Legal Consultative Committee held at the UN Headquarters in New York in October 1994.

The discussions in the Seminar were based mainly on the papers presented by panelist which included Mr. S.T.A. Epaminondas, the Cyprus High Commissioner; Mr. M. Tom George, Minister, Nigerian High Commission; Dr. P.S. Rao, Joint Secretary and Legal Advisor, Ministry of External Affairs, Government of India; and Dr. V.S. Mani, Professor of International Space Law, Jawaharlal Nehru University. Valuable comments and observations were made by several participants notable among whom were Ambassador Chusei Yamada, the President of the AALCC; Dr. Najeeb Al-Nauimi, the Vice President of the Committee; Mr. Anthony Forsow, Ghana High Commissioner, and Professor Rahamatullah Khan, Jawaharlal Nehru University.

The debate on the subject covered almost all fundamental aspects of the proposed International Criminal Court viz. the mode of its establishment; the relationship of the court with the United Nations in particular the Security Council; the question of jurisdiction of the proposed court; the law applicable etc. Several auxiliary questions arising out of these issues were also debated.

Dr. Najeeb Al-Nauimi, Minister Legal Advisor, Government of the State of Qatar and the Vice-President of the AALCC in his address referred to the various aspects of draft statute. Although in his view, the International Law Commission's (ILC) work on the draft was good, the draft Statute presented was far from perfect as it had many gaps which required to be considered. In his view the questions of sovereignty needed further examination. He also noted that the provisions relating to collection of evidence and application of procedural aspects called for thorough examination. One of the areas which required review was concerning the "relationship between the Security Council and the International Criminal Court". In conclusion, he hoped that the discussion in the Seminar would go beyond the traditional areas and would lead to few possible new dimensions.

Dr. P.S. Rao, Joint Secretary and Legal Advisor, Ministery of External Affairs, India and the Member of the ILC gave an account of the evolution of the substantive aspects concerning the establishment of an International Criminal Court. In his assessment of the various factors which were crucial in the evolution of the Court, he made particular references to the Paris Peace Conference, Genocide Convention and several other unofficial proposals. In the post-second World War era, his reference was to Nuremberg and Tokyo Tribunals. He also traced evolutionary process within the ILC

itself in the early 1950s and its renewed importance in the recent times. According to Dr. Rao, the revival of the idea at the ILC was due to the increasing dissolutions in the international society itself. To substantiate these views, Dr. P.S. Rao referred to the increasing degree of terrorist activities, violation of human rights, crimes relating to illicit traffic in narcotics. He also noted the increasing inability of the Security Council to deal effectively with these crimes.

In his address Dr. Rao referred to the primary work of the ILC i.e., the Code of Crimes. He made a particular reference to the definitional problems in the Code. He noted that these difficulties in defining accurately some of the categories of crimes such as aggression, terrorism, apartheid, intervention etc. arose due to political and other reasons involved. He pointed out that in these circumstances it would be difficult for the ILC to find a common factor to establish a consensus. In this regard, he also noted the conflicting views prevalent as regards the question of linking the Code and the Court.

In the last part of his address Dr. Rao outlined the specific aspects of the draft statute. He referred to the issues concerning 'applicable law'. He also referred to the implications of having an *ad hoc* tribunal. The complicated question in his view, was primarily concerning, the compatibility of the national criminal jurisdictions with the trial procedures. "Jurisdiction', he noted, was accordingly another issue which eluded consensus. Financial constraints at various stages of operation, in his view needed greater consideration.

Mr. Chusei Yamada, the Chairman drew the attention of the participants to the background study prepared by the AALCC Secretariat. He hoped that it would be of help in outlining the major provisions of the draft statute. He clarified that the ILC members attended the deliberations in their individual capacities. He also expressed the view that as a member of the ILC, he did not necessarily endorse all the commentaries provided in the ILC draft. He also drew the attention of the participants to the establishment of an *ad hoc* committee by the Sixth Committee (Legal) of the General Assembly to thoroughly discuss these aspects. He hoped that these aspects would be taken note of by the participants.

