

Is there a case for new multilateral rules on transparency in government procurement?¹

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IS THERE A CASE FOR NEW MULTILATERAL RULES ON TRANSPARENCY IN GOVERNMENT PROCUREMENT?

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EXECUTIVE SUMMARY

1. Given the vast sums of money spent by governments on goods and services it is difficult to underestimate the importance of having efficient and effective state procurement regimes that embody excellent governance practices and are transparent and open to participation by all qualified suppliers. Attaining this goal, however, has proven to be difficult, especially in developing countries where arguably the need for efficient social provision is even greater than elsewhere. A question arises, therefore, as to whether international initiatives on public procurement can further reform of national laws and practices.
2. The 1990s saw a number of international initiatives on public procurement and these have built on prior agreements, such as the Tokyo Round Agreement on Government Procurement. In light of the Doha Ministerial Declaration, however, the question before policymakers is whether, and on what terms, negotiations on new multilateral rules on transparency in government procurement practices are to be launched. It is noteworthy in this regard that the Doha Ministerial Declaration explicitly states that further rules on preferences for domestic firms in procurement contracting would not form part of the negotiating mandate. Any future multilateral rules are supposed to address transparency-related matters only and not discrimination against actual or potential foreign bidders for state contracts.
3. The purpose of this chapter is to assess the proposals for further multilateral rules on transparency in government procurement practices, in particular, and more generally, to assess the case for international collective action on public procurement reform. One characteristic of the approach taken in this chapter is to situate the analysis in its appropriate context. That is, to take account of the strength of, and factors underlying, national reform efforts. Moreover, developments in fora outside of the WTO are discussed, enabling an evaluation of a number of international initiatives. In addition, recent economic analyses of the trade-related aspects of government procurement practices are described and are related to current and potential future international initiatives on public procurement reform.
4. The proposals for new multilateral disciplines on transparency in government procurement practices, and the reaction to them by some WTO Members, are discussed in considerable detail. In short, there is a wide divide between WTO Members over the interpretation of the mandate on government procurement in the Doha Ministerial Declaration, over the role and purpose of the associated Working Group at the WTO, as well as over the substance of proposals for new multilateral rules on the transparency of procurement practices. In the light of these marked disagreements, the analysis presented here draws upon economic research to assess the case for international collective action.
5. Without further disciplines on discrimination against foreign bidders for state contracts, the case for new multilateral rules on transparency is weakened. This is because transparent access to foreign procurement markets does little to stimulate competition if overt discrimination against foreign bids is considerable. (That is not to say that improvements in transparency would not have governance-related benefits to WTO Members.)

6. Likewise, without effective multilateral disciplines on transparency, the benefits from prior (and for that matter, future) disciplines on discrimination against foreign firms in national procurement markets will be reduced. This is because governments can substitute *de facto* discrimination against foreign firms for *de jure* discrimination.

7. Put simply, as an economic matter, there is little to be gained by separating negotiations on transparency from negotiations on foreign access to procurement markets. The Doha mandate on government procurement is, therefore, fundamentally misconceived.

8. Rather than continue on their present trajectory, as far as government procurement-related matters are concerned, WTO Members should consider taking one of the following two options; which can be summarised as “all nothing.” The latter option would involve abandoning negotiations on public procurement, with the obvious implication that domestic reform efforts will receive no additional impetus from the initiatives under the WTO umbrella.

9. The “all” option would involve putting market access or discrimination back on the negotiating table. This option would allow for the important interconnections between the transparency-related and discrimination-related aspects of procurement practices to be considered in a comprehensive manner. Moreover, this option could hardly spark additional opposition from those WTO Members that are critical of proposals for more rules on transparency in government procurement practices—precisely because those critics are already on record as suspecting that the desire to improve market access for exporters is what proponents seek from transparency-related rules anyway.

INTRODUCTION

Ever since the conclusion of the Tokyo Round at the end of the 1970s, the world trading system has had rules in one form or the other on government procurement practices. Those rules, however, have only been codified in plurilateral agreements and most WTO members are not bound by them. The latest discussions on the efficacy of new multilateral rules on government procurement practices started after the Singapore Ministerial meeting in 1996. A Working Group on this subject was formed at the WTO, and its mandate was further clarified in the Doha Ministerial Declaration. Paragraph 26 of that Declaration states:

“26. Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants’ development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion” (WTO 2001).

This mandate is noteworthy for at least three reasons. First, deliberations in the Working Group are to be confined to the transparency-related aspects of government procurement practices; although no further guidance was given as to which practices Ministers had in mind. Second, the Working Group was instructed not to consider further or new rules on preferences for domestic firms, or to be more precise, “the scope for countries to give preferences” which have not have the same meaning. The third point to be made is that WTO Ministers will decide at the Cancun Ministerial meeting whether, and upon what terms, any negotiations will be launched on potential new multilateral disciplines on transparency on government procurement practices.

The purpose of this chapter is to assess the efficacy of new multilateral disciplines on transparency in government procurement practices, as stated by the proponents of such new disciplines (which include Canada, the European Communities, Korea, Japan, and the United States.) To provide the appropriate context, these proposals are evaluated in the light of economic analyses of the trade-related aspects of procurement reform; the political forces that encourage or retard unilateral domestic reforms of procurement regimes; and developments in the WTO and in other international fora. To that end, part I of this chapter describes the impetus towards procurement reform and the latest thinking as to why domestic reforms in this policy area stall so often. This part also describes the various means and ends of national procurement policies, as well as providing some information on the size of procurement markets in OECD member states and in 106 non-OECD economies.

Part II of this chapter describes and comments upon a number of international initiatives on procurement reform in the 1990s. This discussion considers the Uruguay Round Agreement on Government Procurement, which came into force on 1 January 1996 and currently has 28 signatories. As none of these initiatives are comprehensive in scope or membership, and some even do not allow for the potential for rigorous enforcement of agreed disciplines, the question arises as to the efficacy of a new multilateral initiative on public procurement reform. Part III of this chapter describes the differences in view on this matter in the WTO’s Working Group on Transparency in Government Procurement and draws upon both the national submissions to that Group and the published minutes of meetings of that Group in 2002. Part IV assesses the case for international collective action in procurement reform more generally, and transparency-related reforms, in particular. Recommendations for policymakers are presented in the final part of this chapter.

