

cost required to examine and evaluate a large number of tenders would not be justifiable in view of the low value of the goods or construction. Consequently, paragraph (1) of this article requires the procuring entity, in the first case, to solicit tenders from all suppliers or contractors from whom the required goods or construction to be procured are available; and in the second case, to select a sufficient number of suppliers or contractors in a non-discriminatory manner so as to ensure effective competition. Paragraph (2) obligates the procuring entity to publicise the restricted tendering either in the official gazette or other official publication. Paragraph (3) makes the entire Chapter III of the Model Law (except for Article 22) applicable to restricted-tendering proceedings except to the extent those provisions derogate from Article 36. This is because restricted tendering is, after all, a specie of the procurement method of tendering.

Article 37 on Two-stage Tendering lays down the procedural modalities for recourse to this procurement method which is a combination of negotiations with the suppliers or contractors and tender proceedings. The first stage involves solicitation of proposals from suppliers or contractors so as to reach a final set of specifications for the goods or construction to be procured and at the second stage ordinary tender proceedings are involved.

Article 38 on Request for Proposals lays down the procedural modalities for this method of procurement. In this procurement method, the procuring entity typically solicits proposals from a select relatively small group of suppliers or contractors. Paragraph (1) requires the procuring entity to solicit proposals from as many suppliers or contractors as practicable, with the minimum being three. Paragraph (2) requires the procuring entity to publicise its request for proposals in a publication having international circulation unless it considers that undesirable for reasons of economy or efficiency. The remainder of Article 38 sets forth the essential elements for request for proposals proceedings related to the evaluation and comparison of proposals and the selection of the winning proposal. These requirements are designed to promote transparency and fairness in competition and objectivity in the comparison and evaluation of proposals.

Article 39 on Competitive Negotiation is a skeletal provision. In this procurement method, the procuring entity is permitted to organise and conduct the negotiations with the suppliers or contractors as it sees fit, except for the compliance with the 'best and final offer' procedure laid down in paragraph (4) of this article.

Article 40 on Request for Quotations specifies the procedural modalities for this procurement method. Paragraph (1) requires the procuring entity to invite quotations from as many suppliers or contractors as practicable, with the minimum number being three. Under paragraph (2), each supplier or contractor

is permitted to give one price quotation which cannot subsequently be changed. Any negotiations between the procuring entity and the suppliers or contractors are forbidden. Under paragraph (3), the procurement contract would be awarded to the supplier or contractor whose quotation is found to be lowest and meets the needs of the procuring entity.

Article 41 relates to *Single-source procurement*. The conditions for the use of this procurement method are set forth in Article 20 of the Model Law. No procedures are laid down for this procurement method as it involves a sole supplier or contractor and is subject to very exceptional conditions of use.

The final chapter, i.e. *Chapter V on Review* consists of Articles 42 to 47. This chapter sets forth provisions establishing a right of review of the actions and decisions of the procuring entity and provisions governing its exercise. As indicated in a footnote of Chapter V, these provisions appear to be optional in that some States might incorporate them without change or with minimal changes while other States may not do so. In the latter case, these provisions could be used to measure the adequacy of existing review procedures. This is because, in the context of procurement, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g. a central procurement board) while in other States the review function is performed by the body that exercises financial control and supervision over the operations of the Government and of the public administration. In some States, the review function is performed by quasi-judicial administrative tribunal while many legal systems provide for judicial review. In view of this divergence of State practice, the Model Law provides for a first recourse to the head of the procuring entity or the head of the approving authority, followed by an administrative review and/or judicial review. Within this framework, Article 42 establishes the basic right to obtain review and frames rules as to which parties can initiate review proceedings and what kinds of actions and decisions of the procuring entity would be subject to review. Article 43 provides for the first instance review by the head of the procuring entity or of the approving authority. Article 44 provides for recourse to an administrative tribunal and Article 47 to judicial review. Under Article 46, submission of a complaint before the head of the procuring entity or before an administrative tribunal suspends the procurement process, and also the performance of the procurement contract if it has already entered into force, for a period of seven days which could later on be extended up to 30 days in order to preserve the rights of the complaining supplier or contractor.

