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NEGOTIATIONS AND THE DEVELOPMENT OF
INTERNATIONAL STANDARDS IN PUBLIC PROCUREMENT: LET
THE BEST TEAM WIN?

CAROLINE NICHOLAS*

This article considers how, and the extent to which, the process of international law-making, as witnessed in UNCITRAL in its work on public procurement and in other topics, contributes to the universalisation of international private law, in the sense of body of rules governing commercial relationships of a private nature involving different countries. Having considered UNCITRAL's working methods, it concludes that these methods when designed in the 1960s offered an excellent opportunity to fulfil its mandate to further the progressive harmonisation and unification of the law of international trade. This is done through the multi-lingual, transparent and inclusive approach to negotiation and development of UNCITRAL's texts that the methods entail. Nonetheless, there are indications that attempts to reach truly harmonised or consistent international instruments should not seek to move forward faster than the pace at which international consensus on novel ideas can emerge through international cooperation. Trying to force the pace may tempt States to promote their national models, whether in the genuine belief that they represent the best solution, or for political or other advantage. Countering such a tendency requires broad and representative participation in UNCITRAL's activities, particularly from developing countries. Thus, it is suggested that all countries should consider participating in UNCITRAL as a worthwhile investment.

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I. INTRODUCTION

This article will consider the extent to which the United Nations Commission on International Trade Law (UNCITRAL) working methods, which coalesce around a non-politicised, intergovernmental negotiating process, can effectively contribute to the harmonisation and modernisation of international trade law, both in theory and in practice. The process involved in the development of a key UNCITRAL legislative text, its Model Law on Public Procurement (2011),¹ will be used as a case study, along with other examples from the UNCITRAL experience.

The author concludes that these working methods, as conceived, offer an excellent opportunity to allow UNCITRAL to achieve its mandate – that is, “to further the progressive harmonisation and unification of the law of international trade.”² UNCITRAL fulfils this mandate by preparing and promoting the use and adoption of universally acceptable legislative and other instruments, in a number of key areas of commercial law. In order to ensure that the working methods operate in practice as they are intended, that is, through broad-based deliberations at the

¹ The Model Law (2011) is supported by other policy documents: a Guide to Enactment (2012), Guidance on Procurement Regulations (2013) and a Glossary (2013). Model Law and accompanying Guide to Enactment, GAOR, 49th Sess., Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I, *available at* http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html. [hereinafter “Model Law 2011”]. References in this paper to the “Model Law” and to the “Guide to Enactment” are to the 2011 and 2012 texts, unless otherwise indicated.

² Establishment of the United Nations Commission on International Trade, G.A. Res. 2205 (XXI), U.N. Doc. A/ 6594 (Dec.17, 1966) [“Establishment United Nations Commission on International Trade”].

intergovernmental level, and with the effect envisaged, the participation of countries from all regions is required. As was noted in 1966, when UNCITRAL was established, “[p]rogress in this field is bound to be rather slow, but the pace of such progress can be substantially accelerated if the United Nations assumes an active role and if Member States give it sustained and continuing support.”³

Another key requirement is the cooperation of other agencies involved in the promotion of international trade and legal reform efforts in supporting it, notably the World Trade Organisation (WTO), the United Nations Conference on Trade and Development (UNCTAD), and the multilateral development banks. These bodies are among the international “formulating agencies”,⁴ whose work in developing rules to enhance international trade has been described as an “outstanding characteristic of the modern development of international trade law.”⁵ One of the most important agencies in this regard is the WTO. Its Agreement on Government Procurement (GPA) seeks to achieve the same objectives as the UNCITRAL Model Law. Moreover, there is long-standing cooperation between these organisations at the technical level.

Even more importantly, perhaps, the fulsome participation of developing countries would enhance the development of UNCITRAL’s legislative texts. It has been observed that smaller and developing countries are comparatively more active in adopting UNCITRAL texts,⁶ and one of the key motivations in establishing UNCITRAL was to offer them a voice in the preparation of those texts, which had hitherto been denied to them.⁷ When submitting a proposal that ultimately led to the establishment of UNCITRAL, it was noted that “[i]t was particularly important for [the developing countries] that the law of international trade should be updated and guarantee the highest security so that they would not be at the mercy of more

³ See U.N. Secretary General, *Progressive Development of the Law of International Trade: Rep. of the Secretary-General*, 21st Sess., 1966, U.N. Doc. A/6396, Add. 1 and 2 (Sept. 23, 1966) [hereinafter “General Assembly 21st Sess. report”].

⁴ These agencies, which include UNCITRAL and other United Nations bodies, are generally set up by a membership of countries, rather than organisations, so it is those countries that set their agenda and direction.

⁵ General Assembly 21st Sess. Report, *supra* note 3, ¶ 25.

⁶ UNCITRAL, *A strategic direction for UNCITRAL*, Note by Secretariat, ¶ 44, U.N. Doc. A/CN.9/752 (May 29, 2012).

⁷ General Assembly 21st Sess. Report, *supra* note 3, ¶ 210(b). This report stated that developing countries had “had the opportunity to participate only to a small degree in the activities carried out up to now in the field of harmonization, unification, and modernization of the law of international trade. Yet those are the countries that especially need adequate and modern laws, which are indispensable to gaining equality in their international trade.”

experienced trade partners.”⁸ Developing countries may also benefit more directly through participating in the negotiations of the rules governing international trade.

Given the enormous size of the market for procurement and infrastructure development,⁹ and the potential of the projects concerned to expand international trade and to contribute to sustainable development, the importance of ensuring that these countries’ experience is also taken into account in the legislative development process cannot be overstated. Otherwise, the risk is that the potential for development of international commercial and trade law may remain as it was prior to the establishment of UNCITRAL: “show[ing] some progress but at the same time some significant shortcomings.”¹⁰

II. THE ESTABLISHMENT OF UNCITRAL¹¹

The United Nations Charter mandates the General Assembly to “initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification”.¹² Various United Nations bodies were established under that article, including the International Law Commission (ILC) in 1947, prior to UNCITRAL’s arrival on the scene.

The object of the ILC is the “promotion of the progressive development of international law and its codification.”¹³ Although its mandate extends to private international law, the ILC primarily focusses on public international law.¹⁴ In 1965, Hungary initiated a proposal for a United Nations body that would address

⁸ See Establishment of the United Nations Commission on International Trade, *supra* note 2, ¶ 8.

⁹ In 2011, on average, OECD countries’ general government procurement spending represented 29% of total general government expenditures (or 13% of GDP). OECD, *Government at a Glance*, 2013, http://www.oecd-ilibrary.org/sites/gov_glance-2013-en/07/01/index.html;jsessionid=1faq4kdgg1ewn.x-oecd-live-03?contentType=&itemId=%2Fcontent%2Fchapter%2Fgov_glance-2013-44-en&mimeType=text%2Fhtml&containerItemId=%2Fcontent%2Fserial%2F22214399&accessItemIds=%2Fcontent%2Fbook%2Fgov_glance-2013-en

¹⁰ General Assembly 21st Sess. Report, *supra* note 3, ¶ 208.

¹¹ For details concerning UNCITRAL’s mandate, see General Assembly 21st session report *supra* note 3, and the relevant summary records of the proceedings of the Sixth Committee (A/C.6/SR.947-955).

¹² Charter of the United Nations, art. 13(a), 1 U.N.T.S. XVI (1945) [hereinafter “U.N. Charter”].

¹³ Statute of the International Law Commission, G.A. Res. 174 (II), art. 1(1), U.N. Doc. A/519 (Nov. 21, 1947) [hereinafter “Statute of the ILC”].

