to which a reference to arbitrators intervening as conciliators should be included in a revised version of the Rules.

299. With respect to future work in the field of settlement of commercial disputes, the Commission recalled its earlier decision that the question of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules, as decided by the Commission at its forty-first session (see para. 290 above). It was reiterated that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration. The Commission also recalled that the issue of arbitrability and online dispute resolution should be maintained by the Working Group on its agenda, as decided by the Commission at its thirty-ninth session.[29]

300. The Commission heard an oral report on progress in the preparation of a guide to enactment and use in relation to the entire UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.[30] It was recalled that, at its thirty-ninth session, the Commission had agreed that it would be useful to prepare such a guide.[31] It was also recalled that such a guide would provide a useful instrument for national legislators and other users of a major UNCITRAL standard. In addition, it would further the process of harmonization of laws. The Commission requested the Secretariat to pursue its efforts towards the preparation of the guide. It was agreed that a more substantive presentation on progress made in the preparation of the guide should be made at a future session of the Commission. (For the two forthcoming sessions of the Working Group, see subpara. 437 (b) below.)

VI. Insolvency law: progress report of Working Group V

A. Progress report of Working Group V

301. The Commission recalled that at its thirty-ninth session, in 2006, it had agreed, inter alia, that: (a) the topic of the treatment of corporate groups in insolvency was sufficiently developed for referral to Working Group V (Insolvency Law) for

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[29] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 187.

[30] United Nations publication, Sales No. E.08.V.4. See also paragraph 376 (k) below.

[31] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 176.

consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending on the substance of the proposed solutions to the problems that the Working Group would identify under that topic; and (b) post-commencement financing should initially be considered as a component of the work to be undertaken on insolvency of corporate groups, with the Working Group being given sufficient flexibility to consider any proposals for work on additional aspects of the topic.[32] The term "corporate groups" was subsequently replaced by the term "enterprise groups" (see A/CN.9/622, paras. 77-84, and A/CN.9/643).

302. At its current session, the Commission expressed its appreciation for the substantial progress made by the Working Group in considering the treatment of enterprise groups in insolvency as reflected in the reports on its thirty-fifth (Vienna, 17-21 November 2008) and thirty-sixth (New York, 18-22 May 2009) sessions (A/CN.9/666 and A/CN.9/671, respectively) and commended the Secretariat for the working papers and reports prepared for those sessions.

303. The Commission noted that the Working Group had adopted in substance a number of recommendations with respect to the domestic treatment of enterprise groups and had reached agreement on its approach to the international treatment of such groups as reflected in the set of 15 recommendations discussed at its thirty-sixth session, a number of which had been adopted in substance. The Commission took note of the close connection between the work on the international treatment of enterprise groups and both the UNCITRAL Model Insolvency Law and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (see para. 24 above) and emphasized the need to ensure consistency with those two texts.

304. The Commission also noted that the Working Group had agreed that the text resulting from the work on enterprise groups should form part III of the UNCITRAL Legislative Guide on Insolvency Law [33] and adopt the same format, i.e. recommendations and commentary. To that end, the commentary to accompany both the domestic and international recommendations would be prepared for consideration by the Working Group at its thirty-seventh session, in 2009, and, if necessary, at its thirty-eighth session, in 2010.

305. The Commission also expressed its appreciation for the cooperation between working groups V and VI with respect to the treatment of intellectual property in insolvency and noted that the questions raised by Working Group VI had been considered and answered by Working Group V at its thirty-sixth session (A/CN.9/671, para. 127) and noted that that information had been incorporated in the work of Working Group VI. (See para. 312 below.)

B. Eighth Multinational Judicial Colloquium

306. The Commission heard a brief report on the Eighth Multinational Judicial Colloquium, held in Vancouver, Canada, on 20 and 21 June 2009. The colloquium, organized by UNCITRAL, the International Association of Insolvency Practitioners

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[32] Ibid., para. 209.

[33] United Nations publication, Sales No. E.05.V.10.

and the World Bank, was attended by some 80 judges from around 40 States, who discussed issues of cross-border insolvency coordination and cooperation, including judicial communication. The colloquium was well received by judges, who welcomed the opportunity to further their understanding of cooperation in cross-border insolvency cases and to have contact with each other to discuss related concerns and issues. Many of the issues discussed were addressed in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (see para. 24 above), the preparation of which was widely supported by judges as a valuable source of information on current issues and practice. The Commission noted that a short report of the colloquium would be prepared and made available on the respective websites of the three organizations.

307. The Commission expressed its satisfaction to the Secretariat for organizing the colloquium and requested the Secretariat to continue cooperating actively with the International Association of Insolvency Practitioners and the World Bank with a view to organizing further colloquiums in the future, resources permitting.

C. Future work on insolvency law

308. The question of possible future work that Working Group V might undertake on completion of the current topic on enterprise groups was raised. The Commission noted several tentative proposals, including: (a) developing a model law based on the recommendations of the UNCITRAL Legislative Guide on Insolvency Law; (b) undertaking a study of the different financial instruments currently being used and how they were treated in insolvency; and (c) in light of the current financial crisis, considering the insolvency of banks and other financial institutions. It was agreed that those and other possible topics should continue to be discussed and elaborated upon in order to establish their feasibility, with a view to possible consideration of the issue of future work at the Commission's forty-third session, in 2010. (For the two forthcoming sessions of the Working Group, see subpara. 437 (d) below.)

VII. Security interests: progress report of Working Group VI

309. The Commission recalled that, during the first part of its fortieth session (Vienna, 25 June-12 July 2007), it had decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Guide on Secured Transactions specific to security rights in intellectual property. At that session, the Commission had emphasized the need to complete that work within a reasonable period of time.[34]

310. The Commission also recalled that, at its resumed fortieth session (Vienna, 10-14 December 2007), it had finalized and adopted the UNCITRAL Legislative Guide on Secured Transactions (the Legislative Guide) on the understanding that the annex to the Legislative Guide would be prepared as soon as possible thereafter so

[34] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 157 and 162.

as to ensure that comprehensive and consistent guidance would be provided to States in a timely manner.[35]

311. At its current session, the Commission had before it the reports of Working Group VI on the work of its fourteenth (Vienna, 20-24 October 2008) and fifteenth (New York, 27 April-1 May 2009) sessions (A/CN.9/667 and A/CN.9/670, respectively). The Commission noted with satisfaction that the Working Group had completed the reading of two versions of the annex to the Legislative Guide (A/CN.9/WG.VI/WP.35 and Add.1 and A/CN.9/WG.VI/WP.37 and Add.1-4) and made significant progress (A/CN.9/667, para. 15, and A/CN.9/670, para. 16).

312. The Commission also noted with appreciation that Working Group V (Insolvency Law), at its thirty-sixth session (New York, 18-22 May 2009), had discussed, on the basis of documents A/CN.9/WG.VI/WP.37/Add.4 and A/CN.9/WG.V/WP.87, certain insolvency-related issues referred to it by Working Group VI, and approved the text referred to it by Working Group VI in document A/CN.9/WG.VI/WP.37/Add.4, paragraphs 22-40, for inclusion in the annex to the Legislative Guide (A/CN.9/671, paras. 125-127).

313. In addition, the Commission noted that, at its fourteenth session, Working Group VI discussed its future work and agreed that it should be able to complete its work on the draft supplement in time to have it submitted to the Commission for final approval and adoption at its forty-third session, in 2010 (A/CN.9/667, para. 143). Moreover, the Commission noted that, at its fourteenth and fifteenth sessions, Working Group VI had engaged in a preliminary discussion of its future work programme (A/CN.9/667, paras. 141-143, and A/CN.9/670, paras. 123-126).

314. In that connection, it was noted that, at the fifteenth session of Working Group VI, the following topics were suggested for inclusion in the future work programme of Working Group VI: a text on security rights in securities not covered by the draft convention on substantive rules regarding intermediated securities, being prepared by the International Institute for the Unification of Private Law (Unidroit); a legislative guide on registration of security rights; a contractual guide on secured financing agreements; a contractual guide on intellectual property licensing; a model law on secured transactions, incorporating the recommendations of the Legislative Guide; and a text on franchising (A/CN.9/670, para. 124).

315. With respect to the Legislative Guide, the Commission requested the Secretariat to expedite its publication as a whole and in part (the terminology and recommendations as a separate publication). The Commission also requested the Secretariat to increase its efforts to raise the awareness of States and other interested parties with respect to the Legislative Guide and in promoting the implementation of the recommendations of that Guide by States in various ways, including by holding seminars, organizing briefing missions, preparing articles for publication and drafting or reviewing draft legislation, as well as cooperating with other organizations active in the field of secured transactions law reform.

316. With respect to the annex to the Legislative Guide (referred to subsequently as a supplement), the Commission expressed its appreciation to Working Group VI and the Secretariat for the progress achieved thus far and emphasized the importance of that supplement. It was stated that economic development involved innovation,

[35] Ibid., part II, paras. 99-100.

which was in turn connected with intellectual property assets. It was also pointed out that the main assets of many small or medium-sized businesses were intellectual property assets. Thus, it was observed that it was important for economic development to facilitate secured transactions in which the encumbered asset was an intellectual property asset.

317. After discussion, the Commission, noting the interest of the international intellectual property community, requested Working Group VI to expedite its work so as to finalize the supplement to the Legislative Guide in one or two sessions and submit it to the Commission for finalization and adoption at its forty-third session, in 2010, so that the Supplement to the Guide may be offered to States for adoption as soon as possible. The Commission agreed that, if two sessions were not sufficient for the preparation of a generally acceptable and balanced text, the Working Group should be given the time necessary to achieve that result, even if that meant that the supplement to the Legislative Guide would be ready for submission to the Commission at its forty-fourth session in 2011.

318. The Commission engaged in a preliminary discussion of the future work programme of Working Group VI. As to the topics to be included in that future work programme, various views were expressed. With respect to security rights in securities not covered by the draft convention on substantive rules regarding intermediate securities, the Commission noted that, at its fortieth session in 2007, it had decided that future work should be undertaken with a view to preparing a supplement to the Guide on certain types of securities, taking into account work by other organizations, in particular Unidroit.[36] In that connection, it was generally agreed that no decision could be made before Unidroit had finalized its work on the draft convention (see para. 314 above), which it would presumably do in the fall of 2009. With respect to a legislative guide on registration of security rights in general security rights registries, it was stated that such work could usefully supplement the work achieved by the Commission on the Guide. With respect to a contractual guide on intellectual property licensing, it was stated that such work, if any, should be undertaken in close cooperation with the World Intellectual Property Organization. With respect to a text on franchising, some doubt was expressed as to whether it would fit into the Commission's work on secured transactions.

319. As to the process for the preparation of a future work programme for Working Group VI, the Commission agreed that, depending on the availability of time, preparatory work could be advanced through a discussion at the sixteenth session of Working Group VI. In addition, it was agreed that the Secretariat could hold an international colloquium early in 2010 with broad participation of experts from Governments, international organizations and the private sector. Moreover, the Commission left it to the Secretariat to organize an expert group meeting, if necessary, to obtain expert advice for the preparation of a paper discussing the various work topics and making suggestions. It was generally agreed that on the basis of that paper the Commission would be in a better position to consider and make a decision on the future work programme of Working Group VI at its forty-third session, in 2010.

320. In response to a question, it was noted that, should Working Group VI complete its work at its sixteenth session in the fall of 2009, it would have an

[36] Ibid., part I, para. 160.

opportunity to consider a possible future work programme at its seventeenth session in the spring of 2010. In that connection, it was noted that, in discussing its possible future work programme in the area of security interests at a future session, the Commission could be assisted by the detailed suggestions of Working Group VI and a paper to be prepared by the Secretariat after a colloquium and an expert group meeting, if necessary.

