II. NEW INTERNATIONAL ECONOMIC ORDER

A. Report of the Working Group on the New International Economic Order on the work of its tenth session (Vienna, 17-25 October 1988) (A/CN.9/315) [Original: English]

CONTENTS

Introduction

1. At its nineteenth session in 1986, the Commission had before it a note by the Secretariat (A/CN.9/277) setting forth possible topics in the context of the new international economic order that the Commission might take up upon the completion of its work on the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works*.[1] Among the conclusions of the note was a suggestion that the Commission should undertake work on procurement. The note proposed that, at least as an initial stage of that work, the Commission might engage in a study of the major issues arising in connection with procurement. After considering the note the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted this work to the Working Group on the New International Economic Order.[2] It was noted at the twenty-first session of the Commission that the Working Group might be expected at its tenth session to outline the nature of the work to be performed.[3]

2. The Working Group, which was composed of all States members of the Commission, held its tenth session at Vienna from 17 to 25 October 1988. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, China, Czechoslovakia, Egypt, France, German Democratic Republic, Hungary, Iran (Islamic Republic of), Japan, Kenya, Mexico, Netherlands, Nigeria, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia.

3. The session was attended by observers from the following States: Bolivia, Bulgaria, Canada, Colombia, Denmark, Finland, Germany, Federal Republic of, Greece, Holy See, Indonesia, Morocco, Oman, Pakistan, Philippines, Republic of Korea, Romania, Switzerland, Thailand and Venezuela.

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

(a) United Nations organizations

International Bank for Reconstruction and Development
United Nations Development Programme

(b) Intergovernmental organizations

Asian-African Legal Consultative Committee
Commission of the European Communities
General Agreement on Tariffs and Trade
League of Arab States

(c) International non-governmental organisations

International Bar Association
International Progress Organization
Pax Christi International

5. The Working Group elected the following officers:

Chairman: Mr. Robert HUNJA (Kenya)

Rapporteur: Mrs. Adriana AGUILERA DE RODRIGUEZ (Mexico)

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

(a) Provisional agenda (A/CN.9/WG.V/WP.21);

(b) Procurement (A/CN.9/WG.V/WP.22).

7. The Working Group adopted the following agenda:

(a) Election of officers

(b) Adoption of the agenda

(c) Procurement

[1]United Nations publication, Sales No. E.87.V.10.

[2]Report of the United Nations Commission on International Trade Law on the work of its nineteenth session, *Official Records of the General Assembly, Forty-first Session, Supplement No. 17* (A/41/17), para. 243.

[3]Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, *Official Records of the General Assembly, Forty-third Session, Supplement No. 17* (A/43/17), para. 37.

(d) Other business

(e) Adoption of the report.

Deliberations and Decisions

I. FOCUS AND DIRECTION OF DISCUSSIONS

8. The Working Group decided to base its discussions on the study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). In order to provide a focus and direction for those discussions it was agreed that it would be desirable to establish at the outset, on a provisional basis, the nature of the work in the area of procurement that would be recommended to the Commission. After considering various possibilities, the Working Group agreed that its discussions should be directed towards the preparation of a model procurement law. Such a model law would set forth basic legal rules governing procurement which could be supplemented with detailed rules by a State implementing it. An implementing State would be able to tailor its detailed rules governing procurement procedures to its own particular needs and circumstances while keeping within the overall framework established by the model law.

9. It was noted that a model procurement law would be helpful to countries, developed as well as developing, in restructuring or improving their procurement laws and procedures or in establishing procurement laws where none presently existed. An internationally-agreed model procurement law based upon sound and equitable principles would benefit international trade by promoting greater international confidence in procurement. It would also assist in relationships between countries of different levels of economic development and between countries with different economic systems. The Working Group agreed that the model procurement law should be drafted so as to take into account the particular needs of foreign participants in procurement proceedings and their opportunity to participate in such proceedings.

10. The preparation of a model procurement law as described above was generally regarded as preferable to the preparation of detailed rules of procurement procedure, since it would not be feasible to formulate such detailed rules to be applicable in countries with widely varying legal and economic systems, administrative structures and other circumstances. The preparation of a model procurement law was also regarded as preferable to preparing a set of general principles governing procurement, such as a "code of conduct", since a set of normative legal rules in the form of a model procurement law would be of greater assistance to States and was more likely to achieve the desired results.

11. There was general support for a suggestion that the model procurement law should be accompanied by a commentary to assist States in implementing and applying the model law and in formulating detailed regulations. The commentary, much of which could be drawn from A/CN.9/WG.V/WP.22, would also be helpful to procuring entities as well as to scholars in the area of procurement.

12. It was observed that some States were parties to the GATT Agreement on Government Procurement in which they undertook various obligations in respect of procurement by their Governmental entities towards nationals of other parties to the GATT Agreement. The view was expressed that a model procurement law prepared by UNCITRAL should avoid conflicts with the GATT Agreement, since that could make it difficult for a State party to the GATT Agreement to implement the model procurement law. It was observed, however, that an UNCITRAL model procurement law would be intended to have a broader application than the GATT Agreement. In any event, the obligations of a party under the GATT Agreement would not be impaired by a conflicting provision in the model procurement law implemented by that party, since in the event of such a conflict the party's international obligation under the GATT Agreement would prevail. Those remarks were also applied in respect of the obligations of member States of the European Communities and the European Free Trade Area under the public procurement rules of those organizations.

II. POSSIBLE OBJECTIVES OF NATIONAL PROCUREMENT POLICIES

13. The Working Group agreed that the identification and discussion of procurement policy objectives in paragraphs 15 to 29 of A/CN.9/WG.V/WP.22 were generally appropriate and balanced. The objectives identified were regarded as important. It was observed that the procurement procedures in the model procurement law would have to be structured in a way to achieve those objectives. It was also observed that the objectives in certain respects conflicted with one another (e.g., promoting the integrity of the procurement process required a system of administrative control over procurement proceedings, which could conflict with the objective of economy and efficiency); the model law should provide States with guidance as to how to reconcile such conflicts in an appropriate manner.