¹⁴ *Id.* at art.1(2).

the unification and harmonisation of an aspect of *private* international law – international trade law.¹⁵ Noting the conclusions of Professor Schmitthoff's extensive survey¹⁶ into efforts to unify and harmonise this field of law, the General Assembly recognised that (a) there had been slow progress in international trade law in particular, especially given the time and effort expended; (b) developing countries had the opportunity to participate in those efforts to a lesser degree than the developed countries; (c) none of the then existing agencies working in this area of law included a membership that represented all the principal geographic regions and all the major economic systems in the world and therefore none of them commanded world-wide acceptance and (d) there was a lack of coordination among the formulating agencies.¹⁷

Three methods had been adopted for the unification and harmonisation of the substantive rules governing international trade law¹⁸ – the development of norms (that is, binding international treaties and agreements); the formulation of model laws (noted to be an alternative to binding norms); and the formulation of commercial customs and practices, any of which might be the more appropriate approach for a given topic.¹⁹ Given the identified need to accelerate and systematise the unification and harmonisation of international trade law, the General Assembly established UNCITRAL with a general mandate to undertake all three activities in the field of international trade law. Additionally, it was also empowered to issue harmonising texts that seek to remove the types of barriers to cross-border trade that substantive rules can impose.²⁰

Although this concept of unification and harmonisation was not a novel one

¹⁵ Defined as the “body of rules governing commercial relationships of a private law nature involving different countries”, including those “entered into by governmental and other public bodies or, particularly in countries of centrally planned economy, by foreign trade corporations.” General Assembly 21st Sess. Report, *supra* note 3, ¶¶ 10, 12.

¹⁶ Professor Clive Schmitthoff prepared a General Report on the Colloquium held in London on the Law of International Trade, its Growth, Formulation and Operation in 1962. See CLIVE M. SCHMITTHOFF, *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 3-38 (1964). His report led the United Nations Secretary General to request a further report for the General Assembly at its 21st session. This report, in essence, provided the justification for establishing UNCITRAL. See Report to the Secretary General, U.N. GAOR, 21st Sess., U.N. Doc. A/6396 (Dec. 17, 1966).

¹⁷ General Assembly 21st Sess. Report, *supra* note 3, ¶ 210.

¹⁸ Considered to be more suitable than refining choice of law rules in the international trade law context, given the historical and existing similarities in international trade law – see General Assembly 21st Sess. Report, *supra* note 3, ¶¶ 22-24.

¹⁹ General Assembly 21st Sess. Report, *supra* note 3, ¶¶ 190-193, 200.

²⁰ See Establishing- United Nations Commission on International Trade, *supra* note 2.

(arising in the early 20th century, and seeking to enhance legal certainty and predictability), the emphasis on coordination of efforts among the international “formulating agencies” that was a key feature of its mandate was indeed new.²¹ As the former Legal Counsel of the United Nations, Hans Corell stated in 2000 that the UNCITRAL’s work involves “two aspects of extraordinary cooperation ... : the cooperation among States participating in the work of the Commission and the cooperation with interested international organisations of the public and private sectors.”²² We will consider how this cooperation has supported the work of UNCITRAL by reference to its work in public procurement.

III. REFORM OF INTERNATIONAL NORMS AND STANDARDS: GOVERNING PUBLIC PROCUREMENT

Public procurement has been deemed to fall within the scope of UNCITRAL’s mandate as part of “international commercial relations on the level of private law entered into by governmental and other public bodies.”²³ UNCITRAL has been engaged in the reform of public procurement since 1988, when a Working Group on the New International Economic Order was tasked with the development of a legislative text for the use of national governments in the field.²⁴ The motivation

²¹ The tasks given to UNCITRAL in section II, ¶ 8 of its mandate are:

“(a) Coordinating the work of organizations active in this field and encouraging cooperation among them;

(b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;

(c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;

(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

(e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;

(f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;

(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade; and

(h) Taking any other action it may deem useful to fulfil its functions.”

²² Hans Corell, Legal Counsel at the United Nations, Opening Speech at UNCITRAL’s 33rd sess. (June 12, 2000), <http://www.un.org/law/counsel/uncitral.htm> [hereinafter “Corell”].

²³ General Assembly 21st Sess. Report, *supra* note 3, ¶ 12.

²⁴ *See* Rep. of the U.N. Comm’n on Int’l Trade Law on the work of its nineteenth session,

for reforms “stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.”²⁵ It was also considered that the then “existing legislation governing procurement [at the national level was perceived to be] inadequate or outdated.”²⁶ It was concluded that “this results in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.”²⁷

The need for a legislative text was then observed to be most acute in developing countries and countries in transition.²⁸ After several years of deliberations, UNCITRAL issued its first Model Law on Procurement of Goods and Construction in 1993 and the better-known Model Law on Procurement of Goods, Construction and Services in 1994.²⁹

In 2011, after seven more years of deliberations, UNCITRAL issued a new Model

U.N. GAOR, 41st sess., U.N. Doc. A/41/33 Supplement No. 17 (A/41/17) ¶ 243, (1986).

²⁵ See UNCITRAL, The Guide to Enactment, History and Purpose of UNCITRAL Model Law on Procurement of Goods, Construction and Services, Introduction, ¶ 4, U.N. Doc. A/CN.9/403 (1994) [hereinafter “Guide to Enactment 1994”].

²⁶ *Id.* ¶ 3.

²⁷ *Id.* ¶ 3.

²⁸ *Id.* ¶ 3: “In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy.”

²⁹ The text is *available at*

http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html. The UNCITRAL Model Law on Procurement of Goods and Construction, U.N. Doc. A/48/17 (1993) [hereinafter “Model Law 1994”] is available at the same location. This text addressed the regulation of public procurement in the area of goods and construction but did not contain provisions on non-construction services.

Law on Public Procurement (the “Model Law”) and a Guide to Enactment of the Model Law in 2012, followed by the issuance of Guidance on Regulations and a Glossary in 2013.³⁰ The Guide to Enactment explains the two main objectives of the Model Law: “first, to serve as a model for all States for the evaluation and modernization of their procurement laws and practices, and the establishment of procurement legislation where none currently exists. The second purpose is to support the harmonization of procurement regulation internationally, and so to promote international trade.”³¹ The Model Law provides a template for the design of national procurement systems, so “that the government purchaser will spend public funds with responsibility and accountability, and thus will obtain value for money.”³²

The reform efforts in UNCITRAL were largely contemporaneous with the conclusion and revisions to the GPA. The WTO’s initial text on government procurement was the 1979 Agreement on Government Procurement that entered into force in 1981. Since then, amended versions of the GPA have come into effect in 1988, 1994 and 2014,³³ through negotiations under the auspices of the WTO Committee on Government Procurement.³⁴ As the WTO website notes, the aims of the GPA are to achieve greater liberalisation and expansion of world trade and to improve the international framework for the conduct of world trade.³⁵ The

³⁰ These documents are available on the UNCITRAL website, at http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html. The main motivations for the reform were to reflect new practices, in particular regarding electronic procurement (e-procurement) and related aspects of electronic commerce, and the experience gained in the use of the Model Law as a basis for law reform. *See* Rep. of the U.N.– Comm’n on Int’l Trade Law, U.N. GAOR, 59th Sess. Supplement no. 17, ¶¶ 80-82, U.N. Doc. A/59/17 (June 29, 2004).

³¹ Guide to Enactment 1994, *supra* note 25, at 2, Part I, General Remarks, ¶ 5.

³² Guide to Enactment 1994, *supra* note 25, at 35, Part II, Commentary on the Preamble to the Model Law, Section A, ¶ 2.