321. At the conclusion of its deliberations on security interests, the Commission recalled the mandate given to the Secretariat for the publication of the commentary to the United Nations Convention on the Assignment of Receivables in International Trade.[37] In that connection, it was suggested that the Secretariat could hold an expert group meeting with the participation of experts who were involved in the preparation of the Convention. The Commission also recalled its mandate for the publication of a text discussing the interrelationship of various texts on security interests prepared by the Commission, Unidroit and the Hague Conference on Private International Law.[38] (For the two forthcoming sessions of the Working Group, see subpara. 437 (e) below.)

VIII. Possible future work in the area of transport law: commentary on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

A. Update on developments relating to the Convention

322. The Commission noted that, following its approval of what was then known as the draft convention on contracts for the international carriage of goods wholly or partly by sea at its forty-first session, in 2008,[39] the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was subsequently adopted by the General Assembly in its resolution 63/122 of 11 December 2008. In that resolution, the Assembly also authorized a ceremony for the opening for signature of the Convention, to be held in Rotterdam, the Netherlands, on 23 September 2009, and called upon all Governments to consider becoming party to the Convention. In addition, the Assembly recommended that the rules embodied in the Convention be known as "the Rotterdam Rules".

323. The Commission was advised of preparations that had taken place for the signing ceremony, including the circulation of a certified true copy of the Convention by the Treaty Section of the United Nations to permanent missions in New York, accompanied by instructions advising States on how to proceed should they wish to sign the Convention. Further, the Commission noted that a note verbale had been sent to permanent missions by the UNCITRAL secretariat, reminding States of the upcoming signing ceremony on 23 September 2009. In addition, it was

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[37] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 195. For the text of the Convention, see General Assembly resolution 56/81 of 12 December 2001, annex. For further information about the Convention, see paragraph 376 (h) below.

[38] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 384.

[39] Ibid., para. 298.

noted that the note verbale informed States of a colloquium to take place under the auspices of UNCITRAL and of the Comité maritime international (CMI), in conjunction with the signing ceremony. The colloquium would take place on 21 September 2009 and would feature presentations on various aspects of the Convention by key experts on the subject from around the world. Other events were planned to take place around the colloquium and the signing ceremony. Delegations were invited to consult the following web page for further information on all events and to obtain a copy of the information circulated by the Treaty Section on the requirements for signature of the Convention: http://www.rotterdamrules2009.com. It was emphasized that all States were invited to participate in both the colloquium and the signing ceremony, regardless of whether or not the State intended to sign the Convention. As stated in the note verbale, States wishing to attend were advised to notify the Secretariat of that desire and of the names of the individuals in their delegation, indicating which member of the delegation, if any, would be signing the Convention.

324. The Commission also took note that intergovernmental organizations and non-governmental organizations whose work was relevant to the subject matter covered by the Convention had been invited by the Secretariat to participate in the colloquium and related events and to attend the signing ceremony as observers. Those wishing to attend were advised to notify the Secretariat of that desire and of the names of the individuals in their delegation.

325. It was recalled that the Secretariat maintained a web page for each of its instruments once they had been approved or adopted. The Commission noted that, in light of the rapidly growing body of information and views being published in respect of the Convention, the UNCITRAL website had expanded its web page on the Rotterdam Rules to include a selection of materials, links to other relevant web pages and an informative podcast on the Convention.

326. The Commission took note of efforts made by the Secretariat to promote the Convention. In addition to preparing the colloquium and the signing ceremony, the Secretariat had been assisting States that were considering signing the Convention by providing them with the information and support they needed to make that decision. Further, the Secretariat had prepared various materials in respect of the Convention for publication in legal journals, on websites, and other publicly accessible locations.

327. The Commission also noted that, following its forty-first session, the Secretariat had participated in a number of events in order to provide information on and to promote the Convention. In October of 2008, the Secretariat participated in the thirty-ninth conference of CMI, held in Athens. The Commission noted with interest that, at that Conference, CMI had overwhelmingly endorsed the Convention, stating that the Convention generally achieved a fair balance among the various interests in the shipping industry, and recognizing that it offered a unique opportunity to unify and update maritime law and practice on a global basis. In addition, in April 2009, the Secretariat, in collaboration with the Arab Society for Commercial and Maritime Law, CMI and other organizations, assisted in the organization of and participated in the third Arab Conference for Commercial and Maritime Law, held in Alexandria, Egypt. The two-day conference was entitled the "Rotterdam Rules 2009: Uniformity vs. Diversity of the Law of Carriage of Goods by Sea, a Euro-Arab Perspective". At the conference, the details of the Convention

were examined and the issue of whether it could meet the perceived needs of Arab countries was discussed.

B. Possible future work on an explanatory note

328. The Commission then considered possible future work in respect of the Convention, in terms of the possible drafting of an explanatory note to accompany the publication of the text. It was recalled that during its deliberations on the Convention from 2002 to 2008, Working Group III (Transport Law) had considered whether certain aspects of the text should be further elaborated in a commentary or explanatory notes that could accompany the Convention upon its publication. For example, in the last draft text of the Convention that was published with footnotes (A/CN.9/WG.III/WP.101), footnote 6, which referred to article 3 on "Form requirements", includes mention of an explanatory note to the effect that any notices contemplated in the Convention that were not included in article 3 could be made by any means, including orally or by exchange of data messages that did not meet the definition of "electronic communication". No decision had been taken by the Working Group or the Commission on whether to include additional materials along with the publication of the Convention, and if so, which form those materials should take.

329. In order to assist in the consideration of that issue, the Commission had before it a note by the Secretariat (A/CN.9/679) suggesting possible models of commentary or note, if any, that should accompany the publication of the Convention. In that note, reference was made to three different styles of explanatory note that had previously been published in conjunction with UNCITRAL conventions. It was observed that none of those notes constituted an official commentary on the convention to which they referred, and that publication of an official commentary on an instrument was extremely rare in the history of UNCITRAL. The sole example of such an official text was said to have been in connection with the original text of the unamended Convention on the Limitation Period in the International Sale of Goods.[40] However, the Commission observed that explanatory notes were regularly included in the publication of UNCITRAL conventions, often with a disclaimer along the following lines: "This note has been prepared by the Secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention."

330. It was noted that in considering what form of note, if any, should be published along with the Convention, certain characteristics of the Rotterdam Rules were thought to be relevant. Those characteristics included the length and breadth of the Convention, its goal of harmonizing the highly disparate global regime for maritime transport, the voluminous *travaux préparatoires*, and the anticipated publication of several academic commentaries on the Convention in the coming months.

331. There was general agreement in the Commission that the text of the Convention, along with the resolution of the General Assembly adopting it, should be published by the Secretariat as a separate document. Further, there was broad

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[40] *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I. See also paragraph 376 (a) below.

support for the suggestion that the Secretariat should prepare an index to the lengthy *travaux préparatoires* that would assist readers in accessing the legislative history of the text on an article by article basis. In addition, there was some support for the preparation of materials relating to the text that would alert the reader to cross-references to other relevant provisions of the Convention.

332. Strong reservations were expressed regarding whether or not an explanatory note on the Convention should be prepared. It was observed that, while lengthy, the Rotterdam Rules were a balanced and measured text that had been the product of complex negotiations over the course of several years. It was said that the resulting text represented a carefully wrought compromise that States had specifically approved when the General Assembly had adopted the text in December 2008. Fear was expressed that it might be more difficult to understand the intricately woven agreement that had resulted in the adoption of the text if a detailed commentary were published, as it might unwittingly reopen certain issues in respect of which agreement had been particularly hard-won. It was also suggested that that danger would be exacerbated if the commentary was to be an official one on which the views of States would be sought, for example, in the context of a Working Group. Further, it was questioned whether the preparation of a detailed commentary, whether or not it was considered by a Working Group, might not inadvertently delay the ratification process, as States awaited the outcome of those discussions. In addition, the view was expressed that following the adoption of the Convention, its interpretation should be left to States and not be influenced by other actors. It was urged that in light of the expressed concerns, no commentary of any type should be published in conjunction with the text. There was support for that view.

333. It was observed that while an official and detailed commentary on the text might be unwise, the preparation by the Secretariat of a more general explanatory note, not intended to affect the interpretation of the text, could aid in the uniform application of the Convention. Further, it was thought that such a general note could assist States both in making recommendations to their legislatures as to whether or not to become party to the Convention, and in the later implementation of the Convention. There was support for that view.

334. After discussion, the Commission agreed that the Secretariat should prepare a brief introductory note to describe, in general terms, how the Convention had come into being, while avoiding entering into a discussion of substantive issues or a legal assessment; such a note could perhaps be along the lines of the note published with the United Nations Convention on Contracts for the International Sale of Goods (United Nations Sales Convention).[41] The view was expressed that it would be desirable for the Secretariat to present a draft introductory note for consideration by the Commission already at its forty-third session, subject to the availability of the relevant resources. However, given the nature of the note as purely descriptive of the provisions of the Convention, and not intended to be used to interpret their content, the Commission decided that the note should be published, without seeking further review by the Commission, as an introduction to the index to the legislative history of the text (see para. 331 above), rather than as an attachment to the text of the Convention itself.

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[41] United Nations publication, Sales No. E.95.V.12. For further information about the Convention, see paragraph 376 (d) below.

IX. Possible future work in the area of electronic commerce

335. It was recalled that, in 2004, having completed its work on a draft convention on the use of electronic communications in international contracts, Working Group IV (Electronic Commerce) requested the Secretariat to continue monitoring various issues related to electronic commerce, including issues related to cross-border recognition of electronic signatures, and to publish the results of its research with a view to making recommendations to the Commission as to whether future work in those areas would be possible (A/CN.9/571, para. 12).

336. It was also recalled that, at its fortieth session, in 2007, the Commission requested the Secretariat to continue to follow closely legal developments in the relevant areas, with a view to making appropriate suggestions in due course.[42] At its forty-first session, in 2008, the Commission requested the Secretariat to engage actively, in cooperation with the World Customs Organization (WCO) and with the involvement of experts, in the study of the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on legal aspects of creating and managing a single window designed to handle cross-border transactions. The Commission noted that one of the benefits arising from its involvement in such a project would be the improved coordination of work between the Commission, WCO and the United Nations Centre for Trade Facilitation and Electronic Business. The Commission also requested the Secretariat to report to the Commission on the progress of that work at its next session.[43]

337. At the current session, the Commission had before it a note by the Secretariat (A/CN.9/678) providing an update on the work relating to policy considerations and legal issues in the implementation and operation of single window facilities. In particular, the note reported on the activities of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window (the Joint Legal Task Force) as well as on other regional initiatives in this field. Moreover, the note referred to a proposal for the compilation of a comprehensive reference document aimed at facilitating the task of legislators and policymakers, in particular in developing countries, when dealing with issues relating to electronic commerce.

338. The Commission had received further proposals for future work on electronic commerce from States. One proposal suggested the preparation of legal standards on the electronic transferability of rights to goods in transit as well as on electronic documents for bills of lading, letters of credit, insurance and other trade in and transportation of goods (A/CN.9/681 and Add.1). A related proposal called for the preparation of uniform rules governing electronic transfer or negotiation of rights or documents with a view to fostering the migration of cross-border operations of this kind to the electronic environment; the suggested approach focused on the role of electronic registries and trusted third parties in these processes (A/CN.9/682). A third proposal suggested preparing a study on possible future work on the subject of

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[42] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 195.