Part I

OVERVIEW OF TRADE-RELATED ASPECTS OF NATIONAL PROCUREMENT LAWS AND PRACTICES

I.1 Factors contributing to or impeding national procurement reforms

The growth of spending by central and local governments was one of the most profound economic changes of the twentieth century (Tanzi and Schuknecht, 2000). Although a large portion of that growth was devoted to higher transfer payments, governments of all types spent considerable sums on goods and services produced by the private sector. In addition, state-owned industries procured substantial quantities of inputs from private firms. As a consequence, through its purchases the state has had considerable influence over the allocation of resources in market-based economies.

Throughout much of the post-World War II era most nations' local and central governments were supplied by their own firms. Discrimination against foreign suppliers was rife. Two justifications were offered for this discrimination. First, the prevailing Keynesian macroeconomic orthodoxy emphasised that the increase in national income caused by a rise in government expenditures was greater the smaller was the share of each dollar spent on goods produced abroad (imports). Governments could reduce this share – or what economists call the marginal propensity to import – by refusing to buy goods from abroad. And so procurement discrimination became associated with the noble goal of macroeconomic management. The second rationale for pervasive discrimination against foreign suppliers is far less glorious – nationalism or outright protectionism³. Often it was claimed that “our money” should be spent on “our goods” to keep “jobs at home.” Consequently, government procurement was excluded from the original General Agreement on Tariffs and Trade. In fact, it was not until the completion of the Tokyo Round of multilateral trade negotiations that an agreement on disciplines for government procurement practices was introduced into the world trading system.

During the Uruguay Round of multilateral trade negotiations, the Agreement of Government Procurement (GPA) was strengthened. Three factors underlie this shift towards greater acceptance of international rules on national procurement practices. First, since the mid-1970s government budgets have come under increased pressure, especially in industrial nations. Spending on welfare states, health, education, and pensions have increased considerably. Governments are then faced with the following unpleasant choices: raising taxes or cutting non-welfare state-related spending. Since the former has become increasingly unpopular in many developing and industrial countries, greater emphasis has been placed on the latter. And one means to reduce non-welfare spending has been to stimulate competition between those firms that bid for government contracts—and allowing foreign suppliers to bid for these contracts helps accomplish this goal. Greater pressure on public budgets, therefore, has been conducive to procurement reform.

The second factor has been the widespread privatisation of state-owned enterprises. Without governments standing behind them, these enterprises know that poor management decisions will not be “bailed out” by the state—leading to what economists refer to as a “hardening of the budget constraint.” In addition, the owners of the newly privatised firms know that their profits will not be entirely appropriated by the state. These two changes provide the privatised firm with an incentive to lower costs, including the expenditures on goods and services bought from other firms. Since most state-owned firms procured (like their governments) from domestic firms, privatisation is likely to increase the opportunities for foreign suppliers that sell high-quality competitively-priced goods and services. As privatisation continues in the future, this will reinforce the opportunities for cross-border procurement.

The third factor conducive to procurement reform is often referred to as “export politics.” Domestic firms eye profitable opportunities in supplying foreign governments and press their own government to negotiate “access” to those overseas procurement markets. In industries where there are strong economies of scale—

³ For other political economy rationales for reform see Hoekman (1998).

that is, average costs which fall as production levels increase—firms have an incentive to increase sales at home or abroad. Although one government could begin bilateral negotiations with another government to open the latter’s procurement market, the most prevalent path to reform has been for nations in the same region to simultaneously increase the access to their procurement markets to firms from the same region. Reciprocity is at the core of such agreements to liberalise together, as contracts lost by domestic firms to foreign suppliers are compensated for by an increase in the contracts won in neighbouring countries. The export gains can be balanced against the loss in sales to domestic firms—or so the theory underlying this approach to trade negotiation goes. Such a regional approach to procurement reform has advanced furthest in the European Union, and this experience had considerable influence in shaping the Agreement on Government Procurement negotiated during the Uruguay Round.

Another important aspect of procurement reform relates to the so-called transparency of the numerous steps associated with the implementation of a procurement law. Transparency, which refers to the publication, notification, and dissemination of pertinent information about a procurement regime to actual and potential bidders and to the public at large, is quite distinct from overt measures to discriminate against or in favour of one class of potential suppliers for state contracts. The absence of transparency is said to reduce the number of firms willing to bid for state contracts, so reducing competition and increasing costs (OECD 2003). Box 3 provides a list of examples of cost savings that are thought to have resulted from reforms that increase transparency in selected nations’ procurement regimes; savings that are to be compared with the expertise and other outlays that such reforms entail.⁴

Box 1. Examples of cost-savings under transparent procurement systems

- Through the strengthening of transparency and procurement procedures including, for example, eliminating any tender specifications that favour a particular tender, Guatemala’s Ministry of Health reports savings of 43 percent on the purchase of medicines.
- The Colombian Ministry of Defence reports generating 47 percent savings in the procurement of military goods through improvement of transparency and procurement procedures.
- Nicaragua had been spending about 17 percent of its health budget on pharmaceuticals. High drug expenditure had resulted from a lack of pricing and drug information and non-transparent procurement procedures. With the establishment of a transparent procurement agency, accompanied by the effective implementation of an essential drug list, the government was able to reduce drug costs significantly. Within one year of introducing these measures, the government had reduced its pharmaceutical budget from \$21 million in 1992 to \$13 million in 1993.
- In Pakistan, an open and transparent bidding process has resulted in savings of more than Rs 187 million (US \$3.1m) for the Karachi Water and Sewerage Board.
- After introducing transparent procurement procedures in the energy sector, Bangladesh was able to reduce electricity prices to less than US \$0.03 a kilowatt-hour, roughly half the price of directly negotiated deals in Indonesia.

Source: OECD (2003) and sources cited therein.

Despite its apparent benefits, domestic procurement reform is often notoriously difficult to accomplish. Hunja (2003) has identified the following impediments to unilateral reform:

1. “Deeply Vested Interests and Lack of Political Will” (page 17).
2. “Paucity of Technical Knowledge and Capacity” (page 18).
3. “Complexity of Substantive Issues Involved” (page 18) including the types of legal instruments involved, different means for organising procurement functions, and enforcement-related matters.