Comments and Observations

Procurement expenditure represents a significant portion of the overall development expenditure in the developing and other countries which are now

transiting to market-oriented economies. However, few of these countries have adequate legal frameworks for procurement while in most of the other countries the matter is regulated by rules and regulations which differ from one government agency to another. It has also been the general impression in some quarters that these rules and regulations are often tilted in favour of national suppliers and contractors and biased against their foreign counterparts. Since procurement of goods and services should be quality-oriented and cost-effective, sound laws and practices for public procurement are *sine qua non* for all countries. The UNCITRAL Model Law on Procurement of Goods and Construction is, therefore, bound to serve as a handy tool for updating and modernising existing laws and as readily available text for the enactment of new legislation where none exists.

It should be noted that the Model Law is a framework law that does not set forth all the rules and regulations that may be necessary to implement the procurement procedures in an enacting State. Accordingly, the Model Law envisages issuance of procurement regulations by the enacting State to fill in the procedural details for procedures authorised by the Model Law and also to take account of the local conditions obtaining therein. In this regard, assistance should be taken from the UNCITRAL Guide to Enactment of the Model Law in identifying the areas in which the national law would need to be supplemented by procurement regulations.

The Model Law offers the following procurement methods for incorporation into the national law: tendering, restricted two-stage tendering, request for proposals, competitive negotiation, request for quotations and single-source procurement. Primacy has, however, been given by the Model Law to tendering to which bulk of its provisions are devoted. The other methods of procurement including restricted tendering and two-stage tendering, which are variants of tendering, have been dealt within a few and skeletal provisions. Moreover, while the Model Law mandates the use of tendering in normal circumstances, the use of the other methods of procurement is permitted only in specified exceptional circumstances and conditions. It is true that procurement by tenders is widely recognised as generally most effective in promoting competition, transparency, efficiency and objectivity in procurement. The other methods of procurement could also be useful alternatives in some circumstances as procuring entities have greater flexibility in the use of these methods as compared to their recourse to tendering. Since the Model Law has now been finalized, it would be in the fitness of things if detailed procedural modalities in respect of procurement methods other than tendering are set forth at least in the national procurement regulations.

The Model Law represents a fair balance between the interests of the procuring entities and those of suppliers and contractors. To ensure that this balance is preserved, it is utmost essential that there are in place adequate

institutional and bureaucratic structures and an impartial review machinery in the enacting States.

(ii) INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

The programme of the work of the International Institute for the Unification of Private Law (UNIDROIT) was considered by its Governing Council at the 71st Session and was adopted. The adopted work programme was for the 1993-1995 triennium. Three items namely the Hotelkeeper's Contract, Relations between Principals and Agents in the International Sale of Goods and the Forwarding Agency Contract were not retained. The Governing Council decided that the Programme should consist of the following:

1. Principles for International Commercial Contracts.
2. International Protection of Cultural Property.
3. International Aspects of Security Interests in Mobile Equipment.
4. International Franchising.
5. Inspection Agency Contracts.
6. Civil Liability connected with the carrying out of Dangerous Activities.
7. Legal Issues connected with Software.
8. Programme of Legal Assistance.
9. Organization of an Information System on Data Bank of Uniform Law.
10. Organisation of a Congress or Meeting on Uniform Law during the triennial period 1993-1995.

This Work Programme was subsequently approved by the 46th Session of the UNIDROIT General Assembly held in Rome during December 1992.

The 72nd Session of the Governing Council which was scheduled from 15 to 18 June 1993 had incorporated in its agenda an item entitled, "Implementation of the Work Programme for the triennial period 1993-1995". This Work Programme consisted of all the items indicated above, as approved by the 71st Session of the Governing Council. The other item particularly was related to "Status of Implementation of UNIDROIT Convention". The UNIDROIT document under consideration for its 72nd Session of the Governing Council briefly surveys the status of each item adopted for the Work Programme for the triennial period 1993-1995 (UNIDROIT, C.D. (72) 5).