³³ The 1994 GPA was negotiated in parallel with the Uruguay Round, and entered into force on 1 January 1996. On 15 December 2011, negotiators reached an agreement on the outcomes of the renegotiation of the GPA. This political decision was confirmed, on 30 March 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113). Both texts are *available at* http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm. Following agreement on coverage, the revised GPA came into force on 6 April 2014.

³⁴ For further details of the negotiations and history of the GPA, *see* SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO ch. 2, sec. 2.2. ((2003) [hereinafter “ARROWSMITH”]).

³⁵ Agreement on Government Procurement, first recital, 1869 U.N.T.S. 508 [“GPA”].

GPA is a plurilateral agreement between 43 members.³⁶ Its purpose, as described by the WTO, is to open up public procurement, as much as possible, to international competition.³⁷ This motive is achieved through committing its members to transparency and procedural fairness in public procurement laws, regulations, procedures and practices at the national level, and by ensuring that governments do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.³⁸

As a former Legal Counsel of the United Nations has noted, “[t]he first specific task given to [UNCITRAL] in pursuance of [its] mandate is to coordinate the work of organisations active in the field of international trade law and to encourage cooperation among them.”³⁹ This coordination and cooperation has worked effectively in the public procurement context.⁴⁰ There is a high degree of consistency and complementarity between the two procurement texts that these organisations have issued, despite the differences in their scope. For example, the tools that the texts offer for national authorities in conducting public procurement procedures are similar, even if their respective legal natures differ.⁴¹ Both texts require transparency, competition and non-discrimination in public procurement regulation in national systems, to encourage greater cross-border procurement trade and to enhance the performance of those systems themselves.⁴² As has been observed, to a great extent, the formal rules on procurement procedures considered appropriate for opening international markets are both consistent with

³⁶ In the sense that not all WTO members are signatories to and bound by the agreement; WTO members negotiate accession to the GPA. Information on the list of Parties, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties.

³⁷ See Government Procurement: opening up for competition, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt.

³⁸ *Id.*; Caroline Nicholas, *Work of UNCITRAL on Government Procurement: Purpose, Objectives, and Complementarity with the Work of the WTO*, in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM* 746 (S. Arrowsmith & R. Anderson eds., 2011) [hereinafter “Caroline Nicholas, *Work of UNCITRAL on Government Procurement: Purpose, Objectives, and Complementarity with the Work of the WTO*”].

³⁹ Corell, *supra* note 22.

⁴⁰ Caroline Nicholas, *Work of UNCITRAL on Government Procurement: Purpose, Objectives, and Complementarity with the Work of the WTO*, *supra* note 38.

⁴¹ For a detailed discussion of these issues, see ARROWSMITH, *supra* note 34, at ch. 7, sec 7.3, 172-179; PETER-ARMEN TREPTE, *REGULATING PROCUREMENT: UNDERSTANDING THE ENDS AND MEANS OF PUBLIC PROCUREMENT REGULATION* (2004). The GPA addresses trade liberalisation in public procurement on the basis of State-to-State relations, whereas UNCITRAL focuses on private legal relations.

⁴² See further, Caroline Nicholas, *Work of UNCITRAL on Government Procurement: Purpose, Objectives, and Complementarity with the Work of the WTO*, *supra* note 38, at 771-772.

and in many cases also appropriate for adoption by national governments seeking to maximise value for money and probity.⁴³ One consequence is that the parallel developments which have occurred in procurement regulation at the domestic level, on the one hand, and the international plane, on the other, have supported and reinforced each other to a certain degree.⁴⁴

The participation of the WTO Secretariat, the World Bank and regional development banks, and other relevant organisations⁴⁵ in the process of reforming the Model Law meant that UNCITRAL could take account of provisions in these international systems and of their concurrent reforms, as well as national experiences. This cooperation was particularly important as the work to develop the Model Law went beyond the traditional UNCITRAL process of bringing long-established practices closer together. The development of Model Law can be considered as an example of “preventive” harmonization — it establishes new principles and practices, which, if reflected in national laws, should minimize divergence.⁴⁶

As a result, the Model Law and GPA can be used together. This is an important issue for countries to consider using the former and acceding to the latter. UNCITRAL has taken the GPA and other relevant international “requirements into account when drafting the Model Law so that the Model Law may be used by States parties to implement those texts and agreements without major amendment of their national procurement legislation.”⁴⁷

Thus, for example, the Model Law refers to a successful tender as the lowest-price

⁴³ ARROWSMITH, *supra* note 34, at 233. In particular, rules requiring transparency, competition and procedural fairness are considered to support both objectives. *See further*, Sue ARROWSMITH ET AL., REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES 230 (2000).

⁴⁴ ARROWSMITH, *supra* note 34, at 233; Sue Arrowsmith, *National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?*, in GOSPODARKA ADMINISTRACIA SAMORZAD 9, 23-31 (B. POPOWSKA ed., 1997).

⁴⁵ Including the United Nations Office on Drugs and Crime, custodians of the UN Convention Against Corruption (which addresses public procurement in its article 9), and the European Commission and European Union (EU), which issues Directives for the legislation on public procurement at the national level by EU member States.

⁴⁶ Guide to Enactment 1994, *supra* note 25, at 8, Part I, General Remarks, Institutional support, ¶ 32.

⁴⁷ Guide to Enactment of the UNCITRAL Model Law on Public Procurement 2011, 28 June, 2012, ¶ 39, *available at* <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf> [hereinafter “Guide to enactment 2012”].

responsive tender, or the most advantageous tender, and describes acquisition in procurement as including “purchase, lease and rental or hire purchase, with or without an option to buy”, consistent with the equivalent approach in the GPA.⁴⁸ Users of the Model Law are encouraged to follow the interoperability requirements of the GPA in e-procurement systems,⁴⁹ the rules of both texts on language in solicitation documents,⁵⁰ and on errors in tenders.⁵¹ In addition, challenge proceedings under the Model Law were “designed to be consistent, so far as practicable, with the approach to challenge procedures under the WTO GPA.”⁵²

IV. THE UNCITRAL PROCESS IN DEVELOPING ITS LEGISLATIVE TEXTS

An important question for this note is whether the intergovernmental process that leads to an UNCITRAL legislative text such as the Model Law on Public Procurement can effectively produce a text that is “widely acceptable as offering solutions appropriate to different legal traditions and to countries at different stages of economic development?”⁵³ while reflecting best international practice.

The starting-point for this question is to assess how UNCITRAL’s work is organized and conducted. The work takes place at three levels: the first is UNCITRAL itself, often referred to as the Commission, which works through an annual plenary session, and that sets UNCITRAL’s work programme. The second is UNCITRAL’s Working Groups, which in practice develop most UNCITRAL texts, and the third is the Secretariat, which assists the Commission and its working groups in the preparation and conduct of their work.⁵⁴

At its annual session,⁵⁵ UNCITRAL sets a mandate for legislative development in a particular topic and generally tasks one of its six Working Groups to undertake the work concerned. These Working Groups typically meet once or twice a year for

⁴⁸ *Id.* at 56, ¶ 3.

⁴⁹ Guide to enactment 2012, *supra* note 47, at 31, ¶ 103.

⁵⁰ Guide to enactment 2012, *supra* note 47, at 91, ¶ 2; *Id.* at 137, ¶ 5.

⁵¹ Guide to enactment 2012, *supra* note 47, at 156, ¶ 3; *Id.* at 157, ¶ 9.

⁵² *Id.* at 296, ¶ 3.

⁵³ The UNCITRAL Guide: Basic Facts about The United Nations Commission on International Trade Law ¶ 1 (2013), *available at* http://www.uncitral.org/uncitral/en/about_us.html [“UNCITRAL Guide”]. The location of UNCITRAL’s meetings alternates between New York and Vienna.