⁴ OECD (2003) notes in this regard that,

“...it should be stressed that some of the reforms needed cannot be implemented at no cost, but require resources to build up capacity and initiate long term change. Indeed, resources are required to change the institutional set-up (eg. the cost of making legislative changes and training the necessary staff) and to maintain procedural requirements to ensure transparency and due process” (page 11).

Reviewing the experience of developing countries in this regard, Hunja (2003) argues:

“Evidence from countries where reform efforts have stalled for a long time indicates that it is very difficult to achieve wholesale, systemic changes to the legal framework in the absence of consistent political commitment and support from within the highest levels of government. Only support at such levels can overcome the progress and substantive obstacles to reform” (page 21).

He goes on to argue that:

“Because efforts to bring about fundamental changes to a flawed system may attract direct opposition if implemented by a self-standing program, one way to increase the possibility of success is to implement such reforms within the context of an existing package of reforms aimed at increasing the efficiency of the public sector...Many countries are in the process of improving their system of governance (of which management of public resources is a key aspect) and in implementing anti-corruption measures. Procurement reform fits well into any such programs and is bound to attract less direct opposition if it is part of a large reform effort” (page 22).

An alternative means for improving procurement practices is in the context of reforms introduced after signing an international trade agreement and, therefore, the question arises as to whether adopting such agreements can galvanise and sustain support for domestic procurement reform.

I.2 Targets and instruments of national procurement policies

Tinbergen, the Nobel-prize winning macroeconomist, introduced the distinction between a government's targets and instruments. The former are the objectives that the government wishes to achieve, and the latter are the means employed in attempts to meet those objectives. This distinction in no way validates, or endorses, the targets chosen by the government; nor does it imply that any given instrument has the desired effect. In the case of government procurement policies, these tend to have multiple targets and numerous instruments. This reality complicates an analysis of procurement policies, and in part accounts for the multi-faceted nature of international disciplines on the design and implementation of such policies.

I.2.1 Targets

Perhaps the most common objective of procurement policies is to obtain “value for money” for the government in its purchases. This straightforward objective itself has many facets; it could mean the purchase of goods, that meet certain quality levels, at minimum cost. Alternatively, it could mean choosing that good with the highest quality among a set of similarly priced goods. At a first cut this objective seems unobjectionable. However, this is to forget that the key metric used by economists to evaluate government policies is the effect of such policies on economic efficiency. Efficiency is attained when the price paid for a good (service) reflects the value to society of the resources used to produce the last unit of that good. One classic source of inefficiency occurs when a buyer with considerable market power artificially reduces the quantity purchased so as to induce suppliers to lower their prices. Therefore, it is important to bear in mind that attaining the lowest possible price, or “value for money,” in government purchasing need not generate efficient economic outcomes.

Governments also use procurement policies to favour certain groups, firms, regions, and industries. For example, such favouritism is widespread in the United States and India where the central government favours small firms who bid for contracts. More recently, South Africa has considered instituting a scheme which will favour black entrepreneurs and firms that employ stipulated numbers of black employees. This is part of a sweeping initiative to enhance the economic status of the majority black population after the fall of the apartheid regime. Finally, purchases of military equipment have long been subject to different rules, as nations have felt the need to maintain a broad range of military production facilities for national defense purposes. Because these objectives of procurement policy do not directly relate to maximising economic efficiency, economists refer to them as “non-economic” objectives; a term that does not imply that these objectives are misguided or unattainable. Rather, this term is applied when governments have explicitly decided to adopt measures that may well lead to market outcomes that do not maximise economic efficiency.

Given the widespread adoption of non-economic objectives by governments, economists have researched extensively their consequences, especially in the area of international trade policy. The main finding of this research has been to show that the amount of economic efficiency sacrificed to meet a non-economic target

varies considerably across instruments—and so it makes sense to determine which instrument attains the desired goal with the smallest reduction in economic efficiency. In so doing, economists have argued that it is better to tackle the direct source of problem at hand rather than take measures that only indirectly bear on the matter.

For example, governments may want to promote the number and production levels of small firms by awarding these firms state contracts even though at least one large firm submitted a lower bid. An economic approach might point to a different course of action: first, the government should identify the impediments faced by small businesses and take measures that directly remedy them. If, for example, the critical impediment to the growth of small firms is access to financial credit, then policies should be directed towards bolstering the supply of credit to small firms—rather than using indirect means such as deliberately increasing the sales of small firms through government contracts.

The arguments above are not theoretical hair-splitting—they have direct relevance for the reform of government procurement policies. Governments may be more inclined to eliminate a procurement scheme that favours a certain industry if they know that other forms of state intervention can better attain this objective. Furthermore, if the chosen form of state intervention directly tackles the constraint of the favoured industry's or group's performance, then economic efficiency can be improved also.

I.2.2 Instruments

The manner in which governments procure goods and services can be complex and leaves plenty of room for favouritism towards groups of suppliers. The main focus here is on favouritism towards domestic suppliers, or alternatively put, discrimination against foreign suppliers. At this point it is worth noting that a supplier can be foreign, and therefore the potential subject of discrimination, in two respects: the supplier is located overseas or the supplier is located domestically but is partially or fully foreign-owned. The latter includes subsidiaries of multinational corporations whose headquarters are located abroad. Moreover, discrimination that is explicitly stated in national law or published regulations, in which case it is said to be *de jure*. Discrimination that results from the implementation of those laws and regulations is often said to be *de facto*.