[43] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 336 and 338.

online dispute resolution in cross-border electronic commerce transactions (A/CN.9/681/Add.2).

339. The Commission heard a statement from a representative of WCO on the work of the Joint Legal Task Force (see para. 411 below). The Commission also heard a statement from the Inter-Parliamentary Assembly of the Eurasian Economic Community on the structure of that body and its activities relating to electronic commerce legislation and single window facilities (see paras. 407-409 below).

340. The Commission stressed the importance of the work of the Joint Legal Task Force, and, more generally, of the legal aspects of single window facilities for trade facilitation. The desirability of focusing that work on practical outcomes, including by involving implementing bodies such as WCO, was also noted. After discussion, the Commission requested the Secretariat to remain engaged in the Joint Legal Task Force, to report periodically on its achievements and to convene a Working Group session should the progress of work warrant it (see subpara. 437 (c) below).

341. The Commission agreed on the importance of the proposals relating to future work in the fields of electronic transferable records and of online dispute resolution to promote electronic commerce, for the reasons expressed in the proposals submitted to the Commission. With respect to electronic transferable records, it was recalled that, as already noted at the Commission's forty-first session, limited elements of commonality in the different records and rights transferred would not support immediate work at the working group level.[44] Thus, it was indicated that further information was needed in order to fully assess the scope and mandate of possible future work on those issues by Working Group IV.

342. With respect to the proposal on online dispute resolution, it was suggested that further studies should identify the different groups interested by possible future standards, including consumers. It was noted in this respect that the variety of rules on consumer protection made it particularly difficult to achieve harmonization in this field. Divergent views were expressed on the desirability of a discussion of the issue of enforcement of awards rendered in online arbitral proceedings. It was explained that practical difficulties arose from the fact that the disputes settled by such awards generally involved small monetary amounts, especially in consumer-related disputes, and from the costs of cross-border enforcement under existing instruments.

343. The Commission requested the Secretariat to prepare studies on the basis of the proposals in documents A/CN.9/681 and Add.1 and 2 and A/CN.9/682, with a view to reconsidering the matter at a future session. It further requested the Secretariat to hold colloquiums on the same issues, resources permitting.

344. The Commission was aware of the importance of providing adequate assistance to developing countries in addressing the digital divide, and of promoting the adoption of modern electronic commerce legislation. However, the Commission did not consider it had sufficient information to support the proposal to initiate the compilation of a comprehensive reference document aimed at facilitating the task of legislators and policymakers. In this respect, it was noted that, while a significant amount of information had already been made available to the public, including through the UNCITRAL website, the studies already requested by the Commission

[44] Ibid., para. 337.

to the Secretariat fully engaged its capacity in the near future. It was therefore suggested that the proposal could be reconsidered at a later stage, subject to availability of resources and to clarification of the specific issues to be covered in such compilation.

X. Possible future work in the area of commercial fraud

345. It was recalled that the subject of commercial fraud had been considered by the Commission at its thirty-fifth to forty-first sessions, from 2002 to 2008, respectively.[45] It was further recalled that at its thirty-seventh session, in 2004, the Commission agreed that it would be useful if, wherever appropriate, examples of commercial fraud were to be discussed in the particular contexts of projects worked on by the Commission so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations. In addition, the Commission agreed in 2004 that the preparation of lists of common features present in typical fraudulent schemes (the "indicators of commercial fraud") could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud in order to help them protect themselves from becoming victims of fraudulent schemes.[46]

346. The Commission also recalled that at its thirty-eighth session, in 2005, its attention was drawn to Economic and Social Council resolution 2004/26 of 21 July 2004, pursuant to which the United Nations Office on Drugs and Crime (UNODC) had begun its work on economic crime and identity fraud. In that same resolution, the Council recommended that the Secretary-General designate UNODC to serve as secretariat for an intergovernmental expert group to prepare a study on fraud and the criminal misuse and falsification of identity and to develop on the basis of the study useful practices, guidelines or other materials, in consultation with the secretariat of UNCITRAL.[47]

347. It was recalled that, at its forty-first session, in 2008, the Secretariat had reported both on its work on the indicators of commercial fraud,[48] and on the comments received by States after the indicators had been circulated to them. It was also recalled that, at that session, the Commission had requested the Secretariat to make such adjustments and additions as were advisable to improve the materials and to subsequently publish them as a Secretariat informational note.[49] The Commission further recalled that at that session, it had heard a report on collaborative efforts undertaken by the Secretariat with UNODC in respect of the work of UNODC on economic fraud and identity fraud and reiterated its request that the Secretariat

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[45] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290; ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 231-241; ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 108-112; ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 216-220; ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 211-217; ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 196-203; and ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 339-347.

[46] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 112.

[47] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 217.

[48] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 339-342.

[49] Ibid., paras. 343-344.

continue to cooperate with and to assist UNODC in its work on fraud and economic crime, and to keep the Commission informed of developments in that area.[50]

348. At the current session of the Commission, the Secretariat reported that several examples of fraudulent schemes that had come to light since the beginning of the global economic crisis were being added to the indicators, which were being updated and prepared for publication and dissemination. The Commission expressed its approval and its continued support for the publication and dissemination of indicators of commercial fraud.

349. The Secretariat further reported that it had participated in all meetings of UNODC core group of experts on identity-related crime, which had been created to examine issues of economic fraud and identity fraud. Three meetings of the core group of experts had been held, in November 2007, June 2008 and January 2009, the results of which had been considered by the Commission on Crime Prevention and Criminal Justice at its eighteenth session (18 April 2008 and 16-24 April 2009), under the agenda item entitled "Economic fraud and identity-related crime".[51]

350. The Commission was informed that at its eighteenth session, the Commission on Crime Prevention and Criminal Justice had considered a number of texts on the issue of economic fraud, including: the reports of the first three meetings of the core group of experts (E/CN.15/2009/CRP.10, E/CN.15/2009/CRP.11 and E/CN.15/2009/CRP.12); a report of the Secretary-General on international cooperation in the prevention, investigation, prosecution and punishment of economic fraud and identity-related crime (E/CN.15/2009/2 and Corr.1); a note by the Secretariat, section II of which was on economic fraud and identity-related crime (E/CN.15/2009/15); a conference room paper on essential elements of criminal laws to address identity-related crime (E/CN.15/2009/CRP.9); a conference room paper on legal approaches to criminalize identity theft (E/CN.15/2009/CRP.13); and a discussion paper on identity-related crime victim issues (E/CN.15/2009/CRP.14).[52]

351. The Commission was advised that two themes raised by the Commission on Crime Prevention and Criminal Justice at its eighteenth session might be of particular interest to UNCITRAL. The first theme was the prevention of economic crime and identity-related crime, and cooperation in that regard with the private sector. The second theme was international cooperation in the prevention of economic fraud and identity-related crime, particularly in terms of raising awareness of the problem and providing technical assistance. The following conclusions reached by the Commission on Crime Prevention and Criminal Justice after the thematic discussions on economic crime and identity-related crime were reported to UNCITRAL as being of possible interest:

(a) It was generally agreed that, in view of the increasing transnational nature of economic fraud and identity-related crime, it was indispensible to strengthen international cooperation mechanisms;

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[50] Ibid., paras. 345-347.

[51] For the report of the session, see *Official Records of the Economic and Social Council, 2009, Supplement No. 10* (E/2009/30–E/CN.15/2009/20).

[52] Ibid., chapter II.

(b) Emphasis was placed on giving special consideration to the protection of victims of economic fraud and identity-related crime, particularly in terms of awareness-raising and educational programmes, among other issues;

(c) The education of potential victims of fraud and identity-related crime, as well as the dissemination of information to them, were said to be critical elements of crime prevention strategies;

(d) It was acknowledged that cooperation between the public and private sectors was essential in order to develop an accurate and complete picture of the problems posed by economic fraud and identity-related crime and in order to adopt and implement both preventive and reactive measures against such crime.

352. At its eighteenth session, the Commission on Crime Prevention and Criminal Justice recommended to the Economic and Social Council the adoption[53] of a draft resolution, in which the Council acknowledged the efforts of UNODC to establish, in consultation with UNCITRAL, a core group of experts on identity-related crime and bring together on a regular basis representatives from Governments, private sector entities, international and regional organizations and academia to pool experience, develop strategies, facilitate further research and agree on practical action against identity-related crime. In the draft resolution, the Commission also recommended that the Council request UNODC to collect, develop and disseminate various materials, the most relevant of which for UNCITRAL were said to be the following: materials on technical assistance for training to enhance expertise and capacity to prevent and combat economic fraud and identity-related crime; useful practices and guidelines in establishing the impact of such crimes on victims; and best practices on public-private partnerships to prevent economic fraud and identity-related crime. Finally, in the draft resolution it was requested that UNODC continue its efforts, in consultation with UNCITRAL, to promote mutual understanding and the exchange of views between public and private sector entities on issues related to economic fraud and identity-related crime, with the aim of facilitating cooperation, through the continuation of the work of the core group of experts, and to report on the outcome of its work to the Commission on Crime Prevention and Criminal Justice on a regular basis.

353. The Commission took note that certain of the actions requested of UNODC by the Commission on Crime Prevention and Criminal Justice in its draft resolution would allow ample scope for integrating the work of UNCITRAL on the indicators of commercial fraud as an important tool for prevention and education and as a possible component of any broader efforts by UNODC in that regard. In response to a question regarding the possibility of future work for UNCITRAL in that area, for example, the development of a code of conduct, the Commission was advised that, following the approval of the draft resolution by the Economic and Social Council, the Secretariat would consult with the UNODC secretariat regarding the possibilities for future work and collaboration, and would report on that issue to UNCITRAL at a future session of the Commission.

354. The Commission expressed its gratitude to the Secretariat for its work in the area of commercial fraud and expressed the desire that the Secretariat would continue its efforts at cooperation and collaboration with the UNODC secretariat in

[53] Ibid., chapter I, B, draft resolution I.

its work on economic fraud and identity-related crime, including by reporting to the Commission on developments at its future sessions.

355. One delegation proposed that the Commission's work in the area of commercial fraud should be extended to the area of financial fraud, in the light of the current situation and recent events in the financial market that had cross-border and international implications. It was proposed that, in the future, work on financial fraud could focus on developing further indicators of financial fraud and on identifying preventive measures. In addition, it was proposed that such work could also involve a study of measures for efficiently solving the consequences of financial fraud, with a view to preserving the integrity of the global financial market. The creation of an institutional arbitration organ was mentioned as one such possible measure. The Commission took note of those proposals.

XI. Endorsement of texts of other organizations: 2007 revision of the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce

356. The International Chamber of Commerce (ICC) requested the Commission to consider recommending the use in international trade of the 2007 revision of the ICC Uniform Customs and Practice for Documentary Credits (UCP 600), as it had with respect to the 1962, 1974, 1983 and 1993 versions of UCP.

357. The Commission recognized that UCP 600, which was aimed at establishing uniformity of practice in relation to dealings with documentary credits, provided successful international contractual rules governing documentary credits. Taking note of the significant changes made to the previous version of UCP, the Commission agreed to recommend the use of UCP 600, adopting the following decision:

> "*The United Nations Commission on International Trade Law*,
>
> "*Expressing* its appreciation to the International Chamber of Commerce for transmitting to it the revised text of 'Uniform Customs and Practice for Documentary Credits', which was approved by the Commission on Banking Technique and Practice of the International Chamber of Commerce on 25 October 2006, with effect from 1 July 2007,
>
> "*Congratulating* the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by bringing up to date its rules on documentary credit practice to allow for developments in the banking, transport and insurance industries and new technological applications,
>
> "*Noting* that 'Uniform Customs and Practice for Documentary Credits' constitutes a valuable contribution to the facilitation of international trade,
>
> "*Commends* the use of the 2007 revision, as appropriate, in transactions involving the establishment of a documentary credit."

