WORLD TRADE ORGANIZATION

WT/WGTGP/3
12 October 1999

(99-4277)

REPORT (1999) TO THE GENERAL COUNCIL

1. The Working Group on Transparency in Government Procurement was established by a decision at the WTO Ministerial Conference held in December 1996 "to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement".

2. The period covered in this report is November 1998-October 1999. The work of the Working Group up to November 1998 is described in the reports of the Working Group for 1997 and 1998 to the General Council (WT/WGTGP/1 and 2). The Working Group held formal meetings on 2425 February, 28 June and 6 October 1999 under the chairmanship of Ambassador Ronald Saborío Soto (Costa Rica). Reports on these meetings have been circulated in documents WT/WGTGP/M/79.[1]

3. At its meeting of 24-25 February 1999, the Working Group had a detailed discussion of transparency-related provisions in existing international instruments on government procurement and national procedures and practices. For its discussion of this item, the Working Group had before it the informal note by the Chair, entitled "List of Issues Raised and Points Made", listing the issues that had been raised, together with the points made on these issues, under each of the items that were discussed by the Group at its meetings held since November 1997. Under the relevant sections of the note, written contributions were presented by the delegations of the European Community on methods of procurement (Job No. 699), Norway on publication of information on national legislation and procedures (Job No. 1067), the United States on evaluation criteria and technical specifications (Job No. 1027) and Australia on rights and responsibilities of government as a buyer, value for money in government procurement, accountability and due process (Job No. 1043). As an auxiliary informal paper for the use of Members wanting to draw on it, delegations also had available to them a revision of the informal note by the Secretariat, "List of Proposals on Items III-VII of the Checklist" reflecting the proposals made on items III-VII in a succinct form, which identified the source of the different proposals and summarized the written and oral comments on these proposals. Also under this item the representative of Venezuela introduced a non-paper on transparency in government procurement and the fight against bribery (Job No. 481). In response to the requests by some delegations, it was agreed that the Secretariat would make available to delegations, upon request, the texts of the OAS InterAmerican Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. During the meeting, the Group also heard general statements made by a number of delegations expressing their views regarding the discussion in the General Council intersessional meetings of January and February 1999 on the subject of government procurement, the Singapore mandate and the relationship between the

[1] WT/WGTGP/M/9 to be circulated shortly

substance of the Group's work on transparency and the rules of the plurilateral Agreement on Government Procurement.

4. At its meeting of 28 June 1999, the Working Group reverted to its discussion of transparencyrelated provisions in existing international instruments on government procurement and national procedures and practices on the basis of a further revision of the informal note "List of the Issues Raised and Points Made" which had been updated in the light of the discussion at the previous meeting and the new papers submitted. Under the relevant sections in the note, written contributions were presented by the delegations of Poland on time-limits (Job No. 3777), Australia on transparency of decisions on qualification (Job No. 1781), Canada on contract award information (Job No. 3131) and the United States on domestic review mechanisms (WT/WGTGP/W/23). Points made were reflected in a revision of this document and also in a revised version of the "List of Proposals on Items III-VII of the Checklist". A communication from the Chairperson of the APEC Government Procurement Experts Group containing APEC non-binding principles of accountability and due process was also made available to the Group (WT/WGTGP/W/22). In the context of the discussion under the item on "definition and scope of government procurement", it was agreed that the documentation of the Working Party on GATS Rules relating to the subject of concessions would be made available to the Group (WT/WGTGP/W/25). Moreover, interested Members were invited to make submissions providing information on their national legislation and practices in regard to concessions from the perspective of government procurement.

5. At its meeting on 6 October 1999, the Working Group reverted to the issues before it on the basis of a further revision of the Chairman's informal note, "List of the Issues Raised and Points Made" (the latest version of which is attached to this report, Job (99)/5534). The Group also had before it non-papers submitted by the delegations of the European Community (Job No. 4519); Hungary, Korea and the United States (Job No. 4510); Japan (Job (99)/5239); and Australia (Job (99)/5803), containing draft texts of an agreement on transparency in government procurement. The Group received a communication from the Chairperson of the APEC Government Procurement Experts Group, forwarding the APEC non-binding principles on government procurement recently developed by the Experts Group (WT/WGTGP/W/24).

6. The IMF, the World Bank, the United Nations represented by the United Nations Commission for International Trade Law (UNCITRAL), UNCTAD and the ITC have observer status in the Working Group. During the period covered in this report, the Working Group considered requests for observer status from OECD, SELA and OIC (the Organization for Islamic Conference) and agreed to revert to these requests in light of the consultations that are being held on this matter by the Chairman of the General Council.

ATTACHMENT

JOB(99)/5534
Working Group on Transparency
in Government Procurement

24 September 1999

LIST OF THE ISSUES RAISED AND POINTS MADE

Informal Note by the Chair

Fifth Revision

1. This note attempts to set out the issues that have been raised, together with the points made on these issues, under each of the items that were discussed by the Working Group at its meetings of 34 November 1997, 19-20 February 1998, 22 June 1998, 8-9 October 1998 and 2425 February and 28 June 1999. This nonpaper is without prejudice to the position of any delegation and, in particular, to whether the Working Group would decide to include or exclude any particular aspect addressed in it from the elements that it will develop for inclusion in an appropriate agreement.

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DEFINITION AND SCOPE OF GOVERNMENT PROCUREMENT

1. It has been recalled that the mandate of the Group is confined to issues of transparency in government procurement practices. The view has been expressed that a distinction should be made between obligations on transparency and market access commitments in the area of government procurement. As regards national practices limiting market access, their transparency but not their substance should be covered. The view has also been held that rules on transparency in government procurement should only apply on a nondiscriminatory basis and obligations on transparency should only be applicable to the extent that market access for foreign supplies and suppliers was permitted by domestic law. For example, procurement from local markets, to be paid in local currency, might be distinguished from procurement from international markets, for which foreign exchange was available. The question has been asked whether transparency of procurement processes would be of any interest to foreign suppliers when access was reserved to domestic suppliers. It has also been said that the application of the rules of a transparency agreement to procurements, open only to domestic suppliers, would be unduly burdensome.

2. Another view expressed in this connection has been that transparency disciplines should apply to government procurement practices as broadly as possible. One of the purposes of developing rules on transparency was to create national procurement systems that were not only transparent but also perceived to be transparent; if the scope of requirements on transparency would be limited to open procurement markets, procurement systems would not be seen to be transparent. It was in the interest of all concerned, domestic as well as foreign suppliers and entities, that information on what procurement was open to international competition and what was not should be readily available to all. The view has also been expressed that the distinction that had been suggested would give rise to an imbalance in rights and obligations since transparency obligations would apply more widely in those Members whose procurement markets were more open to international competition; the distinction would also narrow the scope of a transparency agreement. Moreover, the point has also been made that, given the variety of ways by which market access was limited in national practices, for example in the form of absolute exclusions of foreign suppliers and supplies, price preferences or the awarding of contracts to foreign suppliers only in the absence of competitive bidding from domestic suppliers, it would be technically difficult to identify those government practices that should be exempted from transparency obligations. It has also been said that, if the underlying reason for the suggestion to limit the application of transparency disciplines to open procurement markets was concerns about excessive burdens, these concerns should be addressed in their own right in the course of the Group's work.

3. As regards the issue of the definition and scope of government procurement, a distinction has been made between the definition and scope that should be used by the Working Group for working purposes and those which might be used to govern the scope of application of the elements to be developed for inclusion in an appropriate agreement. In regard to the former aspect, a view has been expressed that a broad approach, without preconceived limitations, should be employed, sufficiently wide to accommodate the differing meanings and levels of detail given to the term "government procurement" in national legislation and practices in individual Members and compatible with innovative procurement procedures and new types of government structures. This would enable the Group to study the full range of issues relating to an eventual agreement on transparency in government procurement and, as regards the latter aspect referred to above, to develop a more exact definition for the purposes of the scope of an eventual agreement on transparency. Another view expressed has been that there would be an interrelationship between the scope of a transparency agreement and the level of detail that its elements would contain. A transparency agreement, incorporating simple and straightforward core principles, could have a very broad coverage. It has also been said that the work of the Group on this issue would need to reflect the realities of procurement practices in individual countries in order to guarantee an effective implementation of an

eventual agreement. In this connection, a range of issues that would need to be taken into account has been identified. These are summarized below.

4. It has been suggested that a useful way of approaching these issues was to draw a distinction between the following questions:

- Who is doing the procuring?
- What is being procured?
- What types of transactions are covered?

B. WHO IS DOING THE PROCURING?

1. In regard to the first of these questions, who is doing the procuring, the following views have been put forward:

- entities at all levels of government, including at sub-central levels of government and enterprises owned or influenced by government, might be covered by a transparency agreement;
- the rules of a transparency agreement should extend to procurement by entities at the central and sub-central levels of government;
- the degree of coverage of sub-federal entities should take account of differences in government structures;
- the rules of a transparency agreement should only extend to procurement by entities at the central or federal government level. It would be difficult to frame international rules that would ensure transparency at sub-central levels in countries with complex government structures. In countries with federative administrative systems, the authority of federal governments to undertake obligations on transparency in respect of entities at the state or local levels of government equivalent to those of the central government level might be limited by the constitution. Another view expressed has been that a limitation of the obligations of a transparency agreement only to central government level would give rise to an issue of equity among countries with different government structures. A further point made has been that a number of provisions in various WTO agreements, for instance GATS Article I:3(a)(i), addressed the issue of obligations undertaken with respect to sub-central levels of government;
- the coverage of state enterprises should depend on how they were operated. One view that has been expressed is that public enterprises required to run on the basis of the same economic considerations as private enterprises should not be subject to requirements on transparency, at least where they did not fall within the ambit of GATT Article XVII. Another view has been that a distinction should be drawn between state enterprises that operated in a competitive environment and others, even if run on the basis of commercial considerations;
- in the light of experience, consideration might be given to extending the coverage further, for instance to public enterprises.

2. It has also been suggested that, in defining the scope of a transparency agreement, the Group would need to define criteria for determining when an entity should be considered as one engaged in government procurement for the purposes of a transparency agreement. For example, it has been

suggested that government ownership of less than 50 per cent should mean that it was excluded. It has also been suggested that account should also be taken of national legislation which conferred on entities the legal right to conduct government procurement activities or gave governments the power to exercise control over the procurement decisions of entities and enterprises.

3. Another suggestion has been that the substance of a relevant provision should determine the scope of the application of the specific requirements in a transparency agreement. For example, requirements on publication of laws and procedures might be applied across the board to entities at all levels of government.

C. WHAT IS BEING PROCURED?

1. In regard to the question of what is being procured, the suggestion has been made that the scope of a transparency agreement might extend to all goods and services and any combination of goods and services. It has been said that Article I of the plurilateral Agreement on Government Procurement might be a useful reference in the discussion regarding this aspect of coverage. The view has also been expressed that the scope of a transparency agreement should extend only to the goods sector.

2. With respect to the use of threshold values in determining the coverage of a transparency agreement, the view has been expressed that, in principle, the coverage of a transparency agreement should not be limited to contracts above a certain threshold level, but that certain provisions might be more flexibly applied for smaller contracts. Also, it would not be appropriate to exclude low-value procurement from the requirements relating to the provision of information on national legislation or to procedures for the qualification of suppliers on the basis of threshold values. On the other hand, requirements on the publication of tender notices, particularly in a foreign language, might be relatively less strict for low-value procurement. Suggestions have also been made that transparency obligations should only apply to procurement above certain threshold levels in order to avoid burdensome procedures and costs related to publication of all procurement opportunities and that the work of the Group should take account of national practices in this respect. Minimum threshold values could vary according to the level of government and be used for defining the scope of application of the rules to entities at sub-central levels of government. The suggestion has also been made that thresholds might differ according to the level of development of Members.