A description of the stages of a typical procurement process for goods is helpful in identifying where discriminatory instruments can affect outcomes. (It should be added that there are additional means by which discrimination against foreign services providers can occur and these are discussed in section I.2.3 below). If a government decides not to effectively ban outright foreign bids for a contract then, in essence, the procurement of goods can be divided into three distinct stages: tendering, evaluation, and award notification and review procedures. At the tendering stage the government notifies a supplier or suppliers of its desire to procure certain types of goods. The government can specify the type of goods that it wishes to buy—including, in principle, the manner in which those goods are produced. There are three types of tendering procedures: open, selective, and limited. In open procedures an interested supplier, located at home or abroad, can submit a bid or, as it is often called, a tender. Under selective procedures only those pre-qualified firms may submit a tender. Pre-qualification is an additional step where a firm must demonstrate that potential to deliver goods of appropriate quality in a timely fashion. As this determination depends on the judgement of the procuring officials, some suppliers (including foreign firms) may be at a disadvantage if they do not have a track record in supplying the relevant goods. A limited tendering procedure tends to be the most restrictive as the procuring agency involved contacts individual suppliers and invites only these suppliers to submit tenders. This is not to say that limited tendering is always inappropriate. (Indeed, ensuring quick delivery in a time of national emergency may require the use of limited tendering.) Rather, that limited tendering frustrates one of the principal objectives of procurement reform—namely, to stimulate competition among suppliers which is likely to result in lower prices paid by the government. Finally, if governments rely on existing suppliers when conducting limited tendering, then new foreign and domestic suppliers will almost certainly lose out on procurement opportunities.

The specification of the goods being procured also introduces the potential for discrimination. For example, a government might require that the goods be produced in firms that adhere to certain health and safety standards for workers. As these regulations differ across countries, foreign suppliers may find their costs have to rise to meet another nation's standards, reducing their ability to effectively compete in a tendering process. Even if a foreign firm already meets those standards, there may well be costly verification procedures which too reduce the effective competition from foreign bidders. Tendering procedures,

therefore, can result in two forms of *de facto* discrimination against foreign suppliers—discrimination that directly or indirectly reduces the number of bidders and discrimination that increases the costs of foreign bidders. In what follows, these government measures are referred to as “entry” and as “cost” discrimination, respectively.

The evaluation of tenders is the next critical stage in the procurement process. As firms rarely bid to supply identical goods, the procuring official will have to assess not only the price of the tender but also a whole series of non-price factors—such as the quality of the good, the quality of after-sales service, the reliability of the supplier, and the like. Many of these factors are hard to quantify and some subjective judgements are inevitable. However, such judgement is to be distinguished from explicit discrimination against certain groups of suppliers. Governments may employ price preferences to inflate the bids of disfavoured suppliers. For example, a ten percent price preference against foreign suppliers implies that their actual bids will be inflated by ten per cent before being compared to bids by domestic suppliers. This puts foreign firms at a disadvantage as raising a bid typically reduces the probability of winning a government contract.

There is one caveat to the presumption that a lower priced bid increases the chances of securing a state contract, and that is when a bid is too low to be commercially viable. At first this may seem implausible, however, it is important to remember that firms often supply a good well after the contract is awarded. For example, if a firm is building a bridge for a government and the firm runs out of money (because its bid was below the cost of producing the bridge), then the government is in something of a bind. Does the government begin the procurement process afresh, or is it cheaper to pay the existing contractor additional sums to complete the bridge? The latter involves the supplier being “bailed out” by the government; and so the bridge costs more (possibly much more) than originally envisaged. Furthermore, the possibility that a supplier may be subsequently bailed out affects the prices that each firm bids in the first place. And, if domestic firms are more likely to be bailed out than foreign firms, this confers an advantage on domestic bidders for state contracts.⁵ Procuring officials often check, therefore, that tenders with exceptionally low bids have the capacity, and the incentive, to complete any contract that is awarded to them.

The role of intangible factors—that are part of the decision as to which firm to award a contract to—can undoubtedly cause controversy. Firms that do not win the contract may feel that they were discriminated against, that the evaluation was conducted unfairly or incorrectly, or that irrelevant factors were taken into account. Consequently, many governments have established review procedures that enable firms to challenge the decisions of procuring officials. The specific details of these procedures determine, in large part, their effect of the tendering and award steps of the procurement process. If aggrieved parties can only recover the cost of preparing the bid and the cost of mounting a challenge, then a firm will be disinclined to object to a procurement decision, unless there is the expectation that similar tenders will be issued in the future and that the challenge will alter the subsequent behaviour of procuring officials. (Of course, the firm might also be concerned about retaliation by these officials in future tenders.) In contrast, if the challenge procedure offers the potential to win substantial damages, then this may well reduce inappropriate behaviour by procuring officials. This beneficial effect must be seen beside the costs of frivolous challenges, and the increased bureaucratic measures that officials will take in order to reduce the likelihood of successful challenges by initially unsuccessful bidders. Finally, to the extent that foreign firms believe that they are unlikely to receive a fair and objective hearing from a domestic challenge procedure, then another form of discrimination is introduced into a nation’s procurement system. This increases the likelihood that the entry-based, cost-based, and price-based discrimination identified earlier will occur, again reducing the benefits that accrue to governments from competition between potential suppliers.

I.2.3 Services

Up until now this discussion has focused on purchases of goods, with the implicit assumption that a foreign firm can supply a domestic government contract by exporting a good. This mode of supply is, in the parlance of trade experts, called the “cross-border movement of goods.” When discussing the procurement of services three other modes of supply are of importance, each of which reflects the fact that many services can only be delivered when the supplier is physically proximate to the purchaser. The first of these three modes of supply is referred to as establishing “commercial presence.” Here a foreign firm sets up a subsidiary, or forms a joint

⁵This argument is developed at length in Mattoo (1997).

venture with a domestic firm, within the borders of the “home” nation. Once established, this subsidiary or joint venture can attempt to bid for the home government’s service contracts. The ability to establish presence, and therefore to bid for government contracts, is highly contingent on government policies towards foreign direct investments, joint ventures, and foreign mergers and acquisitions of domestic firms. Strict rules on foreign takeovers of domestic firms are likely to reduce this method of establishing presence and, therefore, will alter the nature and extent of tendering for government service contracts.

The other two modes of supply relate to the movement of people across national boundaries. To effectively supply some services, such as accounting, auditing, consulting, and legal services, may require the temporary movement of personnel. Other services, such as recurring maintenance and perhaps nursing, may require longer term or even permanent migration of workers, especially if there is insufficient expertise in the domestic labour force. In both cases the ability of a foreign firm to contest the domestic service market—irrespective of whether the buyer is a government or not—depends critically on the nation’s policies towards work visas and migration.