The item "*Principles for International Commercial Contracts*" is, as the report puts it, finalised. These proposed principles are intended to provide a kind of model regulation of international commercial contracts and once its final version is approved by the Governing Council, the UNIDROIT Secretariat proposes to publish it and circulate it to the interested business circles. Subsequent to its finalization, a small steering committee constituted by the President of UNIDROIT examined various aspects of this topic in the sixteen meetings. Later a restricted Working Group representing various legal systems took up the task of preparing draft rules relating to the formation, interpretation, validity, content, performance and non-performance of contracts. (The draft consists of seven chapters forming a total of more than 110 articles).

The item, "*International Protection of Cultural Property*" is to be finalised by convening of a Diplomatic Conference for the adoption of its final version, most probably in the latter half of 1994. This topic, however, had many key provisions in its draft which were not agreed to by members; for example, its scope of application, the payment of compensation to good faith purchasers of stolen or illegally exported cultural objects and the principle of non-retroactivity. Earlier, after due deliberations the text of the preliminary draft convention was duly submitted to the Governing Council at its 69th Session in April 1990. There were some differences and members had expressed their hesitations regarding certain provisions. Accordingly, the topic was submitted to a Study Group to consider these view points. The draft was to be finalized by the Study Group during 1993.

The item "*International Aspects of Security Interests in Mobile Equipment*" is under active consideration of a Study Group constituted after due deliberations held in a restricted exploratory Working Group, as envisaged by the Governing Council in 1991. It was generally agreed that the proposed International Convention should be restricted to situations partaking of an international character and should be continued to security interests in mobile equipment held by the debtor for business use. It has been proposed that in advance of the next session of the Study Group, which is to be held in 1994, the UNIDROIT is proposing to convene a small sub-committee of the Study Group, towards November 1993 for the purposes of preparing one or more tentative drafts.

The item "*International Franchising*" concerns the "consideration of the desirability and feasibility of drawing up uniform rules application to certain aspects of franchising agreements concluded at international level". This topic is under the active consideration of UNIDROIT. The item, "Inspection agency contracts" concerns "preparation of uniform rules on inspection agency contracts". The final version of this study is to be submitted to the Governing Council at its 72nd Session.

The item, "*Civil liability connected with the carrying out of dangerous activities*" proposes "the preparation of model rules governing the liability of operators of establishments engaged in dangerous activities for damage sustained by third parties". At its 71st Session in June 1992 the Governing Council took note of the most recent developments in other organisations reported by the UNIDROIT Secretariat and decided to include the subject in the Work Programme for the triennial period 1993-1995.

The item, "*Legal issues connected with software*" proposes to make an inquiry into the extent to which problems may arise in the international relations between producers and users of software and in particular the identification of new types of contract which may be evolving as the use of computers becomes even more widespread. Initially, there was no unanimity among the members of Governing Council at the 71st Session as regards its inclusion for the Work Programme of 1993-95 triennial period. Notwithstanding, the scepticism of some Council members, a decision was taken to include it so as to examine certain areas such as whether transactions relating to the marketing of software were encompassed by the UN Sales Convention and whether they fell within the scope of the EEC Directive on products liability or of that on the provision of services. Accordingly, the UNIDROIT Secretariat was requested to prepare a paper focussing on the problems raised by the subject for the 73rd session of the Governing Council in 1994.

The item "*Programmes of legal assistance*" relates to "the provision of technical assistance in legal matters (especially international trade law) to developing countries and to countries engaged in the transition to a market economy, directed in particular to the practical implementation of the Statutory Objectives of UNIDROIT". The other item concerns the "*setting up by UNIDROIT of a data bank permitting ready access by Governments, judges, arbitrators and practicing lawyers to information regarding uniform law conventions and in particulars acceptance thereof, reservations thereto, and the relevant case law and bibliography*". With regards the "*Convening of a congress or meeting on uniform law during the triennial period 1993-95*", the item is under consideration by the UNIDROIT's Governing Council and it has called for further study on this topic.

