WORLD TRADE ORGANIZATION

WT/WGTGP/W/33
3 October 2002

(02-5319)

Working Group on Transparency in Government Procurement

WORK OF THE WORKING GROUP ON THE MATTERS RELATED TO ITEMS VI-XII OF THE LIST OF THE ISSUES RAISED AND POINTS MADE

Note by the Secretariat

This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

1. This note has been prepared in response to a request made at the informal meeting that was held on 12 March 2002 that the Secretariat prepare, for each of the two substantive meetings in 2002, short background papers summarizing the work that has already taken place in the Working Group on the matters related to the sub-items to be discussed, drawing on and listing the documentation of the Group. A note on items I to V prepared for the May 2002 meeting of the Working Group has been circulated in document WT/WGTGP/W32.

2. This note covers items VI to XII of the Informal Note by the Chairman, "List of the Issues Raised and Points Made" (JOB(99)/6782, dated 12 November 1999), namely Transparency of Decisions on Qualification, Transparency of Decisions on Contract Awards; Domestic Review Procedures; Other Matters Related to Transparency; Information to be Provided to Other Governments (Notification); WTO Dispute Settlement Procedures; and Technical Cooperation and Special and Differential Treatment for Developing Countries.

3. Similar to the approach taken in the note on items I to V, the aim is to provide a more concise note than the Informal Note by the Chairman as well as to take into account subsequent discussions in the Working Group and papers submitted. Being a summary, this note does not contain all the details of the points made and explanations given. For this information delegations should consult the Informal Note by the Chairman and the other documentation of the Working Group, a list of which can be found in the Annex to WT/WGTGP/W/32.

4. This note first briefly sets out the information that was considered by the Working Group on provisions in existing international instruments[1] and on national procedures and practices concerning items VI to XII. It will be recalled that at the outset of its work the Working Group sought information from other intergovernmental organizations on relevant international instruments (in particular from UNCITRAL and the World Bank[2] and requested the Secretariat to provide a note synthesizing the information available on transparency related provisions in existing international

[1] The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services of 1993; the Guidelines for Procurement under IBRD Loans and IDA Credits and the Guidelines for Selection and Employment of Consultants by the World Bank Borrowers, last revised in 1999; and the WTO Agreement on Government Procurement of 1994.

[2] WT/WGTGP/W/1-2.

instruments on government procurement procedures and on national practices.[3] Under each of the items, this note then summarizes the discussions in the Working Group, outlining the issues raised and main points made.

VI. TRANSPARENCY OF DECISIONS ON QUALIFICATION

(a) Information on provisions in existing international instruments and national procedures and practices

5. In international instruments and national legislation provisions with respect to transparency of procedures for qualification of suppliers relate to four main issues: qualification criteria; fair and non-discriminatory application of qualification procedures; listing and registration of suppliers; and notification of qualification decisions.

6. With regard to qualification criteria, a key transparency requirement is that the evaluation of suppliers and decisions relating to their qualification be based on criteria which have been previously set forth in the pre-qualification documents and pre-disclosed.[4] These provisions also emphasize that qualification criteria be linked to the capability of interested suppliers to perform and be capable of objective application.[5] The UNCITRAL Model Law sets forth the range of criteria that procuring entities may require the suppliers to meet in order to qualify for participation in procurement proceedings.[6] The World Bank Guidelines stipulate that the qualification criteria should be geared to establishing the capability and resources of the supplier to perform in relation to the requirements of the contract and lists the factors that should be taken into account.[7] The Agreement on Government Procurement (GPA) requires that any conditions for participation in tendering procedures be limited to those which are essential to ensure the firm's capability to fulfil the contract in question.[8]

7. In national practice, any particular requirements and conditions regarding qualification procedures are normally set forth in invitations to tender and tender documents, thereby ensuring that all suppliers are informed in advance of the relevant requirements.[9] Qualification criteria employed may include information needed to establish a supplier's professional and technical capability to perform the terms of the contract and may also include additional requirements, such as pertaining to legal capacity to enter into procurement contracts, financial capacity and stability of suppliers, tax obligations or professional risk indemnity insurance.[10] Additionally, entities may base their qualification requirements on some other considerations, for example protection of health and safety of workers and employment equity for men and women. Entities sometimes use negative criteria for disqualifying suppliers.[11]

8. All three international instruments prescribe a number of procedures to ensure that the qualification process is fair and does not lead to discrimination among suppliers. The Model Law requires that same criteria must be applied to all suppliers participating in the procurement process.[12] The GPA emphasizes that entities must not discriminate among suppliers of other GPA Parties and between domestic suppliers and suppliers of other Parties and among suppliers of other Parties with regard to conditions of participation. In certain cases, countries make the eligibility of suppliers of

[3] WT/WGTGP/W/6.
[4] WT/WGTGP/W/6, paragraph 70.
[5] WT/WGTGP/W/6, paragraphs 68-70.
[6] WT/WGTGP/W/6, paragraph 69.
[7] WT/WGTGP/W/6, paragraph 69.
[8] WT/WGTGP/W/6, paragraph 69.
[9] WT/WGTGP/W/6, paragraph 74.
[10] WT/WGTGP/W/6, paragraph 72.
[11] WT/WGTGP/W/6, paragraph 73.
[12] WT/WGTGP/W/6, paragraph 70.

other countries to participate in a procurement depend on these countries providing reciprocal treatment to its suppliers.[13]

9. All three instruments have specific requirements on the provision of information on qualification decisions. Under the Model Law, each supplier that has submitted an application to pre-qualify must be notified whether or not it has been pre-qualified. The GPA requires the entity concerned to advise any supplier having requested to become a qualified supplier of its decision in this regard. The World Bank Guidelines require Borrowers to inform all applicants of the results of the pre-qualification. Under the Model Law and the GPA, the procuring entity must, upon request, communicate to suppliers whose application to qualify was rejected or whose qualification has been brought to an end the grounds therefor.[14] The information available to the Group to date on national systems does not provide details of how decisions on qualification systems are notified to suppliers.

10. Many procuring entities maintain either permanent or occasional lists of qualified suppliers for procurement of specific categories of products, services and public works, in particular in the case of complex projects.[15] Such lists serve to create a pool of readily available information on approved suppliers which the procuring entities may use to request proposals for bids or to evaluate bids. In the case of selective tendering procedures under the GPA, entities maintaining lists of qualified suppliers are required to publish the conditions to be fulfilled by suppliers, the methods of verification of the conditions by entities, up-to-date approved lists of qualified suppliers and the period of validity of the lists.[16] Entities are required to notify the qualified suppliers included on permanent lists of the termination of any such lists or of their removal from them.[17] In order to avoid exclusivity in the preparation and maintaining of lists of qualified suppliers and in the procurement process itself, new suppliers are provided with an opportunity to be admitted to the lists of qualified suppliers at any time.[18] The APEC Non-binding Principles require entities to ensure access for potential new suppliers to procurement opportunities.[19]

11. In some national practices, tenderers applying for qualification may be required to prove their enrolment in a professional or trade register.[20] In certain countries, all potential suppliers, both local and foreign, are required to be enrolled in a centralized registration system as a prerequisite for participation in government procurement contracts in certain categories of tenders, for instance related to public works. In some countries, foreign natural persons without domicile in the country or foreign legal persons without a branch in the country are required to accredit an agent domiciled in the country who is duly empowered to submit tenders and sign contracts and also to represent them both legally and in non-legal matters.

(b) Discussions in the Working Group

12. The discussions in the Working Group on this matter have focused on three broad issues, namely qualification criteria; lists of qualified suppliers; and provision of information on qualification decisions.

[13] WT/WGTGP/W/6, paragraph 72.
[14] WT/WGTGP/W/6, paragraph 80.
[15] WT/WGTGP/W/6, paragraph 82.
[16] GPA Articles IX:9 and VIII(a).
[17] GPA Article VIII (f).
[18] GPA Article VIII (d)-(e).
[19] WT/WGTGP/W/24.
[20] WT/WGTGP/W/6, paragraph 72.

(i) Qualification criteria

13. On the first of these issues, the point has been made that transparency of qualification criteria should reinforce the objective of an open, transparent, efficient and equitable procurement process; ensure uniform provision of information to potential suppliers; and secure sufficient information in relation to suppliers. A key principle of transparency in this respect is that decisions on qualification of suppliers should be taken only on the basis of criteria that had been identified and established early in the procurement process and pre-disclosed to suppliers sufficiently in advance.[21] In this respect, the suggestion has been made that decisions on supplier pre-qualification should be taken on the basis of conditions and criteria including technical specifications[22] and other requirements[23] which have been made known in advance (e.g. through a tender notice or tender documentation)[24], or that have been specified in the qualification documentation or other information that has been provided to all participating suppliers.[25] Also, any changes in qualification requirements should be made known to all interested suppliers.

14. The view has also been expressed that qualification criteria should be limited to necessary requirements only, such as the relevant financial, commercial and technical capacities of suppliers.[26] On the other hand, the view has been held that establishment of qualification criteria should be left within the purview of procuring entities and national authorities which should have sufficient flexibility in developing qualification criteria suited to different types of procurement, sectors and circumstances.[27] Also, the prescription of any harmonized qualification criteria or an illustrative listing in an agreement would not be feasible and did not have any bearing on the work on transparency.[28]

15. With regard to application of qualification criteria, one view has been that the qualification criteria that are set out in invitations to pre-qualify or in tender documents should be applied in a non-discriminatory manner as regards transparency. There could be non-discrimination as regards transparency notwithstanding discriminatory treatment in favour of domestic suppliers, or suppliers from other countries, being built into the criteria themselves pursuant to, for instance, preferences or other domestic sourcing requirements.[29] In response, it has been said that application of the principles of objectivity and non-discrimination to pre-qualification criteria went beyond the concept of transparency.[30]

(ii) Lists of qualified suppliers

16. On the second of these issues, the point has been made that, where pre-qualification and registration systems are maintained, such systems should not be exclusive. New suppliers meeting the qualification criteria in time to participate in a tender should be given the same or, in one view, at least a reasonable opportunity to participate in that and subsequent tenders. Qualification systems could be re-opened at periodic intervals to new suppliers.[31]

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[21] WT/WGTGP/M/10, paragraph 44; WT/WGTGP/M/11, paragraph 29.
[22] WT/WGTGP/W/26, 7.1.
[23] WT/WGTGP/W/27, VIII.1; Job No. 5803, IV.I.
[24] WT/WGTGP/W/26, 7.1.
[25] WT/WGTGP/W/27, VIII.1.
[26] Job No. 4099.
[27] JOB(99)/6782, paragraph 76.
[28] JOB(99)/6782, paragraph 76.
[29] JOB(99)/6782, paragraph 78.
[30] JOB(99)/6782, paragrapgh 79.
[31] WT/WGTGP/M/11, paragraph 29; JOB(99)/6782, paragraph 74.