⁵⁴ *Id.* ¶ 10.

⁵⁵ The reports of UNCITRAL annual sessions are publicly-available and published at <http://www.uncitral.org/uncitral/en/commission/sessions.html>.

one week, in public meetings,⁵⁶ without intervention from the Commission, unless a Working Group asks for guidance or otherwise requests the Commission for assistance.⁵⁷

The Secretariat of each Working Group, which comprises staff members of the UNCITRAL secretariat, has a two-fold role. First, it prepares Working Papers on the issues arising on a particular topic for the Working Group to consider. The Working Papers discuss these issues and make proposals for model laws or other texts, on the basis of existing legislative provisions, practices and experiences, assessed with the assistance of outside experts as necessary. The Working Papers are published in all six official languages of the United Nations on the UNCITRAL website, in time for them to be considered before the sessions of the Working Groups.⁵⁸ In addition, the Secretariat summarises the daily meetings of the Working Groups, which are then collated into a report of their deliberations and decisions. This report is adopted at the end of each Working Group session. All such reports, which effectively chart the progress of each Working Group, are reviewed by the Commission and are published as per the Working Papers.⁵⁹

This transparency in procedure is designed, as has been explained in the public procurement context, “not only [to] assist the technical rigour of the debate within UNCITRAL, but [also to allow] areas of the reforms that were under consideration to be used by States reforming their public procurement laws at that time. For example, Mexico based its provisions on the then draft text for framework agreements”,⁶⁰ as the bibliography on public procurement found on the

⁵⁶ Called sessions. Rule 60 of the Rules of Procedure of the General Assembly requires the sessions to be public. For UNCITRAL’s own rules of procedure, *see* Note by the Secretariat, *UNCITRAL Rules of Procedure and Methods of Work*, U.N. Doc. A/CN.9/638 and Add. 1-6 (Dec. 10, 2007) [hereinafter “UNCITRAL Rules of Procedure”]. For a description of UNCITRAL’s working methods, *see* Rep. of the U.N. Comm’n on Int’l Trade Law, GAOR, 65th Sess., Supp. no. 17, at Annex III, U.N. Doc. A/65/17 (June 21, 2010) [hereinafter “UNCITRAL Working Methods”].

⁵⁷ UNCITRAL Guide *supra* note 53, ¶16.

⁵⁸ The six official languages are Arabic, Chinese, English, French, Russian and Spanish. All Working Papers produced during the development of the Model Law on public procurement are available at http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html.

⁵⁹ UNCITRAL Guide, *supra* note 53, ¶16. The reports of the Working Group that negotiated the Model Law are also available at http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html.

⁶⁰ Caroline Nicholas, *The 2011 UNCITRAL Model Law on Public Procurement*, 21 PUB. PROCUREMENT L. REV. 4 (2012); Javier Dávila, Titular Unidad de Política de Contrataciones Públicas de la Secretaría de la Función Pública, México, *CompraNet como*

UNCITRAL website further attests.⁶¹

The question then becomes whether the transparency upon which UNCITRAL places a high premium in fact transfers into the type of non-political, technical consideration of practice and policy that will yield top-quality, widely-acceptable texts.⁶²

UNCITRAL is a non-political body,⁶³ and remaining non-politicised has been a key to UNCITRAL's success. The Commission has noted that "harmonization is more easily achieved in technical branches of the law than in subjects closely connected with national traditions and basic principles of domestic law."⁶⁴ The Sixth Committee of the General Assembly (its legal committee, and the one to

herramienta de Modernización de las Compras Públicas. Caso de México, available at <http://www.ricg.info:8080/Plone/iniciativas-de-apoyo-es/actividades/conferencia-anual/vii-conferencia-anual-sobre-compras-gubernamentales-en-las-americas/presentaciones/presentaciones-panelistas>.

⁶¹ UNCITRAL, Bibliography on Public Procurement, http://www.uncitral.org/uncitral/en/publications/bibliography_consolidated.html. For a work devoted to the UNCITRAL reforms, see also REFORM OF THE UNCITRAL MODEL LAW ON PROCUREMENT: PROCUREMENT REGULATION FOR THE 21ST CENTURY (S. Arrowsmith, West ed., 2009).

⁶² This is the standard exacted of UNCITRAL. See, for example Kazuacki Sono in a tribute to John O'Honnold, 132 U.P.A. L. REV 947, 948 (1984), available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4599&context=penn_law_review; Kurt Siehr, *The Protection of Cultural Property: the 1995 UNIDROIT Convention and the EEC Instruments of 1992/93 Compared*, 3 UNIF. L. REV. 483 (1998), and more recently, Leonila Guglya, "Same" Act – Different Scope: The "International [Arbitration]" Criterion In The Arbitration Laws Of The Eurasian UNCITRAL Model Law – Compliant Jurisdictions, in THE QUALITY OF LEGAL ACTS AND ITS IMPORTANCE IN CONTEMPORARY LEGAL SPACE (2012), available at

http://www.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Book_LU-JF_konference-2012.pdf#page=477;

Gerold Herrmann, *The UNCITRAL Arbitration Law: A Good Model of a Model Law*, 3(II) UNIF.ORM L. REV. 483 (1998), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/droit1998&div=45&cid=&page=>.

⁶³ Clive M. Schmitthoff, *General Aspects of International Trade Law*, in SELECT ESSAYS ON INTERNATIONAL TRADE LAW 125 (Chia-Jui Cheng ed. 1988), available at http://books.google.at/books?id=ieD5nT0ndHcC&pg=PA125&clpg=PA125&dq=uncitral+non+political&source=bl&ots=k3eEbXV4OZ&sig=IXly0YzNJNUv848i8vFSM-Fs4yg&hl=en&sa=X&ei=6IKFVPLCG4iYPPXkGbAE&redir_esc=y#v=onepage&q=uncitral%20non%20political&f=false.

⁶⁴ General Assembly 21st Sess. Report, *supra* note 3, ¶ 203.

which UNCITRAL presents its annual report) has also welcomed UNCITRAL's efforts to avoid "politicisation and entrenched disagreement, remain [...] technically focused, and establish [...] itself as an effective standard setting organization. This method of work has benefited countries in all economic stages, especially developing and emerging states."⁶⁵ These comments have been echoed in the literature on multilateral negotiations.⁶⁶

In this regard, there are two areas to consider: the extent of participation in UNCITRAL's work and the process by which UNCITRAL takes its decisions.

A. Participation in UNCITRAL's Work

The goal of UNCITRAL's working methods is to ensure that its texts are developed in an open and inclusive manner. As has been noted by Kelly, "UNCITRAL ... prides itself on openness."⁶⁷ Participation in UNCITRAL's work is open to "States with different social-economic systems, different levels of development and different legal systems and historical traditions."⁶⁸ This allows UNCITRAL "to base its work on careful regard for proposals submitted and respect for mutual interests. ... [thus] achieving a larger cooperation among countries having different legal, economic and social systems and [ensures] that the uniform rules derived from the work of the Commission [are] generally acceptable."⁶⁹

In order to be effective in distilling the best international practice, this process

⁶⁵ UNCITRAL Rules of Procedure, *supra* note 56, ¶ 6, Observations by the United States, citing G.A. Resolutions 43/166, 42/152, 41/77, 40/71, 39/82, 38/134, <http://www.uncitral.org/uncitral/en/commission/sessions/40th.html#second>.