In conclusion, the UNIDROIT Work Programme covers important aspects of trade law which have bearing on the international commercial transactions. Some of these studies prepared by the UNIDROIT Secretariat have been of crucial importance to Asian and African countries in their development of trade and commerce in accordance with established legal practices.

(iii) UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

The legislative work programme of UNCTAD is mainly concerned with the commodities, transfer of technology, restrictive business practices, maritime and multimodal transport. This study attempts to survey, albeit briefly, the current legislative work of UNCTAD concerning trade law.

I. COMMODITIES

International Commodity Agreements (ICAs) Negotiated/Renegotiated under the Auspices of UNCTAD

The aims of international commodity agreements and arrangements vary from one agreement/arrangement to another. It should be noted that the principal objectives of agreements with economic provisions were price and export earnings stabilization, although they often also aim at long-term development.¹ Agreements whose main functions were mainly developmental comprised activities related to improved market access and supply reliability, increased diversification and industrialisation, augmented competitiveness of natural products *vis-a-vis* synthetics and substitutes, improved marketing and distribution and transport systems. Further, it is also pointed out that international commodity agreements may also have additional objectives, such as the promotion of consumption, the prevention of unemployment, and the alleviation of serious economic difficulties. Several commodity agreements or arrangements have been adopted pursuant to the objectives adopted by UNCTAD in resolutions 93(IV) and 124(V) on the Integrated Programme for Commodities as well as the Final Act of UNCTAD VII and the Cartagena Commitment of UNCTAD VIII.²

The International Commodity Agreements (ICA) as enunciated in the above indicated resolutions, propose to achieve:

- a) improving the functioning of commodity markets by reducing the distortions affecting supply and demand;
- b) optimizing the contribution of the commodities sector to development by, *inter alia*, working towards greater cost-effectiveness and productivity, thereby enhancing competitiveness;
- c) reviewing and comparing national policies with the aim of enhancing

the competitiveness of the commodity sector, taking into account market trends;

- d) achieving a gradual reduction in excessive dependence on the export of primary commodities through horizontal and vertical diversification of production and exports as well as crop substitution, within a macro-economic framework that takes into consideration a country's economic structure, resource endowments and market opportunities;
- e) progressive removal of trade barriers i.e. trade liberalization for commodity products;
- f) improving market transparency;
- g) exploring the links between commodity policies, sound management of natural resources and achievement of sustainable development;
- h) employing greater use and efficiency of various mechanisms for risk management, having in mind the objective of minimizing the risks arising from commodity market fluctuations, including market-linked price-hedging mechanisms such as commodity futures and options and related long-term mechanisms such as commodity swaps, bonds and loans, obstacles to their potential use and modalities for overcoming them;
- i) analysing problems stemming from commodity-related shortfalls of developing countries and reviewing developments in the field of compensatory financing of export earnings shortfalls.

COCOA: The International Cocoa Agreement 1986 was due to expire on 30 September 1987 but was extended by a decision of the International Cocoa Council for a further period of three years. The UN Cocoa Conference 1992 met from 21 April to 1 May and from 6 to 24 July 1992 and a third session was held from 2 to 13 November 1992 to conclude negotiations on a successor agreement with economic provisions. The fourth session was held from 22 February to 5 March 1993 which affirmed its intention to negotiate an agreement with economic mechanisms and the determination of producing and consuming countries to conclude, as soon as possible, the negotiation of a new International Cocoa Agreement. The fifth part of the UN Cocoa Conference 1993 was held in Geneva during July 1993 to establish the text of the International Cocoa Agreement, 1993. Although the principal aim of this Agreement like that of the previous Cocoa Agreement is to maintain the price of Cocoa beans between an agreed set of prices, it has several distinctive features as compared with the previous Agreements. Notable among these features are:

- a) the incorporation of discretionary intervention prices;

1. A/CN.9/380

2. *Ibid*

- b) the abandonment of the maximum and minimum prices;
- c) withholding scheme to supplement the buffer stock which remains, however, the main supply regulatory mechanism to achieve the principal aim of the Agreement;
- d) rules and procedures for the revision of price levels both at an annual review; and
- e) the deletion of all references to borrowing and the denomination of the price levels in special drawing rights.