D. WHAT TYPES OF TRANSACTIONS ARE COVERED?

1. As regards the issues relating to what types of transactions should be covered, it has been suggested that acquisition by any contractual means, including, for example, through lease or rental, might be covered. Questions have been raised as to whether, and, if so, to what extent, concessions and build-operate-transfer (BOT) contracts should be covered. The point has also been made that privatization should not be covered.

2. Concerning concessions - in the sense of the grant of certain exclusive rights by a government to a private party for a set period of time in order to produce a product or offer a service to the public on its behalf (for example for building and operating motorways or airports) - one view expressed has been that government consumption of certain services (for instance, contracts awarded to private companies for the provision of cafeteria services or cleaning services in public buildings), although sometimes referred to as concessions, should more appropriately be considered as government procurement and should, therefore, be addressed in the discussion of definitions and scope of a transparency agreement. A further view has been that, even if not considered as government procurement transactions *per se*, concessions should be addressed under the scope of a transparency agreement to the extent that principles of transparency should apply to the procedures used for the award of concessions.

3. The question has been asked whether concessions were more properly treated as a matter of investment or the supply of services on behalf of the government and, therefore, should be covered under the scope of other relevant agreements or initiatives. Those concessions that fell within the definition of GATS mode three supply of services might be subject to the disciplines of GATS Article III. In this connection, it has also been said that GATS Article III would not apply to concessions that were not within the scope of GATS Article I.

4. The view has been expressed that concessions should not be included in the coverage of a transparency agreement. Rules which governed concessions and government procurement were separate sets of legislation in national practice. National legislation on government procurement did not apply to procurement by private companies that operated concessions granted by a government. In this regard, the following comparisons between government procurement on the one hand and concession-granting, awarding of BOT (build-operate-transfer) contracts and privatization on the other have been made:

- with regard to definitions, government procurement was a procedure intended to regulate the selection of contractors for the supply of goods, the execution of works and the provision of services. The granting of a concession took the form of a unilateral act of the State giving a private party the right to manage, on its behalf, facilities, properties, public works or resources that were under government ownership or to offer a public service that was within the exclusive competence of a government, for example for mining or exploitation of natural gas. In the area of public procurement, no such authorization was given to a private party supplying the service. Privatization involved a sale of a state-owned company or assets;

- with regard to legal form, government procurement was made effective through an administrative act of the procuring entity. Concessions and privatization were made effective through a decree of the executive power at the level of the head of government or State, and, in some cases, subject to authorization by the legislature;

- with regard to subject-matter, government procurement covered goods, public works and services; concessions covered public works or services; and privatization covered state corporations, property and assets;

- in the case of concessions, the State regulated the operation of the services under concessions, set and controlled the prices that were paid by the public for those services, defined the rights of users and ensured the effectiveness and continuity of the services provided. In government procurement, suppliers offered bid prices based on their own calculation of estimated costs and profits;

- concessionaires were considered as owners of the goods affected to the exploitation of the services during the period of concessions, whereas procurement contractors did not have ownership of the procured goods, services or works carried out;

- with regard to the methods, open, restrictive or limited tendering methods were used in the area of government procurement. Open, restrictive or limited tendering or auctioning were used in the granting of concessions. Public sale or auctioning and liquidation of debt in return for a share of the company were the methods used in privatization;

- as regards the application of the GPA, procurement by concessionaires listed in Appendix I was covered but the granting of a concession was not. The act of privatization was not covered but enterprises in which government control or

influence had been withdrawn through privatization could be excluded from the coverage of the GPA;

- as regards spending of funds, concessionaires were responsible for providing the economic resources necessary for the expenses related to the operation and exploitation of concessions, whereas the governmental authorities disbursed the state funds related to government procurement transactions or the execution of public works contracts. Whether a service provided was a government procurement or a concession was related to the question of who had the financial liability;

- governments did not necessarily enter into contracts with private parties in the process of granting concessions;

- a BOT contract could be considered as a form of concession. The distinction between these two types of government action should be clarified;

- in general, concessions took the form of monopolies. However, more than one concession could be granted for the operation of a public service, for example for different endusers, regions or types of exploitations. Contracts for the procurement of goods, services and works were awarded to one supplier who might use subcontractors to carry out parts of the contract;

- a distinction should be made between the granting of a concession or concluding a BOT contract and transactions entered into by the concessionaires or BOT contractors subsequent to the granting of concessions or awarding of BOT contracts;

- in some countries, only national companies were allowed to operate concessions;

5. It has been suggested that Members should provide information on national legislation and practice as regards concessions in their countries. A view has been expressed that the issue of concessions raised complex questions to which the answers were not clear as yet. It has been said that some concessions could be outside the scope of a government procurement. Nevertheless, the Group should maintain a broad approach to their coverage at this stage, pending further study of the issue. In this connection, reference has been made to the information-gathering activities in the GATS Rules Group.

E. OTHER MATTERS RELATING TO DEFINITON AND SCOPE

1. The issue of the exceptions that might be allowed to the basic coverage of a transparency agreement has been raised. One suggestion has been that there may be reason to allow the exclusion of those areas that track general exceptions in GATT 1994, such as national security exceptions. It has also been suggested that exceptions on development grounds might be envisaged. The view has been expressed that the question of permissible exemptions was better left for discussion at a stage when a better idea of the general definition that might be employed would be available.

2. In regard to developmental aspects, in addition to the points reflected above, the general point has been made that the function of national laws in taking into account social and developmental needs, for instance promotion of small and medium-sized enterprises, balanced regional development or technological development, should be considered in the definition of government procurement to be employed in a transparency agreement. In this connection, it has been said that a transparency agreement should not include provisions setting out the objectives that should be sought through government procurement policies. Rather, the purpose of a transparency agreement should be to ensure that Members provided transparency of the domestic objectives sought through the use of their

various government procurement policies. On the other hand, it has been said that a Member should not be required to provide transparency of the objectives sought in procurement which was open only to domestic suppliers. A transparency agreement should not have provisions that could limit the scope of procurement policy objectives or decisions.

II. PROCUREMENT METHODS

1. The point has been made that, from a transparency perspective, the method of procurement employed was less important than ensuring that it conformed with basic principles on transparency and maximized the level of competition feasible under the particular circumstances. The point has also been made that the method of procurement used should not undermine the principles and objectives of a transparency agreement to encourage open and competitive regimes. Other views expressed have been that an eventual transparency agreement should aim at transparency with regard to the methods employed in different countries rather than seek to limit or modify those methods. According to these views, specific circumstances governing a given procurement dictated the choice of a particular method among alternative methods. Rather than prescribing which method should be the preferred method, a transparency agreement should allow procurement authorities to choose the best method for meeting the objectives of the procuring entity as well as in the interests of efficiency, competition and transparency. General principles of transparency should be developed with respect to the choice and application of procurement methods. Further disciplines might need to be developed to cater for the particular circumstances of individual methods. Whilst the methods used by WTO Members - at least for larger value contracts - mostly seemed to be based on the principle of tendering (open, selective, limited), they were not necessarily limited to this (e.g. purchase cards, electronic catalogues). In this connection, it has been said that setting forth provisions specifying the differences inherent between various procurement methods as regards transparency would allow more flexibility in the use of those methods.

2. The view has been expressed that the Group should consider the issue of procurement methods from the perspective of transparency. The Group's examination of the transparency aspects of procurement methods could focus on the following three categories: where information on the procurement opportunity and selection criteria was made publicly available to all interested suppliers; where a pre-selection of qualified suppliers was made and information was transmitted only to those suppliers; and where no information was made publicly available but the procuring entity negotiated with an individual supplier. Such a categorization, focused on transparency aspects, would avoid getting into the details of procurement methods. It has also been said that the method to be used in a procurement process should be specified in advance, for instance by giving a reference to the relevant provisions of the UNCITRAL Model Law. On this point, it has also been said that such a requirement might be too prescriptive since only a few countries had adopted the Model Law.

3. With respect to the main procurement methods used, the view has been expressed that open or international bidding in which there was no limit to the number of potential bidders was the most transparent method; selective procedures were justifiable where it would not be feasible or efficient to consider and evaluate a large number of potential bids, as long as all potential interested suppliers were given the same opportunity to seek access to information on a procurement and seek to be invited to bid. Another view has been that open and selective tendering should be regarded as equally transparent, provided selective tendering was conducted in accordance with the appropriate principles. One view has been that, while open tendering was the most transparent method, it might not be the most cost-effective, in particular in the case of complex procurements. As regards the third main procurement method, limited tendering (e.g. individual, sole-source, single-source or direct tendering), it has been suggested that, since information opportunities and selection criteria were not made publicly available, this method should only be used in justified and exceptional circumstances. International instruments and national practice commonly accepted a range of circumstances and conditions under which the use of limited tendering would be warranted. A further point has been that it might not be possible to provide information on procurement opportunities under each type of

tendering method. It has been suggested that general principles of transparency regarding the choice and application of procurement methods should be developed. Should those procedures be deemed inadequate, further elements on transparency could be developed to cater for the particular circumstances of individual procurement methods.

4. Based on the written and oral proposals, the following options and alternative approaches for addressing the issue of procurement methods have been identified. These various options and the comments made on them are as follows:

- Option 1. There should be sufficient flexibility to accommodate the differing procurement methods used in national practice, and the possibility of using methods which are not based on tendering should also be provided for. As such there should be no limitation on the choice of procurement method except limitations that exist in domestic legislation.

  It has been said that the scope of option 1 was too wide and would not contribute to the objective of improved transparency in government procurement.

- Option 2 – first alternative. Whilst wishing to ensure flexibility and providing for the use of methods which are not based on tendering, there should be a requirement that the method of procurement used should not undermine the principles and objectives of a transparent procurement regime.

- Option 2 – second alternative. Whilst wishing to ensure flexibility and providing for the use of methods which are not based on tendering, there should be a requirement: (i) that the procurement method used conforms with basic transparency principles [to be defined]; and/or (ii) that transparency is maximized at each stage of the procurement process for the particular method used.

  Views have been expressed supporting this option. It has also been said that the aim of the provisions of a transparency agreement should not be to determine the validity of the procurement methods chosen by entities but rather to guarantee that, when inherently less transparent methods were used, circumstances justifying their use should be made known to all interested parties. One view has been that this option would also take into account national practices that determined the choice of procurement methods based on threshold values.

- Option 3 – first alternative. As for option 2, first or second alternative. In addition, there would be a further requirement that methods which are considered to be inherently less transparent (e.g. single-source procurement or limited tendering) should only be used in exceptional and justifiable cases.

  Views have been expressed supporting this alternative.

- Option 3 – second alternative. As for option 3, first alternative, but the additional requirement would be further developed through the use of an illustrative list (examples which could be included in such a list are given in paragraph 24 below) of such exceptional cases.

  It has been said that this approach in this alternative was flexible enough to take account of the existing and any future procurement practices. It also provided safeguards against loopholes in transparency by the choice of the method used. From this perspective, this option should be the preferred way of dealing with the issue of

procurement methods. The use of methods, other than tendering, should be allowed only in narrowly defined circumstances because of their potential for circumventing transparency. Other views have been expressed supporting this option.

Questions have been asked regarding the treatment of those circumstances that might be envisaged in national legislation but not included in the illustrative list; whether the illustrative list would set some guidelines for justifying the use of limited tendering or would consist of an exhaustive list of all possible exceptional circumstances; and the difference in practice between the first and second alternatives of option 3.

- Option 4. There should be greater prescription as to the type of procurement method which can be used. For example, there could be a requirement that methods based on the so-called open and selective tendering procedures are used and that limited tendering is only used in exceptional and justifiable cases (with or without the use of an illustrative list as suggested in option 3, second alternative).

  It has been said that this approach was far too prescriptive regarding the types of procurement methods that could be used and did not sufficiently take into account diversity in the existing national practices.

5. Views have also been expressed stating that it would be premature to support any of the options above before the principles and objectives of a transparency agreement were clearly defined.