14. In connection with the objective of economy and efficiency in procurement, a view was expressed that it would be useful to provide guidance to procuring entities in choosing the optimum pricing method for their contracts (e.g., lump sum or cost reimbursable methods). In response to that suggestion it was noted that A/CN.9/WG.V/WP.22 had sought to address only the procedures for procurement rather than matters relating to the substance of the contract. There were a number of contractual terms that a procuring entity would have to consider and decide upon in preparing for the procurement. In connection with construction contracts, guidance in formulating contractual terms was provided by the *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*. Further, rules regulating various contractual terms in international sales contracts were contained in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

15. In connection with the objective of promoting the integrity of and confidence in the procurement process, it was agreed that the model procurement law should deal not only with the problem of misapplication or abuse of procurement procedures by procuring entities, but also with the problem of abuse by contractors or suppliers participating in procurement proceedings (e.g., collusive tendering).

16. In connection with specific economic and social objectives, such as the promotion of national economic development or the promotion of certain national economic sectors, groups or regions, it was noted that parties to the GATT Agreement on Government Procurement as well as parties to the European Economic Community and European Free Trade Area treaties would be unable in many cases covered by the GATT Agreement or those treaties to give special treatment in procurement proceedings to domestic contractors or suppliers.

III. NATURE OF MODEL PROCUREMENT LAW

17. It was observed that procurement laws in various countries differed as to whether and the extent to which a contractor or supplier participating in procurement proceedings had a right to require compliance with the procurement laws by the procuring entity. It was generally agreed that the model procurement law should contain a mutuality of obligations between the procuring entity and participating contractors and suppliers; accordingly, contractors and suppliers should have a right to require compliance with the law by procuring entities.

18. It was observed that a related issue was whether a participant in procurement proceedings should have a right of recourse in the event of a failure of the procuring entity to comply with the procurement law. The view was expressed that the right of a participant in procurement proceedings to require compliance by the procuring entity with the procurement law would not be effective unless the participant had a means of obtaining redress for a failure by the procuring entity to comply with the law. It was stated, however, that the question of redress must be approached with caution so as not unduly to interfere with or disrupt the procurement process.

19. It was observed that this issue raised a number of important questions, such as the existence of and relationship between redress under administrative law and under other legal rules, the extent of review to be exercised by a court or administrative body and the type of remedy that could be given. It was agreed to return to the issue at the end of the discussion of the model procurement law.

20. It was stressed that, to promote transparency, laws and regulations relating to procurement should be clear and accessible to all participants in procurement proceedings.

IV. SCOPE OF APPLICATION OF MODEL PROCUREMENT LAW

A. Types of procuring entities to be covered

21. The Working Group discussed the types of procuring entities that should be covered by the model procurement law. It was generally agreed that procurement engaged in directly by governmental departments or agencies should be covered. It was regarded not to be feasible to attempt to provide in a model procurement law, designed for application in countries with widely differing economic systems and administrative structures, a single definition or itemization of other types of procuring entities to which the law would apply. Instead, it was considered desirable to leave it to each implementing State to determine to which entities the model law should apply but to provide in the commentary to the model procurement law criteria to guide States in making that determination. However, some delegations considered that the model procurement law should apply to all public procurement.

22. Criteria suggested during the discussion involved the underlying question of whether the State had an interest in requiring particular types of entities to conduct their procurement in accordance with the formalities and under the competitive conditions provided by the State's procurement law. One suggested criterion was whether or not the entity, or the procurement engaged in by it, was financed by public funds. Other criteria involved consideration of operational aspects of an entity, such as whether it was in a monopolistic position and whether it was subject to substantial governmental influence, such as by being granted exclusive rights or a license to operate. Yet other criteria were whether the entity engaged in procurement for a public purpose, and whether procurement by the entity was subject to satisfactory controls by market forces or other commercial factors.

23. It was generally agreed that whether or not an entity was owned by the State was not a desirable criterion for the application of the model procurement law. For example, in several countries with centrally planned economies, most or all procuring entities were owned by the State, but the State would not necessarily wish to subject all of them to its procurement law. In addition, such a criterion could lead to anomalies in situations where the State sold its ownership interest in an entity to private buyers.

24. It was agreed that it was not necessary for the model procurement law to deal with the question of its applicability to political subdivisions of a State. This issue would depend upon the allocation of governmental competence within each State. Moreover, it was stated that a sound and equitable model procurement law would be acceptable not only to national Governments, but also to regional and local governments. It would also be acceptable to international organizations.

B. Types of procurement to be covered

25. It was generally agreed that, at the present stage, the Working Group should concentrate on the procurement of works and goods, and should not attempt to deal with the procurement of services. It was noted, however, that it was difficult in some cases clearly to differentiate services from works or goods, as in the case of construction services in connection with the supply of works, or the supply of computer software. In addition, there existed other types of situations that did not easily fit into any of those categories, such as leasing, licensing or the formation of a joint venture. One suggested approach was to specify in the model law in a general manner the types of procurement to be covered and then to exclude specific types that were not to be covered.

V. ADMINISTRATIVE CONTROL OVER PROCUREMENT

26. It was observed that the issue of administrative control over procurement concerned matters relating to the internal administrative law of a country and the structure of its governmental administration. It was generally agreed that the model procurement law should not attempt to deal with such matters. Instead, Governments should be advised generally of the desirability of administrative control over procurement and of a system of checks and balances to ensure the economical, efficient and fair functioning of the procurement process, and they should be advised to examine the adequacy of their administrative control mechanisms in that light.

27. It was generally agreed that the commentary to the model procurement law should provide guidance to States in the evaluation and structuring of their own administrative control mechanisms. Attention should be drawn to possible functions to be exercised by administrative bodies, such as those discussed in paragraphs 46 to 49 of A/CN.9/WG.V/WP.22.

28. It was suggested that, in addition to the functions referred to above, the commentary should also deal with functions performed by an administrative body in connection with disputes arising in connection with procurement. In relation to that function it was suggested that the commentary should address not only claims by contractors or suppliers arising from a failure of the procuring entity to comply with the procurement law, but also with administrative proceedings arising from improper conduct by contractors or suppliers, such as collusive tendering. It should also address the issue of possible sanctions that an administrative body could impose for such conduct (e.g., disqualification from participating in subsequent procurement proceedings). According to another view, the question of administrative proceedings or sanctions against contractors or suppliers did not need to be dealt with extensively.