COPPER: The terms of reference of the International Study Group on Copper came into force in January 1992. The Secretary-General of the UNCTAD convened the inaugural meeting of the Group in Geneva from 22 to 26 June 1992, which *inter alia*, amended paragraphs 13 and 14 of the terms of reference. Paragraph 13, now, authorises the Group to be designated as an International Commodity Body (ICB) under Article 7(9) of the Agreement establishing the Common Fund for Commodities, for the purpose of sponsoring in accordance with the provisions of these terms of reference, projects on Copper to be financed by the Fund through its Second Account. Paragraph 14 bestows on the Group an international legal personality.

IRON ORE: Following a series of preparatory meetings of UNCTAD involving iron ore producing and consuming countries, Governments had decided to set up an Intergovernmental Group of Experts on Iron Ore which *inter alia* has been examining the following aspects:

- a) providing regular dialogue between producers and consumers;
- b) improving statistics and market transparency;
- c) reviewing and monitoring the market situation and outlook for iron ore; and
- d) exchanging views about issues of concern to the iron ore industry worldwide.

The first session of the Intergovernmental Group of Experts on Iron Ore was held in Geneva from 26 to 28 October 1992 which reviewed broadly the above-mentioned aspects.

Jute: The 1982 Agreement was renegotiated at the UN Conference on Jute and Jute products held under the auspices of UNCTAD from 30 October to 3 November 1989. The Agreement, without much change, was to have entered into force definitively or provisionally on 1 January 1991 or any date thereafter if by that date three Governments of exporting countries accounting for at least 85%

net exports and 20 Governments of importing countries accounting for at least 65% of net imports had signed the Agreement. As that condition had not been met by 1 January 1991, the Secretary-General of UNCTAD in consultation with the parties concerned, convened a meeting on 12 April 1991. At that meeting, it was agreed to put the Agreement into force provisionally among the concerned parties as a whole as of 12 April 1991.

NATURAL RUBBER: The International Natural Rubber Agreement 1987 entered into force provisionally on 29 December 1988 and definitively on 3 April 1989. It is to expire on 28 December 1993 unless extended by decision of the International Natural Rubber Council. The most important objective of the agreement relates to the stabilization of prices and the achievement of balanced growth between demand and supply.

NICKEL: The International Nickel Study Group has met regularly since June 1990 with the objectives of assessing the market situation and prospects as well as to improve statistics and to examine issues impinging on the market for the metal.

OLIVE OIL: The United Nations Conference to negotiate a successor agreement to the International Agreement on Olive Oil and Table Oils, 1986 took place from 8 to 12 March 1993 and approved, "Protocol of 1993 extending the International Agreement on Olive Oil and Table Oils, 1986 with amendments."³ The 1986 Agreement contains general objectives with respect of international cooperation and concerted action for the integrated development of the world economy for olive products and is aimed at the trade expansion and standardization of olive products, the modernization of olive cultivation and oil extraction, transfer of technology, improvement of the olive-products and by-products industry with regard to the environment, and the defence and promotion of trade in olive products.⁴

TIN: Available information points out that the terms of reference of the International Tin Study Group negotiated under UNCTAD auspices in April 1989 have yet to enter into force. It is stated that the Secretary-General of the UNCTAD, on behalf of the Secretary-General of the United Nations who is the depository of these terms of reference, held consultation during the last quarter of 1992 with the concerned countries on future international cooperation on tin.⁵

TROPICAL TIMBER: At its sixth session in May 1989 the International Tropical Timber Council decided to extend the International Tropical Timber

3. TD/OILIVE OIL. 9/6

4. TD/OILIVE OIL. 9/3

5. TD/DCN. 1/2

Agreement, 1983 for a further period of two years ending on 31 March 1992. The UN Conference on Tropical Timber met from 13 to 16 April and was to meet in June 1993 to negotiate a successor agreement.⁶