6. The following approaches to how limited tendering should be dealt with in a transparency agreement have been suggested:

- since the use of the method permitted procurement authorities to dispense with many of the procedural guarantees associated with transparency, a transparency agreement should set forth an illustrative list of the specific circumstances and conditions justifying the use of this method;

- provisions of a transparency agreement should not impinge upon the right of procuring entities to use this method in circumstances that dictated its use. Spelling out the exact circumstances and conditions justifying the use of this type of method might go beyond the scope of a transparency agreement. It had to be taken into account that governments had other policy objectives apart from transparency;

- while not limiting the circumstances under which limited tendering might be allowed, the Group should develop disciplines to be included in a transparency agreement to ensure that, when used in appropriate circumstances, limited tendering procedures should be employed in a way which maximized transparency at each stage of the procurement process;

- rather than describing in detail the circumstances justifying the use of limited tendering, disciplines should be developed ensuring transparency in the use of this method;

- a distinction might be made between a situation in which the purpose of using this method was precisely to avoid transparency, e.g. for national security reasons, and other cases where the purpose of using limited tendering was to meet needs that might arise from special circumstances of the procurement;

- a transparency agreement should not cover procurement not open to tendering.

7. A range of circumstances which might figure in an illustrative list or define the general circumstances under which limited tendering would be justified has been referred to. These are:

- for reasons of extreme urgency brought about by circumstances unforeseeable by the procurement authority (e.g. natural disasters); such circumstances should not be caused by the procuring entity itself, for instance as a result of its negligence;

- in the absence of responsive tenders, under tendering procedures which do not restrict competition;

- when tenders already submitted have been collusive;

- when it is clear at the outset of a procurement that only one supplier or a limited group of suppliers has the proprietary rights to goods or services being procured, for example procurements involving the protection of patents, copyrights or other exclusive rights, or for other technical or artistic considerations;

- in commodity markets where there may be no individual suppliers since the market is the supplier;

- in so-called "fire sales" where the procurement authority can realize exceptional savings at a one-time event (e.g. liquidation sales);

- when a product or a service is supplied by a supplier with a monopolistic position in the market;

- when a product or a service can only be procured in a specific geographical location or place of production;

- when a procurement is for research or experimental purposes and not for commercial use;

- for national security reasons;

- for other reasons which should be published in law or regulations.

8. Reference has also been made to the circumstances justifying the use of the limited tendering method contained in Article XV:1(a)-(j) of the plurilateral Agreement on Government Procurement.

9. With regard to ensuring that limited tendering, when employed, is used in a way which maximizes transparency, the following suggestions have been made:

- a procuring entity should generally seek more than one bid if circumstances permitted;

- a procuring entity should be required to document the specific circumstances giving rise to the need for such limited tendering;

- public notices of contract awards should disclose the specific circumstances and reasons for contacting a particular supplier.

III. PUBLICATION OF INFORMATION ON NATIONAL LEGISLATION AND PROCEDURES

1. The point has been made that transparency meant ensuring that information on procurement rules, practices and opportunities was made widely available in an easily usable form to all interested parties (and particularly potential suppliers), as well as ensuring the right of access to that information. Publication of information regarding the general environment in which public procurement took place and interested parties were expected to operate was an essential component of transparency. Publication of national legislation not only provided a clear roadmap for potential suppliers but also a check against arbitrary practices within the procurement regime. The resulting procedural certainty also reduced costs in the procurement cycle.

2. The point has also been made that there were two questions regarding this matter: the scope of the information that should be made available and in what way.

3. On the first issue, it has been said that there appeared to be two approaches to establishing the scope of the information that should be made available: a formal approach that would require, for example, that all laws, ministerial ordinances, administrative guides or internal rules and procedures should be published; and an approach that would consist of determining the substance of the information that should be made available, irrespective of the legal form. This second approach might be preferable since what was of importance was the substance of the information to be made available. The key substantive information that should be made available was that which defined what rules of general application had to be followed in determining participation in the tender and making the decision on the award of the tender and what remained at the discretion of the procuring entity. The second approach would have merit in that the objective of transparency would not be achieved if the publications that contained the relevant laws and regulations did not cover important aspects of national procurement practices and procedures.

4. It has also been suggested that all laws, regulations, judicial decisions, policy guidance, and administrative and other procedures on government procurement should be published promptly or be readily and easily accessible in a usable form to all interested parties, including potential foreign suppliers and other Members. Any changes to such laws and regulations should also be published promptly or generally made available through an accessible source. Concerning publication of administrative guidelines, it has been said that it might not be appropriate to publish information relating to internal procedures of government agencies since their disclosure might prejudice the position of a purchasing agency for instance in its negotiations with suppliers; rather, the relevant obligation should be limited to publication of administrative guides to the operation of the procurement systems. It has also been said that publication of regulations of each individual procuring entity would incur burdensome administrative costs.

5. In regard to the second issue, how the information should be made available, the following points have been made:

- the important point was that information should be made publicly available, not how it should be made available;

- a distinction should be made between publication of information and accessibility of information. It has been suggested that laws, regulations and measures having the force and effect of law should be published. Regarding judicial decisions, it has been stated that publication requirements in an agreement had to take into account the different ways of developing national legislation and procedures. For instance, in judicial systems where laws were developed on the basis of case law, judicial decisions could play a central role in defining national legislation and procedures;

- publishing information on judicial decisions, policy guidance and administrative guides could be onerous. But any judicial decisions that would have a bearing on procurement practices and that were not customarily published should be made accessible within the country;

- publication requirements could be met through publication in printed or electronic media. The choice should be left to the discretion of Members. There should be no mandatory provisions requiring the use of electronic media. It has also been suggested the two forms of publication should not be mutually exclusive.

6. The view has been expressed that publication obligations, including in the area of government procurement, already existed in the goods area under Article X of GATT 1994 and in the services area under Article III of the GATS. The provisions of these two Agreements which exempted government procurement from the scope of certain GATT 1994 and GATS obligations (Articles III:8(a) and XVII:2 of GATT 1994 and Article XIII of the GATS) did not apply to these transparency provisions.

7. The suggestion has also been made that information on national legislation and procedures should be provided at no more than cost. It has been said that the matter of fees charged was not within the ambit of a transparency exercise. Government entities should have the discretion to charge fees above cost price. However, any fees for provision of information on national legislation and procedures should be charged on a non-discriminatory basis.

8. The point has also been made in connection with the publication of laws and regulations that the obligation to publish should be limited to publication in a national language and should not involve burdensome and costly translation obligations. It has been stated that some domestic public agencies provided information on legislation in a foreign language or a summary of specific legislation in a WTO language.

9. The suggestion has been made that interested parties should know either where to go to locate this information, or who to ask. A transparency agreement might provide for Members to notify either the source of this information and/or to establish and notify contact or enquiry points (which could take the form of an Internet website), from which other Members and maybe interested suppliers could obtain explanations about national legislation and procedures, including information on the practical steps involved in tendering, any preferential treatment of national suppliers and domestic review mechanisms. In this connection, reference was made to the provision of Article III:4 of the GATS, and also to that of Article IV:2 of that Agreement which requires developed country Members, and to the extent possible other Members, to establish contact points to facilitate the access of developing countries suppliers to information. It has been stated that the feasibility of providing contact or enquiry points in respect of decentralized procurement systems, especially in federal States, would have to be studied carefully. Any obligations should be without prejudice to decentralized procurement systems. In this connection, the suggestion has been made that in decentralized national procurement systems a central office should be designated for keeping a list of the contact points at sub-central levels. One view in this respect has been that the establishment of enquiry points at subcentral levels might incur burdensome administrative costs.

10. In the discussion of this item, the relevance of the overall coverage of a transparency agreement has been recalled. In this regard, it has been suggested that the publication obligation should only relate to situations where access was open to foreign supplies and suppliers. The opposite view has also been expressed, with the argument that it would be essential to have information on any policies including preferences in favour of national suppliers in order to determine whether procurement markets were open to foreign suppliers. In respect of the term "foreign suppliers", the point has been made that in some national practices government procurement was used as an instrument for the

promotion of domestic supplies and suppliers and national treatment would not be granted to those suppliers who did not have a commercial presence in the country of the procuring entity.

11. The link between this item and that in Section X, concerning the provisions on notification of information to other governments under an appropriate transparency agreement, has been referred to.

12. A number of comments have been made on specific proposals put forward by Members as reflected in the note by the Secretariat entitled "List of Proposals on Items III-VII of the Checklist".

13. A non-paper synthesizing the alternative approaches that have been suggested in the Working Group has been circulated as Job No. 1067.

IV. INFORMATION ON PROCUREMENT OPPORTUNITIES, TENDERING AND QUALIFICATION PROCEDURES

1. The point has been made that advance information on government procurement opportunities enhanced the participation of potential bidders in a procurement procedure. Broad participation of bidders in the procuring process contributed to improved efficiency in government procurement. In order for the best level of participation from the market to be achieved, information about procurement opportunities must be available in notices of invitation to tender and in tender documents.

2. The point has also been made that information on procurement opportunities in notices of invitation to tender should be sufficient to allow potential suppliers to assess their interests in participating in the proposed procurement procedure and to seek tender documents; and that information in tender documents should be sufficiently specific to enable suppliers to prepare responsive bids if they participated in the procurement process. The application of these core principles would save efforts and resources of suppliers in preparing bids for procurements in which they did not have sufficient interest and of procuring entities in considering unresponsive bids.

3. It has been recognized that national practices concerning the amount of detail included, respectively, in initial tender notices and in the subsequent tender documentation, varied considerably and that it might not be necessary to have precise minimum requirements concerning their specific contents or to seek harmonization on this point. It would be sufficient for a transparency agreement to develop elements in the form of general principles.

4. In this connection, views have been expressed suggesting that the level of detail of information to be supplied might also vary among the different stages of tendering and procurement methods used. Whereas detailed information should be given under open procurement procedures, the requirements to publish tendering information in a widely available medium under selective tendering procedures should be flexible to enable tender documents to be sent directly to registered suppliers. Information provided to prequalified suppliers could be more specific than information in public notices available to all suppliers. It has also been said that, notwithstanding the flexibility regarding the amount of detail that should be provided in tender notices, certain basic types of information should be provided under all methods for the purpose of achieving maximum transparency whatever the method used. Certain minimum standard requirements, reflecting the core principles of transparency, should apply horizontally to all procurement methods.

5. In regard to tender documentation, it has been said that their contents should provide all information relevant to submitting responsive bids that was not provided in the tender notices. They should set forth the parameters for evaluating bids and awarding the contract, including requirements in respect of technical specifications and any preferences granted to national supplies and suppliers and on any other assessment criteria based on socio-economic considerations. It has also been said that the information contained in tender documents should be comprehensive enough to lead to the

submission of bids that would enable procuring entities to compare them and to allocate their resources efficiently.

6. The view has been expressed that rules on information on tendering opportunities in a transparency agreement should apply on a non-discriminatory basis but only in cases where national markets were open to foreign suppliers; otherwise domestic procedures would be applicable.