In the discussion that followed, Dr. Najeeb Al-Nauimi felt that the political consensus was the main issue. Mr. Tom George, Minister, Nigerian High Commission, agreed that these issues were complex and eluded consensus. He felt that there should be ways to overcome the problems and complexities. In this regard, he referred to the successful functioning

of the International Court of Justice (ICJ). Dr. P.S. Rao while distinguishing the civil and criminal jurisdictions and the possible implications, expressed the view that there should be a non-discriminatory comprehensive criminal jurisdiction. Mr. Anthony Forsow, the High Commissioner of Ghana expressed the view that a permanent court be established by overcoming all the hurdles. There was also a view expressed by one of the participants (Capt. J.S. Gill) that the implications relating to maritime crimes, such as piracy should be given due consideration. Mr. Chusei Yamada, the Chairman drew the attention of the participants that it was left finally to the States to decide the modalities of submitting an accused to the ICC. He also noted that the consent of the individual was not required. He also drew a distinction between the application of substantive and procedural law. He noted that at the stage of trial, the procedural aspect of the law would be decided by the Court itself.

The Second session of the Seminar was chaired by Dr. Najeeb Al-Nauimi, Minister Legal Advisor, Government of the State of Qatar. Prof. Rahamatullah Khan of the Jawaharlal Nehru University, New Delhi and a member of the Executive Council of the ISIL, initiated the discussion. He mainly dealt with the question of the desirability of the establishment of permanent International Criminal Court and its repercussions in the post-cold war scenario wherein a new world order as envisaged and designed by few powerful states; and the conflicting interpretation concerning peace enforcement provisions of the UN Charter and the views given by the Security Council in this regard; and observed that the ICC considering this is a judicial solution to a political problem.

Mr. M.M. Tom George Minister, Nigerian High Commission, in his paper referred to the historical reasons which necessitated the establishment of the ICC. He also referred to the jurisdictional issues of the ICC in relation to other international tribunals. While referring to the scope of the applicable law, he expressed the view that the regional treaties should be considered along with the multilateral universal treaties. He also noted the problems prevalent in the enforcement procedures. He suggested that the proposed ICC should be delinked from the Security Council. He also expressed the view that the proposed Court should be situated in one of the countries of the South and he offered his country's cooperation in this regard. With a view to make the Court more accessible, he suggested that the Court's *locus standi* principle should not only be limited to States. He proposed that the UN Human Rights Commission, National and International Bar Associations could be allowed to bring the cases before the Court.

In his address Mr. Stavros A. Epaminondas the High Commissioner of Cyprus, expressed the view that the ICC should be created by a treaty. He also proposed that it should be closely linked to the United Nations. He also referred to the complexities involved in Article 20 while listing the crimes. He would prefer the formulation as it appears in Articles 21 and 22 of the Draft Code of Crimes against the Peace and Security of Mankind and adopted on first reading rather the formulation listed in the Commentary to Article 20 of the Draft Statute. Thus the exceptionally serious war crimes of "The establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory" and the "deportation or possible transfer of population", should be included in the list of crimes. He also noted that the system of declarations of acceptance of the jurisdiction that is envisaged by the International Law Commission could lead to a situation where, although a sufficient number of states are prepared to establish such a Court, a lack of declarations of acceptance of the Court's jurisdiction will mean that it can exercise no or only very few practical functions.

Professor V.S. Mani, Jawaharlal Nehru University, New Delhi. primarily addressed the jurisdictional issues of the Court. He also referred to the ILC's initial work and the views expressed by few individual members regarding the establishment and viability of the ICC. He referred to various authorities in this regard. Prof. Mani specifically addressed some of the important provisions of the Draft Statute, such as (a) The Preamble, (b) Jurisdiction; (c) The issues concerning the access to the Court; (d) The action by the Security Council; (e) Challenges to jurisdiction and admissibility and (f) Conflicting-overlapping of jurisdictions. Mr. Anthony Forsow, the High Commissioner of Ghana expressed his views on the issues concerning jurisdiction. Dr. Najeeb, the Chairman pointed out the limited mandate of the ILC as given by UN. He also pointed out that the political constraints were not in its purview.