⁶⁶ Kai Mondheim, *The 'Power of Process': The Impact of Process Management on Multilateral Negotiations* 63 (Apr, 2013) (Ph.D. thesis, London School of Economics and Political Science), available at http://etheses.lse.ac.uk/673/1/Mondheim_Power_of_process.pdf ["Kai Mondheim, *The 'Power of Process': The Impact of Process Management on Multilateral Negotiations*"]. See, as cited in that paper, a case study of WTO negotiations in Cancun and Geneva in 2003 and 2004, which found that transparency, fair representation and fair treatment (that is, inclusion in deliberations by the organisers) significantly contributed towards consensus-building and success. See also C. Albin, C. & A. Young, *Setting the Table for Success - or Failure? Agenda Management in the WTO*, 17(1) INT'L NEGOTIATION 37 (2012).

⁶⁷ Claire Kelly, *The Politics of International Economic Law: Legitimacy and the UNCITRAL Working Methods*, 7 Brooklyn Law School, Legal Studies Paper No. 140 (2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371214 [hereinafter "Claire Kelly, *The Politics of International Economic Law: Legitimacy and the UNCITRAL Working Methods*"].

⁶⁸ UNCITRAL Rules of Procedure, *supra* note 56, ¶ 7.

⁶⁹ *Id.*

requires the involvement of “a variety of participants, including member States of UNCITRAL, which represent different legal traditions and levels of economic development; non-member States; intergovernmental organisations; and non-governmental organisations.”⁷⁰

When UNCITRAL was established, care was taken to encourage participation from all countries and regions, in its work so that the various geographic regions and the principal economic and legal systems of the world would be fairly represented.⁷¹ Thus, UNCITRAL has a current membership of 60 countries, elected from among the UN member States for terms of six years. Additionally, the terms of half the members expire every three years and hence, there is regular turnover.⁷² The members comprise 14 African States, 14 Asian States, 8 Eastern European States, 10 Latin American and Caribbean States and 14 Western European and other States.⁷³ The General Assembly elects members for terms of six years; every three years the terms of half of the members expire. In addition, all other United Nations Member States, as well as international and regional organisations with expertise on the topics under discussion are invited to attend all UNCITRAL sessions and working group sessions as observers.⁷⁴ These observers include international organisations and non-governmental organisations (NGOs) that are international in remit and membership and that have specialist knowledge of the subject-matter concerned. Along with non-member States of UNCITRAL, they are permitted to participate in discussions to the same extent as members (including that they may submit papers for consideration).⁷⁵ However, the decisions of the Working Groups and Commission are taken by UNCITRAL member States alone, as is discussed further below.

Member-state and observer delegations to UNCITRAL may comprise

⁷⁰ UNCITRAL Guide, *supra* note 53, ¶ 1. The location of UNCITRAL’s meetings alternates between New York and Vienna.

⁷¹ General Assembly 21st Sess. Report, *supra* note 3, ¶ 212.

⁷² See further Origin, Mandate and Composition of UNCITRAL, <http://www.uncitral.org/uncitral/en/about/origin.html>.

⁷³ UNCITRAL GUIDE, *supra* note 53, ¶ 4. This proportionate approach was designed when UNCITRAL was established – see *supra* note 8; Report of the Sixth Committee to the General Assembly, U.N. GAOR, 21st Sess., ¶ 29, U.N. Doc. A/6594, (1966).

⁷⁴ UNCITRAL Guide, *supra* note 53, ¶ 4. Accordingly, individuals are not permitted to attend the sessions.

⁷⁵ Rep. of the U.N.– Comm’n on Int’l Trade Law, GAOR, 63rd Sess., Supp. no. 17, ¶ 378, U.N. Doc. A/63/17(June 16, 2008). Note, however, that one member State objected to this practice.

“Government officials, academics, experts or private sector lawyers.”⁷⁶ Therefore, in order to achieve the technical excellence referred to above, the Working Groups should comprise a balance of expertise from all regions and all sectors. In a recent study on participation conducted by the UNCITRAL Working Group on Insolvency, it was stated that, “[f]or maximal impact, ... a delegation qua delegation [footnote omitted] will combine (i) high and consecutive attendance of delegations; (ii) high and consecutive attendance of particular delegates; (iii) the conjunction of consistently attending delegates and delegations; (iv) occupationally diverse delegations; and (v) full or dense delegations.”⁷⁷

UNCITRAL⁷⁸ does not survey participation in its sessions: accordingly, evaluating participation of developed and developing countries in its work is essentially based on anecdotal reports.⁷⁹ However, in 2008, a member State regretted “that during the last year several members of UNCITRAL were not represented at its sessions and working groups.”⁸⁰ In 2007 another had voiced concerns that there was a “perception that the working methods of the Commission and its working groups might not sufficiently encourage effective participation in the creation of UNCITRAL standards or the subsequent enactment of those standards by a broad range of States.”⁸¹

Assessing whether there is adequate participation in UNCITRAL’s work is a fair question, as over-representation from any region has the potential to reduce the wide acceptability of UNCITRAL’s texts. Although an external study on participation in the Working Group that developed UNCITRAL’s model law on cross-border insolvency suggested that developed countries were over-represented in the development of this model law,⁸² the text itself has been recognised as an example of the benefits of harmonised legal rules.⁸³

⁷⁶ UNCITRAL Guide, *supra* note 53, ¶ 6.

⁷⁷ T.Halliday, J. Pacewicz, & S. Block-Lieb, *Who governs? Delegations and delegates in global trade law-making*, 7(3) Regulation & Governance 279-298 (2013) [hereinafter “Halliday, Pacewicz & Block-Lieb”].

⁷⁸ The following paragraphs draw on an analysis of the author set out in *UNCITRAL and the Internationalisation of Government Procurement Regulation*, to be published in a work by the European University Institute, forthcoming.

⁷⁹ Participation in UNCITRAL sessions is recorded in a List of Participants, which is made available to participants but not to the general public

⁸⁰ Austria’s Delegate, Speaking to the Sixth Committee (Legal) of the General Assembly, (Oct. 20, 2008), <http://www.un.org/press/en/2008/gal3346.doc.htm>.

⁸¹ Rep. of the U.N. Comm’n on Int’l Trade Law on the work of its fortieth session, GAOR, 62nd Sess., Supp. no. 17, (Part I) ¶ 234, U.N. Doc. A/62/17 (June 25, 2007).

⁸² Halliday, Pacewicz & Block-Lieb, *supra* note 77, ¶ 2.

⁸³ Letter to Financial Times, *Model Law is the Key to Protecting ‘Unprotected’ Government Debt*

One reason cited for possibly limiting participation in UNCITRAL, and perhaps of particular concern to developing countries, is the cost of participation in UNCITRAL, given that participation at its Working Group and Commission sessions is self-funded.⁸⁴ The costs concerned involve not only the expenditure of traveling to New York and Vienna to attend UNCITRAL meetings, but also the resources required for preparation for the sessions and for participation in UNCITRAL. This may involve wide-ranging consultations at the national and local levels (using surveys and other means, in both public and private sectors). Prior to the establishment of UNCITRAL, while referring to the scarcity of qualified personnel within national administrations, it was observed that there was a risk that the relevant resources would not be available “to devote their limited amount of time to the preparation and adoption of laws approving international conventions.”⁸⁵ While the ambit of this comment was limited to some aspects of UNCITRAL activity, this concern is of more general relevance and indeed, the observation continued that “[i]f participating Governments seriously wish to make greater headway ... it is felt that they should endeavour to obtain from their respective parliaments sufficient funds”⁸⁶ for these activities. This point has an obvious relevance in the austerity-straightened times many countries find themselves in today. Consequently, States may be encouraged to consider the appropriate funds for participation in UNCITRAL’s activities as an investment for the benefit both of the participating State and other States, and not merely as an expense.