This discussion implies that a government that wants to reap the full benefits of competition between potential service suppliers cannot confine themselves to implementing a transparent and non-discriminatory government procurement regime. As services can be supplied through four modes of supply (cross border-movement for tradeable services—and the additional three modes described above), policies towards each mode of supply can affect the intensity of competition in the services market. It should be noted that foreign firms do have some choice over which mode of supply to use. For this reason, some have argued that a nation may not need to open all modes of supply in order to derive the benefits from foreign competition. While there may be some validity to this argument in certain situations, in general just because a foreign firm has access to at least one mode of supply does not imply that the permitted mode(s) are the lowest cost mode(s) of supply. Furthermore, as the costs of each mode of supply are likely to vary across industries and over time, there is little reason to suppose that opening any one mode of supply in general (such as permitting foreign direct investments) will maximise the benefits to governments of foreign competition for procurement contracts.

I.2.4 Corruption and collusion

Given that firms (domestic and foreign) want to secure lucrative government contracts, and that some officials may be motivated by personal self-interest as well by promoting the public interest, it should come as no surprise that corruption and collusion are a feature of government procurement. Firms may decide to reduce the competition for contracts by agreeing (or “rigging”) the prices that they submit to the procuring entity. Often, these conspiracies involve each firm taking its turn to win a government contract. For these conspiracies to be sustained there must be repeated tendering by the state over time, so holding out the prospect of future contracts for those engaged the conspiracy. As a separate matter, a firm or firms could attempt to bribe or induce government officials to view their tenders more favourably, and such corruption has been extensively researched (see Bardhan, 1997, and Rose-Ackerman, 1999, for recent surveys.)

Without attempting to present a full analysis of the sources and effects of corruption here, for present purposes it is important to recognise that procurement rules—whether national or domestic—should be designed with the possibility of corruption in mind. Given the considerable scope for discretion on the part of procuring officials, much can be done to force those officials to make their decisions in an open and transparent fashion. Likewise, so-called carrots and sticks can be offered to officials to induce them not to take bribes.

I.3 Evidence on the scale of national procurement markets

Given the importance of the state sector as a determinant of national economic performance, it is perhaps surprising that there is little systematic cross-country and inter-temporal evidence on the size of national procurement markets. OECD (2001) surveys what evidence has been provided⁶, and adds to the evidentiary base by using System of National Accounts (SNA) data (reported by the International Monetary Fund and the United Nations) to compute the magnitude of government spending in the OECD member states and in 106 non-OECD economies. Specifically, measures of government spending were obtained by adding state

⁶ See, for example, Francois, Nelson, and Palmeter (1997).

expenditures on investment⁷ to either expenditure on all current acquisitions⁸ or expenditure on final consumption⁹ and subtracting from the total outlays on the compensation of employees. Table 1 reports the estimates in OECD (2001) of this size of procurement markets in the OECD member states.

Table 1: Size of government procurement markets in OECD nations, 1998

OECD member	Total government expenditure less outlays on defence and compensation, as a percentage of GDP					
	SNA-based measure			SNA-based measure that takes into account intermediate consumption		
	(1) General government	(2) Central government	(3)=(2)/(1)	(4) General government	(5) Central government	(6)=(5)/(4)
Australia	7.64	0.86	0.11			
Austria	11.71	2.31	0.20	11.71	2.31	0.20
Belgium	4.84	1.95	0.40	3.87	2.03	0.52
Canada	10.40	0.62	0.06			
Czech Republic	15.74	2.71	0.17	11.21		
Denmark	10.04	2.75	0.27	10.04		
Finland	9.00	3.58	0.40			
France	7.63	1.81	0.24	7.63	1.81	0.24
Germany	6.72	0.81	0.12	6.62	0.81	0.12
Greece	6.73	3.76	0.56			
Hungary	16.78	7.03	0.42			
Iceland	11.76	3.62	0.31			
Ireland	9.93	2.59	0.26			
Italy	7.38	2.12	0.29	7.11	1.94	0.27
Japan	8.98	1.29	0.14			
Korea	7.20	1.94	0.27			
Netherlands	7.98	2.71	0.34	8.11	2.71	0.33
New Zealand	6.67	3.05	0.46	8.34	5.94	0.71
Norway	9.65	3.82	0.40			
Poland	9.72	5.57	0.57			
Portugal	6.22	3.80	0.61	6.18	3.49	0.56
Slovak Republic	14.09	8.21	0.58			
Spain	8.06	1.95	0.24	8.40	2.08	0.25
Sweden	13.01	4.67	0.36			
Switzerland	8.02	1.50	0.19	7.86	1.45	0.18
Turkey	6.84	4.96	0.73			
United Kingdom	9.97	5.88	0.59	9.77	6.09	0.62
United States	6.18	1.09	0.18			
OECD weighted average	7.57	1.75	0.23	8.22	2.79	0.34
EC weighted average	8.03	2.53	0.32			

Source: OECD (2001)

On average, in the OECD nations government procurement on items other than defense and compensation for state employees entails outlays equivalent to 7.57 percent of national incomes. These calculations imply that in 1998 approximately US \$1.795 trillion of government expenditures were potentially contestable by firms

⁷ Strictly speaking, a measure known as gross fixed capital formation is used here (and is reported in the SNA).