(iii) Provision of information on qualification decisions

17. With regard to transparency of qualification decisions, it has been suggested that information on the basis for selecting suppliers and the way in which the qualification process is conducted should be publicly available to all potential suppliers[32] or on request from a supplier of a Member.[33] Moreover, entities should provide unsuccessful suppliers, upon request, with information as to the reasons for the denial of their request to become a qualified supplier.[34] On the other hand, the view has been held that provision *of ex post information* on qualification decisions could be impracticable in developing countries especially where a large number of suppliers are involved.[35]

18. The view has been expressed that suppliers should have the right to challenge qualification decisions if the rules of the system have not been followed. In response, it has also been said that, under certain tendering methods, it is not possible to overturn decisions on qualification even if certain other suppliers could be considered to be qualified in terms of the pre-published criteria.[36]

VII. TRANSPARENCY OF DECISIONS ON CONTRACT AWARDS

(a) Information on provisions in existing international instruments and national procedures and practices

19. Government procurement regimes and each of the three instruments put great emphasis on decisions on the award of the contracts not only being objective but also being seen to be objective. Being seen to be objective in decision-making requires, first, that the evaluation criteria, including technical specifications, be objective in nature and publicly announced in advance and, second, that arrangements for the receipt and opening of tenders are such as to ensure their regularity. Transparency in decision-making further entails the availability *ex post* of information on the decisions taken.

(i) Transparency of evaluation criteria

20. All three instruments covered by the Secretariat's note on the Synthesis of the Information Available in WT/WGTGP/W/6 provide that tender documents should contain the criteria, including any factor other than price, to be considered by the procuring entity in determining the successful tender and for awarding the contract. They also emphasize that entities should evaluate tenders only on the basis of the criteria that have been previously published. The provisions of the Model Law on examination, evaluation and comparison of tenders require the procuring entity to evaluate and compare the tenders in order to ascertain the successful tender in accordance with the procedures and criteria set forth in the tender documents and prohibit the use of any criterion that has not been set forth in the tender solicitation documents.[37] The GPA also explicitly provides that awards should be made in accordance with the criteria and essential requirements specified in the tender documentation.[38] The World Bank Guidelines require that bidding documents shall specify the relevant factors, in addition to price, to be considered in bid evaluation and the manner in which they will be applied for the purpose of determining the lowest evaluated bid.[39]

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[32] Job No. 5803, IV.1.
[33] Job No. 5239, 3.2.
[34] WT/WGTGP/W/27, VIII.2.2; Job No. 5803, IV.3.
[35] WT/WGTGP/M/11, paragraph 29; JOB(99)/6782, paragraph 79.
[36] JOB(99)/6782, paragraph 79.
[37] Model Law Article 34(4)(a), Article 39(1) and Article 48(3).
[38] GPA, Article XIII:4(c).
[39] World Bank Guidelines on goods and works, paragraph 2.51.

21. Particular attention is given in the three instruments to ensuring the transparency and objectivity of technical specifications criteria and their evaluation. The GPA and the Model Law stipulate that technical specifications[40] prescribed by procuring entities shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.[41] The GPA and the World Bank Guidelines require that technical specifications prescribed by procuring entities shall be based on international standards, where such exist, otherwise, on national technical regulations, recognized national standards or other equivalent standards, or building codes.[42] The GPA has an explicit preference for the use of specifications based on performance rather than design or descriptive characteristics. The Model Law requires that any specifications, plans, drawings, designs and requirements or descriptions be based on the relevant objective technical and quality characteristics of the goods.[43]

22. As regards national practices to guarantee the transparency of evaluation criteria, in some countries, the basic principles and criteria for selecting tenders are established in the procurement legislation[44]; in others, there are no centrally prescribed contract award criteria and agencies determine the criteria that are appropriate in the context of individual procurements.[45] Certain criteria and procedures are common to the process of evaluation of tenders in most countries. It is invariably required that all evaluation criteria be made available in advance to suppliers in the tender notice or in the tender documents[46]; that only those criteria previously announced be taken into account in the evaluation of bids[47]; and that selection of the winning tender be made in accordance with the evaluation criteria and relative importance of each criterion previously announced. It may be required that the criteria that are communicated to the potential suppliers in the invitation to tender and tender documents cannot be modified without notifying all of the potential bidders through the same channels used to transmit the invitations and the tender documents.[48] Contracts are awarded, in general, to the tenders which have the *lowest price* or to the tenders determined to be *economically the most advantageous* in terms of the specific evaluation criteria.

23. All three instruments have provisions regarding the application of the principle of non-discrimination in respect of participation in tenders and award of contracts. The Model Law provides that any restrictions on procurement from foreign sources with the purpose of protecting certain economic sectors or on account of certain legal obligations should only be on grounds specified in the procurement regulations or should be pursuant to other provisions of law.[49] The objective of transparency is promoted by requiring a procuring entity to declare any limitations on participation on the basis of nationality in the invitations to tender and to include in the record of the procurement proceedings a statement of the grounds and circumstances on which a procurement entity has relied for limitation of participation on the basis of nationality. In these cases, the procuring entity is exempted from the obligation to give wide international circulation to the invitation to tender or invitation to pre-qualify.[50] The Model Law also provides for the possibility that, in evaluating and comparing tenders, a procuring entity may grant a margin of preference in favour of local goods, services and suppliers which permits the procuring entity to select the overall lowest-priced tender of

[40] Such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the procedures and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities.

[41] GPA, Article VI:1; Model Law Article 16(1).

[42] World Bank Guidelines on goods and works, paragraphs 2.19 and 2.20.

[43] Model Law Article 16(2).

[44] S/WPGR/W/11/Add.3, Add.8, Add.12, Add.17, Add.19.

[45] S/WPGR/W/11/Add.4, Add.11.

[46] E.g., in section "m" of tender documents published in the Commerce Bulletin Daily of the United States.

[47] S/WPGR/W/11/Add.11, Add.12, Add.17, Add.18, Add.20.

[48] S/WPGR/W/11/Add.18.

[49] Guide to Enactment of UNCITRAL Model Law, page 58 and Model Law Article 8(1).

[50] Model Law Article 23.

a local supplier when the difference in price between that tender and the lowest-priced tender falls within the range of margin of preference.[51] The rules for calculation of such preference margins should be set forth in the procurement regulations. Moreover, the use of a margin of preference is to be pre-disclosed in the tender documents and reflected in the record of the procurement proceedings.[52]

24. Under the International Competitive Bidding (ICB) procedures, the World Bank Guidelines provide that a margin of preference may be granted to domestically manufactured goods and domestic contractors in the evaluation of bids at the request of the Borrower and under conditions to be agreed under the Loan Agreement.[53] The bidding documents should clearly indicate any preferences to be granted, the information required to establish the eligibility of a bid for such preference, and the method that will be followed in the evaluation and comparison of bids.[54] Moreover, for procurement of goods and works, which by its nature or scope is not expected to be of interest to foreign bidders, the competitive bidding procedure normally used for public procurement in the country of the borrower, National Competitive Bidding (NCB), may be preferred to the ICB procedures but the use of this procedure is subject to specified conditions.

25. Under the GPA and in respect of procurement covered by the Agreement, governments Parties to the Agreement are required to give the products, services and suppliers of any other Party to the Agreement treatment "no less favourable" than that given to their domestic products, services and suppliers and not to discriminate among the goods, services and suppliers of other Parties (Article III:1). Furthermore, each Party is required to ensure that its entities do not treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership and do not discriminate against a locally established supplier on the basis of the country of production of the good or service being supplied (Article III:2). Certain derogations from the fundamental principles of the Agreement are provided for in national schedules appended to the Agreement. In addition, special and differential treatment for developing countries under Article V of the GPA allows for agreed exclusions from the requirement of national treatment under the GPA. Furthermore, the GPA prohibits the use of offsets which are defined as measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.[55] However, a developing country may at the time of its accession negotiate conditions for the use of offset requirements, to be used only for qualification of suppliers and not as criteria for awarding contracts.[56]

26. The procurement practices of a number of countries provide for award criteria to take into account considerations such as the promotion of domestic supplies and/or suppliers. To this end, the criteria may include factors such as price preference margins, offset requirements, set-asides for small and medium-sized enterprises or for minority business. Some countries have stated that the procuring entity must give suppliers prior information at the invitation to tender stage of the procedures if domestic preferences or any other conditions in a procurement proceeding are applied.[57]

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[51] Guide to Enactment of UNCITRAL Model Law, page 58; Model Law Article 34(4)(d) and 39(2).

[52] Model Law Articles 27(e), 34(4)(d) and 39(2).

[53] World Bank Guidelines on procurement of goods and construction services, paragraphs 2.54 and 2.55.

[54] World Bank Guidelines on goods and works, paragraph 2.54 and Appendix 2, paragraphs 2-5.

[55] GPA, Article XVI:1.

[56] Article V.

[57] S/WPGR/W/11/Add.12, Add.17.

(ii) Receipt and opening of tenders

27. All the three instruments have provisions to ensure the regularity of the receipt and opening of tenders and awarding of contracts. The GPA provisions require that procedures and conditions for the receipt and opening of tenders guarantee the regularity of the openings and be consistent with the national treatment and non-discrimination provisions of the GPA.[58] The Model Law and the World Bank Guidelines set forth detailed conditions which are aimed at preventing any non-transparent action or decision by the procuring entity in the process of the opening of tenders and at enabling suppliers to observe that the entity complies with the procurement criteria and procedures.