While responding to the comments made, Dr. P.S. Rao addressed some of the specific issues, such as list of crimes, knowledge, state responsibility and crimes. There was a brief discussion on the issue of enforcement. During this discussion a reference was made to the possible conflict between the final resolution of the dispute by the ICJ and the enforceability of the same by the Security Council. Dr. Najeeb clarified the exact operation of these provisions and pointed out that there were no conflict situations in its actual operation.

In his concluding remarks, Dr. Najeeb thanked the participants for making the Seminar a fruitful one. Prof. R.P. Anand, on behalf of ISIL

also thanked the participants. He felt that the purpose of the Seminar was to raise questions and understand their implications that, he noted, was achieved. Mr. Tang Chengyuan, the Secretary-General, AALCC, while thanking the participants, noted that the Seminar served its purpose by generating a lively and purposeful discussion.

IX. International Trade Law

(i) Introduction

The AALCC Secretariat prepares a report on the recent legislative developments in the field of international trade law every year. The purpose of such reports is to keep member states abreast with the recent developments in this field. The Organizations covered include the UNCTAD, UNCITRAL, UNIDO, UNIDROIT and the Hague Conference on Private International Law. Also under the article 4D of the Committee's statutes: the functions and purposes of the committee shall be:

"to exchange views and information on matters of comman concern having legal implications and to make recommendations thereto, if deemed necessary". The AALCC Secretariat undertook a study on "The New GATT Accord". This study has also been reproduced in this chapter.

Thirty-fourth session: Discussions

The *Deputy Secretary-General* (Mr. Essam Abdel Rehman Mohammed introduced two Secretariat documents viz. (1) Report on the Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law (No. AALCC/XXXIV/Doha/95/10) and the Report on the International Seminar on Globalization and Harmonization of Commercial and Arbitration Laws, held in New Delhi on 31 March—1 April 1995. (Doc. No. AALCC/XXXIV/Doha/95/10-A). This Seminar* had been organized by the AALCC with the technical support of UNCITRAL, UNIDO, World Bank and WIPO and hosted by the Indian Council of Arbitration.

* The Report of the Seminar has been annexed at the end of this Chapter at Page 337.

The Report focussed on the legislative activities of UNCITRAL, UNCTAD, UNIDO and UNIDROIT. In addressing the work of UNCITRAL, the report has dealt primarily with the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the text of which had been adopted by UNCITRAL at its 1994 Session. As for UNCTAD, the Report gives an account of the functional reorientation and institutional restructuring which the UNCTAD had undergone since UNCTAD VIII. The report provided an overview of the work of UNCTAD in such areas as International Trade, Trade Efficiency, Transnational corporations and Investment, Privatization and Enterprise Development, Commodities, Services, Poverty Alleviation etc.

On UNIDO, the Report gives a brief account of projects nearing completion: (i) Principles for International Commercial Contracts; (ii) International Protection of Cultural Property; (iii) International aspects of Security Interests in Mobile Equipment; (iv) Franchising; (v) Inspection Agency Contract; and (vi) Civil Liability connected with the carrying out of dangerous activities.

The *Representative of UNCITRAL* commended the Secretariat for providing a succinct account of the work of UNCITRAL, and observed that since there was a general acceptance that creation of a conducive legal infrastructure was a *sine qua non* to the growth of international commercial transaction, the role of UNCITRAL was tailored to the achievement of that objective. The UNCITRAL texts were developed by legal experts representing the main legal systems and as such were internationally accepted. He then provided the context in which UNCITRAL had undertaken the work leading to the adoption of UNCITRAL Model Law or Procurement of Goods Construction and Services. It had been noted that procurement legislation in many countries were deficient, and lacked transparency and clarity which often resulted in misuse of public funds and corrupt practices. This prompted UNCITRAL to develop this Model Law which is intended to assist States in updating and modernizing their existing procurement laws or favour the enactment of new legislation where none existed. He urged the Member States in the AALCC to consider the Model Law while revising the existing procurement legislation or enacting a new one. He pointed out that there was already a fair amount of interest in the Model Law and that UNCITRAL was ready to provide technical assistance to States enacting or revising the procurement legislation. He also referred to the work UNCITRAL was undertaking in relation to BOT contracts by which developing countries lacking finance can promote infrastructure development.