B. *Consensus-building*

Decisions in UNCITRAL are taken by member States of the Commission and according to long-standing practice. These decisions are reached by consensus. In the absence of consensus, decisions are to be taken by voting in accordance with the relevant rules of procedure of the General Assembly, though this has only happened once, on the question of a move by Secretariat from New York to

(Dec. 7, 2014),
<http://www.ft.com/intl/cms/s/0/1e7f9980-7be6-11e4-a695-00144feabdc0.html?siteedition=intl#axzz3La8WgUTa>.

⁸⁴ Claire Kelly, *The Politics of International Economic Law: Legitimacy and the UNCITRAL Working Methods*, *supra* note 67, at 9. Though UNCITRAL does have an UNCITRAL Trust Fund for Travel Assistance to assist delegates from developing countries to attend its Commission sessions in Vienna.

⁸⁵ See for example General Assembly 21st Sess. Report, *supra* note 3, ¶ 9.

⁸⁶ General Assembly 21st Sess. Report, *supra* note 3, Annex.

Vienna in 1973.⁸⁷ However, there have been several instances where voting has not been resorted to despite a lack of consensus.⁸⁸

It is the combination of the process of participation and consensus-building that leads to the wide acceptability of UNCITRAL texts. All participants, members or observers, influence the consensus-building process through sharing relevant experience and expertise. The views of non-member States and observer organizations are shared for the benefit of member States, who may take such views into account in determining their positions on the issues to be decided upon.⁸⁹ The Sixth Committee of the General Assembly has emphasised that “the consensus method [is] conducive to achieving a larger cooperation among countries having different legal, economic and social systems and [ensures] that the uniform rules derived from the work of the Commission [are] generally acceptable.”⁹⁰

The UNCITRAL concept of consensus has been described as a reflection of a variety of situations, from a complete agreement as to substance and a consequent absence of reservations to the substantially prevailing view, a flexible notion that “is characterized by a strong majority of opinions and the absence of formal objection and vote.”⁹¹

As noted above, the value of consensus is considerably undermined if participation is insufficient to ensure that the policy solution chosen is not based on an appropriately wide range of experience and practices. In this context, the resource requirements at the national level noted above, and their impact on participation in and the work of UNCITRAL, have been the subject of considerable discussion.⁹²

⁸⁷ UNCITRAL Guide, *supra* note 53, ¶ 14; *See also* UNCITRAL Rules of Procedure *supra* note 56, ¶¶ 2-15.

⁸⁸ *See*, UNCITRAL Rules of Procedure and Methods of Work, ¶¶ 11, 12 U.N. Doc. A/CN.9/638/Add.4, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/875/89/PDF/V0787589.pdf?OpenElement>.

⁸⁹ UNCITRAL Guide, *supra* note 53, ¶14.

⁹⁰ UNCITRAL Rules of Procedure *supra* note 56, ¶ 7.

⁹¹ For a more detailed discussion of the meaning of “consensus” in the UNCITRAL context, *see* UNCITRAL Rules of Procedure, *supra* note 56, Add.4; Rep. of the U.N.–Comm’n on Int’l Trade Law, GAOR, 64th Sess., Supp. no. 17, ¶ 387, U.N. Doc. A/64/17 (June 29, 2009).

⁹² *See, for example* Rep. of the U.N.– Comm’n on Int’l Trade Law, GAOR, 68th Sess., Supp. no. 17, ¶¶ 294-309, U.N. Doc. A/68/17 (July 8-26, 2013); Rep. of the U.N. Comm’n on Int’l Trade Law, GAOR, 69th Sess., Supp. No. 17, ¶ 243, U.N. Doc. A/69/17 (July 7-18, 2014).

Outside experts from different legal traditions often assist the Secretariat in preparing materials for consideration by Working Groups. This enables the Secretariat to prepare the publicly-available Working Papers that are more thoroughly researched and developed than might otherwise be the case, which in turn can enhance the quality of discussions in the Working Groups. However, this benefit needs to be balanced with respect for the position of member States of UNCITRAL. As “[t]echnical points are examined in greater detail by informal meetings, where a core of experts has the key role,”⁹³ concerns about possible over-representation and excessive influence of some experts have also been brought into consideration.⁹⁴ UNCITRAL has therefore issued a statement of its working methods,⁹⁵ in which the importance of developing texts through its Working Group sessions is emphasised, so that the transparency and consensus-building aspects of UNCITRAL working methods remain paramount.⁹⁶

V. HARMONISATION IN PRACTICE: THE DEVELOPMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT

In the public procurement context, and as the Guide to Enactment notes, the potential of the Model Law as an instrument to support the harmonisation of procurement regulation internationally, and to promote international trade, can be fully realized only to the extent that it is used by all types of States, irrespective of region. The objective of the UNCITRAL working methods is to ensure that “the text [is not] designed with any particular groups of countries or particular state of development in mind, and ... it does not promote the experience in or approach of any one region.”⁹⁷ The question, alternatively phrased, is whether States at all levels of development, most notably the developing countries that were largely absent from earlier harmonisation efforts, along with relevant international

⁹³ Observations by France, ¶ 3.1, U.N. Doc. A/CN.9/635 (June 25, 2007).

⁹⁴ Note by the Secretariat, *A strategic direction for UNCITRAL*, U.N. Doc. A/CN.9/752 (June 25, 2012).

⁹⁵ See UNCITRAL Rules of Procedure, *supra* note 56; UNCITRAL Working Methods, *supra* note 56 ¶ 13(c).

⁹⁶ In 2013, the Commission stated that “the development of UNCITRAL texts as a matter of course should be undertaken through the working group process. In that regard, the Commission recalled the link between that formal negotiation process and the universal applicability and hence acceptance of UNCITRAL texts, the importance of the transparency that that process conferred, and the need to continue the inclusive working methods of UNCITRAL. It was also agreed that the multilingualism of the working methods of UNCITRAL constituted key support for its work and, even though it was resource-hungry, should be continued. See Rep. of the U.N. Comm’n on Int’l Trade Law, GAOR, 68th Sess., Supp. no. 17, ¶ 300, U.N. Doc. A/64/17 (July 08, 2013).

⁹⁷ Guide to enactment 2012, *supra* note 47, at 2, Part I, General Remarks ¶ 5.

organisations have participated in this work, so that this goal was achieved in practice.

The following paragraphs will show that the answer to these questions is yes. A key theme discussed during the development of the Model Law was the extent of discretion that should be afforded to civil servants and procurement officials in their national and sub-national systems. Even in 1990, the procurement community had been urged to “increase dramatically the freedom [given to] public officials to use their judgment in the procurement process,⁹⁸ in order to enhance value for money to the benefit of taxpayers. Since then, many systems have increased the use of procurement tools involving greater discretion and commercial judgment, but other policy-makers – and notably the donor community, including the multilateral development banks - remain concerned that this approach would increase the risks of fraud and corruption in the procurement process.⁹⁹ The commercial disadvantage that arises from blocking the use of discretion in public procurement remains a topic of considerable discussion in academic circles, even today.¹⁰⁰

Both sides of this debate were represented in UNCITRAL’s Working Group. On the one hand, the Working Group heard that “negotiations presupposed significant discretion on the part of procuring entities in decision-making, and therefore ... raised higher risks of corruption and abuse than might be present in other less flexible procedures.”¹⁰¹ At the same time, it was reported to the Working Group “that [a negotiation-based] procurement method had resulted in benefits to the procuring entity in enabling it to obtain the best solution to its procurement needs, and thus that there would be advantages to developed and developing

⁹⁸ STEVEN KELMAN, *PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE* 90 (1990). Kelman was the head of the Office of Federal Public Procurement in the 1990s. While holding that position, he “promoted best value decisions and consideration of contractor’s past performance, as well as expanded use of Indefinite Delivery – Indefinite Quantity (ID/IQ) contracts and task and delivery orders under them, all of which tipped the scales in favour of efficiency because of, at least in part, a perception that concerns about integrity had led to an overly complex, inefficient procurement process,” Steven Schooner, Daniel Gordon & Jessica Clark, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (GWU Law School Public Law Research Paper No. 1133234) (2008) available at <http://ssrn.com/abstract=1133234>.