28. The three instruments set forth a number of other provisions that safeguard transparency at the bid evaluation stage. The procuring entity may ask bidders for clarifications of their tenders that are needed to evaluate them, but no changes are to be asked or permitted with a view to making unresponsive bids responsive except for the correction of arithmetical errors appearing in the tender.[59] The GPA requires that any opportunity that may be given to tenderers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice.[60] The World Bank Guidelines preclude the alteration of bids after the deadline for receipt of bids.[61] Under the GPA, negotiations with entities may only take place where prior notice has been given or where no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth earlier in the notices or tender documentation.[62] The Model Law prohibits negotiations between the procuring entity and a supplier with respect to a tender submitted by the supplier.[63]

29. With regard to the confidentiality of tenders, the World Bank Guidelines require that information relating to the examination, clarification, and evaluation of bids and recommendations concerning awards shall not be disclosed to bidders or other persons not officially concerned with the bidding process until the successful bidder is notified of the award.[64] Under the procedures on negotiations in the Model Law and in the GPA, entities are required to treat information in tenders, in particular any technical, price or other market information, confidentially and not to provide information intended to assist particular participants to bring their tenders up to the level of other participants.[65]

30. As regards, national practices on receipt and opening of tenders and award of contracts, the countries on which information is available follow procedures that are set forth in the generally applicable procurement laws[66] or established by individual procuring agencies for their own use.[67] The details of the procedures and practices on submission and receipt and opening of tenders can be found in paragraphs 109 to 113 of WT/WGTGP/W/6.

[58] GPA, Article XIII:3.
[59] Model Law Article 32(1).
[60] GPA, Article XIII:1(b).
[61] World Bank Guidelines on goods and works, paragraph 2.45.
[62] GPA, Article XIV:1.
[63] Model Law Article 35.
[64] World Bank Guidelines on goods and services, paragraph 2.46.
[65] Model Law Article 49(3) and GPA, Article XIV:3.
[66] S/WPGR/W/11/Add.10.
[67] S/WPGR/W/11/Add.4, Add.8, Add.11.

(iii) Ex post information on contract awards

31. The three instruments lay down provisions requiring procuring entities to inform the public and, in particular, the suppliers that have participated in the procurement process of their award decisions. The Model Law and the GPA require entities to publish a notice award after the award of each contract.[68] The publications in which individual GPA Parties publish such notices are identified in Appendix II to the GPA. The GPA sets forth in detail the type of information that such notices, to be published within a specified time-limit after the award of each contract, must contain. In addition to the publication of a notice of contract award, the GPA goes on to require entities to promptly inform directly those suppliers that have participated in a tender of the decision on the contract award, in writing if requested.[69] Under the Model Law, the procuring entity is required to give a notice to other suppliers after it has entered into a contract with a supplier, specifying the name and address of the supplier and the contract price.[70] Furthermore, the Model Law and the GPA allow an unsuccessful tenderer to seek and obtain pertinent information concerning the reasons why its tender was not selected. The GPA also requires the provision of information on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer. Under the Model Law, however, the procuring entity is not required to justify the grounds for its rejection of tenders.[71]

32. As regards the treatment of confidential information on contract awards, the GPA foresees that entities may decide to withhold certain information on contract awards where release of such information may impede law enforcement or otherwise be contrary to public interest or would prejudice the legitimate commercial interests of particular enterprises or might prejudice fair competition between suppliers.[72] The provisions of the Model Law bar the procuring entity from disclosing certain information, including that relating to the examination, evaluation and comparison of tenders so as to safeguard the public interest or the commercial interest of parties involved in the proceedings.[73]

33. As regards national practice on *ex post* information, the information available suggests that in most countries, entities are required to announce publicly the results of the contract award periodically or within stipulated time periods which varies from three days to three months.[74] The content of the information may be specified in national procurement legislation, regulations or guidelines, as well as the media for publication which in some cases may be the same as that for the procurement notice. In addition to the award notification, some countries require the procuring entity to inform all unsuccessful tenderers of the results of the contract award.[75] In some countries, unsuccessful suppliers may be entitled to a debriefing by the procuring entity as to how their tenders performed. Further details of national practices can be found in paragraphs 120 to 122 of WT/WGTGP/W/6.

34. As regards confidentiality of information on contracts awarded, in some national practices a procuring entity may decide that certain information on the contract award be withheld where divulgence of such information would prejudice the legitimate commercial interests of the winning tenderer or would be contrary to the public interest.[76]

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[68] Model Law Article 14(1) and (2); GPA Article XVIII:1.
[69] GPA Article XVIII:3.
[70] Model Law Article 36(6).
[71] Model Law Article 12(1) and GPA Article XVIII:2.
[72] GPA Article XVIII:4.
[73] Model Law Articles 45 and 34(8).
[74] S/WPGR/W/11/Add.1, Add.2, Add.3, Add.6, Add.8, Add.9, Add.10, Add.17, Add.18.
[75] S/WPGR/W/11/Add.9.
[76] S/WPGR/W/11/Add.4, Add.6, Add.10; WT/WGTGP/W/5.

(b) Discussions in the Working Group

(i) Evaluation criteria

35. The point has been made that a key requirement with regard to transparency of evaluation criteria is that the evaluation of tenders be conducted[77] and contract award decisions based strictly on evaluation criteria, including technical specifications and other relevant information, conditions or other requirements[78], which have been pre-established and made known in advance[79], for example through a tender notice or tender documentation.[80] Such criteria should be clear and be capable of objective application, and should be communicated and applied non-discriminately. In this connection, the view has also been expressed that a transparency agreement would not, as a general rule, set out what those criteria should be.

36. The point has also been made that it is necessary to adopt a flexible approach in order to allow for certain situations – for instance, where negotiations may have to be held in order to obtain better terms, or in cases of *force majeure*[81] where the criteria set out in tender documents cannot be strictly adhered to.[82] Other aspects of the transparency of evaluation criteria are also discussed under item IV in document WT/WGTGP/W/32 relating to Information on Procurement Opportunities, Tendering and Qualification Procedures and under item VI in the present document on Qualification Procedures.

(ii) Receipt and opening of tenders awarding of contracts

37. The view has been expressed that procuring entities should have appropriate procedures to ensure that all tenders are received and opened under procedures and conditions guaranteeing the regularity and impartiality of the opening process[83] and that there is no opportunity to manipulate the specific elements of tenders or to provide a particular tenderer with information on other tenders.[84] In response, it has been said that setting out the procedures on how tenders received by procuring entities should be handled to ensure the regularity and impartiality of the procurement proceedings is not within the ambit of the work on transparency. The objective sought can be achieved through *ex post* information.[85]

38. The suggestion has been made that each Member should ensure that only bids of suppliers whose tenders have been received before the previously published final date for submission of tenders may be considered.[86]

39. The point has been made that each Member shall ensure that its governmental agencies treat tenders in confidence.[87]

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[77] Job No. 5803, V.1.
[78] Job No. 5803, VI.1; WT/WGTGP/W/26, 7.1; WT/WGTGP/W/27, VIII.
[79] Job No. 4099; Job No. 5239, 4.3 and 4.4; WT/WGTGP/W/26, 7.1.
[80] WT/WGTGP/W/26; WT/WGTGP/W/27, VIII.1; Job No. 5803, VI.1.
[81] JOB(99)6782, paragraph 81.
[82] JOB(99)/6782 (6th Rev.), paragraph 82.
[83] JOB(99)/6782 (6th Rev.), paragraph 83.;Job No. 5239, 4.2.
[84] JOB(99)/6782 (6th Rev.), paragraphs 80 and 83.
[85] JOB(00)3276, VI, paragraphs 1.1-5.2.
[86] WT/WGTGP/W/26, 7.1; Job No. 5239, 4.1.
[87] Job No. 5239, 4.2.

(iii) Ex post information on contract awards

40. The provision of *ex post* information on contract awards has been said to be one of the crucial elements of transparency in government procurement especially in cases where certain information might not have been provided *ex ante*.[88]

41. The suggestion has been made that entities should make information on contract awards publicly[89] available.[90] Such information should be made available publicly for a reasonable period of time.[91] One view has been that any requirement to publish contract award decisions should only be in cases of "less transparent" procurement methods such as single-source procurement or limited tendering. Another view has been that they should be published regardless of the procurement method used.[92] On the other hand, the view has been held that decisions on contract awards should be provided in accordance with national practices.[93] Individual Members should be able to determine whether to notify or debrief unsuccessful tenderers on the outcome of their bids or to publish contract award information as provided in national legislation.[94]

42. There has been exchange of views in the Working Group in relation to the minimum content of *ex post* information to be published. It has been suggested that it should include:

- the name of the procuring entity[95];
- a description of the goods and services procured[96];
- other information necessary to identify the procurement[97];
- if a contract is awarded, the name of the awarded[98]/winning[99] supplier and the value of the winning award[100];
- if a contract is not awarded to any supplier, the reasons for the decision.[101]

43. A further view in this connection has been that the *ex post* information in contract award notices could be less detailed than the information to be provided directly to individual suppliers. Another view expressed in this connection has been that the type of information to be provided should be left to the discretion of the procuring entity.[102]

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[88] JOB(00)3276, VI, paragraphs 5.1-5.2; JOB(99)5239, Article 4.4.
[89] WT/WGTGP/W/27, VIII.3.
[90] WT/WGTGP/W/27; Job No. 5803, VII.1(a); WT/WGTGP/W/26, 7.2.
[91] WT/WGTGP/W/27.VIII.3.
[92] JOB(99)6782, paragraphs 85-86.
[93] WT/WGTGP/M/10, paragraph 45.
[94] JOB(99)6782, paragraphs 85-86 and WT/WGTGP/M/10,para 45.
[95] WT/WGTGP/W/27, VIII.3.
[96] WT/WGTGP/W/27, VIII.3.
[97] Job No. 5239, 4.4(a).
[98] Job No. 5239, 4.4(b).
[99] WT/WGTGP/W/27, VIII.3.
[100] Option in WT/WGTGP/W/27, VIII.3; Job No. 5239, 4.4(b).
[101] Job No. 5239, 4.4(c).
[102] WT/WGTGP/M/10, paragraph 45.