The Delegate of the Republic of Korea noting that the BOT mechanism

had emerged as a preferred contractual modality for promoting infrastructure development, wished to know the recent successful BOT projects.

The *Representative of UNCITRAL* pointed out that the BOT mechanism for infrastructure development was a fairly new concept, and therefore there were no examples of completed projects yet. He stated that BOT was a method of project financing wherein government gave concession to build, operate and transfer the project at the final stage. This process took a considerably long time. He drew the attention of the Committee to some of the projects in South East Asia which were either at discussion stage or at the stage of execution. He made a particular reference to a hydel project being undertaken in Pakistan. He also informed the Plenary about the widespread application of this mechanism in Latin America. He was of the view that the BOT mechanism of project finance was sure to emerge as a major factor in the coming decade.

The *Deputy Secretary-General* (Mr. Essam Abdel Rehman Mohammed) also introduced the study on the New GATT agreement contained in document AALCC/XXXIV/Doha/95/11. He pointed out that the main focus of the study was to highlight some of the features of this Agreement in three crucial areas, namely (a) The World Trade Organization (b) Trade-related Investment Measure and (c) Trade-related Aspects of Intellectual Property Rights. He also noted that the implications flowing from these Agreements had both positive and negative aspects for the Member States of the AALCC. He pointed out that the study before the Committee outlined the major policy initiatives which actually shaped the Final Agreement. In his view the approach adopted by the study was to see how best the Agreement could be utilized to serve the interest of countries belonging to different categories.

The WTO, he noted was to facilitate the implementation, administration and operation of the Uruguay Round Agreements and also provided a forum for negotiations among its members concerning their multilateral trade relations. As regards the Agreement on trade-related investment measures, he pointed out that the study outlined the divergences existing in the negotiation of investment measures between the developed and developing countries. On the other hand, intellectual property rights presented an entirely new transwork. Accordingly, he pointed out, the scope and intensity of the obligations contained in the Agreement on TRIPs, went far beyond what had been envisaged at the beginning of the negotiations. The primary focus of the study, he noted, was on the need to consider the requirements of developing countries.

(ii) Decision on the "Progress Report in the field of International Trade Law".

(Adopted on 22nd April 1995)

The Asian-African Legal Consultative Committee at Its Thirty-fourth Session:

Having taken note of the Report concerning the "Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law" contained in Doc. No. AALCC/XXXIV/Doha/95/10 and the Secretariat study on "The New GATT Accord: its implications for the Asian-African Countries" contained in Doc. No. AALCC/XXXIV/Doha/95/11;

1. *Expresses* its appreciation for the brief of documents prepared by the Secretariat on the recent developments in the field of International Trade Law;

2. *Also expresses* its appreciation for the continued co-operation with the various international organizations competent in the field of international trade law and hopes that this cooperation will be intensified in the future;

3. *Urges* the Members States of the AALCC to consider the UNCITRAL Model Law on Procurement of Goods, Construction and Services as they reform or enact their legislation on procurement and also

to consider adopting, ratifying or acceding to the other texts prepared by the United Nations Commission on International Trade Law (UNCITRAL);

4. *Requests* the Secretary-General to continue to monitor the developments in the area of international trade law and present a report thereon to the Asian-African Legal Consultative Committee at its Thirty-fifth Session.

(iii) Secretariat Brief

A. Legislative Activities of United Nations and other Organizations Concerned with International Trade Law

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

The twenty-seventh session of the United Nations Commission on International Trade Law (UNCITRAL) was held at the UN Headquarters in New York, from 31 May to 17 July 1994. The substantive topics before this session were: (i) New International Economic Order—Draft Amendments to the UNCITRAL Model Law on Procurement of Goods and Construction to incorporate procurement of services; (ii) International Commercial Arbitration—preparation of Draft Guidelines for Preparatory Conferences in Arbitral Proceedings; (iii) Legal Issues in Electronic Data Interchange (EDI)—Preparation of Model Statutory Provisions on EDI; and International Contract Practices; Draft Convention on Independent Guarantees and Stand-by Letters of Credit. The Commission also considered possible future work to be undertaken in relation to assignment of claims and related matters; cross-border insolvency and Build, Operate and Transfer (BOT) arrangements.