XII. Monitoring implementation of the New York Convention

358. The Commission recalled that, at its twenty-eighth session, in 1995, it had approved a project, undertaken jointly with Committee D (now known as the Arbitration Committee) of the International Bar Association, aimed at monitoring the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[54] (the New York Convention) and at considering procedural mechanisms that States had adopted for the recognition and enforcement of arbitral awards under the New York Convention.[55] A questionnaire had been circulated to States with the purpose of identifying how the New York Convention had been incorporated into national legal systems and how it was interpreted and applied. One of the central issues to be considered under that project was whether States parties had included additional requirements for recognition and enforcement of arbitral awards that were not provided for in the New York Convention. It was also recalled that the Secretariat had presented an interim report to the Commission at its thirty-eighth session, in 2005, which set out the issues raised by the replies received in response to the questionnaire circulated in connection with the project (A/CN.9/585).[56]

359. At its current session, the Commission recalled that, at its forty-first session, in 2008, it had considered a written report in respect of the project, covering implementation of the New York Convention by States, its interpretation and application, and the requirements and procedures put in place by States for enforcing an award under the New York Convention, based on replies sent by 108 States parties to the New York Convention (A/CN.9/656 and Add.1). The Commission had welcomed the recommendations and conclusions contained in the report, noting that they highlighted areas where additional work might need to be undertaken to enhance uniform interpretation and effective implementation of the New York Convention. The Commission had been generally of the view that the outcome of the project should consist in the development of a guide to enactment of the New York Convention, with a view to promoting a uniform interpretation and application of the Convention, thus avoiding uncertainty resulting from its imperfect or partial implementation and limiting the risk that practices of States diverge from the spirit of the Convention. The Commission had requested the Secretariat to study the feasibility of preparing such a guide. The Commission had also requested the Secretariat to publish on the UNCITRAL website the information collected during the project implementation, in the language in which it was received. In addition, the Commission had agreed that, resources permitting, the activities of the Secretariat in the context of its technical assistance programme could usefully include dissemination of information on the judicial interpretation of the New York Convention, which would usefully complement other activities in support of the Convention.[57]

360. At its current session, the Commission heard an oral report on the project. The Commission noted that a draft guide to enactment of the New York Convention was

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[54] United Nations, *Treaty Series*, vol. 330, No. 4739. See also paragraph 376 (j) below.

[55] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

[56] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 188-191.

[57] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 353-360.

being planned for preparation and that information collected during the project implementation, to the extent it was confirmed to be accurate, would be published on the UNCITRAL website. The Commission urged States to provide the Secretariat with information regarding implementation of the New York Convention to ensure that the information published on the UNCITRAL website regarding that project remained up to date. The Commission noted that comments received from States on the impact in their jurisdictions of the recommendation adopted by the Commission at its thirty-ninth session, in 2006, regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention[58] would also be published as part of the project. It was noted that States generally supported the recommendation as a means to promote a uniform and flexible interpretation, in different jurisdictions, of the writing requirement for arbitration agreements under article II, paragraph 2, of the New York Convention. The Commission noted that technical assistance activities would be designed and implemented in coordination with other international organizations to address specific issues identified during the project implementation. The Commission agreed that a more substantive presentation of the progress on the project regarding the implementation of the New York Convention should be made at a future session of the Commission.

361. The Commission recalled that the ICC Commission on Arbitration had created a task force to examine the national rules of procedure for recognizing and enforcing foreign arbitral awards on a country-by-country basis. The Commission expressed its appreciation to the ICC Commission on Arbitration and commended the Secretariat for maintaining close collaboration between the two institutions. It was noted that IBA, at its annual meeting in 2008, had invited both a representative of UNCITRAL and of the ICC Commission on Arbitration to discuss their respective projects. In view of the common features identified in the work of the Commission and ICC for the promotion of the New York Convention, the Commission expressed the wish that more opportunities for joint activities would be identified in the future. The Secretariat was encouraged to develop new initiatives in that respect.

XIII. Technical assistance and cooperation

A. Technical cooperation and assistance activities

362. The Commission had before it a note by the Secretariat (A/CN.9/675 and Add.1) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its forty-first session, in 2008 (A/CN.9/652). The Commission emphasized the importance of such technical cooperation and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/675, paragraphs 8-31. It was emphasized that legislative technical assistance, in particular to developing countries, was an activity that was not less important than the formulation of uniform rules itself. For that reason, the Secretariat was encouraged to continue to provide such assistance to the broadest extent possible and to improve its outreach to developing countries in particular.

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[58] Ibid., Sixty-first Session, Supplement No. 17 (A/61/17), annex II.

363. The organization of technical assistance and cooperation activities on a regional basis was supported as being particularly useful. The Commission requested the Secretariat to explore the possibility of establishing a presence in regions or specific countries through, for example, having dedicated staff in United Nations field offices, collaboration with such existing field offices or establishing UNCITRAL country offices. In addition to technical assistance with respect to the use and adoption of UNCITRAL texts, it was also pointed out that many countries faced difficulties in maintaining a sustained presence in the Commission and its working groups and that they might require assistance in preparing for and participating in the work of those bodies, particularly where the topics being discussed were highly technical, to ensure they could develop the capacity to participate effectively. It was suggested that establishing channels of information to facilitate monitoring, on a continuing basis, of the work that was being done might also be useful.

364. The Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet associated UNCITRAL costs. The Commission in particular noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical assistance activities had to be very carefully considered and the number of such activities limited. The Commission requested the Secretariat to explore avenues for UNCITRAL to use extrabudgetary resources in a way similar to that used by UNODC to provide technical assistance, noting that UNCITRAL should have at its disposal the means necessary to carry out technical cooperation and assistance activities.

365. The Commission appealed to all States to assist the Secretariat in identifying sources of available funding in their State or organizations that might partner with UNCITRAL to support technical cooperation and assistance activities to promote the use and adoption of UNCITRAL texts, as well as wider participation in their development.

366. The Commission also reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions, or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for technical assistance and cooperation activities. The Commission expressed its appreciation to Cameroon, Mexico, and Singapore for contributing to the Trust Fund since the Commission's forty-first session and to organizations that had contributed to the programme by providing funds or by hosting seminars. The Commission also expressed its appreciation to France, which had funded a junior professional officer to work in the Secretariat.

367. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission. The Commission expressed its appreciation to Austria for contributing to the UNCITRAL Trust Fund and therefore enabling travel assistance to be granted to developing countries that are members of UNCITRAL.

B. Support to the uniform interpretation of UNCITRAL texts

368. The Commission noted with appreciation the continuing work under the system established for the collection and dissemination of case law on UNCITRAL texts (CLOUT). As at 8 April 2009, 83 issues of compiled case-law abstracts from the CLOUT system had been prepared for publication, dealing with 851 cases relating mainly to the United Nations Sales Convention and the UNCITRAL Model Arbitration Law, and also including some cases on the UNCITRAL Model Law on Cross-Border Insolvency.

369. It was widely agreed that the CLOUT system continued to be an important tool for promoting broader use and better understanding of the legal standards developed by UNCITRAL. It was also felt that the enhancement of the CLOUT system to disseminate case law and other legal materials in all six official languages of the United Nations was key to a more uniform interpretation and application of UNCITRAL texts and should be dealt with as a matter of priority, alongside technical assistance to law reform undertaken by UNCITRAL.

370. The Commission expressed its appreciation to the national correspondents and other contributors for their work in developing the CLOUT system. It also noted the need for a collection system that would be sustainable over time and could respond to changing circumstances. The Commission agreed that States that had appointed national correspondents should be requested to reconfirm that appointment every five years, enabling those correspondents who wished to remain actively involved to continue their work and providing an opportunity for new correspondents to join the network. In order to facilitate implementation of that provision, the term of current national correspondents would expire in 2012 and States would be asked to reconfirm the appointment of their national correspondents at that time and every five years thereafter. The Secretariat was requested to update the existing guidelines for national correspondents (see A/CN.9/SER.C/GUIDE/1/Rev.1) to reflect those changes.

371. The Commission noted the need to enhance the completeness of the collection of case law both from countries that already participate in the CLOUT system and from countries that are currently underrepresented. The Commission mandated the Secretariat to utilize all available sources of information that might supplement the information provided by the national correspondents. The Secretariat was requested to carry out that task in collaboration with national correspondents where appointed.

372. The Commission noted that the continued ability of CLOUT to provide meaningful information was dependent on the regular maintenance and development of the system. The Commission further noted that those activities were resource intensive and the Secretariat was currently stretching its available resources to ensure coordination of the system. The Commission appealed to all States to assist the Secretariat in the search for available funding at the national level to ensure coordination and expansion of the CLOUT system.

373. The Commission noted that the digest of case law on the United Nations Sales Convention had been published and that work was commencing on a revised edition for a possible publication in 2010. It was also noted that a quarterly bulletin and an information brochure had been developed to facilitate dissemination of information on the CLOUT system.

C. Library and online resources

374. The Commission further noted developments with respect to the UNCITRAL website (www.uncitral.org), emphasizing its importance as a component of the overall UNCITRAL programme of information and technical assistance activities. The Commission expressed its appreciation for the availability of the website in the six official languages of the United Nations and encouraged the Secretariat to maintain and further upgrade the website in accordance with existing guidelines. It was noted with particular appreciation that, since the holding of the forty-first session of the Commission, the website had received over one million visits. The monitoring of news and information dealing with the activities of UNCITRAL and the availability of it on the website were welcomed.

375. The Commission took note with appreciation of developments regarding the UNCITRAL Law Library, in particular those relating to the development of online resources and audio-visual materials. It also noted developments with respect to UNCITRAL publications, including the note of the Secretariat containing the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/673) and the availability of online updates to the annual document.

XIV. Status and promotion of UNCITRAL texts

376. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/674) and updated information available on the UNCITRAL website. The Commission noted with appreciation the information on the following treaty actions and legislative enactments received since its forty-first session regarding the following instruments:

(a) [Unamended] Convention on the Limitation Period in the International Sale of Goods, 1974 (New York)[59] (new action by Belgium; 28 States parties);

(b) Convention on the Limitation Period in the International Sale of Goods, as amended, 1980 (New York)[60] (new action by Belgium; 20 States parties);

(c) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)[61] (34 States parties);

(d) United Nations Convention on Contracts for the International Sale of Goods, 1980 (Vienna)[62] (new actions by Albania, Armenia, Japan and Lebanon; 74 States parties);

(e) United Nations Convention on International Bills of Exchange and International Promissory Notes, 1988 (New York)[63] (the Convention has five States parties; it requires ten States parties for entry into force);

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[59] *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I.

[60] United Nations publication, Sales No. E.95.V.13.

[61] United Nations publication, Sales No. E.95.V.14.

[62] United Nations publication, Sales No. E.95.V.12.