7. Another view expressed was that provision of information on procurement opportunities was an essential element of transparency in procurement irrespective of the entitlement of foreign suppliers to participate and that such prior information had benefits both from domestic and from foreign suppliers' perspectives. Points made regarding this view have been:

- the obligations of a transparency agreement should apply to all procurement within its scope, whether or not suppliers had access to procurement opportunities. The principle of non-discriminatory access to information would need to be observed regardless of any policies excluding foreign suppliers from access to procurement opportunities or the existence of preferences for domestic suppliers. The establishment of the conditions of competition and transparency in domestic markets was essential to achieving transparency at the international level;

- access to information on any policies, including preferences in favour of domestic suppliers, would allow suppliers to determine whether the procurement markets were in fact open to foreign suppliers. From the government's perspective, transparency in the extent to which markets were open would prevent further requests for information from foreign suppliers on market access matters. Such information would also benefit suppliers who would know in advance whether it would be worthwhile for them to prepare tenders;

- if the obligations on transparency applied only to the extent that foreign bidders were provided access to procurement markets, this would give rise to inequity among Members to a transparency agreement. The end result would be an agreement which would require those countries that had their markets fully open to foreign suppliers and had no rules in place regarding national preference to undertake a much greater level of obligations as regards transparency. On the other hand, other countries that had relatively closed markets and excluded foreign suppliers in a large number of sectors would take on lesser obligations;

- since a transparency agreement would not prevent government procurement from being limited to domestic suppliers, the rights of other Members would not be breached by a Member limiting transparency obligations to government procurement open to international competition because foreign suppliers would not have any interest in obtaining information on a procurement that was not open to them;

- a requirement for transparency in procurement, irrespective of the openness of markets, would result in a transposition of obligations on market access into a transparency agreement. The arguments in favour of transparency in all procurement would imply that all Members should be required equally to provide access to their markets since, by keeping their markets closed, they would assume lesser obligations on transparency. Any country was free to undertake greater obligations on transparency by opening its markets if it chose to do so;

- a decision to open a country's market was independent of the requirements of an agreement on transparency. The balance in a transparency agreement was to be found

in obligations with respect to transparency and not in those with respect to market access. In undertaking obligations on transparency, countries had to take into account their individual national practices;

- this matter was better dealt with in regard to the overall scope of an agreement (c.f. Section I);

- participants in the Working Group should be encouraged to provide information on their national practices in regard to the provision of information in respect of procurement not open to international competition.

8. The question has been raised as to whether openness would depend only on general criteria prescribed by law or whether it could depend on a case-by-case decision of the procuring authority. In this regard, the following views have been expressed:

- to the extent that procurement contracts would be decided on a case-by-case basis, it would be the prerogative of a government authority not to open a specific procurement contract to foreign suppliers;

- it would defeat the objective of a transparency agreement if the question of whether a given procurement would be open to foreign suppliers were to be decided on a caseby-case basis;

- in those countries where decisions to open procurement to foreign suppliers were made on a case-by-case basis, such decisions could be taken, either at the onset of a tendering process or at the time of the award of a contract. With the latter type of casebycase decision, it would be significantly non-transparent should a governmental authority decide to award contracts only to domestic suppliers. Disciplines should be developed in order to provide maximum transparency in those situations in which the decisions were taken on a case-by-case basis.

A. PUBLICATION

9. On advance information on tender opportunities, it has been suggested that there are two key issues: where the information can be found (publication) and content. With regard to where the information can be found (publication) by potential suppliers, the following points have been made:

- procurement opportunities and procedural requirements relating to those opportunities should be made known and be generally available to interested parties, including the general public and other Members, through an easily accessible source;

- the source used to make information on procurement opportunities generally available should be left to the discretion of WTO Members, but its level of availability should be proportionate to the likely level of interest in the procurement. In other words, where a procurement opportunity was likely to attract international interest, procurement opportunities should be published through a source which potential foreign suppliers and service providers had access to, as opposed, for example, to posting a notice in a town hall. It has also been stated that it would not seem necessary to have a requirement to publish tender notices in an international publication; rather, interested suppliers should be expected to keep track of national publications;

- publication of tender opportunities should be made available in printed and/or in electronic media. Printed media could be an official gazette or a national newspaper of wide circulation;

- electronic publication should be used where feasible and taking into account the level of development of individual WTO Members. The internet address of electronic publications could be made available. It has also been stated that electronic publication offered significant benefits in terms of both time and costs, and based on current trends would be used increasingly in the coming years (see also Section IX B);

- the choice should be available to each WTO Member to publish in the appropriate media and electronic publication should be an option rather than an obligation. This would permit account to be taken of the divergences in the capability to make use of electronic means of publication between WTO Members and between regions within a WTO Member and between suppliers;

- allowances should be made for systems by which information was furnished by private sector service providers acting on behalf of procuring entities;

- under limited tendering procedures where a procuring entity contacted the prequalified suppliers directly, advance publication of tender notices did not seem to be necessary;

- some Members' notices of invitation to tender and to prequalify were published also under selective procedures;

- requirements for publication of tender notices might be less strict for low-value procurements in order to avoid burdensome administrative costs;

- publication of tender opportunities should not be limited to contracts above a certain threshold level (see also Section I).

10. The view has been expressed that exceptions to the obligation to publish procurement opportunities (e.g. to take account of limited tendering in the case of some national practices) should only be permitted in exceptional and justified cases. These circumstances should be the same as those set out for the use of procurement methods which severely restrict competition. Some suggestions have been made concerning situations where publication should not be required. This could be the case for purchases below threshold levels and for purchases not made through open tendering procedures for instance for limited tendering. The point has been made that, in the latter instance, it would be important that information on how to qualify for selective tendering procedures be adequately available, and that post-contract award notices should be published. Another view has been that, for transparency reasons, publication of procurement opportunities should in principle not be limited to contracts above a certain threshold level.

B. CONTENTS OF INFORMATION

1. With regard to minimum requirements for the information to be published on procurement opportunities, the point has been made that, while national practices with regard to the amount of information to be included might differ, information on procurement opportunities in notices of invitation to tender and tender documents notices should be sufficient to allow potential suppliers to assess their interests in participating in the proposed procurement or in a qualification system and enable them to prepare responsive bids or proposals for qualification. Members should be able to decide whether the provision of information on procurement opportunities or its availability to interested parties through an accessible source should be done just through the use of tender notices, or whether the bulk of information should be contained in the tender documentation or be made available by other means.

2. The suggestion has been made that an illustrative list of the types of information that such documents should contain should be developed to provide at least:

regarding the procuring entity:

- full contact details (the name and the address) of the procuring entity (the buying department or agency, the location of the responsible office and the division or branch of the department or agency);

- coordinates of a contact point or document centre from which additional information including on technical and commercial requirements and any other relevant information or documents may be requested and obtained, the final date for making such requests and, if applicable, the cost of such information; unique reference number identifying the request in the department or agency's records;

regarding suppliers:

- any requirements relating to the supplier or service provider, for example economic or qualification requirements;

regarding the intended procurement:

- an identifiable description (nature) of the goods and/or services to be provided, together with their quantity or an indication of their extent;

- the place of delivery, site or place of performance of the service and, if applicable, the timelimit for delivery, completion or duration of the contract;

regarding evaluation of tenders:

- the procurement procedure envisaged to be used (open, selective, whether negotiations are involved, etc.);

- the criteria for the award of the contract including factors other than the price that are to be considered in the evaluation of tenders (economically most advantageous bid) in the evaluation of tenders;

- information on the existence of any conditions in favour of national suppliers in awarding contracts, such as price preferences, local content requirements or any other policies of discriminatory nature. In this connection, it has also been said that

provision of such information would not be necessary if a description of national preferences or discriminatory policies was already published in the Official Gazette;

- any technical specifications required;

- where applicable, the location, date and time of any public briefing on the requirements;

regarding submission, receipt and opening of tenders:

- the final date for the submission/receipt of tenders or requests to be invited to participate in a qualification system;

- the address to which submission of tenders or requests to be invited to participate in a qualification system must be sent;

- details of any language requirements in respect of submission of tenders;

- date and place of opening of tenders.

3. The view has been expressed that such a list might be excessively burdensome and costly, in particular in those countries in which the number of tenders issued by government entities was high.

4. In addition, it has been suggested that entities might publish, on a voluntary basis, a summary of information on their intended procurements at regular intervals. The point has been made that only those entities which could sufficiently plan their procurement activities ahead could have such procedures.

C. EVALUATION CRITERIA

1. With regard to the specification of criteria for the evaluation of tenders and awarding of contracts in public notices and/or tender documents, it has been said that all relevant evaluation criteria should be accessible to interested suppliers, whether through publication of procurement opportunities, specifications laid down in tender documentation, or by giving references to applicable laws and regulations. It has been recalled that the question of whether national preferences, or other policies underlying practices of a discriminatory nature should be part of such criteria, was not within the scope of the work of the Group. However, emphasis has been put on the importance of information on such national preferences and other measures in favour of domestic supplies or suppliers, for instance offsets, being made known in advance in the tender documents and/or tender notices. The point has been made that transparency in regard to the existence of preferences or other discriminatory requirements would enable potential foreign tenderers to determine whether they had an interest in entering a specific procurement process in spite of discriminatory national policies. Interested suppliers would only be able to distinguish between procurement opportunities that were reserved for domestic suppliers and those that were open to international competition if information on any discriminatory policies were made available to them in advance. Provision of information upfront on price preferences or qualification requirements favouring domestic suppliers would enable suppliers to gauge their interest and assess the real opportunity to win a contract. Such information would also allow interested suppliers to make the appropriate decisions in preparing bids that would be responsive to the conditions set out in this respect in tender documentation. By avoiding participation in procurement processes in which their bids would be ultimately dismissed, suppliers would save not only their own resources but also those of procuring entities. Moreover, the clear specification of requirements based on socio-economic considerations in the tender documentation would facilitate the implementation of such policies by providing transparency in respect of the nature of the socio-economic needs applicable to specific procurements.

2. One view has been that information on preferences to national supplies and suppliers need only be included in tender notices and/or tender documents when it was not adequately provided through laws or regulations of general application, either through setting out the relevant information or through an explicit reference to the applicable legislation. It has also been said that, according to national practice in one country, information on national preferences or other discriminatory policies were supplied in response to requests by individual suppliers. Another view has been that clear references to any national policies, including any preferences applied, should always be included in tender notices and/or tender documents. In this regard, the point has been made that the establishment of links between electronically published tender documents and relevant laws and regulations would enable suppliers to search easily for further information on any applicable discriminatory policies.

3. In regard to offsets, for instance domestic content, technology transfer, export earnings or similar requirements, the view has been expressed that, although procurement policies in many countries incorporated such requirements, they had the effect of distorting procurement decisions. It was important to ensure that such requirements were applied in a transparent manner. If used at all, they should form part of the qualification criteria rather than the criteria for evaluating tenders. Suppliers should be informed of the offset requirements laid out by the procurement entity at the outset, which should define how such requirements could be met, for example certain percentage of domestic content in total procurement or certain value of export earnings, before they participated in the bidding. Offset requirements that were used as part of evaluation criteria were inherently nontransparent because this would not give suppliers a clear indication at the outset of what requirements they would be expected to meet so that they could prepare responsive bids.

4. Another view has been that a requirement regarding offsets might go beyond transparency matters and appeared not to be a main element of transparency. The comment has also been made that, rather than an element of a transparency agreement, the provisions relating to offsets should be seen as measures against circumventing the non-discrimination principle. However, since a transparency

agreement would confer on Members an explicit right to use discriminatory measures, including conditions such as local content requirements, any such anti-circumvention provisions would not be warranted. A paradoxical result of more stringent obligations in a transparency agreement might be to encourage Member countries to make their procurement markets less accessible rather than be obliged to comply with obligations that might be too strict.

5. The point has been made that technical specifications were an important element of evaluation criteria. Only those bids that met the technical specifications included in the tender documentation were considered as responsive bids. The role of technical specifications in procurement processes would become even more significant in future with increasingly complex procurements. Technical specifications should avoid specifying one technology over others and should not be developed in such a way as to require the use of technology only available to a limited number of suppliers. Another view in this connection has been that in certain circumstances, for example advanced medical technology used in hospitals, entities should be allowed to specify their preferred type of technology in order to fulfil the objectives of a given procurement, provided that this was done in advance in notices of invitation to tender. Further views have been expressed that a transparency agreement should have provisions encouraging the use of performance-based specifications over those that were design-based; and wherever possible, basing technical specifications on existing internationally agreed or other relevant standards. Comments have been made questioning the relevance of the requirements to use performance-based specifications to transparency. It has also been said that any changes in technical specifications should be made known to all interested suppliers.