The main focus of discussion at this session was, however, a set of draft amendments aimed at incorporating the procurement of services into the UNCITRAL Model Law on Procurement of Goods and Construction, adopted at its last session in 1993 and consequent draft amendments to the Guide on Enactment of the Model Law on Procurement of Goods and Construction aimed at extending the scope of the Guide to procurement of services. The Commission adopted these amendments resulting in the

establishment of a more comprehensive Model Law on Procurement entitled "UNCITRAL Model Law on Procurement of Goods, Construction and Services".

On the topic of International Commercial Arbitration, the Commission examined the draft of the guidelines on Preparatory Conferences in Arbitral Proceedings prepared by the Secretariat. It is often considered useful to hold, particularly in international cases, a preparatory conference at an early stage of the arbitral proceedings amongst the participants to an arbitration. At such a conference, appropriate procedural decisions are taken and details of procedure settled so as to make the subsequent arbitral proceedings more predictable as well as more efficient and cost-effective. The preparation of the proposed Guidelines is motivated by the consideration that in appropriate circumstances, a preparatory conference is a useful exercise and internationally harmonized guidelines would assist practitioners in deciding whether to hold a preparatory conference, and if one is to be held, to help them prepare it and carry it out. The Draft Guidelines is made up of three chapters: Chapter I sets out general considerations; Chapter II sets out the guidelines on convening and conducting of preparatory conferences. Chapter III sets out guidelines on a checklist of possible topics which might be addressed in the preparatory conference. These issues could be divided into two parts: Issues required to be addressed at an early stage of the arbitral proceedings. These would include rules governing arbitral procedure, language of the arbitral proceedings and the place of arbitration. Issues which could be taken up at a later stage of the arbitral proceedings would include: definition of issues and the order of deciding them; undisputed facts or issues, matters relating to taking of evidence etc. Further issues suggested during the course of this Session for coverage in the proposed guidelines included: designation of an appointing authority if such an authority had not been designated; confidentiality of information disclosed during the arbitral proceedings; the use of EDI in the conduct of arbitral proceedings; and establishment of ground rules for communications between the parties and the arbitral tribunal.

After examination of the proposed Draft Guidelines, the Commission requested the Secretariat to revise them in the light of the suggestions made at the present session and to submit revised draft Guidelines with a view to finalization of the text at its next session.

On the topic of Legal Issues in Electronic Data Interchange (EDI), the Commission had before it two reports of its Working Group on EDI (A/CN.9/373 and A/CN.9/390) and noted with satisfaction that the Working

Group had begun the preparation of model statutory provisions for uniform rules on the legal aspects of EDI and related means of trade data communication. For expediting the work, the Commission requested the Working Group on EDI to at least complete a set of basic "core provisions" for consideration at the next session of the Commission in 1995, in particular since it had already been decided that the relationship between EDI users and public authorities as well as consumer transactions would not be the focus of model statutory provisions.

On the topic of International Contract Practices, the Commission noted the progress made by its Working Group on International Contract Practices as set out in the reports of the Working Group (A/CN.9/388 and A/CN.9/391) towards developing the draft of a Convention on Independent Guarantees and Stand-by Letters of Credit. The Working Group had revised 17 of the 27 articles of the Draft Convention. The Commission asked the Working Group to expedite its work so as to present the Draft Convention at its next session in 1995.

Finally, the Commission addressed itself to the scope of the work to be undertaken in regard to the three new topics before it: namely, assignment of claims and related matters; cross-border insolvency; and BOT arrangements. As regards the first topic, the Commission decided to limit itself to assignment of international commercial receivables, i.e. claims for payment of sums of money that arise from international commercial transactions, including assignment by way of sale or by way of security, non-notification assignment (a type of assignment in which the debtor is not notified of the assignment) and factoring (sale of receivables for financing and other purposes) to the extent not covered in the UNIDROIT Convention on International Factoring of 1988. This Convention covers assignments both by way of sale and by way of security. The Commission requested the Secretariat to prepare a detailed study on the issues that had been identified, possibly accompanied by a first draft of the uniform rules in cooperation with UNIDROIT and other international organizations active in this area such as the World Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank.