44. A further suggestion with regard to *ex post* information has been that, upon request, unsuccessful suppliers should be provided with more detailed[103] information and explanation as to the reasons for their non-selection and/or why the winning bid has been chosen.[104] It has also been suggested that any debriefing provided by the entity should be available to all participating suppliers on a non-discriminatory basis.[105] A further point has been that debriefing should be a complementary measure rather than a substitute for public availability of contract award information.[106]

45. In response, the point has been made that *ex post* provision of information to unsuccessful bidders could be burdensome and costly for procuring entities, and that some national practices do not provide for this.[107]

46. The point has been generally made that information considered confidential, on grounds of commercial or public interest, should be treated as such, and a number of the proposals submitted make provision for this.[108]

VIII. DOMESTIC REVIEW PROCEDURES

(a) Information on provisions in existing international instruments and national procedures and practices

47. Review procedures are often considered a key component of transparency and accountability of government procurement practices. The rules set out in the Model Law and the GPA establish the basic features that national review mechanisms must have without going into great detail. The purpose of these provisions is to give suppliers believing that an entity has breached national law or, in the case of the GPA, the rules of the GPA itself, a right of review.[109]

48. Under the Model Law and the GPA, as an initial step, complainants are encouraged to seek resolution of their complaints through consultations with the procuring entity itself prior to recourse to an administrative review body.[110] Under the Model Law, unless the complaint is resolved by mutual agreement, the procuring entity shall, within prescribed time-limits, issue a written decision including a statement on the reasons for the decision and indicating any corrective measures that are to be taken.[111] If the matter is not settled through this procedure, the complainant is entitled, under the Model Law, to seek an administrative review.[112] The functions of an administrative review may be vested in an existing appropriate administrative body or a body whose competence is exclusively to resolve disputes in procurement matters and which is independent of the procuring entity. The decisions of the review bodies or failure to make a decision within prescribed time-limits shall be subject to judicial review.[113] The Model Law also lays down certain procedures to ensure the openness and fairness of review procedures.[114] Under the GPA, Parties may confer the authority to hear challenges by suppliers on national courts or on an impartial and independent review body of an administrative nature. In the event that a bid challenge is heard by a review body which does not have the status of a court of law, either its decisions must be subject to judicial review or it must follow the

[103] WT/WGTGP/W/26, 7.2.
[104] WT/WGTGP/26, 7.2; WT/WGTGP/W/27, VIII.2.2; Job(99)5803, VII.1(b); WT/WGTGP/M/10, paragraph 46.
[105] WT/WGTGP/W/27,VIII.2.2; Job(99) 5803, VII.2 (c).
[106] Job (00)/3276, page 17.
[107] JOB(99)6782, paragraphs 83.
[108] JOB(99)6782, paragraphs 85; WT/WGTGP/W/26, Article 9.
[109] Model Law Article 52; GPA Article XX:1.
[110] GPA Article XX:1.
[111] Model Law Article 53.
[112] Model Law Articles 54 and 55.
[113] Model Law Article 57.
[114] Model Law Article 55.

criteria laid down in detail in Article XX:6(a)-(g). These minimum standards are mainly designed to ensure the openness, fairness and equity of the proceedings.[115] The World Bank carries out prior or post reviews of the procurement documents, bid evaluations, award recommendations and the contract to ensure that the process is carried out in conformity with the Guidelines.[116] In addition the World Bank Guidelines allow a bidder or a consultant who wishes to ascertain the grounds on which its bid or proposal is not selected, after notification of award, to address a request for explanation to the Borrower country or agency. If the bidder or consultant is not satisfied with the explanation given, it may seek debriefing with the World Bank.[117]

49. Under the GPA, a review body must have the authority to order the correction of a breach of the Agreement or compensation for the loss or damages suffered by a supplier, but this may be limited to costs for tender preparation or protest. Pending the outcome of the challenge, the review body must be able to order rapid interim measures, including the suspension of the procurement process, to correct breaches of the GPA and to preserve commercial opportunities.[118] However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. The provisions of the Model Law also provide for the suspension of procurement proceedings which takes account of the need of the procuring entity to conclude a contract in an economic and efficient way without undue disruption and delay in the procurement process.[119]

50. Many countries have procedures which allow aggrieved suppliers to lodge complaints against any alleged breaches of the applicable rules and to seek review of the procurement proceedings of an entity, including award decisions. The procedures for review of complaints and remedies available to successful complainants are sometimes provided explicitly in procurement legislation[120] and, in other cases, they may result from more general possibilities to appeal administrative decisions. Regarding the conditions of recourse to review, complaints may be raised on the grounds that the applicable procurement laws and regulations have been violated[121] or, where a country is a party to an international agreement, an alleged breach of the rules of that agreement.[122] In most cases, procedures are available to any person who has or has had an interest in obtaining a particular contract or who has been or risks being harmed by an alleged infringement.

51. Complaint-based procedures in national practices generally have the following main features. Suppliers are encouraged, in the first instance, to take up the matter directly with the procuring entity for an early resolution.[123] In some cases, mediation or good offices of an independent authority can be sought. Finally, suppliers can bring an action against the procuring entity before an independent body or a court. Most countries have designated administrative or judicial authorities to handle procurement-related challenges. The nature of the review authorities varies and, when review bodies are not judicial in character, their decisions are often subject to judicial review.[124] The review may be handled either by a specialized body established to review challenges in the area of government

[115] GPA Article XX:6(a)-(g).

[116] World Bank Guidelines on goods and works, Appendix 1,paragraghs 1,2 and on consultants' services, Appendix 1, paragraphs 1, 2 and 4.

[117] World Bank Guidelines on goods and works, Appendix 4, paragraph 15 and on consultants' services, Appendix 4, paragraph 15.

[118] GPA Article XX:7(a)-(c).

[119] Model Law Article 56.

[120] S/WPGR/W/11/Add.1, Add.3, Add.19.

[121] S/WPGR/W/11/Add.3, Add.17, Add.20.

[122] E.g., GPA, NAFTA and the Government Procurement Agreement between Australia and New Zealand.

[123] S/WPGR/W/11/Add.3, Add.4, Add.6, Add.9, Add.11, Add.12, Add.20, Add.21; WT/WGTGP/W/5; APEC Survey – Philippines.

[124] S/WPGR/W/11/Add.10, Add.12, Add.13, Add.15, Add.17, Add.18, Add.20.

procurement, an administrative authority with a broader mandate or courts of law.[125] Apart from complaint-based procedures, the mechanisms that are used in some instances for monitoring the procurement process include the internal audits of procuring authorities, external control or audits by an administrative body in charge of overseeing the proper conduct of procurement proceedings; or oversight by the legislative authorities in some countries.[126] In those countries where procurement procedures are decentralized, each entity has its own procedures which may vary from one entity to another.[127]

52. The remedies available to successful complainants differ from country to country and may include the following:

- interim measures, including the suspension of the procurement procedures and of the implementation of any decision of the procuring authority taken unlawfully in order to preserve the rights of suppliers[128];

- recommendations to entities to bring their procurement proceedings and decisions in line with the rules in force[129];

- damages awarded to the aggrieved supplier[130] which are sometimes limited to the financial costs of tendering[131].

National laws sometimes provide for the public interest to be taken into account in deciding whether to suspend or cancel a procurement decision; cancelling of procurement procedures or setting-aside decisions and awards.[132]

(b) Discussions in the Working Group

53. A widely-held view appears to be that any provisions on review in a transparency agreement should not require one model for every Member or introduce elaborate obligations on the particular characteristics of national systems that should be maintained.[133] The matter of domestic review procedures was within the purview of domestic legislation and that the primacy of national legislation should be maintained.[134] Any provisions should be flexible enough to allow Members to design their domestic review mechanisms in accordance with their national legislation and to rely on administrative or judicial review mechanisms that are appropriate to their national legal systems and to accommodate different Members' existing independent administrative or judicial tribunals and review procedures.[135]

54. Those advocating the inclusion of a requirement in a transparency agreement in relation to domestic review procedures base their arguments on the role of such procedures in guaranteeing the overall transparency of the procurement process and the need for an appropriate mechanisms to ensure the enforcement of underlying rules. With regard to the first of these points, the point has been

[125] S/WPGR/W/11/Add.1, Add.2, Add.8, Add.10, Add.14, Add.15.
[126] S/WPGR/W/11/Add.4, Add.15, Add.18, Add.19.
[127] S/WPGR/W/11/Add.15.
[128] S/WPGR/W/11/Add.1, Add.2, Add.3, Add.6, Add.13, Add.17.
[129] In Australia, while compliance by an entity with a recommendation of the review authority for a remedy is not mandatory, the review authority may report to the Prime Minister and then to the Parliament if the entity does not act upon a recommendation adequately.
[130] S/WPGR/W/11/Add.1, Add.11.
[131] S/WPGR/W/11/Add.2.
[132] S/WPGR/W/11/Add.1, Add.3, Add.10, Add.12, Add.18.
[133] WT/WGTGP/W/15 and 17.
[134] WT/WGTGP/M/14, para 58.
[135] WT/WGTGP/M/10, paragraph 47 and WT/WGTGP/M/12.

made that the availability of a bid challenge mechanism adds to the transparency of the decision-making process, increases confidence in the effective functioning of the overall procurement system and enables the system to be seen to be transparent. Review procedures should also be in place in the interest of introducing due process and public accountability of decision-making through the procurement process.[136] Domestic review mechanisms are necessary to ensure that the applicable transparency rules are respected by all involved in a procurement process.[137]

55. The view has also been expressed that there should be no provisions on domestic review mechanisms in a transparency agreement.[138] According to this view, domestic administrative or judicial review mechanisms are in place for the purpose of public accountability at the domestic level, a matter not within the ambit of a transparency agreement.[139] The issue of domestic review goes beyond that of transparency and therefore the mandate of the Working Group. A further comment in this respect has been that, since the purpose of domestic procedures in many countries is to review whether procurement has been made in accordance with domestic law and procedures, it might not be feasible to limit the application of review procedures to obligations in a WTO agreement, the scope of which will be limited to transparency. Moreover, the concern has been expressed in this connection that review provisions in a transparency agreement might be used as a means by certain vocal private parties to create complications in the domestic political arena and that additional review procedures might increase the number of challenges and create unnecessary costs for procuring entities.[140]

56. A further approach that has been put forward envisages leaving the choice of review procedure to individual Members provided the review mechanism itself was transparent and provided a guarantee of independence.[141] Another view has been that the requirements on domestic review procedures in a transparency agreement should be limited to the provision of information on available national review mechanisms and procedures. All that is necessary is that suppliers are made aware that such national mechanisms exist and are provided with information as to how they work. A further suggestion has been that a transparency agreement could contain an exhortation to Members or a best endeavours obligation to provide on and maintain domestic review mechanisms.[142] It has also been suggested that provision of *ex post* information to unsuccessful suppliers and debriefing by procuring authorities would be sufficient and obviate the need for provisions on review[143] (see also Section VII and X).