⁹⁹ J.L. Schwartz, *Katrina’s Lessons for Ongoing US Procurement Efforts*, 6 *PUB. PROCUREMENT L. REV.* 362–373 (2006).

¹⁰⁰ *Id.*

¹⁰¹ U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its sixteenth session, 42nd Sess., ¶ 15, U.N. Doc. A/CN.9/672 (May 26, 2009).

countries alike in its use. It was also stressed that the opportunity cost of not providing for such negotiations should be taken into account.”¹⁰² These quotations are from a single proposal from Austria, the United Kingdom and the United States.¹⁰³ The question, which was a sensitive one in having the developed countries largely on one side, and other countries and the donor community largely on the other, was handled in a neutral way and at the technical level.¹⁰⁴

There was similar debate on several other issues during the development of the Model Law, reflecting the same divergence of views. The Working Group debated whether or not the Model Law should require major procurement decisions, such as on the use of a procurement method other than open tendering, to be subject to a prior approval mechanism. It was suggested to the Working Group that prior-approval mechanisms could increase the chances of detecting errors and problems (including possible corruption) at an early stage, and could enhance uniformity and support capacity-development through the justification and consideration of the actions or decisions concerned when seeking approval.¹⁰⁵ While prior approval mechanisms had been included in the 1994 Model Law in order to prevent corruption and arbitrary decisions on the side of the procuring entities,¹⁰⁶ some

¹⁰² *Id.*

¹⁰³ U.N. Comm’n on Int’l Trade Law, *Proposed Article 40: Competitive Negotiations Proposal Submitted by Austria, the United Kingdom and the United States*, 16th Sess., U.N. Doc. A/CN.9/WG.I/XVI/CRP.2 (May 8, 2009), available at http://www.uncitral.org/pdf/english/workinggroups/wg_1/CRP2.e.pdf [hereinafter “*Proposed Article 40: Competitive Negotiations Proposal Submitted by Austria, the United Kingdom and the United States*”].

¹⁰⁴ *See, for example*, discussion of Proposed Article 40, in U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its sixteenth session, 42nd Sess., ¶¶ 70-120 U.N. Doc. A/CN.9/672 (June 5, 2009).

¹⁰⁵ U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its fifteenth session, 42nd Sess., ¶¶ 52, 112, U.N. Doc. A/CN.9/668 (June 29, 2009); U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its sixteenth session, 42nd Sess., ¶ 33, U.N. Doc. A/CN.9/672 (June 5, 2009).

¹⁰⁶ *See, for example*, Model Law 1994, *supra* note 29, arts. 12, 15, 18-22, and accompanying Guide to Enactment 1994 *supra* note 25, section I. G., ¶ 28 “Prior-approval requirement for use of exceptional procedures”, at page , which states that “The Model Law provides that certain important actions and decisions by the procuring entity, in particular those involving the use of exceptional procedures (e.g., use of a procurement method other than tendering for the procurement of goods and construction or, in the case of services, a method other than the principal method for procurement of services or other than tendering), should be subject to prior approval by a higher authority. The advantage of a prior-approval system is that it fosters the detection of errors and problems before certain actions and final decisions are taken.” *See also*, MODEL LAW 2011 *supra* note 1.

delegations considered that these procedures involved “cumbersome and costly practices”,¹⁰⁷ and that such a system was increasingly less relied-on in practice. This was because it might prevent the long-term acquisition of decision-making capacity, would dilute accountability, and would operate so as to delay the procurement procedure for little apparent benefit.¹⁰⁸ In addition, it was also suggested that the approving agency would in reality have to rely on the expertise of the procuring entity as regards the choice of this procedure, and thus the safeguard might be illusory.¹⁰⁹ Ultimately, the Working Group decided that the Model Law would not include prior approval provisions other than as options in limited cases, and that guidance for those enacting the Model Law to decide whether to include these options for a prior approval method would be given.¹¹⁰

When the Working Group considered the use of framework agreements, the question was whether there should be rules restricting the use of the technique, based on experience at the national level. Prescribed “conditions for use” of all procurement methods other than open tendering (considered as the “gold standard of UNCITRAL”)¹¹¹ constitute a feature of the Model Law.¹¹² “Conditions for use are tools” designed to ensure appropriate use of procurement methods: by describing situations in which procurement tools are available, they effectively state that the tools concerned are not considered appropriate for other situations.”¹¹³ Framework agreements are a discretionary tool and, it was accordingly suggested that “positive conditions for use would be beneficial” for accountability reasons and in order to promote appropriate behaviour and to avoid abuse.¹¹⁴ Other views were that the risk of abuse would be better addressed through other means, such as limiting duration and including provisions requiring transparency and competition throughout the procedure.¹¹⁵ While some delegations considered that conditions for use “were too restrictive and might lead to unsubstantiated

¹⁰⁷ U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its fifteenth session, 42nd Sess., ¶ 52, U.N. Doc. A/CN.9/668 (June 29, 2009).

¹⁰⁸ Guide to enactment 2012, *supra* note 47, at 20-22, Part I, General Remarks, Institutional support, ¶¶ 71-72.

¹⁰⁹ *Supra* note 101, ¶ 33.

¹¹⁰ Guide to enactment 2012, *supra* note 47, at 22-23, Part I, General Remarks, Institutional support, ¶¶ 73-78; *Id.* at 268, Introduction to Chapter VIII.

¹¹¹ U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its ninth session, 39th Sess., ¶ 87, U.N. Doc. A/CN.9/595 (June 19-July 7, 2006).

¹¹² *See* Model Law 1994, *supra* note 29, ch. II, sec. 1.

¹¹³ Caroline Nicholas, *A Critical Evaluation of the Revised UNCITRAL Model Law Provisions on Regulating Framework Agreements*, 21 PUB. PROCUREMENT L. REV. 19 (2012).

¹¹⁴ U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its thirteenth session, 41st Sess., ¶ 24, U.N. Doc. A/CN.9/648 (June 16, 2008).

¹¹⁵ *Id.* ¶¶ 25, 27-32.

complaints”, and that the matter should be dealt with in the Guide to Enactment alone, conditions for use were ultimately retained.¹¹⁶

The tenor of these debates, as recorded in the reports of the Procurement Working Group, indicates that the issues were indeed discussed from a policy and technical, and not a political perspective. The debate also took place at a detailed level and contributed to the quality of the final text. Nonetheless, as regards some aspects of public procurement, consensus on a single suite of tools that should be offered to procurement officials at all levels of skill and experience could not be reached. For example, the World Bank signalled to the Working Group that it would not recommend some of the features – notably negotiations of some types – involved in some procurement methods.¹¹⁷ This caveat echoed the World Bank’s reservations about the use of competitive negotiations when the 1994 Model Law was adopted. The then observer to UNCITRAL stated that the Bank would generally not recommend this method.¹¹⁸

The Guide to Enactment therefore explains that “enacting States may wish to take into account that, historically, the procurement rules of some multilateral development banks have not included procurement methods equivalent to request for proposals with dialogue or competitive negotiations as provided for in the Model Law [other than] for the procurement of consulting (e.g. advisory) services. Consequently, and in the light of possible developments, enacting States - potential borrowers from the multilateral development banks - should verify the public procurement policies of those donors at the relevant time that will be applicable to procurement projects financed by such donors.”¹¹⁹

It may appear counter-intuitive to suggest that this example in fact indicates the benefits of cooperation among member States and international organisations in UNCITRAL, but this article considers that it does indeed demonstrate such a

¹¹⁶ U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its fifteenth session, 42nd Sess., ¶¶ 227, 229, 112, U.N. Doc. A/CN.9/668 (June 29, 2009)..