6. It has also been said that any changes in evaluation criteria during the course of the procurement should be communicated to all interested suppliers, or in the case of selective or limited tendering, to all suppliers participating in the procurement process.

D. CLARIFICATION AND MODIFICATIONS

1. With respect to clarifications of tender documents given by procuring entities to potential suppliers, it has been stated that any questions raised by interested suppliers should be responded to in good faith by the procuring entity. Any information provided in response to requests for clarification from one supplier should be transmitted simultaneously to all other suppliers participating in the procurement process. Another view has been that it would be impracticable to provide the responses to requests for information from suppliers that were received at different contact points disseminated around the country to all other suppliers participating in the procurement process. This might only be feasible in the case of high value procurements, for example in the context of projects financed under the World Bank loans, in which the number of participants were usually limited.

2. It has also been said that all potential suppliers or all participants in selective tendering should be informed of any changes to information contained in tender notices and tender documents, including those regarding evaluation criteria and technical specifications. Another view has been that such information should be made available to interested parties through an accessible source. In this connection, it has also been said that a transparency agreement should clearly specify that all those suppliers who had originally ordered tender documents or had indicated an interest in the procurement opportunity should have any additional information transmitted to them through the same means as the one used for providing the original information.

E. LANGUAGE

1. The suggestion has been made that requirements concerning publication of notices of invitation to tender should be limited to publication in an official national language. The translation of the whole publication into a WTO language could become too burdensome. Another suggestion has been that, where possible, tender notices should be published in a WTO language. It has also been suggested that procuring authorities should have the discretion to decide whether translation of tender notices should be limited to those tendering opportunities that might be of interest to international suppliers.

2. It has been suggested that, in addition to the publication of the whole information in the official national language of the WTO Member concerned, consideration might be given to whether a summary of the main elements of the information in an invitation to tender might also be published in one of the official WTO languages. Such a summary might contain the following elements:

- the name and address of the procuring entity;
- the nature (subject-matter) of the contract;
- the time-limits for submission of tender or application to be invited to tender;
- the address from where further information can be obtained.

3. It has also been suggested that there could be a limited requirement for giving a summary of tender notices in one of the WTO official languages allowing, for example, the exemption of tender notices for small-value procurements which might be of limited interest to international suppliers. One view has been that providing a summary of every tender notice would incur undue administrative costs (see also Section IX C).

4. A number of comments have been made on specific proposals put forward by Members as reflected in the note by the Secretariat entitled "List of Proposals on Items III-VII of the Checklist".

V. TIME-PERIODS

1. In regard to minimum time-periods to be available to potential suppliers to fulfil the requirements of the different stages of the procurement process, the point has been made that timeperiods in existing international instruments and national practice varied significantly. A transparency agreement should not be overly prescriptive in this respect. Any provisions on timelimits should be accepted only as recommendations. A Member government or procuring entity should retain the discretion for the establishment of appropriate time-limits on a case-by-case basis and in the light of the responses from the market. On the other hand, it has been said that timelimits should be specified in national legislation in order to avoid any subjective actions by entities in this respect. National legislation could set out a number of criteria relating to time-limits that would define the parameters of discretion that entities could have in this respect. This would provide procuring entities with the flexibility for using shorter time-limits under certain circumstances, for instance during the actual tendering procedures, if a prior tender notice with all the relevant information had been issued. The suggestion has been made that, rather than establishing specific minimum time-periods in a transparency agreement, the Group might agree on a general principle, as in the UNCITRAL Model Law or in Article XI:1 of the GPA.[11]

[11] Article XI.1(a) of the GPA reads as follows:

"Any prescribed time-limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time-limit, entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for

2. It has been said that sufficient time should be allowed for the preparation, submission and receipt of responsive bids to individual procurement opportunities. Any timelimits which are set should not undermine the principles and objectives of a transparency agreement. They should be determined with due consideration to the particular circumstances of the procurement (including the likely level of interest), type of procurement method used and the capacity of the market to act on the information in tender notices, as well as the complexity of the procurement. In this connection it has also been said that a balance should be found in setting any requirements on time-limits; with longer timeperiods, procuring entities might resort to limited tendering procedures more frequently. The point in this connection has been that Members should not be required to set time-periods to suit foreign suppliers, who should be treated on a national treatment and MFN basis. A further point has been made that timeperiods should be sufficiently long to give both foreign and domestic suppliers a meaningful opportunity to avail themselves of the relevant information and to submit responsive bids. It has further been said that a proposed requirement to provide adequate time-limits might be biased towards allowing suppliers including foreign suppliers to prepare and submit bids. The term "reasonable" should be used to provide, for instance, for emergency situations in which it might not be possible to provide for adequate or sufficient time-limits. Moreover, it has been said that there should be non-discrimination between potential suppliers with respect to the application of timelimits. Another view has been that the timeperiods allowed for the preparation and submission of tenders should be the same for all qualified suppliers provided they had access to procurement opportunity. It has further been said that any changes in the time-periods should be made known to all suppliers or the relevant information be made generally accessible from an available source.

3. A number of comments have been made on specific proposals put forward by Members as reflected in the note by the Secretariat entitled "List of Proposals on Items III-VII of the Checklist".

VI. TRANSPARENCY OF DECISIONS ON QUALIFICATION

1. The point has been made that registration and qualification systems had a useful role in the procurement process provided that they were run in a fully transparent manner. The qualification procedures enabled purchasing entities to assess potential suppliers' capacities for meeting their requirements and also expedited the tender review process by reducing costs to purchasers and suppliers. It has also been said that qualification procedures facilitated the achievement of the overall government policy objectives of the community or the industry. The transparency of criteria for qualification should reinforce the objective of an open, transparent, efficient and equitable selection process; ensure uniform provision of information to potential suppliers; and encourage the receipt of sufficient information from suppliers. The key principle of transparency as regards this issue was that decisions on registration and qualification of suppliers should be taken only on the basis of criteria that had been identified early in the process and predisclosed to suppliers sufficiently in advance. Any changes in qualification requirements should be made known to all interested suppliers. Qualification decisions should be taken in a manner that would build a two-way confidence between the procuring entity and the market including potential suppliers.

2. The point has been made that prequalification 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 be included on a qualification list as had been enjoyed by those already qualified.

3. Moreover, a distinction has been made between qualification systems which potentially could cover a number of different procurements and qualification on a procurement-by-procurement basis. It has also been noted that the issue of qualification of suppliers could play a greater role in the procurement of services than in the procurement of goods.

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transmitting tenders by mail from foreign as well as domestic points."

4. It has been said that the qualification of suppliers should be undertaken well in advance of the tendering process involved in order to ensure the efficiency and fairness of the government procurement process. It has further been said that the criteria for qualification could include such factors as: technical capability; client satisfaction; financial capacity; contracting and partnering issues; quality control; performance requirements relating to occupational health and safety; compliance with an associated code of practice for potential suppliers; human resource management (including skill formation); compliance with domestic legislative requirements; and commitment to continuous improvement. On the other hand, views have been expressed stating that there should be sufficient flexibility to allow for the development of appropriate qualification criteria for different types of procurement and sectors. The point has been made that the establishment of any harmonized qualification criteria at the multilateral level would not be feasible and was outside the ambit of the Group's work. The prescription of any binding criteria or an illustrative listing of criteria for qualification in an agreement did not have any bearing on the work on transparency.

5. It has further been said that qualification decisions should be made by expert bodies constituted for that purpose within procuring entities. The basis for selecting members for such bodies and the way in which the decision-making process was conducted should be publicly available to all potential suppliers. On the other hand, it has been said that the setting up of an expert body on qualifications was a matter within the purview of national authorities. Another issue with respect to transparency to which attention has been drawn is the situation in which a supplier who had applied under the predisclosed qualification criteria had received no decision on its application. All applicants should be informed of the qualification decision in advance of the call for tenders.

6. The point has been made that, once the qualification criteria were set out in invitations to prequalify or tender documents, they should be applied in a non-discriminatory way as regards transparency. Prequalification criteria should be made known to all potential suppliers in a non-discriminatory way. This would not prevent preferential elements in favour of domestic supplies or suppliers from other countries being built into the criteria themselves.

7. The point has also been made that transparency in qualification procedures involved matters of due process. Suppliers should have the right to challenge qualification decisions if the rules of the system had not been followed. The view has also been expressed that application of the principles of objectivity and nondiscrimination to prequalification criteria extended beyond the concept of transparency. There could be non-discrimination as regards transparency notwithstanding discrimination in favour of national suppliers pursuant to preferences or other domestic sourcing requirements. It has been said that all decisions relating to qualification should be notified to all interested parties. It has also been said that, under certain tendering methods, it was not possible to overturn decisions on qualification even if certain other suppliers could be considered to be qualified in terms of the published criteria.

8. A number of comments have been made on specific proposals put forward by Members as reflected in the note by the Secretariat entitled "List of Proposals on Items III-VII of the Checklist".

VII. TRANSPARENCY OF DECISIONS ON CONTRACT AWARDS

1. The point has been made that an essential feature of transparency in decision-making on the award of procurement contracts was that such decisions be taken strictly on the basis of the evaluation criteria (including in relation to technical specifications) which had been set forth in advance in the tender documents and in accordance with the information provided on how those criteria would be applied. Furthermore, in order to ensure that decisions were seen to be taken in this way, criteria should be set out in such a way as to ensure as objective an application as possible. The view has also been expressed that a transparency agreement would not, as a general rule, set out what those criteria should be. The point has been made that allowance would need to be made for cases where, for reasons of *force majeure*, for example in the case of the lifting or imposition of an embargo, the criteria set out in tender documents could not be strictly adhered to.

2. Concerning the receipt and opening of tenders, the view has been expressed that, while it may not be necessary to require public opening of tenders to ensure transparency, procuring entities should have procedures in place to ensure the regularity and impartiality of the procurement process and that there was no opportunity to manipulate the specific elements of tenders or to provide a particular tenderer with information on other tenders. In this respect, the view has been expressed that the details of the procedures on how tenders received by procuring entities should be handled were not within the ambit of the Group's work. Another view has been that further consideration should be given to whether it would be sufficient to embody these concepts in general principles or whether more specific requirements should be envisaged.

3. With respect to *ex post* information on contract awards, the point has been made that the right to such information was a crucial element of transparency in the area of government procurement. The procurement procedures might provide for some form of public announcement of the contract awards and also give tenderers the opportunity to be debriefed, for example on written request from an unsuccessful tenderer. A public announcement on contracts awarded was also of interest to industry generally (as potential future bidders) and to other governments which would want to see the transparency agreement working in practice. One approach suggested to this matter has been that the provision of *ex post* information was particularly important in cases where certain information had not been provided *ex ante*. It has also been said that decisions on contract awards need not include the types of information that had been included in the relevant notices of invitation to tender, provided that a reference was made linking the *ex post* information to the earlier information.

4. As to the purpose of *ex post* information, it has been said that contract award information provided unsuccessful tenderers and other Members with the opportunity to ensure that they had been treated equitably according to the specific requirements and the assurance that criteria set forth in the tender documentation and the applicable national rules and procedures had indeed been properly followed in the procurement proceedings; this type of information also provided unsuccessful bidders with the opportunity to improve their future bids.

5. Based on the written and oral proposals, a number of options and alternative approaches for addressing the issue of the provision of information on contract awards have been identified. These various options and the comments made on them are as follows:

- Option 1. As provided in national legislation. There would be no requirement to make contract award information available, except that which existed in domestic legislation.

  It has been said that national practices would determine whether *ex post* information on contract awards should be given through prompt publication of contract award notices or directly by writing to individual tenderers; unsuccessful bidders should be

informed but it would be burdensome and costly to publish this information or otherwise make it publicly available.

It has also been said that the existing practice in some countries was to send a standard regret letter to unsuccessful bidders and to give the reasons for rejecting their offers only where possible.