TUNGSTEN: The Committee on Tungsten reports to the Standing Committee on Commodities and its term of references were very general, namely:

- (a) to provide opportunity for international consultations concerning trade in Tungsten;
- (b) to promote the improvement of statistics on Tungsten and follow developments in the Tungsten market. There had been 23 Sessions of the Committee. The Intergovernmental Group of Experts on Tungsten met in its First Session during December 1992 and reviewed the market situation and outlook.⁷

SUGAR: The International Sugar Agreement, 1992 negotiated in March 1992 entered into force provisionally as of 20 January 1993.⁸ The main thrust of this Agreement is based on export quotas and national stocks in order to stabilize prices.

BAUXITE: In accordance with the decision adopted by the *Ad Hoc* Review Meeting on Bauxite at its 4th Meeting on 17 May 1991, and taking into account the results of consultations held with producers and consumers of Bauxite, the Secretary-General of UNCTAD convened the Second *Ad Hoc* Review Meeting on Bauxite in April 1993.⁹

It should be noted that in respect of certain agricultural products, there are Intergovernmental Groups in the Food and Agriculture Organisation (FAO), on bananas, citrus fruits, fisheries, forestry, grains, hard fibres, jute, kenaf and allied fibres, meat, oilseeds, oils and fats, rice, tea and wine, and in GATT (dairy products and meat). The Intergovernmental Working Groups meet at regular intervals to review the market situation and prospects of commodities in question.¹⁰

COFFEE: The International Coffee Agreement, 1983, with its economic provisions suspended since July 1989 had been extended to 30 September 1993. In April 1992, the International Coffee Council had established a Negotiating Group for the negotiation of a new, market-oriented International Coffee Agreement on the basis of a universal quota supported by an effective system of

controls. The Negotiating Group, however, could not bridge the gap between the different views on the question of the continuous operation of the selective adjustment of quotas under a universal quota system. At its meeting of 29 April 1993, the Executive Board of the International Coffee Organization recommended that the issue of a possible one-year extension of the current Agreement till 30 September 1994 be put to a postal vote in order to maintain international cooperation on coffee and allow more time for renegotiation of a new Agreement. Following the postal vote, the International Coffee Council agreed on 4 June 1993, to the further extension of the International Coffee Agreement, 1983, for one more year i.e. until 30 September 1994.

II. TRANSFER OF TECHNOLOGY

The UNCTAD Secretariat prepared a study in 1990 entitled "The relevance of recent developments in the area of technology to the negotiations on the draft International Code of Conduct on the transfer of technology."¹¹ The consultations were held during 1990, 1991 and 1992 by the Secretary-General of UNCTAD and interested Governments aimed at facilitating agreement on the Code. The General Assembly in its resolution 47/182, invited the Secretary-General of UNCTAD to continue his consultations with Governments on the future course of action on the Code and to report to the General Assembly at its forty-eighth session on the outcome of those consultations.

The focus of UNCTAD's initiative in this area has been reflected in the comparative analysis of the role of the national policies, laws and regulations in promoting investment, technological innovation and transfer of technology. In this regard, reference is made to two studies concerning Brazil¹² and the Republic of Korea.¹³ Regarding the role of intellectual property systems in promoting technological innovation, three studies have been prepared:

- (a) Historical trends in protection of technology in developed countries and their relevance for developing countries¹⁴
- (b) A case study of selected Swedish firms¹⁵
- (c) A case study of the United Republic of Tanzania¹⁶

6. TD/TIMBER.2/7 and TD/TIMBER.2/3
7. TD/B/CN.1/7 and TD/B/CN.1/TUNGSTEN/5
8. TD/SUGAR.12/8
9. TD/B/CN.1/RM/BAUXITE/4 and TD/B/CN.1/RM/BAUXITE/2
10. TD/B/CN.1/2

11. TD/CODE/TOT/55
12. UNCTAD/ITP/TEC/15
13. UNCTAD/ITP/TEC/16
14. UNCTAD/ITP/TEC/18
15. UNCTAD/ITP/TEC/13
16. UNCTAD/ITP/TEC/17