(f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, 1991 (Vienna)[64] (the Convention has four States parties; it requires five States parties for entry into force);

(g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995 (New York)[65] (eight States parties);

(h) United Nations Convention on the Assignment of Receivables in International Trade, 2001 (New York)[66] (the Convention has one State party; it requires five States parties for entry into force);

(i) United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (New York)[67] (the Convention requires three States parties for entry into force);

(j) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York)[68] (new actions by the Cook Islands and Rwanda; 144 States parties);

(k) UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006)[69] (new legislation based on the Model Law has been adopted in the Dominican Republic (2008), Honduras (2000), Serbia (2006) and the former Yugoslav Republic of Macedonia (2006); new legislation based on the Model Law as amended in 2006, has been adopted in Mauritius (2008), New Zealand (2007), Peru (2008) and Slovenia (2008));

(l) UNCITRAL Model Law on International Credit Transfers (1992);[70]

(m) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)[71] (new legislation based on the Model Law has been adopted in Bangladesh, Ghana, Guyana, Madagascar, Nepal, Rwanda and Zambia);

(n) UNCITRAL Model Law on Electronic Commerce (1996)[72] (new legislation based on the Model Law has been adopted in Brunei Darussalam (2000), Cape Verde (2003) and Guatemala (2008));

(o) UNCITRAL Model Law on Cross-Border Insolvency (1997)[73] (new legislation based on the Model Law has been adopted in Mauritius (2009) and Slovenia (2008));

(p) UNCITRAL Model Law on Electronic Signatures (2001)[74] (new legislation based on the Model Law has been adopted in Cape Verde (2003) and

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[63] United Nations publication, Sales No. E.95.V.16.

[64] *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, document A/CONF.152/13, annex.

[65] United Nations publication, Sales No. E.97.V.12.

[66] United Nations publication, Sales No. E.04.V.14.

[67] United Nations publication, Sales No. E.07.V.2.

[68] United Nations, *Treaty Series*, vol. 330, No. 4739.

[69] United Nations publication, Sales No. E.08.V.4.

[70] United Nations publication, Sales No. E.99.V.11.

[71] United Nations publication, Sales No. E.98.V.13.

[72] United Nations publication, Sales No. E.99.V.4.

[73] United Nations publication, Sales No. E.99.V.3.

Guatemala (2008); legislation influenced by the principles on which the Model Law is based has been adopted in Costa Rica (2005));

(q) UNCITRAL Model Law on International Commercial Conciliation (2002)[75] (legislation influenced by the Model Law and the principles on which it is based has been enacted in the United States of America by the States of Idaho, South Dakota, Utah and Vermont, as well as by the District of Columbia).

377. With respect to model laws and legislative guides, the Commission noted that their use in and influence on the legislative work of States and intergovernmental organizations was considerably greater than suggested by the limited information available to the Secretariat and reflected in the above-mentioned note.

378. The Commission was informed and noted with appreciation, that a number of States had adopted legislation that would enable them to become a party to the United Nations Sales Convention and the United Nations Convention on the Use of Electronic Communications in International Contracts[76] and that the instruments expressing consent to be bound would be deposited with the Secretary-General in due course.

XV. Working methods of UNCITRAL

379. The Commission recalled that, at the first part of its fortieth session (Vienna, 25 June-12 July 2007), it had before it observations and proposals by France on the working methods of the Commission (A/CN.9/635) and engaged in a preliminary exchange of views on those observations and proposals. It was agreed at that session that the issue of working methods would be placed as a specific item on the agenda of the Commission at its resumed fortieth session (Vienna, 10-14 December 2007). In order to facilitate informal consultations among all interested States, the Secretariat was requested to prepare a compilation of procedural rules and practices established by UNCITRAL itself or by the General Assembly in its resolutions regarding the work of the Commission. The Secretariat was also requested to make the necessary arrangements, as resources permitted, for representatives of all interested States to meet on the day prior to the opening of the resumed fortieth session of the Commission and, if possible, during the resumed session.[77]

380. The Commission further recalled that, at its resumed fortieth session, it considered the issue of the working methods of the Commission on the basis of observations and proposals by France (A/CN.9/635), observations by the United States (A/CN.9/639) and the requested note by the Secretariat on the rules of procedure and methods of work of the Commission (A/CN.9/638 and Add.1-6). The Commission was informed about the informal consultations held on 7 December 2007 among representatives of all interested States on the rules of procedure and methods of work of the Commission. At that session, the Commission agreed that any future review should be based on the previous deliberations on the subject in the

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[74] United Nations publication, Sales No. E.02.V.8.

[75] United Nations publication, Sales No. E.05.V.4.

[76] United Nations publication, Sales No. E.07.V.02.

[77] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, paras. 234-241.

Commission, the observations by France and the United States (A/CN.9/635 and A/CN.9/639) and the note by the Secretariat (A/CN.9/638 and Add.1-6), which was considered as providing a particularly important historical overview of the establishment and evolution of the UNCITRAL rules of procedure and methods of work. The Commission also agreed that the Secretariat should be entrusted with the preparation of a working document describing current practices of the Commission as regards the application of rules of procedure and methods of work, in particular as regards decision-making and participation of non-State entities in the work of UNCITRAL, distilling the relevant information from its previous note (A/CN.9/638 and Add.1-6). That working document would be used for future deliberations on the subject in the Commission in formal and informal settings. It was understood that, where appropriate, the Secretariat should indicate its observations on the rules of procedure and methods of work for consideration by the Commission. The Commission further agreed that the Secretariat should circulate the working document to all States for comment and subsequently compile any comments it might receive, that informal consultations among all interested States might be held, if possible, before the forty-first session of the Commission, and that the working document might be discussed already at the Commission's forty-first session, time permitting.[78]

381. The Commission also recalled that, at its forty-first session, in 2008, it had before it a note by the Secretariat describing current practices of the Commission as regards decision-making, the status of observers in UNCITRAL and the preparatory work undertaken by the Secretariat (A/CN.9/653). At that session, the Commission also had before it a note by the Secretariat compiling the comments received on the note by the Secretariat (A/CN.9/653) prior to the Commission's forty-first session (A/CN.9/660 and Add.1-5). The Commission requested the Secretariat to prepare a first draft of a reference document, based on the note by the Secretariat (A/CN.9/653), for use by chairpersons, delegates and observers and by the Secretariat. It was understood that the reference document should be somewhat more normative in nature than document A/CN.9/653. While the term "guidelines" was most often used to describe the future reference document, no decision was made as to what its final form would be. The Secretariat was requested to circulate the draft reference document for comments by States and interested international organizations and to prepare a compilation of those comments for consideration by the Commission at its forty-second session. Without prejudice to other forms of consultation, the Commission decided that two days should be set aside for informal meetings to take place, with interpretation in the six official languages of the United Nations, at the beginning of the forty-second session of the Commission to discuss the draft reference document.[79]

382. At the current session, the Commission had before it a note by the Secretariat containing a first draft of a reference document (A/CN.9/676). The Commission was informed that, as requested by the Commission at its forty-first session, the draft reference document had been circulated for comments by States and interested international organizations, and that comments received by the Secretariat had been compiled in document A/CN.9/676/Add.1-9. The Commission also had before it a proposal by France (A/CN.9/680) for revisions to be made to the reference

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[78] Ibid., part II, paras. 101-107.

[79] Ibid., *Sixty-third session, Supplement No. 17* (A/63/17), paras. 373-381.

document (A/CN.9/676). Also as requested by the Commission at its forty-first session, the Commission devoted the first two days of its current session to informal consultations on the topic of working methods.

383. The Commission expressed its appreciation for the documents and generally agreed that they provided a sound basis for formulating a set of guidelines as a reference for the chairpersons, delegates and secretariat of UNCITRAL. The subsequent discussion was based on document A/CN.9/676.

384. The Commission noted that paragraphs 1-14 and 37-43 of document A/CN.9/676 had been considered in informal consultations. After the informal consultations, possible revisions to paragraphs 11, 12 and 14 were made available for consideration by the Commission.

385. It was suggested that paragraph 11 should be revised to read as follows:

> "11. There is no established United Nations definition of consensus. However, in United Nations practice, consensus is generally understood to mean adoption of a decision without formal objection and vote; this being possible only when no delegation formally objects to a consensus being recorded, though some delegations may have reservations to the substantive matter at issue or to a part of it. The fact that consensus is recorded does not necessarily mean that there is unanimity of opinion, namely, complete agreement as to substance and a consequent absence of reservations.[12] 'Consensus' should therefore be distinguished from 'unanimity', i.e., the decision-taking by a vote wherein no negative votes are cast, albeit with abstentions. There are numerous occasions in United Nations practice where States make declarations or reservations to a matter at issue while not objecting to a decision being recorded as taken by consensus,[13] which includes a decision taken 'without a vote'.

"[12] See the legal opinion in United Nations Juridical Yearbook, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

"[13] Ibid. The 1987 legal opinion is reproduced in a note by the Secretariat (A/CN.9/638/Add.4, para. 22). Paragraphs 16-24 of that note clarify the meaning of 'consensus' in United Nations practice. Some organs distinguish between 'consensus' and 'decision without a vote'. 'Consensus' is used simply to reflect a situation where disagreeing delegations would not have pressed their disagreement to the point where no 'decision by consensus' could be reached. In that case, disagreeing delegations could, of course, have voiced their disagreement and, if they so wished, could have had their views reflected in the records. Where delegations do not wish to be closely associated with the decision, they have on occasion had the decision recorded as taken 'without a vote'. Such a decision would have a less positive appearance and, it may be said, does not represent 'consensus' in its truest form. Other organs use the terms 'by consensus', 'without a vote' or 'by general agreement' interchangeably. In any event, as noted in the 1987 legal opinion, 'the legal status of a decision is not affected by the manner in which it is reached. Once adopted, it has the status of a legally adopted decision'."

386. It was generally agreed that the suggested revision fully reflected the discussion during the informal consultations. However, a concern was expressed with regard to whether such a paragraph, which described the practices of consensus in the United Nations at large, and thus related to United Nations bodies other than the Commission, could form part of a document produced by the Commission. The

Commission took note of those reservations. After discussion, the Commission found paragraph 11 as reproduced in paragraph 385 of the present report to be generally acceptable.

387. The Commission found the following text for paragraph 12, revised to ensure consistency with the language used in paragraph 11, to be generally acceptable:

> "12. Consensus in the Commission may reflect a complete agreement as to substance and a consequent absence of reservations. It may also be based on the substantially prevailing view, a flexible notion that does not embody a pre-defined mode of calculation and is characterized by a strong majority of opinions and the absence of formal objection and vote. Delegations may request that the decision be recorded as taken without a vote."

388. Although there was some support for deleting the last sentence or moving it to section 3 on voting, the decision was made that it should be retained in paragraph 12.

389. The Commission emphasized that the role of the chairperson included advancing negotiations, facilitating consensus and determining the existence and exact nature of the consensus. After discussion, the Commission found that a text for the chapeau of paragraph 14 along the following lines would be generally acceptable subject to possible drafting refinement, which the Secretariat was requested to consider for discussion at a future session (the content of the accompanying footnote was not discussed):

> "14. The chairperson plays an important role in facilitating and determining the existence and the exact nature of a consensus.[15] The chairperson should be committed to advancing negotiations in order to reach a widely acceptable solution. In practical terms, when a chairperson announces that it is her or his understanding that the Commission wishes to take a decision by consensus, the following scenarios are possible:

> "[15] It should be noted that the chairperson, in the exercise of her or his functions, remains under the authority of the Commission (rule 107 of the Rules of Procedure of the General Assembly), which may overrule her or his decisions by a majority of the members present and voting (rule 125 of the same rules). It is therefore recommended that, as a general rule, before the chairperson rules, she or he seeks views from the member States of the Commission."

390. It was suggested that an objecting delegation should be responsible for formulating alternative solutions. That proposal was not supported.