Other views have been expressed questioning whether this option would meet adequately the objectives sought by a transparency agreement. An obligation to provide *ex post* information should be considered as a powerful incentive to awarding authorities to abide by the rules and procedures in national legislation.

- Option 2. There would be an option for individual Members to determine whether to provide debriefs to unsuccessful tenderers or to publish contract award information. The mechanism chosen should be made known to interested parties. A provision should be included safeguarding the confidentiality of information on contract awards or debriefings, the release of which would prejudice the legitimate commercial interests (whether general public or private).

  A view expressed has been that debriefing should be a complementary measure rather than a substitute for public availability of the contract award information. Another view expressed has been that it would be time-consuming and burdensome to inform unsuccessful bidders individually of the outcome of their bids.

  It has also been said that, with a view to striking a balance between the need for rules on transparency and the administrative burden of providing *ex post* information, the information to be provided in contract award notices should be less detailed than that provided through briefings.

  With regard to protecting the confidentiality of tenders, it has been said that the obligation to provide new information related to tenders, such as the name of the winning supplier, the value of the contract and any technical details, need not undermine the confidentiality of information. Entities could brief unsuccessful tenderers without necessarily releasing confidential information supplied by successful bidders. Another view has been that requirements on debriefing of unsuccessful tenderers would not be useful since most tender information was commercially sensitive and could not be disclosed without the consent of the tenderer concerned. Another point made has been that a starting point for consideration of the confidentiality of information could be the provisions of other WTO agreements on the matter.

  Other views have been expressed stating that debriefing of all unsuccessful tenderers on the reasons why they had not obtained an award was unnecessary.

  - Option 2(a). Information provided would be in line with the principles and objectives of a transparent procurement regime and provided within a fixed time-frame (which may be different between countries).

    Views have been expressed supporting this sub-option.

- Option 2(b). Information would be based on an illustrative list[111] and provided within a fixed time-frame.

- Option 2(c). Unsuccessful bidders should be informed of the outcome of their bids and debriefed, when they themselves requested it, as to why their bid had been rejected and/or the winning bid had been chosen. Information given to unsuccessful tenderers on where their bids were deficient and why they were not selected would provide them with the assurance that they had been treated fairly and equitably in accordance with the requirements and criteria of the tender documentation and that proper procedures and rules had been followed and would indicate where a bid was deficient and why it had not been selected. This was an important guarantee of transparency, particularly in circumstances where limited information on the contract awarded was provided. Moreover, it has been said that debriefings had an educational role. Debriefings allowed unsuccessful tenderers to assess their bids against the winning bid and to be informed about the shortcomings of their bids.

- Option 3. Publish contract award information. There would be a requirement to publish contract award information within a fixed time-frame, with the provisions for making the mechanism known and confidentiality included in Option 2.

  Views have been expressed supporting this option.

  - Option 3(a). Information included in a list (see footnote 2) would be provided.

    A view has been expressed supporting this sub-option.

Another view has been expressed questioning the need for a prescriptive listing of the type of information that contract award notices should contain. The provision of this type of information would be outside the scope of a transparency agreement. The point has also been made that any illustrative list to be annexed to a transparency agreement should be non-binding. The Group would need to consider whether laying down general principles would be sufficient in this respect or whether the minimum types of information that should be given on contract award notices should be set out in a transparency agreement.

  - Option 3(b). There would be a requirement to provide the information based on the list (see footnote 2) and, where the contract was awarded using a method considered to be inherently less transparent (e.g. singlesource

[111] The following specific elements for contract award notices have been suggested: the procuring entity, the location of the responsible office, division or branch of the department or agency and its address; description of the supplies including the department or agency for which they are required, if different from the above, and in enough detail to identify their nature, quantity and any period that may be applicable; a unique reference number identifying the contract, purchase or agreement in the department or agency's records and the date of the purchase or agreement; the value of the winning bid or the total liability of the contract at the date of entering into the contract; or where it is not possible to predict accurately the total liability with precision because of the basis of the contract, for example cost escalation, labour and materials, or schedule of rates, the total estimated value or liability; the value of the lowest and the highest bid, the type of procurement method used, the name of the winning supplier(s), their postal address and the date of the award should be published. Where a panel contract has been made, details of all suppliers should be notified. However, if this is impractical, a contact address within the agency should be published for persons seeking further information; and relevant product and service code.

procurement or limited tendering), to explain why this method was used and, where applicable, to explain why the information was not given at the start of the procurement process.

A view has been expressed supporting this sub-option.

Another comment has been that *ex post* information on contract awards should be given regardless of the procurement method used.

On the other hand, it has been said that the provisions suggested in this suboption were not within the ambit of a transparency agreement.

6. A comment with respect to the operation of *ex post* information has been that *ex post* information on contract awards should be given regardless of the procurement method used.

7. It has been noted that a number of other WTO agreements, for example the Agreement on Customs Valuation and the Agreement on Preshipment Inspection, included requirements on the provision of *ex post* information to economic agents. The link between the provision of *ex post* information and item VII on review and item VIII(a) on maintenance of records of procurement proceedings has been referred to.

8. A number of comments have been made on specific proposals put forward by Members as reflected in the note by the Secretariat entitled "List of Proposals on Items III-VII of the Checklist".

VIII. DOMESTIC REVIEW PROCEDURES

1. The view has been expressed that it was not sufficient for rules to be introduced to ensure transparency in government procurement practices; there must also be a domestic review mechanism to introduce accountability into the process and to ensure that the rules were respected by everyone involved in a procurement process. The availability of an avenue for review of procurement processes was a key element of transparency. The mechanism for review of complaints by suppliers or a bid challenge system guaranteed due process and public accountability throughout a procurement process and enabled the process to be seen as transparent. The existence of a review mechanism might make public procurement authorities more aware of the need to ensure the consistency of the procedures used in a particular procurement with the applicable laws and regulations. The view has also been expressed that a welldefined and transparent bid challenge mechanism added to the transparency of any decisionmaking process, ensured that procurement decisions were reviewed openly and increased confidence in the effective functioning of the overall procurement system. It has also been said that a bid challenge system would be a last resort that occurred when, despite good and transparent processes and best endeavours, a potential supplier alleged that the procedures had not been applied correctly and a breach had occurred.

2. It has been suggested that precedents for review or appeal mechanisms could 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. Additionally, paragraph 3(b) of Article X of the GATT 1994 on publication and administration of trade regulations provided for "judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters" to ensure that complaints or appeals could be resolved under the jurisdiction of individual WTO Members pursuant to national laws. Other views expressed in this connection have been that issues involved in procurement practices could not be compared with the issues that might constitute the grounds for the review provisions in other WTO agreements. 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.

3. Reference has also been made to the element of due process in the APEC non-binding principles on transparency in government procurement.[1111] It has been said that, in the APEC context, the existence of a domestic bid challenge mechanism was viewed as an important element of a transparent procurement system. On the other hand, it has also been said that the substance of the APEC non-binding principles went beyond transparency matters.

4. Moreover, the view has been expressed that governments should ensure that scrutiny mechanisms were independent, appropriate to their circumstances, scope, topic and objectives, including "internal" scrutiny of actions or decisions of a procurement official or area within a government organization by another official or area of that organization, for instance, an organization investigating a complaint by an aggrieved supplier; scrutiny by other "external" government organizations, which may or may not be independent of government influence, such as an ombudsman, government audit organization; or representatives of an elected assembly; or scrutiny by judiciary, non-government bodies or bodies independent of government influence.

5. It has also been suggested that elements of a future transparency agreement should include the establishment of domestic legal mechanisms, whether administrative or judicial, available to any national or foreign person in order to challenge government procurement procedures flawed by bribery.

6. It has been stated that any 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. While it might often be difficult to dissociate transparency aspects of government procurement from other aspects, the mandate of the Group should guide its work on this matter as on others.

7. The point has been made that a domestic review mechanism could be achieved through a variety of means. It has been noted that administrative or judicial review procedures in the interest of assuring due process and public accountability were common to most national regimes, which in consequence already contained the main features that might be applicable to domestic review procedures in a transparency agreement. The view has been expressed that any obligation to provide for domestic review procedures in a transparency agreement should take into account such national practices and procedures; no attempts should be made to develop special review mechanisms where appropriate domestic administrative or judicial procedures already existed. The view has also been expressed that a transparency agreement should not have provisions requesting Members to adapt their domestic systems to certain prescribed criteria and the existing national systems should be fully respected. The Group should guard against developing overly prescriptive provisions on the specific characteristics that national systems must have. 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 were appropriate to their national legal systems. They could be in the form of an exhortation to Members of a transparency agreement or a best endeavours obligation to provide for domestic review mechanisms. The choice of review procedure should be left to individual Members provided the review mechanism itself was transparent and provided a guarantee of independence. In this connection, the suggestion has been made that, as a first step, Members should provide information on whether their domestic administrative or judicial review systems addressed government procurementrelated matters and, if so, under what conditions.

[1111] Circulated in document WT/WGTGP/W/11

8. The point has also been made that domestic review procedures could be used to review either the consistency of the procurement practices or an individual procurement process with the domestic laws or regulations in force or the consistency of the procurement practices with the rules of a transparency agreement. Review of complaints or other dispute settlement mechanisms were often initiated after the contract had been awarded, making it impossible to overturn a procurement decision, cancel a contract and start the procurement process all over again. A mechanism established under the terms of a transparency agreement might be limited to reviewing the consistency of the laws and whether they should be amended or removed. While WTO dispute settlement was available to resolve differences between WTO Members relating to the implementation of WTO obligations, domestic review mechanisms were established with the purpose of addressing complaints by suppliers under the domestic jurisdiction of a particular country. Under a WTO enforcement system, complaints should only relate to the compliance of Members with their obligations under a transparency agreement whereas domestic reviews mostly concerned specific award decisions. The WTO review procedures should not give rise to situations in which the procurement decisions of government authorities could be overturned.

9. The view has been expressed that the issue of review went beyond that of transparency and therefore the mandate of the Working Group. It has been said that domestic administrative or judicial review mechanisms were in place in national systems for the purpose of public accountability at the domestic level, a matter not within the ambit of a transparency agreement. Concerns have been expressed 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 additional review procedures might increase the number of challenges and give rise to unnecessary costs. Since the purpose of domestic procedures in many countries was to review whether procurement had been made in accordance with domestic law and procedures, the scope of which went further than the obligations that might be agreed in a transparency agreement, it might not be feasible to limit the application of review procedures to specific transparency obligations in a WTO agreement on transparency. It has been suggested that transparency requirements in respect of review procedures, under the scope of a transparency agreement, should be limited to the provision of information to suppliers in regard to the domestic national review mechanisms and procedures.

10. The view has also been expressed that a review should be available to all potential suppliers including suppliers from other WTO Members. Another view has been that a review should be available to all suppliers who were involved in the procurement process. In this connection, the question has been asked whether foreign interested parties could file complaints against domestic governmental authorities under existing national administrative and judicial mechanisms or whether there would be need for special procedures under a transparency agreement to guarantee the receivability of complaints by foreign suppliers.

11. While some delegations have indicated that they had not yet formulated their views on the specifics of a review mechanism, attention has been drawn to the following features of review mechanisms that might be studied by the Working Group:

- encouraging suppliers, in the first instance, to take up the matter directly with the procuring entity for an early resolution. Agencies might have procedures in place to handle complaints directly;

- in some cases, the mediation or good offices of an independent authority might be sought;

- if the matter was not resolved mutually, provisions enabling suppliers to bring an action against the procuring entity before a judicial or administrative authority or other independent body; the point has been made that review provisions should allow

flexibility to Member governments to choose whether to designate judicial or administrative bodies or both;

- review provisions should require that review bodies be impartial and independent of the procurement process itself. The point has also been made that Article X:3(b) of GATT 1994 provided some guidance in this regard;

- account should be taken of such principles as objective legality, ex officio action and material delegation in the review procedures;

- in addition to procedures based on formal complaints, initiation of review procedures by competent public authorities on an ex officio basis or national mechanisms for monitoring procurement proceedings;

- the review procedure should result in a published and reasoned conclusion that should be notified to interested suppliers in writing;

- review procedures should be published in a medium that is publicly available.