VI. METHODS OF PROCUREMENT

29. The tendering method was generally recognized to maximize competition in procurement. It was stated, however, that competition could also be achieved when the negotiation method was used.

30. A view was expressed that, in addition to the methods of procurement referred to in A/CN.9/WG.V/WP.22, the model procurement law should refer to a method provided for in some countries whereby the procuring entity selected enterprises that fulfilled certain conditions and engaged in consultations with them with a view toward entering into a contract with one of them. It was also suggested that the model procurement law should deal with the use of intermediaries in tendering, a practice that was permitted in some countries but precluded in others. A further suggestion was that the model procurement law should deal with two-stage tendering methods.

31. It was stated that the model procurement law should provide for open as well as restricted methods of procurement. Restricted tendering was said to be no less competitive than open tendering; it was a more efficient means of achieving competition in particular cases (e.g., where there were few contractors or suppliers capable of fulfilling the procuring entity's procurement needs). A question was raised as to whether the "jury" or "concours" method should be provided for. It was noted that those methods seemed to be of a different nature than the other methods discussed in A/CN.9/WG.V/WP.22.

32. A view was expressed that the model procurement law should manifest a preference for tendering; the use of other methods should be treated as exceptional and should be authorized only in specified circumstances. In opposition to that view it was observed that a requirement that the tendering method be used might in some cases be contrary to the interests of the procuring entity. For example, in a construction project it might be in the procuring entity's interest to enter into a turnkey contract with a single contractor. However, the tendering method might not be suitable for procurement of a turnkey contract, and a requirement that tendering be used might compel the purchasing entity to enter into multiple contracts for the construction.

33. The initial view was that the model procurement law should not favour any particular method of procurement. Instead, it should provide for various methods, with the tendering method as a base, and set forth criteria to guide procuring entities in the choice of the most appropriate method to be used in particular cases. Once the procuring entity decided to use a particular method it should be required to conform to the rules in the model procurement law relating to that method.

34. Among the suggested criteria for the choice of a method of procurement were whether the procuring entity could formulate sufficiently precise specifications to serve as a basis for tendering, and whether there existed a sufficiently broad range of potential contractors or suppliers to participate in tendering. An additional suggested

criterion was the relative efficiency of the various methods in respect of the procurement in question. It was agreed that in drafting the model procurement law the Secretariat should set forth the criteria on the basis of the discussion in paragraphs 64 to 74 of A/CN.9/WG.V/WP.22.

VII TENDER PROCEDURES

A. Formal eligibility requirements

35. It was generally agreed that in dealing with the issue of formal eligibility requirements the policies of free competition and the non-admissibility of restrictive commercial practices should be respected to the greatest extent possible. It was stated that formal eligibility requirements were sometimes used in a manner that infringed upon those policies. It was mentioned, for example, that requirements that enterprises participating in procurement be from particular countries, and that foreign enterprises form joint ventures with local ones, were sometimes applied abusively. In addition, it was noted that such restrictions violated the obligations of national and non-discriminatory treatment incumbent upon parties to the GATT Agreement on Government Procurement. According to another observation, however, formal eligibility requirements were frequently used to protect legitimate interests of the procuring entity or its State. It was also observed that those requirements helped to lay a proper basis for the conduct of the procurement proceedings.

36. It was generally agreed that eligibility requirements that excluded certain types of enterprises from participating in tender proceedings should be kept to a minimum, and that a procuring entity should be able to apply only those requirements that were specifically set forth in the model procurement law. A suggestion was made that the model procurement law should set forth various types of permissible exclusionary requirements, designed to further legitimate governmental policy objectives. An implementing State could choose the requirements that it wished to entitle a procuring entity to impose. The commentary to the model law should assist in that choice; further, it should point out the possible effects of certain types of requirements and should recommend that the requirements should not be used abusively or in a manner that unduly restricted competition.

37. It was also agreed that the procedures and formalities by which a procuring entity established its eligibility should be kept to a minimum. It was said to be desirable for the model procurement law to standardize those procedures and formalities.

38. The Working Group agreed that, to promote transparency, the model procurement law should require the purchasing entity to set forth in the tender documents the eligibility requirements that would be applied to tenderers.

39. There was support for the view that it was desirable to avoid excluding tenderers at the outset of tender proceedings merely on the basis of their failure to establish that they met formal eligibility requirements. It was stated, however, that it was preferable to require tenderers to establish their eligibility at an early stage, since it could delay the procurement if it were discovered later that an otherwise acceptable tenderer was not eligible.

B. Qualifications of tenderers

40. The Working Group agreed that the establishment of the qualifications of tenderers should be dealt with in the model procurement law. It was stressed in particular that, in the interest of transparency, the procuring entity should be required to set forth in the tender documents the criteria and methods to be used to evaluate the qualifications of tenderers. It was also agreed that in drafting the model procurement law the Secretariat could rely upon the discussion in paragraphs 85 to 89 of A/CN.9/WG.V/WP.22.

41. It was generally agreed that in the model procurement law the evaluation of the qualifications of tenderers should be treated as a separate matter from the evaluation of tenders.

C. Pre-qualification of tenderers

42. It was agreed that even if an enterprise had been pre-qualified, the procuring entity should nevertheless be able to examine the qualifications of the enterprise at a later stage and reject its tender if the enterprise was found to be unqualified.

43. It was noted that pre-qualification proceedings were sometimes used in an abusive manner to exclude certain enterprises from tendering. To help avoid such practices, as well as other abuses, it was suggested that the model procurement law should require procuring entities to act in good faith and in accordance with principles of fair dealing. According to another view, however, such a provision would be meaningless unless an aggrieved enterprise could claim against a procuring entity that violated the provision. It was stated that an effective system of administrative control over procurement could help to ensure fair treatment of enterprises by procuring entities.

D. Lists of approved contractors and suppliers

44. A view was expressed that the model procurement law should not deal with lists of approved contractors and suppliers, as such lists were used in practice only in connection with domestic procurement. In addition, the lists were sometimes used abusively to exclude certain contractors or suppliers or those from certain countries. The prevailing view, however, was that the lists were used in international procurement and that they should be dealt with in the model procurement law. It was noted that the lists could be beneficial to procuring entities by enabling them to identify reputable and competent contractors and suppliers. In response to that point it was observed that there existed other, less potentially abusive, means by

which a procuring entity could identify such contractors or suppliers. The view was expressed that, to promote free competition, the model procurement law should enable contractors or suppliers to participate in procurement proceedings even if they were not included in such a list.