57. By way of precedents for review and appeal mechanisms in the WTO system, attention has been drawn to the mechanisms that can be found in a number of WTO agreements, for example the Agreements on Countervailing Measures and Anti-Dumping Practices, Customs Valuation, Import Licensing, Rules of Origin, Preshipment Inspection and TRIPS and in paragraph 3(b) of Article X of the GATT 1994.[144] A note by the Secretariat that was prepared in response to a request by the Working Group, reproduces the relevant provisions in the WTO Agreements.[145] In response, the point has been made that WTO agreements do not have a consistent approach towards domestic review procedures. It might not be feasible to transpose the provisions regarding review mechanisms in other WTO Agreements into a transparency agreement since the scope of the rules under those Agreements went beyond simple transparency obligations.

[136] WT/WGTGP/W/17.
[137] WT/WGTGP/W/17.
[138] WT/WGTGP/M/10.
[139] WT/WGTGP/M/14, paragraph 58.
[140] JOB(99)6782, paragraphs 99.
[141] WT/WGTGP/M/12 and WT/WGTGP/W/15.; WT/WGTGP/M/10.
[142] WT/WGTGP/M/12.
[143] WT/WGTGP/W/17.
[144] WT/WGTGP/W/15.
[145] WT/WGTGP/W/3.

58. Observations have been made regarding the basic features that domestic review mechanism should have in order to ensure effective, open, fair and transparent review of procurement decisions. While the point has been made that a domestic review mechanism could be achieved through a variety of means, certain features common to most domestic mechanisms and that could be taken into account in developing provisions in this respect have been suggested.[146]

59. Regarding the provisions in a transparency agreement on access to review, the point has been made that a review should be available to all interested or potential suppliers or to all suppliers who have participated in the procurement process[147] and are directly or individually affected by the practice or the action[148], including suppliers from other WTO Members.[149]

60. Observations have been made on the grounds for domestic review under a transparency agreement. In relation to a transparency agreement, one suggestion has been that reviews should relate to practices and actions that may be inconsistent with the requirements of a future transparency agreement[150], as implemented by Members.[151] In this respect, it has been stated that the obligation to provide for review procedures in a transparency agreement should only concern actions within the scope of that agreement, not the substance of preferential measures relating to market access in government procurement.[152]

61. With regard to review bodies, it has been said that a review provision should permit flexibility as to whether a country chooses to provide opportunities to seek review through judicial, arbitral or administrative bodies.[153] Nevertheless, it should clearly require that such bodies be impartial[154] and operate independently[155] of the procurement entity.

62. With regard to review process itself, the importance of promptness[156] of the process and timeliness of decisions of procuring entities[157], the point has been made that there should be procedures encouraging suppliers, in the first instance, to take up the matter directly with the procuring entity for an early resolution through consultations between the procuring entity and suppliers.[158]

63. With regard to *ex post* information, the point has been made that review procedures should result in reasoned conclusions that should be notified to interested suppliers in writing[159] and/or be published in a medium that is publicly or widely available or readily accessible.[160]

64. Another suggestion with regard to ensuring transparency of review procedures has been that a transparency agreement should require procurement entities to maintain comprehensive administrative written records of the procurement process[161], for instance for a three-year period[162] in order to ensure

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[146] JOB(99)/5803, WT/WGTGP/W/27 and Job No. 4099.
[147] WT/WGTGP/W/26 and 27.
[148] WT/WGTGP/W/26 and 27.
[149] WT/WGTGP/W/17 and Job No. 4099.
[150] WT/WGTGP/W/15.
[151] WT/WGTGP/W/27.
[152] WT/WGTGP/W/15.
[153] WT/WGTGP/W/15, 26 and 27.
[154] Job No. 4099.
[155] Job No. 4099, JOB(99)/5803 and WT/WGTGP/W/26 and 27, JOB(99)/5239.
[156] JOB(99)/5239 and WT/WGTGP/W/26.
[157] JOB(99)/5803, WT/WGTGP/W/15 and WT/WGTGP/W/26 and 27.
[158] WT/WGTGP/W/27, JOB(99)/5803 and WT/WGTGP/W/15.
[159] JOB(99)5239.
[160] WT/WGTGP/W/17, JOB(99)/5803, WT/WGTGP/W/27 and JOB(99)/5239.
[161] WT/WGTGP/W/26.
[162] WT/WGTGP/W/27.

that review bodies had an adequate factual basis for review. This issue is discussed under item IX A of this note.[163]

65. In connection with remedies, the point has been made that a review provision should provide for adequate remedies to protect the interests of suppliers and to deter procurement entities from engaging in future actions that would be inconsistent with WTO transparency provisions. Remedies should include the possibility of re-tendering procurements or damages to cover legitimate claims[164] and provide relief to complainants. It has been said that most national review systems already provide remedies for suppliers whose rights have been denied under the applicable laws and regulations.[165]

66. The point has been made that review of complaints or other dispute settlement mechanisms are often initiated after the contract has been awarded, making it difficult or impossible to overturn a procurement decision, cancel a contract and start the procurement process all over again. A review provision should ensure that claims from interested suppliers could be heard and decided upon in a manner that did not prejudice their interests in the procurements in question. Such guarantees could be available through rapid decisions on challenges or through suspension of the procurement process while claims are pending or remedies which could include compensation after administrative or judicial procedures have determined that an injury or an economic loss has flowed from the inconsistency of a procurement process with the applicable legislation.[166] In cases in which the procurement process may be suspended, there could be provision for continuing with the award of procurements in the public interest.[167] Since suspension could be detrimental to the public interest and create difficulties in cases of urgent procurements, most national review procedures and the provisions of the GPA provided for exceptions enabling, in circumstances so warranting, public interest considerations to override the interest in suspending a procurement process.

67. In response, it has been said provisions requiring adequate remedies would fall outside the scope of the work on transparency. Prescribing obligations on remedies might have counter-productive repercussions on the procurement practices of governmental authorities; to the extent that procuring authorities would be liable to remedies, they might have a tendency to restrict access to foreign suppliers in order to minimize any such risks.[168]

68. The Group also had an exchange of views on the way in which WTO dispute settlement procedures and domestic procedures might interact and in particular whether WTO dispute settlement procedures should apply to obligations with respect to domestic review. A common starting point for the discussion on this point appears to be that the legal criteria for domestic reviews and WTO dispute settlement are different. A distinction should be made between domestic review mechanisms which involve responding to complaints by suppliers against procuring authorities under the law of a country and dispute settlement procedures between governments under the law and procedures of the WTO.[169]

69. The concern has been expressed that WTO dispute settlement procedures should not give rise to situations in which the procurement decisions of government authorities could be overturned by recourse to them. In this respect, the view has been expressed that WTO dispute settlement should only apply in respect of obligations of governments in their capacity as regulators. Any procurement decisions taken by them, including contract award decisions, in their capacity as purchasing entities should not be subject to WTO dispute settlement procedures but to domestic review procedures. WTO dispute settlement procedures should apply to issues relating to the consistency of laws of

[163] WT/WGTGP/W/15.
[164] WT/WGTGP/W/15.
[165] Job No. 4019.
[166] JOB(99)6782, paragraphs 104.
[167] WT/WGTGP/W/15.
[168] JOB(99)6782, paragraphs 105.
[169] WT/WGTGP/W/26 and WT/WGTGP/M/10.

general application with the rules of a transparency agreement and should not be invoked with regard to decisions resulting from national review procedures concerning a particular procurement. The scope of the application of WTO procedures to domestic review provisions should be limited to actions relating to the implementation, through domestic laws and procedures, of the requirements of the transparency agreement in this respect.[170]

70. On the other hand, it has been said that challenges of individual award decisions under the provisions of a transparency agreement were unlikely. Moreover, the point has been made that recourse to WTO dispute settlement procedures being a prerogative of governments, could not be had by suppliers who might challenge procurement procedures of government entities.[171]

71. The view has also been expressed that provisions should reflect the principles of exhaustion of domestic judicial review mechanisms before recourse to WTO dispute settlement procedures.[172] A further point has been made that the possibility for foreign suppliers to have recourse to effective and independent domestic review procedures, as a first avenue for resolving complaints, would minimize the likelihood that such complaints might eventually rise to the level of government-to-government disputes.[173]

IX. OTHER MATTERS RELATED TO TRANSPARENCY

(a) Information on provisions in existing international instruments and national procedures and practices

72. Four main areas have been identified in the discussions in the Working Group in relation to this item. These are maintenance of records of proceedings; information technology; language; and fight against bribery and corruption. The treatment of these matters in the three international and in national practices are presented in turn in the following sections.

(i) Maintenance of records of proceedings

73. Both the Model Law and GPA have provisions for the maintenance of records of procurement proceedings. The GPA requires that this information be retained by procuring entities for use, if required, under various procedures such as provision of information by entities (Article XVIII), between governments (Article XIX), under bid challenge procedures (Article XX) and under dispute settlement (Article XXII).[174] Moreover, where limited tendering – rather than open or selective procedures have been adopted, the GPA requires a specific report to be prepared on each such occasion of limited tendering.[175] The Model Law establishes an explicit requirement for the maintenance of a record of the key decisions and actions taken by the procuring entity during the course of the procurement proceedings. As is explained in the Guide to the Enactment of the Model Law, the maintenance of a record is one of the principal mechanisms for ensuring adherence to the rules and also facilitates the exercise of the right of aggrieved suppliers to seek review.[176] They both also set out the minimum content of information to be maintained; these cover the procurement requirement, the procuring entity, suppliers and evaluation of tenders.[177] APEC Non-binding principles require that

[170] JOB(99)6782, paragraph 102.
[171] JOB(99)6782, paragraph 131.
[172] JOB(99)6782, paragraph 131.
[173] JOB(99)6782, paragraph 132.
[174] WT/WGTGP/W/6, paragraph 138; GPA Article XIII:3.
[175] WT/WGTGP/W/6, paragraph 139.
[176] UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment, pages 61 and 71.
[177] WT/WGTGP/W/6, paragraphs 136, 137; Model law, Guide to Enactment, pages 61 and 71; Model Law Article 11(a)-(m); GPA Article XVIII:1(a)-(g).

records should be kept in relation to every contract awarded. The information recorded should be sufficient to justify decisions taken in the procurement process.[178]

74. In two instances where information about national practices has been provided, procuring entities are required to maintain certain minimum records about every procurement or contract award.[179]