12. As regards the approach to be taken on the matter of domestic review in a transparency agreement, it has been said that an agreement should include a simple and flexible provision that could accommodate different Members' existing independent administrative or judicial tribunals and review procedures. Such a provision should ensure that there were transparent, timely and independent decisions on complaints or appeals relating to the transparency of procuring entities' actions and procedures. The scope of review of this provision under WTO procedures should be limited to actions relating to the implementation, through domestic laws and procedures, of the requirements of the transparency agreement.

13. The view has been expressed that procurement decisions were different from many other administrative decisions, in that review or dispute settlement mechanisms often had to function after the contract had been awarded. 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 were pending. In this regard, the point has been made that suspension of a procurement process upon a challenge by a supplier could hold up the whole procurement process until a decision had been reached concerning the challenge. Since this 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. In cases in which the procurement process might be suspended, there could therefore be provisions in a transparency agreement for continuing nonetheless with the award of procurement in the public interest.

14. In connection with remedies that might be provided under review provisions, the following views have been expressed:

- most national review systems already provided remedies for suppliers whose rights had been denied under the applicable laws and regulations;

- review provisions should provide for adequate remedies that would protect the interests of suppliers and would deter procurement entities from engaging in future actions that would be inconsistent with the provisions of an eventual agreement on transparency;

- remedies should include the possibility of corrections including altering the inconsistent procurement process, re-tendering for the procurement or awarding damages to cover legitimate claims;

- an independent review should review complaints about tendering procedures in order to determine possible damages or administrative responsibility;

- account should be taken of the fact that review systems might provide for remedies which could include compensation only after administrative or judicial procedures had determined that an injury or an economic loss had flowed from the inconsistency of a procurement process with the applicable legislation.

15. Another view expressed on remedies has been that a transparency agreement should not specify them for the following reasons:

- provisions requiring adequate remedies would fall outside the scope of the work on transparency. It would be sufficient to have provisions requiring the establishment of a review procedure without specifying the remedies that should be available;

- 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.

16. It has also been suggested that a transparency agreement should require procurement entities to maintain written records of the procurement process in order to ensure that review bodies had an adequate factual basis for review (see Section IX A). As another possible means of review mechanism, provision of *ex post* information to unsuccessful suppliers and debriefing by procuring authorities have also been mentioned (see also Section VII).

17. As regards the content of a domestic review provision in a transparency agreement, the following text has been suggested: "Members shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review and correction of procurement actions that may be inconsistent with the requirements of this Agreement, as implemented in Members' laws. Such tribunals or procedures shall be independent of the agencies responsible for procurements covered under this Agreement and shall provide for rapid decisions that, as appropriate, can affect the modification or reversal of any inconsistent actions." The following comments have been made concerning this text:

- other types of remedial actions such as imposition of fines or banning suppliers from participating in future procurements for a given period of time, could be envisaged;

- the word "correction" should be deleted in the first sentence. Existing administrative procedures were used for dealing with requests for the revision of formal or material errors;

- the phrase "as implemented in Members' laws" at the end of the first sentence required clarification;

- the last phrase in the second sentence after the words "as appropriate" should be replaced by the phrase "can provide appropriate relief in accordance with national law or practice";

- the text suggested above was more complicated than the approach taken to this issue in other WTO agreements.

18. The question has been asked how a review, modification or reversal of inconsistent procurement actions could be envisaged in the context of an agreement on transparency in government procurement. In this connection, it has been said that, while sometimes impractical or inappropriate, for example when contracts had already been awarded or the public interest dictated otherwise, corrective actions were often feasible. For instance, upon a complaint lodged by a supplier, a procuring entity that had not published a notice of procurement opportunity at the outset of a procurement process could be asked to do so, or a procuring entity that had provided certain tender information to one supplier could be asked to provide the same information to all interested suppliers.

IX. OTHER MATTERS RELATED TO TRANSPARENCY

A. MAINTENANCE OF RECORD OF PROCEEDINGS

1. The view has been expressed that openness and transparency, through appropriate public access to information for external scrutiny, are essential elements of accountability. Government procurement records and information and mechanisms for collecting, assessing and scrutinizing those records and that information, should enable effective external scrutiny. Information recorded on authorizations, procurement systems, actions and decisions should be sufficient to justify decisions taken in the procurement process and to demonstrate that procurement activity was consistent with government requirements.

2. The view has also been expressed that procuring authorities should maintain a proper record of decisions and actions taken during the procurement process and the reasons for them. The maintenance of a record of procurement proceedings and the availability of non-confidential information contained in it to interested parties was one of the principal mechanisms for ensuring adherence to agreed rules and was of particular importance in the functioning of an administrative or judicial review process. Such records provided the basis for an audit trail and supported any evaluation of the procurement[11111] and thus introduced an element of accountability into the process. It has also been said that maintenance of records for a pre-established minimum length of time was also essential in order to enable bribery to be proved in legal proceedings. With regard to the length of time that records of proceedings should be maintained, it has been said that the requirements in this respect 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. It might not be necessary to keep a record of proceedings beyond that period. Another view in this connection has been that a transparency agreement should not have provisions stating explicitly in what form and for how long records should be maintained by entities. It has also been suggested that information should be provided on the national practices of those Members in which procuring entities were required to maintain records of procurement proceedings.

3. The question has been asked whether record maintenance should be treated as a separate element providing an additional guarantee of transparency or whether this item would be sufficiently addressed under other elements.

[11111] The following details of the matters that should be documented have been suggested: approval to make the procurement; the selection criteria upon which evaluation and selection decisions will be based; discussions with potential bidders before bids close; details of clarification of bids during evaluations; reasons for variations to a tender; steps to provide all bidders with an equal opportunity to revise their bids; agreements reached during negotiations; authorization and signing of a contract; details of debriefings; reasons for varying a contract; and records of contractor performance.

4. By way of general comments under this Section, a view has been expressed that prescription of stringent rules on transparency and review could be counter-productive to market access. Having no obligations on market access in the area of government procurement, national governments would have the tendency to close their procurement markets to foreign suppliers in order not to run the risk of breaching these rules on transparency.

B. INFORMATION TECHNOLOGY

1. It has been suggested that the work of the Group in developing a transparency agreement should take full account of innovative government procurement practices. Information technology was already being rapidly adopted by procurement communities and offered tremendous opportunities to level the playing field by increasing access to information at low cost to all suppliers. To the greatest extent possible, a transparency agreement should encourage the use of information technology tools to disseminate information on procurement opportunities and contracts awarded as an alternative to more traditional methods of communication (see also Section IV above). The view has also been expressed that, for the time being, procuring entities should be able to continue to maintain paperbased tendering procedures.

2. On the other hand, it has been suggested that, because of the lack of uniformity among countries' stages of development in this area, any requirements for the use of information technology in government procurement should be optional and that the use of information technology tools should not undermine the basic transparency principle of guaranteeing access to information for all, including small and medium-sized suppliers and suppliers from countries less advanced in the use of information technology. 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 the increasing use of information technology in government procurement 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. Electronic tendering using Internet-based systems facilitated access of suppliers worldwide with a minimum requirement of equipment and technological know-how and was the most efficient way of ensuring non-discriminatory access to tender information.

3. It has been said that one of the issues that had to be dealt with in electronic procurement concerned procedures for opening tenders when they were submitted electronically. It has been noted that there was scope for international cooperation in the area of information technology, for example in developing electronic databases or maintaining lists of qualified suppliers.[111111] The point has also been made that procuring entities should be allowed to charge for electronic access to information and tender documentation and other tendering procedures, in particular if the information was supplied by a private service provider. It has also been said that the Group would need to consider at a later stage whether it would be appropriate to cover such specific matters as information technology in a transparency agreement. In this connection, it has been noted that information technology was an area where there was scope for technical cooperation (see Section XII).

[111111] It has been mentioned that the APEC Group of Experts in Government Procurement has established a Home Page with linkages to existing databases on government procurement in member economies (www.apecsec.org.sg/govtproc/gphome.html).

C. LANGUAGE

1. It has been said that information on national practices showed that documents and other information relating to tendering proceedings were generally provided in the official language(s) of the country of the procuring entity. As a rule, documents and other information relating to procurement procedures and individual procurements should be allowed to be provided to potential suppliers and service providers in an official language of the country of the procuring entity. In general, potential suppliers wishing to do business in another country would have the necessary language facilities available to them; there should not be a specific requirement to provide such information in a WTO language. Nevertheless, procuring entities could be encouraged to provide information, where possible, in a WTO language where a particular procurement opportunity was likely to attract international interest (see also Section IV).

D. FIGHT AGAINST BRIBERY AND CORRUPTION

1. It has been said that all governments were committed to combatting corruption and were engaged in efforts towards diminishing and, ultimately, eliminating bribery. Bribery in government procurement processes was currently a source of serious concern to the international community. It involved, not only political considerations such as legal insecurity, good governance and ethical problems, but also considerations of an economic nature such as efficiency of resource management, the negative impact of bribery on investment and the ensuing distortions of national competitive conditions.

2. The view has been held that there was an important relationship between transparency in government procurement and reducing the incidence of bribery and corruption in government procurement practices. Because governments had recognized the importance of this matter, the Working Group had been given the mandate by Members to develop elements relating to transparency in this area. Attention has been drawn to international instruments aimed at fighting corruption and bribery established by a number of international fora, including the OAS and the OECD. The point has been made that, while such initiatives had been useful in attacking the problem from various angles, so far there had 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, was not enough and therefore needed to be supplemented by specific appropriate action and measures related, among others, to bribery of public officials, transnational bribery, tax deductibility of bribes paid to foreign officials, retention of records of procurement proceedings, establishment of bid challenge systems, lifting of banking secrecy, mutual legal assistance and technical and financial cooperation.

3. Views have been expressed that an agreement on transparency in government procurement would be an important and effective contribution to reducing the incidence of bribery and corruption in procurement practices as well as to the broader efforts to fight bribery. There was a real need to address bribery in all its forms provided that any possible measures genuinely fell within the scope of the WTO activities. It has also been said that the outcome of the work in other international fora as well as in the Working Group could bring about systemic changes that would reduce opportunities for corruption. The task of the Working Group was to improve transparency by creating a rulesbased environment and the procedures that were necessary for that purpose. As a secondary goal, the fight against bribery and corruption could be achieved through increased transparency in government procurement procedures. The work in several WTO bodies that was aimed at achieving systemic improvements and a rulesbased environment in trade matters had already made a meaningful contribution to advancing the fight against corruption. It has been suggested that, with the aim of creating the necessary safeguards against corruption in this area, the Group should focus on those aspects which most easily lent themselves to abuse in the area of government procurement. For instance, consideration should be given to requirements in regard to the retention of government

procurement records for a pre-established minimum period and establishment of domestic administrative or judicial actions available to any national or foreign person in order to challenge government procurement procedures flawed by bribery. Such measures were common elements of international instruments on government procurement as well as of national legislation (see Sections IX A and VIII, respectively, above). A future agreement on transparency in government procurement should include such measures.

4. Views have been expressed questioning the appropriateness of expanding the scope of the work of the Working Group to the matters of bribery and corruption. Although its effects were often very severe in government procurement, corruption was far from being strictly confined to this area of economic activity. While transparency in government procurement would contribute to the fight against corruption and bribery, the issue itself was not within the mandate of the Group and was also outside the ambit of the WTO. The objective of the fight against corruption and bribery should not be stated explicitly in an agreement on transparency in government procurement. Members should deal with such issues through their own national legislation concerning this area.

5. Other views in this connection have been that the work of the Working Group should not be overloaded with too many issues that, while important, might be dealt with more appropriately in other fora. Establishing a link between the issues of trade and corruption in the WTO might give Members the possibility of justifying trade measures or sanctions on grounds of alleged corrupt practices in other Member countries.