E. Solicitation of tenders

45. The Working Group was in general agreement with the approaches reflected in paragraphs 95 to 99 of A/CN.9/WG.V/WP.22 relative to the procedures and requirements for soliciting tenders.

F. Tender documents

46. It was generally agreed that the model procurement law should require the procuring entity to inform tenderers in the tender documents of laws and regulations, including all amendments thereto, pertinent to the procurement and to the tender procedures. It was agreed that it should not be necessary for the tender documents to reprint the laws and regulations; they need only contain references to enable tenderers to locate them. A view was expressed that the procuring entity should not incur liability to a tenderer for failing to provide this information.

47. The foregoing approach was regarded to achieve a balance between the interests of procuring entities and of tenderers. On the one hand, it was regarded as unfair to impose too heavy a burden on procuring entities to inform tenderers of every law and regulation that might be relevant. It was also pointed out that tenderers had opportunities to obtain their own legal advice about relevant laws and regulations. On the other hand, it was believed that disclosure of relevant laws and regulations would help to promote fairness and transparency, particularly in relation to foreign tenderers that were unfamiliar with the legal system in the country of the procuring entity. It was regarded as important in particular for information to be provided about laws and regulations that gave rise to liabilities on the part of tenderers, and other laws and regulations that were not contained in the State's procurement law or that would not otherwise ordinarily come to the attention of tenderers.

48. With respect to the inclusion of contractual terms and conditions in the tender documents, a view was expressed that it would be useful for the model procurement law to promote the standardization of terminology used in contracts, e.g., on the basis of internationally recognized trade terms such as INCOTERMS. It was also suggested that the procuring entity should be required to inform tenderers of any mandatory legal rules concerning contractual terms, e.g., certain rules relating to the applicable law or to jurisdiction over disputes arising from the contract.

49. It was generally agreed that the contractual terms and conditions contained in the tender documents should coincide with those contained in the contract ultimately entered into between the procuring entity and the successful tenderer. In addition, it was generally agreed that the relationship and hierarchy among the various portions of the tender documents that were to become parts of the contract (e.g., specifications, drawings and contractual terms and conditions) should be made clear.

50. In connection with the portions of the tender documents eliciting information about the qualifications of tenderers, it was suggested that the procuring entity should be required to inform tenderers if post-qualification procedures were to be used.

51. With respect to the price charged for tender documents, it was generally agreed that the procuring entity should be able to charge a sum to cover the costs of producing and distributing the tender documents to tenderers.

G. Preparation and formulation of tender documents

52. The Working Group agreed that the model procurement law should set forth the essential requirements to be observed by procuring entities in preparing the tender documents.

53. It was agreed that the procuring entity should be required to formulate the tender documents in an objective and clear manner, particularly with respect to the description of the works or goods to be procured and the criteria and methods to be used for the evaluation and comparison of tenders. This requirement was stated to be fundamental to the tendering method.

54. The Working Group agreed that the model procurement law should require technical specifications to be formulated objectively, by reference to their functional or performance characteristics, as discussed in paragraph 112 of A/CN.9/WG.V/WP.22. A view was expressed that the provisions of the model procurement law on this issue should take into account the need for the protection of intellectual property. It was also agreed that international standards should be used, if available, in the formulation of technical specifications; however, where national standards were more stringent, those standards should be applied.

55. In other respects the Working Group was in general agreement with the approaches reflected in paragraphs 111 to 114 of A/CN.9/WG.V/WP.22.

H. Clarification and amendment of tender documents

56. It was generally agreed that the model procurement law should enable the procuring entity to amend the tender documents prior to the deadline for submission of tenders if it reserved the right to do so in the tender documents.

57. A view was expressed that the model procurement law should set forth consequences that would arise if the tender documents were amended, such as providing for the

procuring entity to extend the deadline for submission of tenders and entitling tenderers to recover additional costs incurred by them as a result of the amendments. It was stated that if the tender documents were amended prior to the deadline for submitting tenders a tenderer should be able to withdraw or modify its tender.

58. It was stated that the term "material amendments" used in paragraph 119 of A/CN.9/WG.V/WP.22 would require clarification if used in the model procurement law or in the commentary.

I. Formulation and submission of tenders

1. Language of tenders

59. The Working Group was in general agreement with the approaches reflected in paragraphs 121 and 122 of A/CN.9/WG.V/WP.22 regarding the language or languages in which tenders were to be formulated when foreign participation in the tender proceedings was anticipated or sought. Those approaches sought to avoid obstacles to such participation that could arise from the language to be used in formulating tenders.

2. Formulation of tender price

60. It was generally agreed that the model procurement law should require the procuring entity to specify in the tender documents the manner in which tenderers were to formulate their tender prices. This would contribute to transparency and fairness and enable tenders to be evaluated on a common basis.

61. A view was expressed that the procuring entity should be required to make known to tenderers information concerning taxes, customs duties and similar charges levied by its country that would affect their tender prices. With respect to the question of whether such charges should be included in or excluded from tender prices, it was said to be more equitable to foreign tenderers for the charges to be excluded and for the successful tenderer to be able to claim the charges separately from the procuring entity. The reason for this was that new or additional charges that were not foreseeable at the time of tendering might be imposed during the performance of the contract and, if tender prices were deemed to include all applicable charges, the tenderer might not be able to claim reimbursement from the procuring entity.

62. Suggestions were made that, in addition to the charges mentioned in paragraph 124 of A/CN.9/WG.V/WP.22, the model procurement law should take into account customs duties, export taxes, local taxes, and taxes imposed on domestic tenderers in connection with imported components.

63. It was noted that when tenderers were allowed to formulate their tender prices in their own currencies or in a third currency, the risk of exchange rate fluctuations was reduced for the tenderers but increased for the procuring entity. It was generally agreed that the model procurement law or the commentary should mention the possibility of expressing the tender price in a relatively stable unit of account such as the European Currency Unit (ECU) or the Special Drawing Right (SDR) or in freely convertible national currencies.

64. Reference was made to the risk faced by foreign contractors and suppliers of substantial changes in exchange rates after the contract had been entered into. It was stated, however, that this matter could be addressed in the contract and need not be dealt with in the model procurement law.