391. The Commission found the following text of paragraph 14, subparagraph (a), to be generally acceptable:

> "(a) If the announcement is met by silence, either by implicit or explicit expression of support, the chairperson can declare that the decision has been taken by consensus;"

392. The Commission did not have time to conclude its deliberations on paragraph 14, subparagraph (b). The following text, which did not gain consensus in the Commission, was suggested for further deliberations at a later stage:

"(b) If an objection to the decision being recorded as taken by consensus is lodged by a member State of the Commission, the chairperson gives an opportunity to the objecting delegation to formulate the grounds for its objection. The chairperson has a general duty to seek a consensual way out of a deadlock. If after best efforts, it is not possible to find a solution, the chairperson may wish at this stage to explain [to the objecting delegation] that a formal objection by a delegation to a decision being adopted by consensus [does not have effect akin to a veto but is to be treated as an implicit request for formal voting] [may lead to a vote]. The chairperson may wish subsequently to seek confirmation of the delegation's intention. If the formal objection is maintained, the chairperson may proceed to formal voting (see section 3 below)."

393. With respect to the first sentence, the view was expressed that the right to object to a decision being recorded as being taken by consensus should also be available to non-member States. It was recalled that the principal difference between member and non-member States of the Commission related to the right to vote. The view was expressed that, except for the right to vote, observer States should enjoy all of the rights from which member States benefited, consistent with the practice developed over years since the establishment of the Commission and the objectives of UNCITRAL to achieve the universal acceptability of its standards and the broadest participation by States. The opposite view was also expressed that the right to raise a formal objection to consensus should be available only to member States of the Commission.

394. With regard to the third sentence of subparagraph (b), concern was expressed with respect to the use of the word "veto" in the first alternative wording in square brackets. The Secretariat was requested to consider possible alternative language to reflect the impossibility of reaching a decision as a result of a formal objection being maintained by one State. It was suggested that a formal objection and a request for a vote were independent actions and that the former should not be treated as an implicit request for a vote. For that reason, the second alternative wording in square brackets was proposed.

395. It was proposed that the text should clarify the different intentions that the objecting delegation might have, which would include requesting the decision to be recorded as one taken without a vote or requesting a vote. However, it was observed that the guidelines should provide guidance to chairpersons in dealing with decision-making in the specific situation where an objecting delegation sought to maintain its objection after extensive negotiation without requesting a vote, and thereby sought to prolong the negotiation phase indefinitely. It was noted that the final sentence attempted to address such a practical difficulty. The Commission did not reach a decision on that point and the discussion was postponed.

396. The view was expressed that, in the light of the consideration of the revised paragraphs 12 and 14 (b) above, paragraph 13 of document A/CN.9/676 should also be revised.

397. The text of revised paragraphs 14 (c) to (e), 37, 39, 41 and 43, which were prepared by the Secretariat but not considered by the Commission for lack of time, read as follows:

"14. (c) If a delegation announces that it is not participating in the decision-taking but does not prevent the chairperson from stating that the decision has been adopted by consensus, the chairperson can make such a statement and then, in effect, the situation would be viewed as if such a State was not present when the decision was taken;[16]

"(d) Those delegations which do not expressly indicate that they do not participate in a consensus are deemed to have participated in it;[17]

"(e) Non-member States of the Commission and observer organizations may participate in the collective effort to achieve a generally acceptable text.[18] However, they may not raise any formal objection to a decision being recorded as taken by consensus.

"37. The secretariat has discretion in determining its working methods.[40]

"39. The secretariat may have recourse to the assistance of outside experts from different legal traditions and affiliations, such as Government officials, academics, practising lawyers, judges, bankers, arbitrators or other subject-matter experts and members of various international, regional and professional organizations.[42]

"41. When the secretariat decides to convene an expert group meeting, information about the meeting (dates and format of the meeting, topic(s) to be discussed and participants invited to the meeting) is made available to States to the extent compatible with articles 100 and 101 of the Charter of the United Nations. Conferences and colloquiums are broadly advertised, particularly through the posting of the relevant information about the events on the UNCITRAL website.

"43. As demonstrated by practice so far, the use of one working language only at expert group meetings convened by the UNCITRAL secretariat has not hampered but rather facilitated the consultation process at such meetings. Nevertheless, the UNCITRAL secretariat is committed to endeavour, resources permitting, to provide at such meetings translation and interpretation in the other working language of the Secretariat, according to its needs and the needs of participants. In addition or alternatively, as the case may be, the Secretariat may find it necessary, under certain circumstances, to provide at such meetings translation and/or interpretation into another official language of the United Nations (for example, when expert advice from a particular country or region is required and the experts coming from that country or region do not have a good command of English or French but can communicate in another official language of the United Nations). In its requests for translation and interpretation services during such meetings, the secretariat has to take into account that the requested services can only be provided on an 'as available' basis, since intergovernmental meetings, formal or informal, have priority access to translation and interpretation services.

"[16] Based on the wording of the legal opinion in United Nations Juridical Yearbook, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

"[17] Ibid.

"[18] Ibid.

"[40] It is recalled that, under Article 100 of the Charter of the United Nations, Secretariat staff, in the performance of their duties, shall not seek or receive instructions from any Government or from any other authority external to the Organization. Each Member State of the United Nations undertakes to respect the exclusively international character of the responsibilities of the staff of the Secretariat and not to seek to influence them in the discharge of their responsibilities. It is also recalled that, under Article 101 (3) of the Charter, the necessity of securing the highest standards of efficiency, competence and integrity is the paramount consideration in the employment of the staff.

"[42] Already in its early years, the Commission envisaged that the UNCITRAL secretariat would hold consultations with the organs and organizations concerned as may be appropriate in the different phases of the work. In particular, it envisaged that studies and other preparatory documents would be prepared by the secretariat with the assistance of experts, if necessary, and budget permitting. The Commission agreed that budget and planning estimates prepared by the secretariat for subsequent years should take into account the need for obtaining the services of consultants or organizations with special expertise in matters dealt with by the Commission, in order to enable the Commission to carry out its work. See, e.g., A/8017, paras. 219-221."

XVI. Coordination and cooperation

A. General

398. The Commission heard an oral report from the Secretariat providing a brief overview of the work of international organizations related to the harmonization of international trade law. The Commission recalled that at its forty-first session, in 2008, the Secretariat had suggested that the timing of both its general annual report on the current activities of international organizations related to the harmonization and unification of international trade law, as well as its ongoing series of specialized reports on particular topics, would in the future not necessarily be published prior to the annual session of the Commission.[80] The Commission noted that the Secretariat would publish its 2009 annual report on the activities of other international organizations in the fourth quarter of 2009. It was also noted that, given the growing interest in insolvency issues that had been witnessed in the light of the current global economic crisis, the Secretariat would publish a more detailed study on insolvency-related activities.

399. It was recalled that at its thirty-seventh session, in 2004, the Commission had agreed that it should adopt a more proactive attitude, through its secretariat, in fulfilling the terms of its mandate as regards coordination activities.[81] Recalling General Assembly resolution 63/120 of 11 December 2008 (see paras. 428 and 429 below), in which the Assembly endorsed the efforts and initiatives of the Commission towards coordination of activities of international organizations in the field of international trade law, the Commission noted with appreciation that the Secretariat was taking steps to engage in a dialogue, on both legislative and technical assistance activities, with a number of organizations, including the Hague Conference on Private International Law, Unidroit, the Organization for Economic Cooperation and Development, the Organization of American States, the World Bank, WCO, the World Intellectual Property Organization, and WTO. The

[80] Ibid., para. 382.

[81] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 114.

Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

400. By way of example of current efforts at coordination, the Commission noted the coordination activities listed in document A/CN.9/675, paragraphs 32-35, and in particular the meetings involving the Hague Conference on Private International Law and Unidroit.

B. Reports of other international organizations

401. The Commission took note of statements made on behalf of the following international and regional organizations.

European Bank for Reconstruction and Development

402. The Commission was advised of a statement received by the Secretariat from the General Counsel of the European Bank for Reconstruction and Development (EBRD) confirming the willingness of EBRD to follow the appeal made by the General Assembly in its resolution 63/120 (para. 7 (d)) (see paras. 428 and 429 below) for regional development banks to cooperate and coordinate their activities with UNCITRAL and to support the technical assistance programme of the Commission. The General Counsel of EBRD pointed to the joint conference organized by UNCITRAL, EBRD and the World Bank entitled "Secured transactions and insolvency: reforms at a crossroads", held in Washington, D.C., on 5 and 6 May 2008 (A/CN.9/675, para. 25 (a)) as a successful example of such collaboration and cooperation.

Food and Agriculture Organization of the United Nations

403. The Commission heard a statement concerning the International Treaty on Plant Genetic Resources for Food and Agriculture, [82] which established a Multilateral System of Access and Benefit-Sharing covering the 64 most important crops for global food security and which was implemented through a standard contract, namely the Standard Material Transfer Agreement for the transfer of plant genetic resources and the sharing of benefits accruing from those transfers.

404. It was noted that the UNCITRAL secretariat had participated in expert consultations on various aspects of information technology being developed to assist with the transfer of genetic resources and the sharing of benefits arising from the use of those resources and that it had contributed expertise on developing mechanisms for dispute resolution. The Commission heard that the value of its contribution to the implementation of the Treaty was recognized by the 122 Contracting Parties to the Treaty, whose governing body had recently held its third session in Tunis from 1 to 5 June 2009. The contribution made by UNCITRAL was particularly appreciated by developing countries in need of advice on practical,

[82] Food and Agriculture Organization of the United Nations, *Report of the Conference of FAO, Thirty-first Session, Rome, 2-13 November 2001* (C 2001/REP), appendix D.

efficient and cost-effective solutions to implement the Multilateral System of Access and Benefit-Sharing.

405. At its third session, the Governing Body and the Contracting Parties, in approving the procedures for the Third Party Beneficiary, thanked UNCITRAL for its excellent advice to the Secretariat (Governing Body resolution 5/2009). Contracting Parties also consolidated the basis for further collaboration by requesting the Treaty secretariat to foster cooperation with other organizations and strengthen existing cooperative arrangements with a view to developing synergies and reducing inefficiencies (Governing Body resolution 8/2009).

406. The Commission noted that continuing to collaborate with UNCITRAL would contribute to the implementation of the Treaty and benefit both the Food and Agriculture Organization of the United Nations and UNCITRAL.

Inter-Parliamentary Assembly of the Eurasian Economic Community

407. The Commission heard a statement concerning the Inter-Parliamentary Assembly of the Eurasian Economic Community relating, in particular, to its structure and projects that were relevant to the work of UNCITRAL. It was noted that the Assembly was involved in the formation of common external customs at the borders of the member States of the Eurasian Economic Community (Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan and Uzbekistan) and the elaboration of unified foreign economic policies, tariffs, prices and other components of a functioning common market. It was also noted that the Assembly, a body of parliamentary cooperation of States members of the Eurasian Economic Community, was considering issues related to the harmonization of national legislation with the agreements concluded within the framework of the Assembly, in order to achieve the objectives of the Eurasian Economic Community.

408. It was explained that the work of the Inter-Parliamentary Assembly included projects to develop normative legal acts, such as draft model legislation and recommendations on the harmonization of national laws. One of its reported activities was the creation of a legal framework for electronic commerce, which was viewed from the perspective of trade facilitation and the development of a single window facility.