On the topic of cross-border insolvency, in which the problems are compounded by a wide disparity of national laws and conflicting jurisdictions, the Commission decided to concentrate on three sub-areas, namely, judicial cooperation, "access and recognition" and formulation of a set of model legislative provisions on insolvency aimed at achieving substantive unification of the insolvency law. In regard to judicial cooperation, the questions needed to be resolved included the extent of

judicial cooperation possible under the current law, for example by the application of the notion of comity and framing of necessary rules by which through judicial cooperation the problems arising as a result of parallel proceedings and conflicting legal regimes and jurisdictions could be addressed. "Access and recognition" concerned the granting of access to courts to representatives of foreign insolvency proceedings or creditors and to giving recognition to orders issued by foreign courts administering insolvency proceedings. The Commission, however, decided to ask the Secretariat to undertake at the present stage work on the twin issues of judicial cooperation and access and recognition.

On BOT arrangements, the Commission decided to study the desirability and feasibility of undertaking work on some of the legal problems that arise in BOT projects, including the creation of an enabling framework for such projects, after the UNIDO had finalized its "Guidelines for the Development, Negotiation and Contracting of BOT Projects" in September 1994. Typically, a BOT project is one in which a Government grants a concession for a period of time to a private consortium for the development of a project, the consortium then builds, operates and manages the project for a number of years after its completion and recoups its construction costs and makes a profit out of the proceeds coming from the operation and commercial exploitation of the project. At the end of the concession period, the project is transferred to the Government. Although BOT projects have already been used in the development of large infrastructural projects such as telecommunications networks, highways and other public transportation projects, port facilities and in energy supply, increasingly it is also being utilized for medium and small scale projects. BOT projects are particularly attractive for developing countries faced with decreasing borrowing capacity and declining budgetary resources. It yields them an opportunity to finance projects without involving public funds and without guaranteeing the repayments on any loans or returns on the investments made on the project.

Since a major achievement of the twenty-seventh session of the Commission has been the adoption of a consolidated text of the Model Law encompassing procurement of goods, construction and services this note focusses only on this important legislative work.

UNCITRAL Model Law on Procurement of Goods Construction and Services

Background

The work on the subject of procurement was first undertaken by UNCITRAL in 1986 and had been entrusted to its Working group on

NIEO. Since different considerations were involved in the procurement of goods and construction and in the procurement of services, it was decided at that time to first take up the preparation of a Model Law devoted to the procurement of goods and construction. Consequently between 1986 and 1993, the Working Group on NIEO devoted six sessions to the elaboration of the draft text of the Model Law on Procurement of Goods and Construction. The Working Group completed its mandate at the close of its fifteenth session by adopting the draft text. The draft of the Model Law as finalized by the Working Group was then circulated to Governments and interested international organizations for comment. At the twenty-sixth session of the Commission in 1993, the draft of the Model Law on Procurement of Goods and Construction was examined in the light of the comments received. At the end of its deliberations, the Commission formally adopted the draft text as "UNCITRAL Model Law on Procurement of Goods and Construction". The Commission also formally approved the draft of a Guide to Enactment of the Model Law on Procurement of Goods and Construction prepared by the Secretariat.

The Model Law on Procurement of Goods and Construction consisted of a Preamble and 47 articles arranged under five chapters. Chapter I set forth general provisions in Articles 1 to 15. Chapter II listed out the various methods of procurement and conditions for their use in Articles 16 to 20. Chapter III dealt with Tendering Proceedings in Articles 21 to 35. Chapter IV set out the provisions relative to procurement methods other than tendering in Articles 36 to 41. Finally, Chapter V set forth provisions establishing a right of review of acts and decisions of the procuring entity and governing its exercise in Articles 42-47.[1]

At its twenty-sixth Session (1993), after adopting the Model Law on Procurement of Goods and Construction, the Commission asked the Working Group on NIEO to proceed with the preparation of model statutory provisions on procurement of services. The Working Group devoted its sixteenth (Vienna, 6 to 17 December 1993) and seventeenth (New York, 14 to 25 March 1994) sessions for the purpose of discharging this mandate.