65. Suggestions were made to take into account in the model procurement law and commentary other factors affecting the formulation of the tender price, such as payment conditions, interest (if credit was to be given by the tenderer to the procuring entity), banking charges for letters of credit, and the costs of various forms of insurance in addition to transport insurance. According to another suggestion, the model procurement law should deal with the formulation of the price in tenders for construction. It was noted that in formulating such prices it was often necessary to take into account the costs of various types of services and supplies obtained by the contractor from a number of different sources.

66. It was observed that procuring entities sometimes required tenderers to disclose the components and calculations of their tender prices, including the way in which profit was factored into the tender prices, but that tenderers often regarded such information as confidential. It was suggested that the commentary to the model procurement law should deal with this issue and should discuss the various considerations involved.

3. Manner, place and deadline for submission of tenders; consideration of late tenders

67. It was stated that the deadline by which tenders must be submitted should be clearly defined in the model procurement law. A view was expressed that it should be possible to submit tenders until the time of opening of tenders.

68. It was generally agreed that late tenders should be considered by the procuring entity only in exceptional cases, e.g., where a tenderer could not submit its tender on time due to reasons beyond its control. A view was expressed that the situation mentioned in paragraph 134 of A/CN.9/WG.V/WP.22, whereby a tenderer could obtain the approval of a higher supervisory authority to submit a tender late, was not desirable since it could produce uncertainty and would be unjust to tenderers that had submitted their tenders on time.

69. A view was expressed that, in preparing provisions of the model procurement law on the issue of the time for submitting tenders, modern approaches should be considered. For example, a tender might be regarded as timely if its essential features were communicated to the procuring entity by any means (e.g., communicated by telephone) prior to the deadline for submission as long as a

complete written tender was submitted within a specified period of time (e.g., 24 hours) thereafter.

J. Alternative tenders and partial tenders

70. There was broad support for the view that the issue of alternative tenders should be treated with caution in the model procurement law. It was stated to be contrary to the principle of competition, which was a fundamental attribute of the tendering method, to allow the procuring entity to consider and accept an alternative tender with which other tenderers did not have an opportunity to compete. It was generally agreed that the model procurement law should strike a balance between allowing a procuring entity to benefit from an advantageous alternative tender and preserving fairness and competitiveness in tender proceedings.

71. A procedure whereby a procuring entity could consider and accept an alternative tender only from the tenderer that had submitted the most advantageous responsive tender was criticized. It was stated that the fact that a tenderer had submitted the most advantageous responsive tender did not necessarily ensure that its alternative tender would also be the most advantageous tender for that version. It was conceivable that other responsive tenderers might be able to offer more advantageous tenders based on the alternative.

72. A proposal was made that a procuring entity should be permitted to consider an alternative tender if it gave the other responsive tenderers an opportunity to tender based upon the alternative version. In opposition to that proposal, it was stated that such a procedure would delay the procurement. In addition, it would discourage tenderers from developing and submitting potentially innovative and advantageous alternative tenders if other tenderers were allowed to tender on the basis of the alternative.

73. According to another view, when the works or goods to be procured involved both design and execution, the procuring entity should be able to consider an alternative tender even if the tenderer had not submitted a responsive tender.

74. It was generally agreed that the procuring entity should be required to specify in the tender documents the conditions under which alternative tenders could be considered. The Working Group returned to the question of alternative tenders, and their relationship to deviations and to the concept of "responsiveness", during its discussion of examination of tenders (see paragraphs 88 and 89, below).

75. With respect to partial tenders, it was generally agreed that the procuring entity should be required to specify in the tender documents the portions of the works or goods to be supplied for which tenders could be submitted. It should not be able merely to reserve the right to decide to divide the entirety of the works or goods to be supplied into separate contracts as it saw fit after tenders had been submitted.

K. Period of validity of tenders

76. A view was expressed that the model procurement law should require tenders to remain valid for a period of time to be specified in the tender documents. It was suggested that the law should regulate the period of time that a procuring entity might specify and that the commentary should provide guidance in that regard. According to a further view, the model procurement law should inhibit the procuring entity from seeking extensions of the period of validity unreasonably.

L. Withdrawal and modification of tenders

77. A view was expressed that a tenderer should not be allowed to withdraw its tender after a certain point in time, i.e., after the deadline for submission of tenders or after the commencement of opening of tenders, and that it should forfeit its tender guarantee if it did so. It was pointed out that in one country a tenderer had an absolute right to withdraw its tender until it was accepted by the procuring entity. This resulted from general rules of law in that country relating to the formation of contracts.

78. According to another view, the issue of the modification of tenders was of greater practical significance than the issue of the withdrawal of tenders. It was stated that the usual reasons for modifying tenders were either that the procuring entity had discovered errors in the tenderer's calculation or that the tenderer had made an error in assessing a factor on which its tender was based. It was suggested that the model procurement law might permit modifications to be made in the former case, but might be more circumspect with respect to modifications in the latter case.

M. Tender guarantees

79. It was noted that the terminology with respect to the instruments referred to in A/CN.9/WG.V/WP.22 as "tender guarantees" differed in various legal systems, and it was suggested that the terminology be unified in the model procurement law.

80. Views were expressed that the model procurement law and the commentary should clarify the uses of tender guarantees, the obligations that they secured and defaults that they covered, and the grounds upon which the procuring entity was entitled to call the guarantee. With respect to the defaults covered by the tender guarantee, it was suggested that the model procurement law should clarify that withdrawal of a tender prior to the deadline for submission would not constitute a default.

81. It was stated that one of the underlying purposes of a tender guarantee was to cover at least part of the losses that the procuring entity could suffer if the tenderer withdrew its tender during the period of validity of tenders or if it failed to enter into a contract with the procuring entity or to supply a performance guarantee. Those losses could include, for example, the cost of engaging in new procurement proceedings, delay of the procurement and a higher contract price.

82. A view was expressed that the model procurement law should clarify the relationship, if any, between the amount of loss suffered by the procuring entity and the amount that the procuring entity could claim under the tender guarantee, and whether the procuring entity could recover an additional amount from the tenderer if its losses exceeded the amount of the guarantee. It was observed that this issue was dealt with by rules of national law, and there was general agreement not to deal with it in the model procurement law.