(ii) Information technology

75. Information technology can play, and in some countries is already playing, a major role in enhancing transparency. The GPA recognizes the useful role that information technology could play in government procurement and, at Article XXIV:8, provides for the Committee on Government Procurement to consult regularly in the light of unfolding developments with the aim, in particular, of using information technology to promote transparent, efficient, open and non-discriminatory government procurement.[180] In the context of the renegotiation of the Agreement under Article XXIV:7(b), the Committee on Government Procurement has initiated work on possible amendments to the relevant provisions of the GPA to reflect recent developments in information technology.[181]

76. In the area of information technology national practices appear to have substantially advanced in recent years. Information available indicates that a substantial number of countries, including developing countries, have implemented electronic procurement, electronic tendering or other forms of application of information technology to government procurement[182], though the use is not uniform.[183] For instance, Chile, Mexico and Brazil have reported to the Working Group their implementation of electronic tendering and procurement systems. Information available suggests that information technology in government procurement has tended to be focused on the development and maintenance of electronic databases which provide information on tender opportunities, contract award notices and similar information. The information provided, nevertheless, suggest a broad thrust of initiatives to take advantage of the benefits offered by information technology in government procurement.[184] In some electronic procurement implementations reported, a dual system has been adopted, involving the obligation on procuring entities to publish information – and receive tenders – both in paper form and electronically, to cater to the needs of those suppliers who may not have access to appropriate information technology facilities.[185]

(iii) Language

77. The three international instruments have varying provisions as regards language. Under the Model Law, the language of documentation is generally the official language(s) of the enacting State, or, in certain specified cases, in a language customarily used in international trade. The formulation and submission of tenders can be in any language in which the tender notices have been issued or in any other language stipulated by the procuring entity.[186] Under the GPA, a summary of the invitation to tender has to be submitted in a WTO official language, and, if an entity allows tenders to be submitted in several languages, then one of those must be an official WTO language.[187] The World Bank Guidelines stipulate that qualification and tender documents – and the ensuing contract –

[178] WT/WGTGP/W/24
[179] GPA/10; WT/WGTGP/W/5.
[180] WT/WGTGP/W/6, paragraph 146.
[181] GPA/8.
[182] WT/WGTGP/M/12, paragraphs 11-15.
[183] WT/WGTGP/W/6, paragraph 142.
[184] WT/WGTGP/W/6, paragraphs 142-145.
[185] WT/WGTGP/M/12, paragraph 12.
[186] WT/WGTGP/W/6, paragraph 146.
[187] WT/WGTGP/W/6, paragraphs 146- 147; GPA Articles IX:8 and XII:2.

in the case of international competitive bidding, shall be in either English, French or Spanish, but that a subsequent contract entered exclusively with a local supplier may be in the national language.[188] In the case of local tendering and contracting, such as under national competitive bidding procedures, the World Bank Guidelines provide that the national language may be the medium of communication and also used in documentation.[189]

78. As regards national practices, generally procurement information is provided in official national language(s). In some instances, summaries are provided in languages traditionally used in international trade. Where countries have several official languages, the information may be provided in all, or provided in one and summarised in the others.[190]

(iv) Fight against bribery and corruption

79. Neither the GPA nor the Model Law have explicit provisions specifically directed at the fight against bribery and corruption. The World Bank Guidelines require all participants in Bank-financed projects – including borrower countries together with beneficiary organizations, and bidders, suppliers and contractors - to observe the highest standards of ethics during the procurement and execution of contracts. Where a fraudulent or corrupt practice is determined to have taken place, the Bank's Guidelines provide for a number of measures, including: rejection of a proposed contract award, cancellation of the portion of a loan so affected or declaration of the affected supplier as ineligible to participate in further Bank-financed programmes for a stated or an indefinite period of time.[191] The Bank also reserves the right to inspect, under certain circumstances, the records and accounts of suppliers and have these audited by independent auditors appointed by it[192], and in large contracts to have suppliers give an undertaking to observe a borrower country's laws on bribery, fraud and corruption.[193] A number of international instruments have also been established by international forums for fighting bribery and corruption, including the OAS and the OECD.[194]

(b) Discussions in the Working Group

(i) Maintenance of records of proceedings

80. The point has been made that the maintenance of a record of procurement proceedings and the availability of non-confidential information contained in it to interested parties is one of the principal mechanisms for ensuring adherence to agreed rules and is of particular importance in the functioning of an administrative or judicial review process. Such records provide the basis for an audit trail and support any evaluation of the procurement and thus introduce an element of accountability into the process. It has also been said that the length of time that records of proceedings should be maintained could be linked to the time provided to domestic suppliers in domestic legislation to challenge a procurement decision and to seek a review of a procurement process. Suggestions have been made as regards the type, form and duration of information to be maintained in records.[195] On the other hand, it has been said that a transparency agreement should not have provisions stating explicitly in what form and for how long records should be maintained by entities.

[188] WT/WGTGP/W/6, paragraph 146, WB Procurement Guidelines, paragraph 2.15.
[189] WB Guidelines, paragraph 3.14.
[190] WT/WGTGP/W/6, paragraph 148.
[191] WB Guidelines, paragraph 1.15 (a)-(d).
[192] WB Guidelines, paragraph 1.15(e).
[193] WB Guidelines, paragraph 1.16.
[194] JOB(99)6782, paragraph 118.
[195] JOB(99)6782, paragraphs 109-112; WT/WGTGP/M/10, paragraph 48; WT/WGTGP/W/26, Part III:6.1; JOB(99)5239, paragraph 6.

(ii) Information technology

81. There has been a wide recognition that the use of information technology offers enormous opportunities to level the playing field by increasing access to information at low cost to all suppliers. As such, it has been suggested that a transparency agreement could encourage its use as an alternative means of disseminating information about procurement opportunities and contract awards in comparison to more traditional methods of communication. The view has been expressed that electronic tendering using Internet-based systems provides efficient and non-discriminatory access to tender information with minimum equipment requirements and technological know-how.[196] Amongst the other advantages that can be offered are provision of a single point of registration, access to information by suppliers, access to price information by procuring entities, information on tenders and contract awards, and access to supplier information by procuring entities. In some cases, the national systems also provide useful statistical information on government procurement which assists the monitoring, control and justification of government expenditures.[197]

82. The view has also been expressed that given the different stages of development amongst the countries, the use of information technology could disadvantage some suppliers – for instance small and medium-scale enterprises in less developed countries, who may not have access to such technology – and accordingly should be optional. A balance should be found whereby a transparency agreement would not constitute an unnecessary barrier to progress in the area of information technology and would accommodate its increasing application in Members, while ensuring that the use of information technology would not result in discrimination against countries which did not have a competitive edge in this area.[198] In this respect, the suggestion has been made that the use of information technology might be promoted in a transparency agreement through the use of a best endeavours clause.[199]

(iii) Language

83. The discussion in the Working Group on the issue of language has revolved around whether information on procurement opportunities should be made only in Members' official languages, or additionally should be made in a WTO language. The general view appears to be that information should continue to be provided in the official language(s) of Members. It has been suggested that, where possible, however, information could be provided in a WTO language, where a procurement opportunity is likely to provide international interest.[200] Certain types of information, such as notification of enquiry points and matters to do with dispute settlement or consultations, should be made in an official WTO language.[201]

(iv) Fight against bribery and corruption

84. The view has been expressed that there is an important relationship between transparency in government procurement and reducing the incidence of bribery and corruption in government procurement practices. In response, the point has been made that, while the initiatives in international fora such as the OAS and the OECD have been useful in attacking the problem from various angles, so far there have not been any studies, negotiations or agreements on the relationship between the fight against bribery and transparency in government procurement in a specific and systematic manner. The view has also been expressed that transparency, by itself, is not enough and therefore needed to be supplemented by other appropriate action and measures. A further view has been expressed

[196] JOB(99)6782, paragraphs 113-114.
[197] See WT/WGTGP/M/12, paragraphs 10-14
[198] JOB(99)6782, paragraph 114; WT/WGTGP/M/12, paragraph 15.
[199] See WT/WGTGP/M/10, paragraph 49.
[200] JOB(99)6782, paragraph 116; WT/WGTGP/W/26, Article 10, JOB(99)5239, paragraph 7; WT/WGTGP/W/27, Article IX:3.
[201] JOB(99)5239, Part III:7.1 and 2.4.

questioning the appropriateness of expanding the scope of the work of the Working Group to matters of bribery and corruption which might be more appropriately dealt with in other fora. This view suggests that there should be no explicit linkage between transparency and bribery and corruption in a transparency agreement, and Members should deal with this issue through their own national legislation.[202]

X. INFORMATION TO BE PROVIDED TO OTHER GOVERNMENTS (NOTIFICATION)

(a) Information on provisions in existing international instruments and national procedures and practices

85. The GPA, being an international instrument that sets contractual rights and obligations between governments in the area of government procurement, includes provision on exchange of procurement-related information between governments. The relevant provisions relate to provision of information on national legislation; notification of national legislation; provision of information on contract awards; and statistical reporting.

86. The GPA Parties are required, in response to a request by any other GPA Party, to explain their government procurement procedures[203]; supply copies of laws, regulations, judicial decisions, administrative rulings or other measures relevant to the Agreement; and provide information concerning procurement by covered entities and their individual contract awards.[204]

87. As regards the establishment of enquiry points, the provisions on special treatment for developing countries in the GPA require developed country Parties to establish information centres to respond to reasonable requests from developing country Parties for information relating to, among others, laws, regulations, procedures and practices regarding government procurement, addresses of the entities covered by the Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders.[205] The coordinates of the contact points of GPA Parties have been notified to the GPA Committee. Furthermore, contact points have also been designated by individual APEC member countries pursuant to the work of the Group of Experts on Government Procurement. These are included in the APEC Surveys and can be accessed through the APEC Home Page on Government Procurement at the Internet (http://www.apecsec.org.sg/gphome.html).

88. A regards the notification of national legislation and any changes, the GPA Committee has adopted relevant procedures for such notifications, including responses to a checklist of issues.[206] GPA Parties are required to submit the complete texts of their basic legislation (laws and regulations) on government procurement, including the basic legal instruments pursuant to which effect is given to the provisions of the Agreement, in the original language to the Secretariat. Each Party is also required to provide a summary of the implementing legislation in a WTO language.

[202] JOB(99)6782, paragraphs 120-121; WT/WGTGP/M/10, paragraph 50.
[203] GPA Article XIX:1.
[204] GPA Article XIX:3.
[205] GPA Article V:11.
[206] GPA/1/Add.1 and GPA Article XXIV:5(a) and (b).