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

1. The view has been expressed that it was somewhat premature to discuss in detail this aspect, which might be better taken up once a clearer notion of the nature of a transparency agreement had been generated. Nonetheless, a number of issues have been raised relating to the possible notification arrangements under a transparency agreement and other mechanisms by which information can be exchanged between Member governments.

2. While some views expressed have put emphasis on the importance of adequate information on relevant national legislation and any amendments thereof being notified to other Members of a transparency agreement, other views have drawn attention to difficulties that would have to be addressed in this connection. It has been suggested that the 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. This would particularly be the case if they all had to be notified in a WTO language. An additional concern that has been expressed was that it was doubtful that Members would be ready to share confidential information. A number of possible ways of overcoming these difficulties have been put forward:

- Members might be expected to notify their basic law on government procurement, but not each and every law and regulation;

- an approach of employing a checklist of points, or questionnaire, to elicit basic information on how the national laws and regulations of each Member responded to the requirements of a transparency agreement might be employed;

- each Member might be required to respond to requests from any other Member for specific information on its laws, regulations, procedures and practices regarding transparency in government procurement. Contact points might be established by each Member for this purpose. In this connection, reference has been made to the discussion on this point reflected in item III of this note;

- greater use of electronic databases might be made for providing information on procurement procedures at sub-central levels;

- 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. This could be a vehicle for forestalling disputes. The view has also been expressed that the information sought should relate to how the commitments on transparency had been complied with in the contract award process. Another view was that the provision of such postcontract award information might not be necessary in an agreement on transparency, since it would not extend to matters of market access;

- enhanced use could be made of existing WTO transparency mechanisms, including the Trade Policy Review Mechanism;

- the question has been raised as to whether the existing provisions of Article X of GATT 1994 and Article III of the GATS were sufficient for the purposes of a transparency agreement on government procurement or whether additional rules should be provided for. Should there be, for example, a requirement to specify where the relevant laws were published? In this regard, the view has been expressed that the provisions of the GATT 1994 and GATS that had been referred to would not be adequate for the purposes of notification in an eventual transparency agreement.

3. It has also been suggested that Members might provide information identifying government departments, agencies and enterprises subject to the rules in a transparency agreement. The point has been made that this could be done through notification of a positive list of such entities or through notification of a negative list of those entities not subject to the agreement. It has been suggested that the latter approach might have the advantage of avoiding the problem of frequent changes in lists resulting from changes of a formal nature, such as the renaming or restructuring of departments. The issue of the most appropriate technique for the presentation of the coverage of entities would depend on the outcome of discussions on the scope of the agreement, in particular which type of entities were covered. It has also been said that it was premature to consider the form in which the coverage of entities should be presented.

4. On statistical reporting, the following points have been made:

- such provisions should not be included in a transparency agreement;

- there should not be an obligation, but governments might be invited to provide what information they have available, for example on the size of their procurement market;

- the issue should be put aside for the time being.

5. The view has been expressed that any requirements relating to the provision to other Members of information on and explanation of national procurement rules and procedures should apply only to the extent that such rules and procedures were within the scope of a transparency agreement. Requirements on the provision of information and explanations should be limited to those relating to transparency matters, and not otherwise relate to market access questions.

XI. WTO DISPUTE SETTLEMENT PROCEDURES

1. With regard to dispute settlement between governments, the general view has been that it would be premature to consider the applicability of provisions on dispute settlement before the elements of a transparency agreement had been more clearly identified. However, the view has also been expressed that any commitments on transparency should be subject to the DSU in the same way as the existing clauses on transparency in any other WTO agreement. Another view has been that it was questionable that the dispute settlement system could apply, with significant results, to obligations on transparency in the absence of commitments with respect to market access. For example, it has been asked whether any decision resulting from a dispute regarding the provision of transparency in a government procurement process could apply retroactively. A view has also been expressed in this connection that the Group's mandate was to discuss the elements of an appropriate agreement on transparency which could be in the form of guidelines or a code; only an agreement with binding obligations should be subject to WTO dispute settlement procedures. It would be sufficient to invoke Article X of GATT 1994 in dispute cases involving a violation of obligations on transparency. The creation of a linkage between a transparency agreement and the WTO dispute settlement procedures was not warranted.

2. Regarding the relationship between domestic review procedures and the WTO dispute settlement mechanism, it was said that a distinction should be made between domestic review mechanisms which involved 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. The legal criteria for domestic reviews and WTO dispute settlement were different. In the case of domestic procedures, a review related to the consistency of a procurement process with the domestic laws and regulations, whereas in the case of WTO dispute settlement the grounds for a dispute were an alleged breach of the commitments under a WTO agreement. The view has been expressed 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 a government-to-government dispute.

3. In regard to the way in which national review procedures and the WTO dispute settlement procedures might interact, it has been suggested that the Group might wish to examine the approach to this matter adopted in the Agreement on Implementation of Article VI of GATT 1994. Another view expressed was that there should be no particular relationship between a domestic review process and government-to-government dispute settlement. WTO dispute settlement procedures should apply to issues relating to the consistency of laws of 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 view has also been expressed that national practices would not allow the WTO dispute settlement process to override a specific procurement decision taken by a national judicial body. In this connection, a further view has been that a transparency agreement could have provisions setting minimum standards regarding the legal framework for domestic review procedures. The objective of WTO dispute settlement procedures would be to enforce the effective implementation of such provisions. WTO dispute settlement procedures should only apply in respect of obligations of governments in their capacity as regulators. Any procurement decision taken by them, including contract award decisions, in their capacity as purchasing entities should not be subject to WTO dispute settlement procedures. Any complaint in this respect should be addressed under domestic review procedures. The question has been asked whether there had ever been a case in the history of GATT/WTO where dispute settlement procedures had been invoked based on allegations of breach of the rules on transparency. A comment has been made stating that challenges of individual award decisions under the provisions of a transparency agreement were unlikely. However, Members should be able to invoke dispute settlement procedures with the objective of achieving improved transparency, if a purchasing entity had breached the rules of a transparency agreement, for instance if it had persisted in not publishing notices of procurement opportunities. It has also been said that provisions should reflect the principle of exhaustion of

domestic judicial review mechanisms before recourse to WTO dispute settlement procedures. Moreover, the point has been made that recourse to WTO dispute settlement procedures, being a prerogative of governments, could not be initiated by suppliers who might challenge procurement procedures of government entities.

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

1. The point has been made that technical cooperation was important for ensuring the successful implementation of a future transparency agreement. It could also play an important role in helping Members to develop domestic procurement regimes and in taking practical steps to enhance transparency of procurement policies and practices. The view has been expressed that, in discussing a framework for technical cooperation, inspiration might be drawn from the language of Article 67 of the Agreement on TRIPS. This required developed country Members to make available technical and financial cooperation, on mutually agreed terms, in response to requests from developing country Members. It also listed specific areas where such cooperation should be provided, including assistance in the preparation of laws and regulations and support regarding the establishment of domestic offices and agencies, including the training of personnel. Technical cooperation plans could be drawn up identifying the needs of individual developing and least-developed countries in meeting their obligations under a transparency agreement and targeting technical cooperation activities to specific purposes, for instance for the establishment of contact points. The view has been expressed that the provisions on technical cooperation should match the specific requirements in a transparency agreement; compliance with the rules of a transparency agreement might require changes in national legislation and procedures and the building up of new institutions in individual countries. The following types of areas in which technical cooperation would be beneficial have been suggested:

regarding development of national legislation and procedures:

- legal advice and assistance in drawing up national legislation;
- administrative and policy option analysis and guidance;
- drawing up procedures on publication;
- establishment and implementation of bid challenge systems;
- taking practical steps to make procurement more userfriendly by developing standard forms for tender notices and fillintheblank bid forms, as well as developing a common procurement vocabulary;

regarding training:

- training for those who have to implement, use or enforce new legislation, procedures and/or practices, training the judiciary, and training local trainers who would continue training programmes in, for example, business schools or colleges of public administration in the beneficiary country;
- exchange of officers;
- training of purchasers and suppliers;

regarding institution building:

- administrative cooperation to enhance institution building and the exchange of information;

regarding access to information by suppliers:

- workshops, seminars and the production of user guides, including the development of Internet websites, search engines and databases, to help provide information about opportunities to do business with governments at home and abroad, and to facilitate access to that information; in particular, such assistance could benefit small and medium-sized enterprises, by increasing their confidence and effectiveness in successfully entering procurement markets at home and abroad;

regarding use of information technology:

- the development of information technology tools which could be used to disseminate information about procurement opportunities and practices, and/or to establish full electronic tendering, as well as to facilitate the collection of relevant economic data and statistics;

- the provision of office, information technology and/or other equipment necessary for the implementation and enforcement of legislation, procedures and/or practices.

2. The view has been expressed that the practices under the TRIPS Agreement might also be useful in assessing and monitoring assistance on an ongoing basis, while avoiding the creation of additional bureaucratic structures and red tape. The point has also been made that the issue of technical cooperation should be discussed not only in terms of ensuring compliance of developing countries with the requirements of a future agreement, but also in terms of the practical steps that could be taken to enhance transparency in developed as well as developing countries.

3. It has also been suggested that requirements similar to the provisions of Article 66.2 of the Agreement on TRIPS might be included in an agreement on transparency. Developed country Members might be required to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to developing country suppliers in order to enable them to participate in bidding for public contracts in developed countries. In comparison with Article 67 of that Agreement, under which technical cooperation depended on the mutually agreed terms and conditions between developed and developing country Members, technical cooperation under Article 66.2 was provided unilaterally and at the initiative of developed countries. Technical cooperation could be useful in achieving the objective of economic efficiency in government procurement. For instance, providing information to developing countries as to what governments usually procure and information as to worldwide sources would be relevant in this regard.

4. The point has been made that the technical cooperation activities of international intergovernmental organizations and fora, including international financial institutions and regional development banks, in the field of government procurement could contribute to transparency and the implementation of a transparency agreement. It has been suggested that consideration should be given to developing a framework under a transparency agreement for rationalizing the various activities in this area at the bilateral, regional and multilateral levels. In this respect, it has been suggested that the Secretariat would prepare a background paper containing information on technical cooperation programmes of international and regional intergovernmental organizations related to

government procurement, so as to enable the Group to have as complete a picture as possible of the availability of technical cooperation in this area.[1111111]

5. It has been suggested that potential recipient and donor countries should be encouraged to share their views on particular needs and the available forms of technical cooperation in the area of government procurement. It has also been suggested that special attention should be paid to the problems of institution building, in particular in least developed countries. The Chair invited Members to provide information in writing to the Working Group on their needs and on the technical cooperation already available.

6. With regard to special and differential treatment for developing countries, the view has been expressed that this issue might be addressed once the elements of an eventual agreement were more clearly defined. In this connection, it has been said that the substantive provisions of a transparency agreement should reflect in particular the special circumstances in developing country Members. The formulation of the provisions of a transparency agreement should not be too ambitious in order to enable all Members to adhere to an eventual agreement without the need for lengthy transitional periods.

7. The suggestion has also been made that transitional periods in respect of developing countries might be provided. On the other hand, it has been said that provisions on transitional periods would not be sufficient for special and differential treatment of developing countries. In the light of the divergence among individual Members' practices in this area, any meaningful special and differential provisions should require developing countries to comply with the provisions in a transparency agreement, only to the extent that they were capable of undertaking the relevant obligations. Certain objective criteria should be developed for this purpose.

[1111111] The information communicated from UNCITRAL, OECD, the World Bank, the Asian Development Bank, the African Development Bank, IMF, the APEC Government Procurement Experts Group, the European Bank for Reconstruction and Development, ITC and UNDP on their respective technical cooperation activities in the area of government procurement has been circulated in documents WT/WGTGP/W/20 and Addenda 1-8.