83. It was noted that different approaches were followed in national legal systems with respect to the return or expiry of a tender guarantee. Various suggestions were made to deal in the model procurement law with some of the legal problems that had arisen in that regard (e.g., from the failure of the procuring entity to return a guarantee) and to attempt to put the relevant legal rules on a more contemporary basis. Other suggestions were made to deal with the problems that had arisen in connection with the improper call of first-demand guarantees. However, noting that many of those issues would be addressed by the Working Group on International Contract Practices in its work on the topic of stand-by letters of credit and guarantees, the Working Group agreed not to deal with the issues pending the outcome of that work.

84. With respect to the last sentence of paragraph 145 in A/CN.9/WG.V/WP.22, a view was expressed that tenderers that were State enterprises should not be given preferential treatment with respect to the requirement to provide a tender guarantee.

N. Opening of tenders

85. It was generally agreed that the model procurement law should deal with the procedures for opening tenders, such as the keeping of minutes of the proceedings, the requirement that tenders be sealed until they were opened and the question of whether the proceedings for the opening of tenders should be public or closed. With respect to the latter question, the prevailing view was that it was desirable for representatives of the tenderers to be able to be present at the proceedings. That approach was said to promote transparency as well as confidence in and the integrity of the procurement process. In addition, it made the choice by the procuring entity of the successful tenderer less subject to challenge. A view was expressed, however, that the decision of whether proceedings for the opening of tenders should be public or closed might differ depending upon whether the tender proceedings were open to participation by all interested tenderers or restricted to tenderers selected by the procuring entity.

86. The main reasons for conducting closed proceedings were said to be to preserve the confidentiality of tenderers and their tenders (e.g., to protect know-how) and to avoid revealing information which formed a basis of the decision of the procuring entity as to which tender to accept.

87. A view was expressed that the model law should deal with procedures for opening tenders to be followed when the two-envelope system was used.

O. Examination of tenders

88. It was generally agreed that the meaning of the term "deviation" and the relationship of deviations to alternative tenders and to the concept of "responsiveness" required clarification. One suggestion was to regard an alternative tender as one that modified in a fundamental way, or that completely replaced, the technical specifications or contractual terms and conditions set forth in the tender documents; deviations were regarded as less fundamental departures from the tender documents.

89. In principle, there was general agreement that deviations and alternative tenders should be permitted only to the extent that they were expressly authorized by the tender documents. (For the discussion of the Working Group with respect to alternative tenders, see paragraphs 70 to 75, above). Accordingly, a tender that contained unauthorized deviations, and unauthorized alternative tenders, should be regarded as non-responsive and should be rejected. However, it was generally agreed that the model procurement law should permit a procuring entity to consider a tender that contained minor deviations, and that the nature of such permissible deviations should be clearly defined in the model procurement law. It was noted that some guidance in that respect might be derived from article 19 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

P. Evaluation and comparison of tenders

1. Criteria and methods for evaluation and comparison of tenders

90. It was generally agreed that for the procurement of simple, routine goods it might be adequate to base the choice of which tender to accept on the tender price alone. However, for other works or goods, criteria in addition to the tender price would have to be taken into account.

91. Various views were expressed as to the nature of those additional criteria. According to one view, they should be objective and quantifiable in monetary terms, such as the ones referred to in paragraph 171 of A/CN.9/WG.V/WP.22. That approach was said to preserve the essential element of competition in tendering by enabling tenders to be evaluated and compared on a common basis, thereby promoting confidence in the tender proceedings. In that connection, it was stated that subjective criteria were sometimes applied abusively by procuring entities to the prejudice of certain tenderers.

92. According to another view, it was essential for procuring entities from developing countries to be able to take into account subjective criteria, such as those mentioned in paragraph 176 of A/CN.9/WG.V/WP.22, in order to promote the development objectives of their countries. In this connection it was noted that the GATT Agreement on Government Procurement called upon parties, in the implementation and administration of the Agreement, to take into account the development, financial and trade needs of developing countries. In accordance with this

view the opinion was expressed that the model procurement law should enable procuring entities from developing countries to take such subjective criteria into consideration; another opinion was that procuring entities should be given complete freedom to take into account any criteria they deemed appropriate.

93. The trend of the discussion revealed support for an approach whereby priority would be given in the model procurement law to objective and quantifiable criteria, but the law would take into account that developing countries needed to be able to permit their procuring entities to use subjective criteria as well in order to promote national development objectives. It was stated that such an approach would enable the model procurement law to be acceptable to countries of all levels of economic development. It was noted, however, that where social or economic development considerations were important factors in a particular procurement the tendering method might not be the most appropriate method of procurement. It was generally agreed that the model procurement law should require the procuring entity to specify clearly in the tender documents the criteria that it would apply in evaluating and comparing tenders.

94. A suggestion was made that, since the criteria to be applied by the procuring entity in relation to a particular procurement would depend upon what was being procured, the model procurement law should set forth various possible criteria from which the procuring entity could choose. It was stated that the criteria should be as precise as possible, and that a general provision enabling the procuring entity to accept, for example, the tender that it found to be most advantageous, was not sufficient. It was believed wise for all objective non-price factors to be subject to the application of a mathematical formula, if feasible, and for the result to be combined with the tender price to determine the lowest tender.

2. Conversion of tenders to single currency

95. It was generally agreed that the model procurement law should set forth specific rules concerning the conversion of tender prices expressed in several currencies to a single currency for the purpose of evaluating and comparing tenders. The approach set forth in paragraph 179 of A/CN.9/WG.V/WP.22 was regarded as suitable. It was suggested that the rules applied by the World Bank might also provide examples. There was also general agreement that the procuring entity should be required to set forth in the tender documents the methodology and rules according to which the conversion would be effected.

96. A distinction was noted between the currency in which tenders were evaluated (which was typically the currency of the procuring entity) and the currency or currencies in which the tenderer was to be paid (e.g., its own currency or the currencies in which it incurred its costs). This distinction reflected, among other things, different allocations between the tenderer and the procuring entity of the risk of exchange rate fluctuations. It was suggested that in dealing in the model procurement law with the conversion of tenders to a single currency consideration should be given to the possibility of converting tenders to one of the internationally used units of account consisting of a basket of currencies or to a freely convertible national currency.