409. The Commission heard that model basic principles for e-commerce had been prepared for use as a framework for national legislation, on the basis, inter alia, of the UNCITRAL Model Law on Electronic Commerce,[83] with a view to improving legislation on electronic commerce and supporting the development of electronic commerce in member States. It was further indicated that the Inter-Parliamentary Assembly had taken advantage of the expertise and experience of the UNCITRAL secretariat, including by receiving suggestions on draft recommendations to be presented at the meeting of the standing committee on trade policy and international cooperation of the Assembly, to be held in Minsk in November 2009.

International Institute for the Unification of Private Law

410. The Commission heard a statement on behalf of Unidroit. Unidroit welcomed the current coordination and cooperation with UNCITRAL and reaffirmed its

[83] See paragraph 376 (n) above.

commitment to cooperating closely with UNCITRAL with a view to ensuring consistency and avoiding overlap and duplication in the work of the two organizations and the best use of the resources made available by the respective member States. Unidroit reported that:

(a) At the sixty-third session of the Unidroit General Assembly, held in Rome on 11 December 2008, the members of the Unidroit Governing Council were elected for the subsequent five years. The Unidroit General Assembly also approved the recommendations made by the Governing Council in respect of the Unidroit work programme for the 2009-2011 triennium, assigning the highest priority to the work on finalization of a draft convention on intermediated securities and the additional chapters of the Unidroit Principles of International Commercial Contracts, and to the work on a protocol on matters specific to space assets to the Convention on International Interests in Mobile Equipment (Cape Town Convention);

(b) The first session of the diplomatic conference to adopt a convention on substantive rules regarding intermediated securities took place in Geneva from 1 to 12 September 2008. The final session, to complete work on the draft convention, is to be held from 5 to 9 October 2009 in Geneva. A steering committee for drafting an official commentary to the convention had been established and the English version of the draft commentary had been posted on the Unidroit website, with the French text to become available soon;

(c) A Model Law on Leasing was completed in 2008 and formed the basis of leasing laws already developed by Jordan, Tanzania (United Republic of) and Yemen and leasing laws being developed, for example, in Afghanistan. An official commentary on the model law is being prepared by the Unidroit secretariat, in close cooperation with a group of experts, and should be finalized in the course of 2009;

(d) The working group for the preparation of a third edition of the Unidroit Principles of International Commercial Contracts held its third session in Rome from 26 to 29 May 2008 and its fourth session also in Rome from 25 to 29 May 2009. The Working Group had been considering a draft chapter on the unwinding of failed contracts, a draft chapter on illegality, a draft chapter on plurality of obligors and/or of obligees, a draft chapter on conditional obligations and a position paper with draft provisions on the termination of long-term contracts for just cause. The working group decided to temporarily set aside its work on the termination of long-term contracts for just cause and to focus only on the other four chapters, with a view to submitting them to the Governing Council for its approval in 2010;

(e) An additional area of work under the overall umbrella of the Cape Town Convention was the preparation of a draft protocol on matters specific to space assets. A steering committee was formed in 2007 to develop the draft protocol and, in view of the progress of its work, a diplomatic conference for adoption of a draft protocol might be held in 2010. A preparatory commission was established by resolution of the Luxembourg diplomatic conference in order to prepare the international registry under the Luxembourg Rail Protocol. A meeting of the Commission, co-hosted by Unidroit and the Intergovernmental Organization for International Carriage by Rail (OTIF), was held in Rome in April 2008. Another such meeting is expected to be held on 1 and 2 October 2009;

(f) Possible future work by Unidroit included (i) a protocol to the Cape Town Convention on agricultural, construction and mining equipment; (ii) a study

on civil liability for satellite-based services; (iii) a proposal for a model law on the protection of cultural property; (iv) a convention on the netting of financial instruments; and (v) possible work in the area of private law and development, in particular, as regards food security and agriculture.

World Customs Organization

411. The Commission heard of the continued interest of WCO in collaborating with UNCITRAL through the Joint Legal Task Force (see para. 337 above) as a means of providing a road map for potential single window users to follow when creating a legally enabling environment. WCO indicated its intention to continue doing its best to obtain strong member involvement in analysing the policy, operational and procedural contexts of single window facilities and providing strategic guidance to prospective single window stakeholders. That member involvement was expected to include representation from the six WCO global regions, which include all 174 members. WCO expressed its belief that, at the present stage, the process could be satisfactorily managed by face-to-face meetings at its Brussels headquarters, as well as through the various other means described in the original terms of reference of the Joint Legal Task Force, such as a shared space on the Internet.

XVII. Role of UNCITRAL in promoting the rule of law at the national and international levels

412. The Commission recalled that at its resumed fortieth session (Vienna, 10-14 December 2007) it decided to include the item "Role of UNCITRAL in promoting the rule of law" in the agenda of its forty-first session and invited all States members of UNCITRAL and observers to exchange views on this agenda item at that session. It also recalled that that decision was taken on the basis of General Assembly resolution 62/70 on the rule of law at the national and international levels, in paragraph 3 of which the General Assembly invited the Commission to comment in its report to the General Assembly on the Commission's current role in promoting the rule of law.[84] The Commission further recalled that it had transmitted the comments, as requested, to the General Assembly in its annual report on the work of its forty-first session, in 2008.[85]

413. At its current session, the Commission took note of General Assembly resolution 63/128 on the rule of law at the national and international levels. In particular, the Commission noted that in paragraph 4 of that resolution the Assembly had called upon the United Nations system to systematically address aspects of the rule of law in relevant activities and that in paragraph 6 it had encouraged the Secretary-General and the United Nations system to accord high priority to rule of law activities. The Commission also noted that, in paragraph 7 of that resolution, the Assembly had invited the Commission to continue to comment, in its reports to the Assembly, on its current role in promoting the rule of law.

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[84] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part II, paras. 111-113.

[85] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 386.

414. The Commission noted that, in paragraph 10 of its resolution 63/128 the General Assembly had decided that at its sixty-fourth session, in 2009, the debates in the Sixth Committee under the agenda item on the rule of law would focus on the sub-topic "Promoting the rule of law at the international level", without prejudice to the consideration of the item as a whole. The Commission therefore decided that at its current session its comments to the General Assembly would focus on its current role in promoting the rule of law at the international level.

415. The Commission recalled the mandate given to it by the General Assembly in its resolution 2205 (XXI) of 17 December 1966 establishing UNCITRAL as the United Nations expert body in the field of international commercial law. It was stressed that, pursuant to this mandate, the Commission contributed to the progressive development and harmonization of international commercial law by formulating modern international norms and standards to support international commerce and by ensuring that these norms and standards were acceptable to States with different legal, social and economic systems, as well as to other international actors, such as multilateral donors, using such norms and standards. The Commission also promoted general awareness and greater understanding of those standards, through teaching and technical assistance, CLOUT, the UNCITRAL website and publications and by dissemination of information about international commercial law by other means.

416. It was also noted that the Commission always attached high importance to another aspect of its mandate – cooperation and coordination with international organizations, including non-governmental organizations, active in the formulation, interpretation and/or implementation of international commercial law standards. Cooperation and coordination were seen to be the means to avoid conflicting rules or interpretations and confusion as regards sources of law and thus to achieve order, clarity, efficiency and consistency in the international regulation of commerce. In that regard, the Commission recalled its numerous appeals, supported by the General Assembly, most recently in its resolution 63/120 (see para. 428 below), for relevant international and regional organizations to coordinate their rule-making and/or technical assistance activities with those of the Commission. Noting that the desired coordination and cooperation were still to be achieved, the Commission welcomed the upcoming consideration at the sixty-fifth session of the General Assembly, in 2010, of ways and means of strengthening and improving coordination and coherence in rule of law activities (see para. 420 below).

417. The Commission also promoted peaceful and independent adjudication of disputes in the context of trade and investment, including between States, respect for binding commitments, confidence in the rule of law and fair treatment by strengthening non-judicial mechanisms such as arbitration and conciliation. In that respect, the Commission recalled its ongoing project on the revision of the UNCITRAL Arbitration Rules (see paras. 286-298 above), which were widely used in many different instances, including for solving disputes involving States and international organizations, as well as ongoing and new projects with respect to the New York Convention that aimed at achieving universal recognition and enforcement of foreign arbitral awards (see paras. 358-361 above). The Commission also recalled its plans for future work in the area of investment disputes resolution that touched upon such issues of international law as State responsibilities, transparency and human rights.

418. The Commission also worked at the critical juncture between international and national rule of law by assisting States with the implementation, at the domestic level, of international norms and standards and their uniform interpretation. Noting that laws and practices of Member States in implementing international law would be considered separately by the General Assembly at its sixty-fifth session (see para. 420 below), the Commission wanted only to reiterate, at the current stage, its concern that successful continuation of its programme of technical assistance with domestic law reforms was jeopardized by the lack of sufficient resources. It recalled in this respect its request at previous sessions, as supported by the General Assembly, and repeated at the current session (see paras. 364-366 above and para. 428 below), for additional resources to be allocated to meet the increased demand from developing countries and countries with economies in transition for technical assistance with the implementation of international commercial law.

419. The Commission considered that higher awareness, understanding and use of international commercial law were as important for modern commerce and sustained economic development as for good governance, justice and legal empowerment. The Commission therefore reiterated its conviction that promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the rule of law unit in the Executive Office of the Secretary-General. The Commission was looking forward to being part of strengthened and coordinated rule of law activities of the Organization.

420. The Commission drew the attention of its member States and observers to the following sub-topics under the agenda item "Rule of law at the national and international levels" expected to be considered at the sixty-fifth and sixty-sixth sessions of the General Assembly, in 2010 and 2011: "Laws and practices of Member States in implementing international law" and "Rule of law and transitional justice in conflict and post-conflict situations".[86] Noting the relevance of its activities to the subjects identified in these sub-topics, the Commission invited its member States and observers to submit comments in writing or orally addressing the role of UNCITRAL in the relevant context, for reflection in the Commission's reports to the General Assembly in the respective years.

XVIII. International commercial arbitration moot competitions

A. General remarks

421. The Commission recalled that pursuant to proposals made at the UNCITRAL Congress in 1992,[87] and following deliberations at the Commission's

[86] The Sixth Committee reached the understanding that comments related to the first sub-topic should address, among others, laws and practices in the domestic implementation and interpretation of international law, strengthening and improving coordination and coherence of technical assistance and capacity-building in this area, mechanisms and criteria for evaluating the effectiveness of such assistance, ways and means of advancing donor coherence and perspectives of recipient States. Comments related to the other sub-topic should address, among others, the role and future of national and international transitional justice and accountability mechanisms and informal justice systems (A/63/443, para. 7).

twenty-sixth session, in 1993,[88] the first Willem C. Vis International Commercial Arbitration Moot was organized in Vienna by the Institute of International Commercial Law at Pace University, New York. That arbitration moot competition was conceived as an educational initiative aimed at promoting and expanding familiarity with and understanding of UNCITRAL legal texts,[89] in particular the United Nations Sales Convention[90] and the UNCITRAL works in the field of international commercial arbitration.

422. At its current session, the Commission noted with satisfaction that the Willem C. Vis International Commercial Arbitration Moot competition, which involved participants from all over the world, was a very successful educational initiative, having contributed both to the dissemination of information about UNCITRAL instruments and to the development of university courses dedicated to international commercial arbitration. The Commission was informed that arbitration moot competitions modelled on the Willem C. Vis International Commercial Arbitration Moot were being organized in Argentina, China (Hong Kong) (see para. 425 below) and Spain (see para. 426 below).