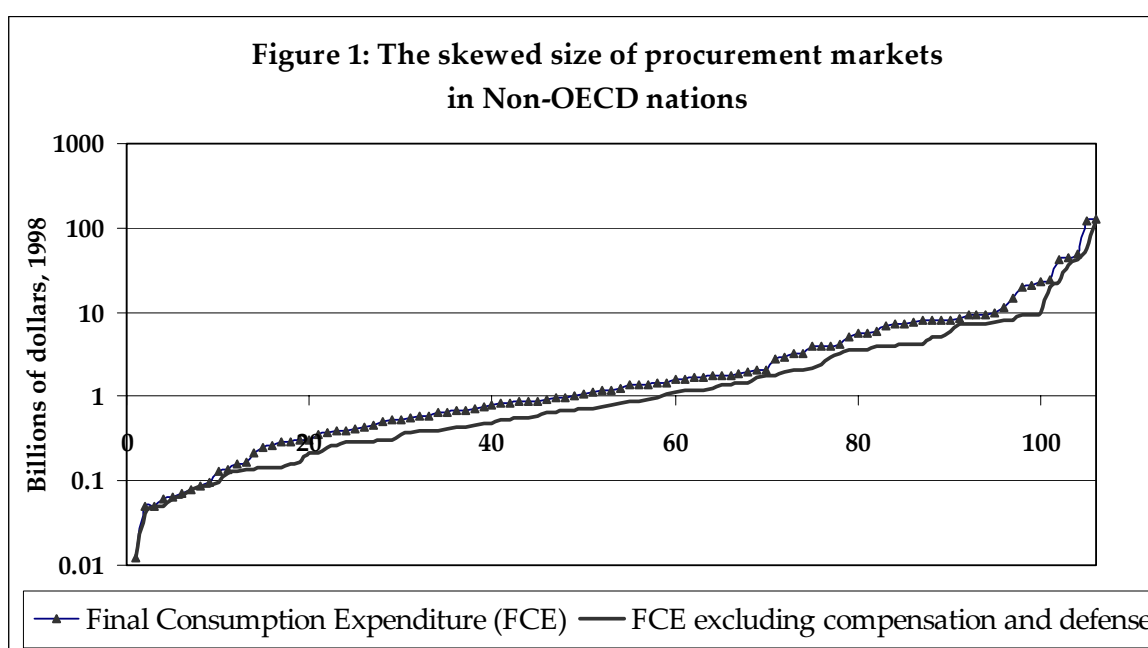
⁸ Strictly speaking, a measure known as intermediate consumption is used here (and is reported in the SNA).

⁹ Strictly speaking, a measure known as final consumption expenditure is used here (and is reported in the SNA.)

located at home and abroad. Moreover, between a quarter and a third of those outlays are undertaken by central governments, highlighting the importance of sub-national authorities.

Turning to the economies that are not members of the OECD, OECD (2001) reports that on average their contestable government expenditures amounted to 5.10 percent of their national incomes. The total amount of such expenditures in these non-OECD nations equals US\$287 billion, approximately one-sixth of the size of the contestable procurement markets in OECD nations. Moreover, as Figure 1 makes clear, the size of the contestable procurement markets in non-OECD nations is highly skewed with 60 of the 106 nations having procurement outlays less than US\$1 billion. In 1998, around 10 non-OECD nations have contestable procurement outlays of US\$10 billion or more. (For a full breakdown of the procurement outlays by non-OECD economy see Appendix 1 at the end of this chapter.)

The fact that so many non-OECD countries have relatively smaller contestable procurement outlays do not imply that state procurement is unimportant in these economies. However, the magnitude of their state outlays does suggest that in absolute terms the maximum size of market access to their procurement markets is far more limited than in the OECD nations and in a few of the larger non-OECD countries.



Part III

EXISTING PLURILATERAL DISCIPLINES ON GOVERNMENT PROCUREMENT AND OTHER INTERNATIONAL INITIATIVES IN THE 1990s

Although a second Agreement on Government Procurement (GPA) was adopted by some WTO Members at the conclusion of the Uruguay Round, there have been a number of other important international initiatives in the 1990s that have had considerable bearing on content and application of national procurement laws. The purpose of this part of the chapter is to describe these international initiatives, to contrast them with the provisions in the current GPA, and to assess along a number of dimensions how comprehensive these measures are.

II.1 The Uruguay Round Government Procurement Agreement

The WTO's Government Procurement Agreement entered into force on January 1, 1996. At present the agreement has twenty-eight members (Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, and the United States), and over twenty economies hold observer status. Furthermore, at present, Bulgaria, Estonia, Jordan, the Kyrgyz Republic, Latvia, Panama, and Chinese Taipei are negotiating accession to the GPA. In sum, the membership of the GPA comprises mainly of industrial nations and many developing nations have evidently chosen not to accept this agreement's disciplines and reporting requirements.

According to the WTO (2000):

"The GPA establishes an agreed framework of rights and obligations among its Parties with respect to their national laws, regulations, procedures and practices in the area of government procurement. The cornerstone of the rules in the Agreement is non-discrimination. In respect of the procurement covered by the Agreement, governments Parties to the Agreement are required to give the products, services and suppliers of any other Party to the Agreement treatment "no less favourable" than that they give to their domestic products, services and suppliers and not to discriminate among goods, services and suppliers of other Parties (Article III:1). Furthermore, each Party is required to ensure that its entities do not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership and do not discriminate against a locally-established supplier on the basis of country of production of the good or service being supplied (Article III:2) In order to ensure that the basic principle of non-discrimination is followed and that access to procurement is available to foreign products, services and suppliers, the Agreement lays heavy emphasis on procedures for providing transparency of laws, regulations, procedures and practices regarding government procurement."

The annexes of the GPA outline, for each member, which government entities (central government, sub-central governments, and other state bodies such as utilities) and which purchases of goods and services are potentially covered by the disciplines of the GPA. Even then, only those transactions which exceed certain threshold levels are actually covered by the GPA. Although a common threshold of SDR 130,000 was established for central government utilities purchases of goods and non-construction services, these thresholds tend to be much higher for construction projects and purchases by non-central government entities (see the top panel of Table 2 overleaf).

The treatment of goods and services in the GPA differs in one important respect. All goods purchases are subject to GPA disciplines unless a nation secured exemptions during the agreement's negotiation (or during subsequent accession to the agreement.) In contrast, only those services which a nation lists in the Annexes to the agreement are covered by the GPA's disciplines. Nevertheless, the WTO suggests that the scope of government procurement covered by the current GPA is approximately \$300 billion, which is ten times the estimated coverage of the Agreement of Government Procurement negotiated during the Tokyo Round.

As the quotation above made clear non-discrimination is at the core of the GPA. However, unlike many other WTO agreements, many members have conditioned their own commitments on the market access offered by other members of the GPA. This has effectively meant negotiating a raft of bilateral obligations on reciprocal access to procurement markets, and is at odds with the well-established principle that nations grant unconditionally the same access to all members of a WTO agreement. To the extent that such reciprocity actually prolongs discrimination against foreign suppliers, then the benefits of enhanced competition to supply domestic procurement contracts will be reduced. Finally, the GPA's national treatment disciplines ensures that foreign bidders are treated no less favourably than domestic bidders, and effectively bans price preferences against foreign bidders located in nations which are members of the GPA.