Q. Two-envelope system

97. It was generally agreed that the model procurement law should deal with the two-envelope system of procurement, since that system was frequently used in some regions. In particular, it was agreed that the procedures for that system should be elaborated. A view was expressed, however, that the two-envelope system was not really of the same nature as competitive tendering, and therefore it should be treated separately in the model procurement law. For example, it was stated that in some applications of the system the procuring entity selected the tender essentially on the basis of the technical proposal, and did not necessarily choose the one offering the lowest price.

R. Preferences for procurement from domestic sources or of domestic works or goods and other provisions to achieve economic and other objectives

98. It was noted that the issue of preferences could have implications with respect to international obligations of States, such as those under the General Agreeement on Tariffs and Trade and under the GATT Agreement on Government Procurement. It was noted, however, that the GATT Agreements contained means to accommodate the interests of developing countries within the framework of free competition. It was generally agreed that the model procurement law should be structured so that States could implement it in a manner that was consistent with their international obligations.

99. According to one view, the model procurement law could do little more than require the procuring entity to specify in the tender documents any preference that would be applied and the criteria for its application. Another view was that the model procurement law should permit preferences to be given to tenders proposing to use domestic resources, but should not permit domestic tenderers to be preferred over foreign ones.

100. In response to the latter view it was noted that many States, representing every level of economic development, applied various types of preferences for domestic tenderers. It was said that, although those practices could not be ignored, the work of UNCITRAL in the area of procurement presented a good opportunity to try to restrict their disadvantageous aspects. For example, the model procurement law might contain provisions directed to ensuring that the preferences and the criteria for their application were as objective as possible. In addition, it could encourage States to treat the preferences as exceptions, to be applied only in cases of proven objective facts showing that domestic industries, regions or groups needed protection.

S. Negotiations with tenderers

101. It was generally agreed that, in the model procurement law, negotiations between the procuring entity and tenderers should be restricted to certain cases. It was stated that the possibility of wide-ranging negotiations could be abused by the procuring entity and could undermine confidence in and the integrity of the tender process. The Secretariat was requested to prepare a suitable provision dealing with this question for inclusion in the first draft of the model procurement law.

T. Rejection of all tenders

102. It was generally agreed that the procuring entity should have the right to reject all tenders and terminate the tender proceedings for reasons unrelated to the merits of the tenders or the eligibility or qualifications of the tenderers (e.g., because its needs have changed, because of a change in government policy, or for its convenience), as long as that action was not taken for a fraudulent purpose. It was also agreed that if the procuring entity reserved the right to reject all tenders it should expressly so provide in the tender documents.

103. A question was raised as to whether the procuring entity should be required to give tenderers the reasons for rejecting all tenders. It was also questioned whether the procuring entity should be required to give to tenderers in completed tender proceedings (i.e., where a tender was accepted by the procuring entity) the reasons for rejecting their tenders. It was generally agreed that, in both cases, the procuring entity should be required to give the reasons for rejection upon the request of a tenderer, but that the procuring entity should not have to justify its reasons.

104. It was generally agreed that when the procuring entity rejected all tenders the tenderers should not be able to recover from the procuring entity the costs of preparing and submitting their tenders. The possibility that a procuring entity might change its mind about the procurement was said to be a normal commercial risk that should not give rise to a right of recovery. It was also generally agreed that unsuccessful tenderers in completed tender proceedings should not be able to recover their costs from the procuring entity. A view was expressed, however, that they should be able to recover their costs if the reasons for rejecting their tenders were not adequate.

U. Acceptance of tender and formation of contract

105. A view was expressed that, due to the varying approaches in national legal systems to the issue of when a contract between the procuring entity and the successful tenderer came into existence, it would be useful for the issue to be clarified in the model procurement law. According to another view, however, there was no need for the model procurement law to deal with that issue since it would be governed by rules of national law and of international conventions (e.g., the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)) relating to the formation of contracts, which the model procurement law should not try to alter.

106. A view was expressed that the treatment of the issues related to the formation of the contract should be amplified in the model procurement law; for example, the rights and obligations of the parties after the acceptance of a tender but before the contract came into existence should be dealt with. A further view was that the model procurement law should clarify procedural aspects of the formation of the contract (e.g., the hierarchy of contract documents).

107. It was stated that the model procurement law should not follow the approach adopted in one country where, when the lowest tenderer failed to conclude the contract or supply a performance guarantee, the procuring entity could try to persuade the next lowest tenderer to agree to the terms offered by the lowest tenderer (see A/CN.9/WG.V/WP.22, paragraph 199). It was observed that in such cases the procuring entity could contract with the next lowest tenderer upon the terms of its tender and call the tender guarantee supplied by the lowest tenderer, or claim from the lowest tenderer the difference between its tender price and the price of the next lowest tender.

108. A view was expressed that any requirement in the model procurement law that the procuring entity disclose or make public information relating to the tender proceedings should take into account laws in the country of the procuring entity relating to commercial confidentiality.

VIII. NEGOTIATION AND OTHER PROCEDURES IN NATIONAL PROCUREMENT LAWS

109. There was broad support for the view that the model procurement law need not deal in great detail with procurement by negotiation, for the following reasons: in contrast to the tendering method, which was *sui generis* and required specific rules, negotiation was an ordinary commercial activity; the procedures for negotiation were not amenable to regulation; negotiation gave rise to no significant legal issues except for those relating to the formation of the contract, which were satisfactorily dealt with by national law and international conventions.

110. Nevertheless, since basic rules relating to negotiation could be of help to developing countries desiring such rules, the Working Group requested the Secretariat to include general rules on negotiation in its first draft of the model procurement law. These rules should maintain to the greatest extent possible the freedom of the procuring entity to pursue its negotiations as it saw fit. The Working Group would then determine whether it was necessary to deal with negotiation in the model procurement law. It was also agreed that the rules should define the cases in which one could resort to negotiation rather than the tendering method.

111. A suggestion was made that the model procurement law should contain rules to prevent a procuring entity from avoiding the rules and procedures relating to tendering by deciding to engage in procurement by negotiation. For example, the procuring entity might be required to justify to a higher authority its decision to

engage in procurement by negotiation. A view was expressed, however, that it was not necessary to deal with this issue since it was an internal matter for States to deal with in the context of constraining public entities in the expenditure of public funds, and did not concern the relationship between procuring entities and contractors or suppliers participating in procurement proceedings.