423. The Commission expressed its gratitude to the organizers and other sponsors of the Willem C. Vis International Commercial Arbitration Moot competition and, in particular, to the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot and its institutional members (Pace University School of Law, United States; Queen Mary University, United Kingdom; University of Stockholm, Sweden; University of Vienna, Austrian Arbitration Association and Federal Economic Chamber, Austria) for their efforts to make it successful and hoped that the international outreach and positive impact of the moot competition would continue to grow. Special appreciation was expressed to Eric E. Bergsten, former secretary of the Commission, for developing the moot competition and giving it direction since its inception in 1993-1994. Special appreciation was also expressed to Rafael Illescas Ortiz and Pilar Perales Viscasillas for their initiative in establishing the Madrid commercial arbitration moot competition.

B. Willem C. Vis International Commercial Arbitration Moot competition

424. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Sixteenth Moot in Vienna from 2 to 9 April 2009. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that legal issues dealt with by the teams of students participating in the Sixteenth Moot had been based on the United Nations Sales Convention,[91] the arbitration rules of the Institute of

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[87] "Uniform Commercial Law in the Twenty-First Century", *Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992* (United Nations publication, Sales No. E.94.V.14).

[88] *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17* (A/48/17), para. 312.

[89] Ibid.

[90] See footnote 47 above.

[91] Ibid.

Arbitration of the Stockholm Chamber of Commerce[92] and the Arbitration Model Law.[93] A total of 228 teams from law schools in 57 countries had participated in the Sixteenth Moot. The best team in oral arguments was that of Victoria University of Wellington. The Seventeenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 26 March to 1 April 2010.

425. It was also noted that the Sixth Willem C. Vis (East) International Commercial Arbitration Moot organized by the Chartered Institute of Arbitrators East Asia Branch, and co-sponsored by the Commission had been organized in China (Hong Kong) from 23 to 29 March 2009. A total of 64 teams from 17 countries took part in the Sixth (East) Moot. The winning team in the oral arguments was from Loyola Law School Los Angeles, United States. The Seventh (East) Moot would be held in Hong Kong, China, from 15 to 21 March 2010.

C. Madrid commercial arbitration moot competition

426. It was noted that University Carlos III of Madrid, Universia and PromoMadrid had organized the first international commercial arbitration moot competition in Madrid from 22 to 26 June 2009, which had also been co-sponsored by the Commission. The legal issues involved in the competition were the Arbitration Model Law,[94] the Model Law on International Commercial Conciliation,[95] the UNCITRAL Arbitration Rules,[96] the United Nations Sales Convention,[97] and the New York Convention.[98] A total of nine teams from law schools or master programmes of five countries had participated in the Madrid moot competition in Spanish. The best team in oral arguments was the University of Versailles Saint-Quentin-en-Yvelines, France. The second Madrid moot competition would be held in Madrid from 28 June to 2 July 2010.

XIX. Relevant General Assembly resolutions

427. The Commission took note with appreciation of those resolutions related to the work of UNCITRAL adopted by the General Assembly at its sixty-third session on the recommendation of the Sixth Committee: Assembly resolution 63/120 on the reports of UNCITRAL on the work of its resumed fortieth and forty-first sessions and Assembly resolution 63/121 of 11 December 2008 on the Legislative Guide on Secured Transactions of the United Nations Commission on International Trade Law.

428. The Commission noted that by General Assembly resolution 63/120, the Assembly had commended the Commission for the completion of the Legislative Guide on Secured Transactions and the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and welcomed the preparation of digests of case law and the continuous efforts of the Commission to

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[92] Available at the date of this report at http://www.sccinstitute.com/?id=23719.
[93] See footnote 31 above.
[94] Ibid.
[95] See footnote 84 above.
[96] See footnote 22 above.
[97] See footnote 47 above.
[98] See footnote 60 above.

maintain and improve its website. It also welcomed the comprehensive review undertaken by the Commission of its working methods and the discussion by the Commission of its role in promoting the rule of law at the national and international levels. The General Assembly endorsed the efforts and initiatives of the Commission towards expanding its technical assistance and cooperation programme. The Assembly appealed to relevant organizations to coordinate their legal activities with those of the Commission and appealed for contributions to the UNCITRAL trust funds.

429. The Commission noted that by its resolution 63/121, the General Assembly had requested the Secretary-General to disseminate broadly the text of the Legislative Guide on Secured Transactions, transmitting it to Governments and other interested bodies, such as national and international financial institutions and chambers of commerce. The Assembly recommended that all States give favourable consideration to the Legislative Guide when revising or adopting legislation relevant to secured transactions, and invited States that had used the Legislative Guide to advise the Commission accordingly.

430. The Commission further noted that, in considering agenda item 9, it had taken note of Assembly resolution 63/122 of 11 December 2008 on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (see para. 322 above).

XX. Other business

A. Internship programme

431. An oral report was presented on the internship programme at the UNCITRAL secretariat. While general appreciation was expressed for the programme, which is designed to give young lawyers the opportunity to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law, it was observed that only a small proportion of interns were nationals of developing countries. A suggestion was made that consideration should be given to establishing the financial means of supporting wider participation by young lawyers from developing countries. That suggestion was supported.

B. Microfinance in the context of international economic development

432. The Commission heard a suggestion that it would be timely for UNCITRAL to carry out a study on microfinance in the context of international economic development, in close coordination with the main organizations already active in that field. The purpose of the study would be to identify the need for a regulatory and legal framework aimed at protecting and developing the microfinance sector so as to allow its continuous development, consistent with its purpose, which was to build inclusive financial sectors for development.

433. After discussion, the Commission requested the Secretariat, subject to the availability of resources, to prepare a detailed study including an assessment of the

legal and regulatory issues at stake in the field of microfinance as well as proposals as to the form and nature of a reference document discussing the various elements required to establish a favourable legal framework for microfinance, which the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world. It was said that developing countries and countries with economies in transition were considering whether and how to regulate microfinance; thus, the creation of consensus-oriented legal instruments could prove highly valuable for countries at this stage of development of the microfinance industry. The Commission requested the Secretariat to work in conjunction with experts and to seek possible cooperation with other interested organizations for the preparation of such a study, as appropriate.

C. Evaluation of the role of the Secretariat in facilitating the work of the Commission

434. It was recalled that, as indicated to the Commission at its fortieth session,[99] the programme budget for the biennium 2008-2009 listed among the "expected accomplishments of the Secretariat" its contribution to facilitating the work of UNCITRAL. The performance measure of that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).[100] The Commission agreed to provide feedback to the Secretariat. It was recalled that a similar question regarding the level of satisfaction of UNCITRAL with the services provided by the Secretariat had been asked at the close of the forty-first session of the Commission, in 2008.[101] At that session, it had elicited replies from seven delegations, with an average rating of 4.5.

XXI. Date and place of future meetings

A. Forty-third session of the Commission

435. The Commission approved the holding of its forty-third session in New York, from 21 June to 9 July 2010.

B. Sessions of working groups

436. At its thirty-sixth session, in 2003, the Commission agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group

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[99] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 243.

[100] Proposed programme budget for the biennium 2008-2009, Part III, International justice and law, Section 8, Legal affairs (Programme 6 of the biennial programme plan and priorities for the period 2008-2009), Subprogramme 5, Progressive harmonization, modernization and unification of the law of international trade (A/62/6 (Sect. 8), table 8.19 (d)).

[101] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 392.

provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[102]

1. Sessions of working groups up to the forty-third session of the Commission

437. The Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Procurement) would hold its seventeenth session in Vienna from 7 to 11 December 2009 and its eighteenth session in New York from 12 to 16 April 2010;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-first session in Vienna from 14 to 18 September 2009 and its fifty-second session in New York from 1 to 5 February 2010;

(c) Working Group IV (Electronic Commerce) would be authorized to hold its forty-fifth session in New York from 17 to 21 May 2010, should this be warranted by the progress of work done in cooperation with WCO (see para. 340 above);

(d) Working Group V (Insolvency Law) would hold its thirty-seventh session in Vienna from 9 to 13 November 2009 and its thirty-eighth session in New York from 19 to 23 April 2010;

(e) Working Group VI (Security Interests) would hold its sixteenth session in Vienna from 2 to 6 November 2009 and its seventeenth session in New York from 8 to 12 February 2010.

Additional time

438. Tentative arrangements were made for a four-day session to be held in Vienna, from 27 to 30 October 2009 (26 October being an official holiday) and a one-week session in New York, from 24 to 28 May 2010. This time could be used to accommodate the need for a session of a working group, depending on the needs of the working groups and subject to consultation with States.

2. Sessions of working groups in 2010 after the forty-third session of the Commission

439. The Commission noted that tentative arrangements had been made for working group meetings in 2010 after its forty-third session (the arrangements were subject to the approval of the Commission at its forty-third session):

(a) Working Group I (Procurement) would hold its nineteenth session in Vienna from 11 to 15 October 2010;

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[102] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-third session in Vienna from 4 to 8 October 2010;

(c) Working Group III (Transport Law) would hold its twenty-second session in Vienna from 13 to 17 December 2010;

(d) Working Group IV (Electronic Commerce) would hold its forty-sixth session in Vienna from 6 to 10 December 2010;

(e) Working Group V (Insolvency Law) would hold its thirty-ninth session in Vienna from 1 to 5 November 2010;

(f) Working Group VI (Security Interests) would hold its eighteenth session in Vienna from 8 to 12 November 2010.

Annex

List of documents before the Commission at its forty-second session

Symbol	*Title or description*
A/CN.9/663	Provisional agenda, annotations thereto and scheduling of meetings of the forty-second session
A/CN.9/664	Report of Working Group I (Procurement) on the work of its fourteenth session (Vienna, 8-12 September 2008)
A/CN.9/665	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session (Vienna, 15-19 September 2008)
A/CN.9/666	Report of Working Group V (Insolvency Law) on the work of its thirty-fifth session (Vienna, 17-21 November 2008)
A/CN.9/667	Report of Working Group VI (Security Interests) on the work of its fourteenth session (Vienna, 20-24 October 2008)
A/CN.9/668	Report of Working Group I (Procurement) on the work of its fifteenth session (New York, 2-6 February 2009)
A/CN.9/669	Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (New York, 9-13 February 2009)
A/CN.9/670	Report of Working Group VI (Security Interests) on the work of its fifteenth session (New York, 27 April-1 May 2009)
A/CN.9/671	Report of Working Group V (Insolvency Law) on the work of its thirty-sixth session (New York, 18-22 May 2009)
A/CN.9/672	Report of Working Group I (Procurement) on the work of its sixteenth session (New York, 26-29 May 2009)
A/CN.9/673	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/674	Status of conventions and model laws
A/CN.9/675 and Add.1	Technical cooperation and assistance
A/CN.9/676	UNCITRAL rules of procedure and methods of work
A/CN.9/676/Add.1 to Add.9	UNCITRAL rules of procedure and methods of work – Comments received from Member States and interested international organizations
A/CN.9/677	Settlement of commercial disputes – UNCITRAL Arbitration Rules: Designating and appointing authorities under the UNCITRAL Arbitration Rules
A/CN.9/678	Possible future work on electronic commerce
A/CN.9/679	Possible future work in the area of transport law: Commentary or explanatory notes on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (“Rotterdam Rules”)
A/CN.9/680	UNCITRAL rules of procedure and methods of work – Proposal by France
A/CN.9/681	Possible future work on electronic commerce – Recommendations for future work of Working Group IV

Symbol	*Title or description*
	(Electronic Commerce) submitted by the United States of America
A/CN.9/681/Add.1	Possible future work on electronic commerce – Proposal of the United States of America on electronic transferable records
A/CN.9/681/Add.2	Possible future work on electronic commerce – Proposal of the United States of America on online dispute resolution
A/CN.9/682	Proposal of Spain concerning the future work of Working Group IV