89. Further to the obligations of entities under the GPA relating to the provision of information by procuring entities to an unsuccessful tenderer[207], the GPA allows the government of an unsuccessful tenderer to seek such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government is required to provide information on both the characteristics and relative advantages of the winning tender and the contract price. The government may disclose the information thus obtained provided it exercises this right with discretion. In cases where the release of such information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer.[208]

90. The GPA has a general provision in Article XIX:4, requiring that confidential information provided to any government Party to the GPA shall not be revealed without formal authorization from the Party providing the information.[209]

91. As a means of monitoring procurement covered by the GPA, Article XIX:5 of the GPA requires each Party to collect and provide to the Committee on an annual basis statistics on its procurements covered by the GPA. The type of information that such reports shall contain is stipulated in detail in Article XIX:5, paragraphs (a) to (d). Statistical reports of GPA Parties can be found on the WTO website.

(b) Discussions in the Working Group

92. The issues that have been raised in regard to the type of information that could be provided to other governments relate to notification of national legislation, provision of information on national legislation and practices upon request from interested parties in other Members, for instance through enquiry points established for this purpose, and statistical reporting. The general remark has been made that any requirements relating to the provision to other governments of information on rules and procedures should apply only to the extent that such rules and procures are within the scope of a transparency agreement. Attention has been drawn to the distinction between the use of notification and that of publication or availability of laws and regulations (summarized under item III in document WT/WGTGP/W/32).

(i) Notification of national legislation

93. A suggestion has been made that Members should be required, on request, to provide relevant information about their laws, regulations, procedures and practices affecting the implementation of a transparency agreement.[210] The possibility of using the relevant provisions in GATT 1994 Article X and GATS Article III for purposes of a transparency agreement has also been mentioned. With regard to notification of information on basic laws and regulations and any amendments thereof, a suggestion has been made that the relevant information about the laws and regulations be provided to the WTO Secretariat, which should then make it publicly available through an electronic medium.[211] In response, a concern has been expressed that notification of all national laws, regulations and administrative guidelines, including those of sub-central and other levels of government covered, might prove to be unduly burdensome[212].

[207] GPA Article XVIII:2(c).
[208] GPA Article XIX:2.
[209] GPA Article XIX:4.
[210] WT/WGTGP/W/26, Article 12; WT/WGTGP/W/27, Article V:3.
[211] WGT/WGTGP/M/10, paragraph 52; WT/WGTGP/W/26, Article 11.
[212] JOB(99)/6782, paragraph 123.

94. It has also been suggested that Members should be required to provide a list in one of the WTO languages of the relevant generally applicable instruments[213], but not copies of each and every law and regulation.[214] There has also been a suggestion regarding the use of checklists or questionnaires to obtain relevant information on the responsiveness of national laws and regulations to the requirements of a transparency agreement. A further point that has been made in this connection has been that any requirements for notification should apply only to matters that fell within the scope of a transparency agreement, and otherwise should not apply to market access issues.[215] The point has been made that a requirement to notify information on national legislation, regulation and administrative procedures might prove burdensome for some Members, for instance, if it included relevant information at the sub-central level, and also had to be notified in a WTO language. Particular concerns have been expressed about sharing of confidential information.[216]

(ii) Enquiry points

95. With reference to the establishment of enquiry points, it has been suggested that each Member should establish enquiry point(s) and notify its details to other Members.[217] Other suggestions in this connection have been that there should be a single access point for obtaining information and it should be free of charge.[218] On the other hand, the point has been made that the establishment of a single enquiry point might require coordination between different government departments and agencies which might present some difficulties for national authorities.[219] The issue of enquiry points has also been taken up in relation to item III as noted in document WT/WGTGP/W32.

(iii) Information on contract awards

96. The main discussion on this issue has been reflected under item VII of the present note. The suggestion has been made that the government of an unsuccessful tenderer might be entitled to seek information on the contract award in question from the government whose entity conducted the procurement.[220] Such information could be limited to how the commitments on a transparency agreement are being complied with in the contract award process[221]. On the other hand, the view has been expressed that the provision of such post-contract award decision may not be necessary in a transparency agreement, the scope of which will not extend to market access.[222]

(iv) Statistical reporting

97. A view expressed on this matter has been that statistical reporting should not be an obligation in a transparency agreement, but that governments may provide relevant information on a voluntary basis.[223]

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[213] WT/WGTGP/W/26.
[214] JOB(99)/6782, paragraph 123.
[215] JOB(99)6782, paragraph 126.
[216] JOB(99)6782, paragraph 123; WT/WGTGP/M/10, paragraph 52.
[217] JOB(99)5239, Part III:2.1-2.4; WT/WGTGP/W/27, Article V:3-5; WT/WGTGP/W/26, Article 14.
[218] WT/WGTGP/M/10, paragraph 51.
[219] WT/WGTGP/M/10, paragraph 51.
[220] JOB(99)/6782, paragraph 123.
[221] JOB(99)/6782, paragraph 123.
[222] JOB(99)6782, paragraph 123.
[223] JOB(99)6782, paragraph 125; WT/WGTGP/M/10, paragraph 53.

XI. WTO DISPUTE SETTLEMENT PROCEDURES

(a) Information on provisions in existing international instruments and national procedures and practices

98. Under the GPA disputes between Parties are subject to the procedures of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.[224] Dispute settlement procedures are applicable to all the rules of the Agreement. Because of the area covered and of the plurilateral nature of the Agreement, GPA provisions on dispute settlement contain a number of special rules or procedures, for instance on composition of panels, time-periods for panel proceedings and disallowing cross-retaliation in case of disputes arising under other WTO Agreements.[225] Moreover, under the GPA, the DSB has the authority to authorize consultations among parties to the dispute regarding remedies when withdrawal of violating measures is not possible.[226] By their nature, the issue of government-to-government dispute settlement does not arise in the other two international instruments.

(b) Discussions in the Working Group

99. It has been said that the approach to the application of government-to-government dispute settlement in a transparency agreement should reflect the general approach adopted in the WTO. WTO dispute settlement procedures applied to the provisions in the Agreement Establishing the WTO and transparency-related rules and other procedural disciplines in other WTO agreements, for instance GATT Article X.[227] The view has been held that WTO dispute settlement procedures are intended to guarantee the integrity and consistency of the WTO system and to create confidence in it. Without clear provisions on dispute settlement, a future agreement would not have any merits.[228] An enforcement mechanism is necessary in order to ensure that all Members have a consistent understanding of what their commitments are under an agreement.[229]

100. Three of the draft texts of an agreement presented contain proposals suggesting that consultations and settlement of disputes with respect to any matter affecting the implementation and operation of the Agreement should follow the provisions of GATT Articles XXII and XXIII and GATS Articles XX and XXIII, respectively, as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes under WTO Agreements.[230] Two of these proposals set out provisions which take into account the specificity of government procurement disputes, suggesting specific provisions in relation to the composition of panels[231] and the non-applicability of decisions of a panel or the Appellate Body regarding the inconsistency of a measure with respect to prior contract awards.[232]

101. On the other hand, comments have been made that the question of whether or not there should be a link between WTO dispute settlement procedure and a future agreement would depend on the nature of the obligations and their substance.[233] Regarding the nature of obligations, the view has been expressed that provisions subjecting a transparency agreement to dispute settlement procedures would not be necessary if its obligations would be of the 'best-endeavours' type since any decisions reached by the Dispute Settlement Body under such an agreement could not be enforceable[234] An

[224] GPA Article XXII:1.
[225] GPA Article XXII:5, 6 and 7.
[226] GPA Article XXIII:3
[227] JOB(99)/6782; WT/WGTGP/M/10 and 11.
[228] WT/WGTGP/M/11.
[229] JOB(99)/6782.
[230] JOB(99)5803; WT/WGTGP/W/26 and 27.
[231] WT/WGTGP/W/26 and 27.
[232] WT/WGTGP/W/27.
[233] JOB(99)/6782; WT/WGTGP/M/11.
[234] WT/WGTGP/M/11.

agreement on transparency could be in the form of guidelines or a code. A further view has been that WTO agreements and DSU are part of the single undertaking. If WTO dispute settlement procedures were to apply to a future transparency agreement, it would be necessary to ensure that it was incorporated in the single undertaking.[235] A further suggestion has been that Article X of GATT could be the basis for dispute settlement in cases involving violation of obligations on transparency.[236]

102. Questions have been asked seeking clarification on the types of measures that would be the subject of a WTO dispute settlement and in what circumstances the WTO dispute settlement procedures would apply,[237] for instance in relation to obligations on scope and definition, procurement methods or time-periods in a transparency agreement.[238] Moreover, a comment has been made questioning the application of dispute settlement procedures with significant results in the absence of commitments on market access.[239] Finally, comments have been made expressing the view that it would be premature to consider the applicability of dispute settlement procedures before the elements of a transparency agreement have been more clearly identified and the rules have been prescribed.[240]

103. By way of an alternative to the WTO dispute settlement mechanism, one suggestion has been that implementation of the rules could be ensured through a peer review mechanism in the committee administering the agreement. Another view has been that domestic review mechanisms existing in Members provide an adequate mechanism to address disputes related to transparency in government procurement.[241]

104. The following questions have been asked regarding the application of specific aspects of WTO dispute settlement procedures: how would suspension of concessions be envisaged under a transparency agreement[242]; whether DSB decisions concerning a breach of transparency obligations could apply retroactively; whether national legislation would need to be adapted to take account of the application of WTO dispute settlement procedures[243]; and whether there should be provisions regarding non-violation complaints.[244] One observation has been that, in terms of paragraph 3 of the DSU, any decisions under the DSU would not alter the rights and obligations of Members.[245]

105. The matter of the relationship between dispute settlement procedures and domestic review mechanism have been addressed in two of the draft texts of an agreement presented. One proposal suggests that WTO dispute settlement procedures should apply to decisions of domestic review bodies.[246] Another proposal suggests provisions encouraging the use of domestic review procedures before the invocation of WTO dispute settlement procedures. This proposal also suggests that all available formal judicial remedies under domestic laws against the inconsistent measure should be exhausted before WTO dispute settlement procedures can be invoked.[247] Another view has been that the WTO dispute settlement procedures should not give rise to situations in which the procurement

[235] WT/WGTGP/M/11.
[236] WT/WGTGP/M/11.
[237] WT/WGTGP/M/10 and 11.
[238] WT/WGTGP/M/11.
[239] JOB(99)/6782; WT/WGTGP/M/11.
[240] JOB(99)/6782.
[241] JOB(99)/6782.
[242] WT/WGTGP/M/11.
[243] JOB(99)/6782.
[244] WT/WGTGP/M/11.
[245] WT/WGTGP/M/11.
[246] WT/WGTGP/W/26.
[247] WT/WGTGP/W/27.

decisions of government authorities could be overturned by recourse to them.[248] This matter is further discussed under item VIII of the present note.