112. With respect to the question of whether contractors or suppliers negotiating with the procuring entity should be required to disclose certain types of information (discussed in paragraph 209 of A/CN.9/WG.V/WP.22), a suggestion was made that the Secretariat review the reference to this issue in the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* to determine whether and, if so, how the issue might usefully be dealt with in the model procurement law. An additional suggestion was to deal in the model procurement law with bribery and similar illegal practices by the procuring entity in connection with negotiations.

113. With respect to the methods of procurement referred to in paragraph 213 of A/CN.9/WG.V/WP.22, a view was expressed that competitive negotiation should be treated in the model procurement law as a form of tendering. It was generally agreed that the other methods should be treated in a much briefer and more general manner than the tendering method, mainly from the standpoint of when those other methods could be used.

IX. RIGHT OF RECOURSE BY AGGRIEVED PARTICIPANTS IN PROCUREMENT PROCEEDINGS

114. It was generally agreed that the model procurement law should provide a right of recourse for participants in procurement proceedings aggrieved by actions or decisions by the procuring entity contrary to the law. Such a right was regarded as an essential underpinning of mandatory rules of law, such as those to be contained in the model procurement law; it was also regarded as necessary in order to promote confidence in and the integrity of the procurement process.

115. It was agreed that the model procurement law should deal with the ability of a tenderer to seek recourse before administrative bodies, courts and arbitral tribunals. Suggestions were made with respect to other possibilities that might be taken into account. For example, it was noted that actions by public procuring entities might in some cases violate obligations of the State and that the Government of the State of an aggrieved tenderer might be able to protest to the Government of the State of the procuring entity. It was also noted that in some States certain administrative organs could challenge violations of the procurement laws pursuant to their obligation to oversee the proper functioning of the law, rather than on behalf of an aggrieved tenderer.

116. It was observed that the question of the forum where recourse could be sought depended upon the legal and administrative structures of States. It was therefore agreed that the model procurement law should provide generally formulated alternatives from which a State could choose those that it wished to implement. It was further agreed that the commentary to the model procurement law should discuss the various possibilities in detail and should provide guidance to States in making that choice.

117. A view was expressed that the model procurement law should contain various alternative possibilities with respect to the issue of whether or not the commencement of recourse proceedings should interrupt the procurement proceedings. One opinion was that, as a rule, the procurement proceedings should not be interrupted, since an interruption would delay the procurement and could lead to disruptive tactics on the part of tenderers whose claims might not be well-founded.

118. According to another opinion, however, it was said that the right of recourse would lose much of its effectiveness if the procurement proceedings were allowed to continue despite a claim of irregularity. It was observed that the model procurement law could incorporate safeguards against abuses of the interruption of the procurement proceedings, e.g., by requiring the tenderer to supply a security to cover possible losses of the procuring entity if the claim was determined to be unfounded, by establishing strict time limits for the resolution of claims, and by requiring the tenderer to establish the existence of certain conditions to justify an interruption (e.g., that the interruption was necessary to prevent irreparable harm to the tenderer and that the interruption would not cause undue or irreparable harm to the procuring entity).

119. It was generally agreed that the model procurement law should outline the various types of remedies that could be given to aggrieved tenderers. It was stated that it would not be possible for the model procurement law to deal with the remedies in detail due to the differences that existed in national legal systems. It was agreed that the commentary to the model procurement law should discuss the various remedies and provide guidance with respect to the inclusion of various remedies by implementing States.

120. It was generally agreed that the remedies to be dealt with in the model procurement law should include requiring the recommencement of procurement proceedings, substituting the tender submitted by the aggrieved tenderer for the tender that was accepted by the procuring entity, and requiring the procuring entity to pay compensation to the aggrieved tenderer. A view was expressed that compensation should in this case be limited to the costs of the tenderer in preparing and submitting its tender; the tenderer should not be entitled to compensation for its lost profits since that would expose the procuring entity to claims for potentially large sums.

121. A view was expressed that the remedies available to a tenderer might be made to depend upon the nature of its claim. For example, if the claim was based on a procedural irregularity, it might be appropriate to require the procurement proceedings to be recommenced; if the claim was that the procuring entity had not appropriately applied the criteria for the decision as to which tender to accept,

and that the aggrieved tenderer's tender should have been accepted, it might be appropriate to enable the tenderer to recover compensation.

X. CONCLUDING DISCUSSION

122. It was generally agreed that the model procurement law should not be confined to international procurement; rather, it should be suitable for application both to domestic and to international procurement. Implementing States could decide whether to apply it to procurement in general or only to international procurement. It was also agreed that the model procurement law should take into account the particular needs and interests of foreign participants in procurement proceedings.

123. A view was expressed that the number of alternative versions of provisions in the model procurement law should be kept to a minimum. In that connection it was noted that the mandate of the Commission was to harmonize the law relating to international trade, rather than to perpetuate the existing disparities in national laws. Thus, the Working Group should endeavour to agree upon and formulate specific provisions reflecting the appropriate solutions to the issues addressed in order to assist States in improving their procurement laws or introducing new laws on a sound basis.

124. According to another view, it was important for the model procurement law to contain alternative versions of provisions dealing with various issues, particularly those that involved fundamental features of the legal and administrative systems of States, so that States could adopt versions that were compatible with those systems.

125. The Working Group requested the Secretariat to prepare a first draft of the model procurement law and an accompanying commentary, taking into account the discussions and decisions at the present session. It was generally agreed that the model procurement law should not attempt to be too detailed or set forth too many rules, since that would make it less acceptable to States.

126. It was observed by the Working Group that it would have been desirable to have had at the present session greater participation by developing countries. The hope was expressed that more developing countries would be able to contribute to the further stages of the work on the model procurement law.

127. It was noted that drafts of the model procurement law to be considered at sessions of the Working Group would be circulated to Governments as a matter of course, and a suggestion was made that developing countries that faced difficulties in sending delegations or observers to those sessions should send to the Secretariat their written comments on those drafts.

B. Procurement: report of the Secretary-General[a] (A/CN.9/WG.V/WP.22) [Original: English]

CONTENTS

[a] Working paper submitted to the Working Group on the New International Economic Order at its tenth session.