Table 2: Thresholds for Korean government procurement

(a) Threshold values for procurement by GPA-covered entities

Classification	Type of contract	Threshold value (SDR)
Central government entities	Supplies and services	130,000
	Construction services	5,000,000
Sub-central government entities	Supplies and services	200,000
	Construction services	15,000,000
All other entities	Supplies	450,000
	Construction services	15,000,000

Note: These thresholds were also notified in national currency fixed for two years.

(b) Korean government contracts, by tender procedure, 1997-98

	1997 US\$ million (%)	1998 US\$ million (%)
Goods	7,264 (100)	5,192 (100)
Tender procedure:		
Single	3,083 (42.4)	2,814 (54.2)
Restricted	2,109 (29.0)	1,043 (20.1)
Open	2,072 (28.5)	1,335 (25.7)
Public works	14,184 (100)	9,103 (100)
Single tendering	1,798 (12.7)	1,256 (13.8)

Note: More recent data on procurement methods were not available.

Source: The latest Trade Policy Review for Korea, which cites the original sources as WTO document GPA/W/81, 11 February 1999; and the Ministry of Finance and Economy, Government of Korea.

The GPA has two other important features: measures to improve transparency in the procurement process and enforcement provisions. The agreement contains measures on the use of selected and invited tendering, the nature of technical specifications listed in a tender, and the criteria used to make procurement awards. Tables 2, 3, and 4 contain information on the use of different tendering procedures by government entities in Korea, Israel, and Norway, respectively.

The article on technical specifications, Article VI, contains a number of loopholes as it only enjoins nations from creating “unnecessary” obstacles to trade. Furthermore, the agreement notes that specification should “where appropriate” relate to performance, rather than to the manner in which a good or service is designed, produced, or marketed.

The GPA preserves some discretion on the part of procuring entities when it comes to deciding which bidder to award the contract to. Contracts must be awarded to the supplier that is deemed capable of undertaking the contract and satisfies one of the following two requirements: (i) the supplier made the lowest bid or (ii) the supplier best meets the evaluation criteria laid out in the original tender. Essentially, this latter requirement prohibits a procuring entity from refusing to award a contract to a supplier on grounds that were not specified in the tender. Of course, the effectiveness of this requirement depends critically on how broad are the evaluation criteria in the tender.

On the subject of transparency two other provisions of the GPA are worth noting. First, the GPA allows a government to refuse to award a contract on “public interest” grounds that, alas, are not defined. Second, once a contract award has been made the procuring entity does not have to provide an explanation to those bidders who did not win the contract. The latter is only required when a member government intervenes on behalf of a bidding firm under the GPA’s enforcement procedures.

The enforcement provisions of the GPA are of particular interest. Recognising that aggrieved bidders want to have rapid redress, perhaps even reversing an ongoing procurement process, the GPA mandates that Members establish impartial domestic arbitration procedures capable of making swift decisions. Furthermore, complainants are allowed to invoke the provisions of this WTO agreement in making their case in a domestic arbitration procedure. In addition to these domestic procedures, WTO Members are allowed to bring cases before the WTO dispute settlement body, including when it is thought that a domestic arbitration procedure has misinterpreted the GPA. Naturally, the effectiveness of this domestic dimension to enforcing an international trade agreement depends crucially on the manner in which national adjudication is carried out. There will inevitably be differences in such procedure across nations and, perhaps more worryingly, differences in the ability of adjudicators to resist pressures to favour domestic suppliers.

Table 3: Key Israeli government procurement practices

Procurement procedures	Instances when the method is applied
1. No tender 2. Closed tender (award is based on most advantageous offer, mainly based on price) 3. Public tender (award is based on most advantageous offer, mainly based on price) 4. Extraordinary tender (award is based on price, and technical and administrative details) 5. Shortened tender (award is based on price only)	<i>Contracts up to:</i> - NIS 39,000 (or about US\$9,500 in June 1999) for Ministry, other than defence; - NIS 15,600 for defence establishment; and - NIS 156,000 for government company or subsidiary. <i>Examples of other instances:</i> a contract that is urgently needed in order to prevent substantial harm; a contract pertaining to a transaction for which a tender is liable to cause substantial harm to national security; additional contracts within three years of the conclusion of the first contract; and a contract concerning the subject of marketing of agricultural produce, advertising in the media, cultural, artistic, entertainment, or certain areas of medicine. <i>Contracts:</i> - from NIS 39,000 up to NIS 312,000 for Ministry, other than defence; and - from NIS 15,600 up to NIS 156,000 for defence establishment <i>Examples of other instances:</i> selective tendering procedure based on a list of qualified suppliers for the acquisition of goods with special properties and with “uncommon characteristics”; for the acquisition of medical equipment; insurance; research and development activities. <i>Contracts above:</i> - NIS 312,000 for Ministry, other than defence; - NIS 156,000 for defence establishment; and - NIS 156,000 for government company or subsidiary. <i>Contracts:</i> - transaction with respect to R&D or scientific work; - when no technical specification is available; - for educational or vocational training; and - when because of defence consideration the Ministry will need to make investments in infrastructure. Closed tender for purpose of shortening procedures, applicable to tenders up to NIS 30,000
Preferences for domestic industries A. All international tenders, except for GPA tenders: price preference of up to 15% to domestic suppliers. Preferences for “priority areas” B. All tenders, including domestic, except for GPA tenders: price preference of 5% in respect of goods and services from Area B and 15% from Area A^a. Preferences for local subcontracting C. Tenders offering local subcontracting, except for GPA tenders: a foreign company receives a 1% price advantage over other foreign companies for the first 10% and an additional 1% for every additional 5% subcontracting, up to a maximum 35% of the contract; the maximum preference for local subcontractors may not be greater than 5%. Business cooperation D. International public tenders with a value of above NIS 1.5 million: minimum “cooperation” of 35% of the value of the contract^b.	

a The sum of these preferences and the domestic suppliers preferences may not exceed 15%. Areas A and B are within the meaning of the priority areas defined in the Capital Investment Encouragement Law.

b The offset requirement can be satisfied in the form of subcontracting to local companies, investment in local industry, know-how transfer, or acquisition of goods made in Israel or of work or services in Israel.