XII. TECHNICAL COOPERATION AND SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

A. TECHNICAL COOPERATION AND SUPPORT FOR CAPACITY-BUILDING

(a) Information on provisions in existing international instruments, activities of international intergovernmental organizations and national practice

106. The UNCITRAL Model Law and the World Bank Guidelines do not have specific provisions related to technical cooperation. The obligations of GPA Parties in this respect are set out in Article V of the Agreement under which developed countries are required to provide technical assistance which they may deem appropriate to developing countries. The provision of technical assistance is upon request, on mutual agreement between the Party making the request and the donor Party. The types of assistance envisaged in the GPA include the solution of particular technical problems relating to the award of a specific contract, translation of qualification documentation and tenders made by suppliers of developing countries into an official WTO language and resolving any other problems in the field of government procurement.[249] There are also specific provisions for technical assistance to least-developed countries. These require developed country Parties to provide assistance to potential tenderers in such countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers, and likewise assist them to comply with technical regulations and standards relating to products or services which are subject of the intended procurement.[250]

107. An overview of technical cooperation activities of IGOs (intergovernmental organizations) in the area of government procurement is contained in a note by the Secretariat (WT/WGTGP/W/29). This note, which has been prepared in response to a request by the Group in 2000[251], describes in broad terms the main features of the assistance available and gives examples of activities based on the relevant information that has been made available to the Group or elsewhere in the WTO. In response to an earlier request by the Group[252], information was sought by the Secretariat on the relevant activities of ten IGOs (UNCITRAL, OECD, the Asian Development Bank, the African Development Bank, APEC Government Procurement Experts Group, the European Bank for Reconstruction and Development, ITC, UNDP, the World Bank and UNOPS) and was circulated to the Group in 1998 in documents WT/WGTGP/W/20 and Addenda 1 to 9.

108. In light of the information available to the Group, the following appear to be the major aspects of technical cooperation provided by the IGOs: ensuring the proper application of the principles and rules of the organization in question by interested governments; facilitating participation in activities aimed at the development of international disciplines and rules on government procurement to be agreed by governments pursuant to the more general objectives of the respective international or regional agreements or arrangements; providing support to procurement reform activities in individual countries by establishing or improving the regulatory framework of procurement in individual countries, particularly from the perspective of ensuring that such countries are aware of the standards and the principles that are codified in the existing international instruments on government procurement; and strengthening and supporting public procurement institutions to

[248] JOB(99)782, paragraph 102.
[249] GPA Article V, paragraphs 8-10.
[250] GPA Article V:13.
[251] GPA/M/10.
[252] GPA/M/5.

increase their capacity.[253] The latter forms of technical cooperation relate to the formulation of new, or the improvement of existing, laws, regulations, administrative guidelines and procedures and tender documents; and supporting the establishment or reinforcement of public procurement offices and agencies. Furthermore, assistance to the development of human resources to build up and to sustain capacity in the area of public procurement is provided in the form of training of procurement officials and the organization of workshops, seminars and symposia. Application of information technology to government procurement has recently become an another important area of technical cooperation.[254]

109. A number of Members have shared information on their past and future initiatives relating to technical cooperation in the area of government procurement. A submission by one Member gave some of the reasons it provides technical assistance in the area of government procurement.[255] By way of contribution towards the commitment undertaken pursuant to Doha Declaration, several new initiatives and programmes have been planned by the Secretariat as well as individual Members..[256]

(b) Discussions in the Working Group

110. The discussions in the Working Group have related to both technical cooperation and support for capacity-building before and as part of a transparency agreement. This note focuses on the latter aspect.

111. The view has been expressed that ensuring compliance with the rules and requirements of a future transparency agreement might require changes in national rules and procedures and building up of new institutions in individual countries. Technical cooperation and support for capacity-building would help in responding to some of the administrative and technical challenges in fulfilling the obligations in a transparency agreement.[257] As regards the types of areas in which technical cooperation and support for capacity-building would be beneficial, the following have been mentioned: development and improvement of national legislation and procedures[258]; institution building[259]; access to information by suppliers including establishment of enquiry points, in particular provision of information to developing country suppliers as to what entities in developed countries usually procure[260]; provision of information on national legislation and procedures[261]; application of information technology including assistance related to hardware, software and the expertise necessary to disseminate procurement information[262]; identifying ways in which suppliers in developing countries and small and medium-sized enterprises could participate in procurement by government entities in developed countries[263]; training[264]; divulging information on how government procurement could influence employment and development in general[265]; technical advice and other experience-sharing activities such as twinning between developed and developing country agencies and study tours.[266]

[253] WT/WGTGP/W/29, Section I.
[254] WT/WGTGP/W/29, Section II.
[255] WT/WGTGP/W/18.
[256] WT/WGTGP/M/14, paragraphs 73 and 68.
[257] WT/WGTGP/M/14.
[258] JOB(99)/6782; WT/WGTGP/W/27; JOB(99)5239.
[259] JOB(99)/6782; WT/WGTGP/W/27.
[260] JOB(99)/6782; WT/WGTGP/W/27.
[261] WT/WGTGP/M/14, paragraph 70.
[262] JOB(99)/6782; WT/WGTGP/W/26; WT/WGTGP/W/27; WT/WGTGP/M/14, paragraph 70.
[263] WT/WGTGP/M/14, paragraph 64.
[264] JOB(99)/6782; WT/WGTGP/W/27; JOB(99)5239.
[265] WT/WGTGP/M/14, paragraph 64.
[266] WT/WGTGP/M/14, paragraphs 70 and 71.

112. The Working Group has also addressed the issue of the types of provisions on technical cooperation and support for capacity-building that should be included in a transparency agreement. One suggestion has been that the relevant provisions should match the specific requirements in a transparency agreement. In this connection, reference has been made to the provisions of Article 66.2 of TRIPS and Article 67 of TRIPS in terms of which developed country Members should make available technical and financial cooperation, on mutually agreed terms, in response to requests from developing country Members.[267] A further suggestion has been that a transparency agreement should specify the areas in which technical cooperation and support for capacity-building could be provided and the form it might take.[268] The draft texts of an agreement presented contain provisions on technical assistance. According to these proposals, technical assistance should be provided on request[269]; on mutually agreed terms and conditions[270]; and specify the areas in which such assistance could be provided.

113. With respect to the modalities, the view has been expressed that technical assistance and support for capacity-building be based on the needs and requests to be identified by the Members that face challenges in meeting the requirements of a transparency agreement.[271] It has also been suggested that the committee to be established under a transparency agreement should have procedures in place to monitor and assess technical assistance on an ongoing basis.[272] Another suggestion made has been that a framework should be developed under a transparency agreement for keeping track of and rationalizing the various technical assistance activities at the bilateral, regional and multilateral levels.[273] In response, it has been said that establishment of bureaucratic structures in this respect should be avoided.[274]

B. SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES

(a) Information on provisions in existing international instruments, activities of international intergovernmental organizations and national practice

114. The UNCITRAL Model Law and the World Bank Guidelines do not have specific provisions related to special and differential treatment. The provisions of Article V of the GPA on special and differential treatment mainly relate to obligations of developed countries and agreed exclusions for developing countries from the coverage. The first of these are aimed at promoting exports from developing countries. GPA Parties are required, in the preparation and application of laws, regulations and procedures, to facilitate increased imports from developing countries. Moreover, developed countries, in the preparation of their coverage lists under the GPA, are required to endeavour to include entities procuring products and services of export interest to developing countries.[275] As to the second of these, the agreed exclusions from coverage granted are in the form of exclusions from the rules on national treatment with respect to selected entities, products and services products. These exclusions can be granted to a developing country either at the time of its accession to the Agreement, i.e. in the negotiations of its Schedule of offers or through modifications of its coverage lists after its accession to the Agreement.[276] Moreover, exceptions from the non-discrimination obligation are allowed to developing countries participating in regional or global arrangements among developing countries.[277] In addition the provisions in Article V allow

[267] JOB(99)/6782.
[268] WT/WGTGP/M/10.
[269] WT/WGTGP/W/26; WT/WGTGP/W/27; JOB(99)5239.
[270] WT/WGTGP/W/26; WT/WGTGP/W/26; JOB(99)5239.
[271] WT/WGTGP/M/10,12 and 14.
[272] WT/WGTGP/M/10; WT/WGTGP/W/27.
[273] WT/WGTGP/W/27.
[274] JOB(99)/6782.
[275] GPA Article V:2 and 3.
[276] GPA Article V:4 and 5.
[277] GPA Article V:4 and 5.

developing countries at the time of their accession to the agreement to negotiate offset requirements for qualification of suppliers, a measure that is prohibited under the GPA .[278]

(b) Discussions in the Working Group

115. It has been emphasized that provisions on special and differential treatment are necessary in light of differences in capacity among Members in the area of government procurement and the special circumstances in developing countries.[279]

116. With regard to the question of how special and differential treatment should be addressed in a transparency agreement, one view has been that it should be reflected in the substantive provisions in order to allow developing countries to comply with them only to the extent that they are capable of undertaking them. The view has also been expressed that the issue of special and differential treatment may be more appropriately addressed once the elements of a future agreement are defined.[280]

117. As to the types of special and differential treatment in a transparency agreement the suggestions that have been made relate to:

- provision of transitional periods[281];
- the application of higher level threshold values[282];
- exemptions from coverage, for instance in relation to entities at sub-central levels or services.[283]

118. With regard to transitional periods, a suggestion has been made that developing countries and least-developed countries should be allowed respectively one year and two years during which they would apply the agreement on a best endeavours basis. There is also a suggestion that such a transition period could be combined with a standstill clause regarding any modifications to the laws and regulations in the countries that will benefit from it.[284]

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[278] GPA Article XVI:2.
[279] WT/WGTGP/M/10.
[280] JOB(99)/6782.
[281] WT/WGTGP/M/10 and 12.
[282] WT/WGTGP/M/10 and 12.
[283] WT/WGTGP/M/10 and 12.
[284] JOB(99)5792.