The Working Group began its task by considering the two approaches mooted before it in implementing its mandate. The first one consisted of the formulation of a free standing model law dealing exclusively with the procurement of services. This approach was stated to have the advantage of underscoring a distinct and specialized treatment for the procurement

1. For detailed analysis of the Model Law on the Procurement of Goods and Construction, see Notes and Comments of the AALCC Secretariat prepared for the 48th Session of the General Assembly.

of services because unlike in the case of procurement of goods and construction, it was mostly governed by non-price considerations. Moreover, the existing Model was premised on the tendering method which in most cases would be unsuitable for the procurement of services. The second approach advocated consisted of making suitable amendments and additions to the existing Model Law with a view to the elucidation of a consolidated text dealing with the procurement of goods and construction as well as of services. This approach was considered preferable for a number of reasons: (i) Most provisions of the existing Model Law were in substance also applicable to the procurement of services: (ii) At the national level, States traditionally dealt with procurement of goods, construction and services in a consolidated text; and (iii) it was true that procurement of services required a specialized treatment in most cases, but it was thought to be inadvisable to preclude the use of other methods of procurement in the case of procurement of services in the circumstances when it would be advisable to have recourse to those methods. In the light of the aforementioned discussion, the Working Group eventually decided to follow a mixed approach, consisting of a consolidated model statute dealing with the procurement of goods, construction and services with a more distinct treatment for the procurement of services. Having decided this course of action, the Working Group proceeded to undertake a review of the provisions of the existing Model Law article by article so as to ascertain what drafting or substantive changes would be required to be effected therein to ensure that they are applicable to the procurement of goods and construction as well as to the procurement of services and to provide for a preferred method for procurement of services in a separate chapter, except in cases falling within the conditions of use of tendering in the cases of services or in cases subject to procurement by other methods (restricted tendering, two-stage tendering, competitive negotiation, single-source procurement, and request for quotations).

Having decided on the structure of the Model Law applicable to the procurement of goods and construction as well as of services, the Working Group effected the necessary drafting and/or substantive changes in the provisions of the Model Law on Procurement of Goods and Construction which are as follows:

Title : It was decided to entitle the revised text as "UNCITRAL Model Law on Procurement of Goods, Construction and Services".

Preamble : Both in the *chapeau* and sub-paragraph (c) a reference to "services" was included.

Article 2
Definitions

The definitions of 'procurement', 'goods' and 'construction' were revised to accommodate the new context. Further, a definition of 'services' was added in sub-paragraph (d) *Bis*.[2]

Article 6
Qualifications of suppliers and contractors

The qualifications of suppliers and contractors were improved in view of the extension of the text to cover procurement of services. Further, a proviso was added to the end of paragraph (5) so as to prohibit discrimination amongst suppliers and contractors based on criteria that were not objectively justifiable.

Article 7
Prequalification proceedings

Paragraph (3) was amended to make the prequalification proceedings applicable to all methods of procurement including the principal method for the procurement of services as provided for in Chapter IV *Bis*.[3]

Article 9
Form of communications

Drafting changes were inserted to adjust this provision to the procurement of services.

Article 11
Record of procurement proceedings

Drafting changes were made in paragraphs (1)(d), (e) and (f) and a new provision was added as (i) *Bis*.[4] Paragraph (1)(d) was amended to ensure that in the circumstances where a tender, proposal or offer did not involve a price or price-determining mechanism and if other terms were not known to the procuring entity, there was no obligation on the procuring entity to record them. Paragraph (1)(e) was modified to permit a margin of preference in the case of procurement of services. Drafting change in sub-paragraph (f) became necessary in view of the relocation of Article 33 on Rejection of All Tenders as Article 11 *Bis*.[5]

A new sub-paragraph (i) *Bis*[6] was inserted to require the procuring entity to record the grounds and circumstances on which it relied to justify the selection procedure in the case of procurement of services.

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2. This is now sub-paragraph (e) of the final text.
3. This is now Chapter V of the finally adopted text.
4. Paragraph (j) of Article 11 of the finally adopted text.
5. This is renumbered as Article 12 in the final text.
6. Sub-paragraph (j) of Article 11 in the finally adopted text.