¹¹⁷ *See also*, U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its twentieth session, 44th Sess., ¶ 69, U.N. Doc. A/CN.9/718 (June 27, 2011).

¹¹⁸ *See* 1984 U.N.Y.B. 361, ¶ 64 U.N. Doc. A/CN.9/SER.A/1994 : “64. In recent years, the World Bank ... recommended the Model Law with some reservations. For example, it suggested that the method of competitive negotiation should not be applied, and once 'the draft was approved, the Bank would probably also recommend against application of article 16, paragraph 3(b) [in that iteration, the rules governing the use of the default method for the procurement of services].”

¹¹⁹ Guide to enactment 2012, *supra* note 47, at 130, ¶ 9.

benefit. The risk that “excessive zeal might lead to unification at the level of the lowest common denominator”¹²⁰ has been avoided through a flexible notion of harmonisation, rather than a single set of rules that all must enact. It has been noted, in this context, that the result will not be that Company A can sell to the Government in country B because the rules are identical; rather, there is a process that fosters the emergence of systems based on the same objectives, so that the essential principles and procedures, and consequently outcomes are similar.¹²¹ Thus, “as there are wide variations among States in such matters as size of the State and the domestic economy, in legal and administrative traditions, in levels of economic development and in geographical factors, options are provided for in the Model Law to suit local circumstances.”¹²² This flexible approach nonetheless supports international trade as there is legal certainty that trade in countries with national laws based on, in this case, the Model Law on Public Procurement, provides a reassurance that bids from suppliers competing to sell to the governments concerned will be treated according to established minimum standards of competition, transparency, and procedural fairness.

Other examples of international agency cooperation can be seen in the Working Group Reports that highlight efforts to achieve consistency with the GPA. In addition to the general points noted above, when negotiations as a tool in public procurement were discussed, it was noted that the scope of permissible negotiations should not exceed that allowed in the GPA,¹²³ and provisions restricting references to trademarks or similar references in the Model Law were drafted so as to be closely aligned to the provisions of the GPA (then, article VI (3)).¹²⁴

¹²⁰ General Assembly 21st Sess. Report, *supra* note 3, ¶ 223.

¹²¹ See Daniel I. Gordon, *Anti-Corruption Internationally: Challenges In Procurement Markets Abroad—Part II: The Path Forward for Using Procurement Law to Help with Development and the Fight Against Corruption*, WEST GOVERNMENT CONTRACTS YEAR IN REVIEW CONFERENCE COVERING 2012 CONFERENCE BRIEFS, GWU Legal Studies Research Paper No. 2013-40 (2013).

¹²² Guide to enactment 2012, *supra* note 47, at (iii), Preface.

¹²³ The Working Group heard that “Article XIV (2) of the WTO Government Procurement Agreement (GPA) states: ‘Negotiations shall be primarily used to identify the strength and weakness in tenders.’” Negotiations undertaken for other purposes may, therefore, raise issues under the GPA. It has also been noted, though, that the provisional (2006) GPA text no longer includes this language. Negotiations are addressed in Article XII of the 2006 GPA text, *available at* www.wto.org. See Proposal submitted by Austria, the United Kingdom and the United States, *available at* http://www.uncitral.org/pdf/english/workinggroups/wg_1/CRP2.e.pdf.

¹²⁴ U.N. Comm’n on Int’l Trade Law, Rep. of Working Group I (Procurement) on the work of its fifteenth session, 42nd Sess., ¶ 78, 229, 112, U.N. Doc. A/CN.9/668 (June 29,

VI. CONCLUSIONS: INTERNATIONAL NEGOTIATIONS AND UNCITRAL

The experience narrated above does not indicate an existing risk in UNCITRAL that “private legislators” heavily influenced by lobbying groups [may seek] to promote their economic interests, and [operate] in an environment of scant accountability”,¹²⁵ as has been suggested is a general risk in multilateral negotiations. Nonetheless, the emergence of such a situation could be contemplated if broad participation in UNCITRAL’s work is not maintained. It has also been suggested that countries may have a political interest in promoting their national rules in international standards because these texts will, “if widely adopted, affect their power.”¹²⁶ This concern echoes earlier comments that the way in which countries influence international negotiations such as through building coalitions is often dependent on their interests and power.¹²⁷ This type of interest-promotion is self-evidently more likely to arise if participation falls below a critical mass of divergent countries and organisations.

It has been suggested that skilful process management can help facilitate divergent initial interests towards consensus (e.g. by creating new options or leading parties to redefine their preferences), which could mitigate the situation were a more politicised UNCITRAL to emerge.¹²⁸ However, it is submitted that prevention, that is, encouraging broad participation in UNCITRAL, is better than this type of cure. First, although UNCITRAL’s member State delegations select a chairperson from among member State delegations at each session, the member States remain those that direct the proceedings (the Secretariat’s role does not extend beyond supporting deliberations).¹²⁹ Second, parties are unlikely to be persuaded to act against their interests even with the most skilled facilitators directing negotiations.¹³⁰ Thus, the key is to ensure that UNCITRAL’s work is not seen as

2009).

¹²⁵ J.A.E. Faria, *Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?*, 14(1-2) UNIF. L. REV. (2009), <http://www.unidroit.org/english/publications/review/articles/2009-1&2-faria-e.pdf>, citing Paul B. Stephan, *Accountability and International Law-making: Rules, Rents and Legitimacy*, 17(1) NW. J. INT’L L. & BUS 681 (1997).

¹²⁶ Claire Kelly, *The Politics of International Economic Law: Legitimacy and the UNCITRAL Working Methods*, *supra* note 67, at 19.

¹²⁷ Kai Mondheim, *The Power of Process: The Impact of Process Management on Multilateral Negotiations*, *supra* note 66, at 65-66.

¹²⁸ *Id.*

¹²⁹ UNCITRAL Guide, *supra* note 53, ¶ 16.

¹³⁰ Kai Mondheim, *The ‘Power of Process’: The Impact of Process Management on Multilateral*

competing interests in which the best team may win, but a collaborative approach to find the most widely-acceptable solution to technical questions.

This article started with an explanation of how identified shortcomings in efforts to harmonise international trade law had led to the establishment of UNCITRAL. As UNCITRAL moves towards celebrating its 50th anniversary in 2016, it will be looking to areas of international trade law that are still in need of harmonisation efforts. These areas may be of considerable importance to developing countries who may wish to assess their own experience and suggest topics amenable to consensus-based legislative development in UNCITRAL, and that can contribute to the ongoing harmonisation of international trade law. The experience recorded above indicates that UNCITRAL's work over recent years has sought to reduce concerns about "fragmentation and dispersion of efforts" in harmonising international trade law.¹³¹ This has been done through efforts to encourage participation in UNCITRAL's present and future legislative development. These efforts need to be redoubled in this era of tight public sector budgets, to avoid the risks of "multilaterally-funded dis-unification of law ... [hitting] at the heart of UNCITRAL."¹³²

Negotiations, *supra* note 66, at 67.

¹³¹ CORELL, *supra* note 22.

¹³² *Id.*