Source: The latest Trade Policy Review for Israel, which reports the original sources as: WTO Secretariat, based on Mandatory Tenders Law of 1992; Mandatory Tenders Regulations of 1993; Mandatory Tenders Regulations (Defense Establishments Contracts) of 1993; Mandatory Tenders Regulations (Preference for Israeli Products and Mandatory Business Cooperation) of 1995; Mandatory Tenders Regulations (Preference for Products from National Priority Areas) of 1995; and Mandatory Tenders Regulations (Preference for Products from National Priority Areas) of 1998.

Table 4: Norwegian government procurement statistics, 1996-97

	1996				1997			
	Number of contracts	%	Value of contracts	%	Number of contracts	%	Value of contracts	%
Supply contracts , of which:	323	100	3,052		260	100	5,460	100
Open procedures	251	78	2,289	75	176	68	2,894	53
Selective procedures	53	16	549	18	23	9	382	7
Negotiated procedures	19	6	244	8	61	23	2,184	40
Awarded to domestic supplier	304	94	..	..	247	95	..	..
Awarded to foreign supplier	19	6	..	..	13	5	..	..
Service contracts	138	100	1,388	100	139	100	2,040	100
Open procedures	92	67	1,138	82	92	66	1,530	75
Selective procedures	30	22	167	12	33	24	449	22
Negotiated procedures	13	11	83	6	14	10	69	3
Awarded to domestic supplier	137	99	..	..	138	99	..	..
Awarded to foreign supplier	1	1	..	..	1	1	..	..
Works contracts	243	100	1,960	100	143	100	1,803	100
Open procedures	213	88	1,548	79	131	92	1,569	87
Selective procedures	27	11	373	19	2	0	90	5
Negotiated procedures	3	1	39	2	12	8	144	8
Awarded to domestic supplier	242	99	..	..	142	99	..	..
Awarded to foreign supplier	1	1	..	..	1	1	..	..
Utilities contracts	284		17,741		87		2,602	
Open procedures	..	..	..	..	..	..	..	..
Selective procedures	..	..	..	..	..	..	..	..
Negotiated procedures	..	..	..	..	..	..	..	..
Awarded to domestic supplier	..	..	..	..	..	..	..	..
Awarded to foreign supplier	..	..	..	..	..	..	..	..
Total contracts	988	100	35,117	100	629	100	11,904	100

.. Not available.

Source: The latest Trade Policy Review for Norway, which cites the original sources as WTO documents GPA/21, 29 May 1998 and GPA/22/Add.1, 23 April 1999.

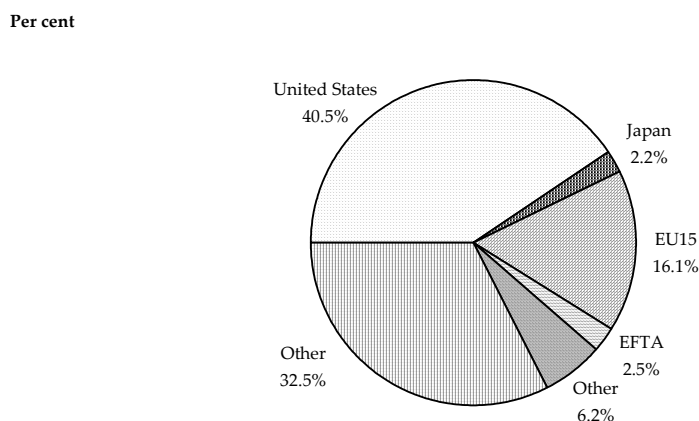
II.2 Economic impact of the GPA

An important component of any assessment of the case for further international disciplines on government procurement is an analysis of the economic impact of the existing plurilateral GPA. This section starts by reporting some pertinent facts concerning the proportion of government contracts sourced from abroad then goes on to discuss the economic literature on the effects of procurement discrimination in markets and in auctions, and concludes with some remarks about the likely effects of the current GPA.

The Trade Policy Reviews of national policies, that are carried out periodically by the WTO secretariat, often provide useful information on the degree of preferences awarded to different types of domestic firms and on the proportion of contracts sourced abroad. For example, in Table 3 above, the preferences in the Israeli procurement code are described. Israeli firms that are competing in a tender against firms that are not located in GPA members receive a 15 percent price preference, indicating the degree of conditional discrimination in this case. Moreover, the number of contracts awarded to foreign firms by Norwegian procuring entities

during 1996-1997 is reported in Table 4. In addition, Figure 2 reports that in 1999 2087.5 billion won of Korean government contracts were awarded to foreign firms, of which forty percent were awarded to firms from the United States. A further 16.1 percent were awarded to firms from the European Union. (One important to bear in mind when interpreting such numbers is that it is not clear whether procurement contracts awarded to the local subsidiaries of a given foreign economy's firms is included in the reported total of sourcing from that foreign economy.)

Figure 2: Korean government procurement by origin of foreign suppliers, 1999



Total: Won 2,087.5 billion

Source : Information provided by the authorities of the Republic of Korea and reported in Korea's latest Trade Policy Review at the WTO.

Some countries report by procuring entity and by type of good the extent of foreign sourcing. The latest Trade Policy Review for Japan reports by type of good that nations government's purchases from abroad (see Table 5). Of the 769,630 million yen of reported procurement expenditures, 16.1 percent was awarded to foreign firms. Moreover, there is considerable variation across different types of product, with no foreign sourcing in stone etc. (product number 8 in this table), ships and boats, and sanitary, plumbing, heating and veterinary equipment. In contrast, 93.3 percent of the Japanese government purchases of aircraft and associated equipment were from abroad as were 88 percent of mineral purchases; no doubt reflecting the lack of domestic suppliers of these items. For an extensive analysis of Japanese state procurement patterns, see Evenett and Shingal (2002).

With this factual record in mind, the discussion now turns to research of the effects of discrimination against foreign suppliers in markets and in auctions.

II.2.1 Economic analyses of procurement discrimination in markets

In recent years the forms of procurement discrimination identified in the last section has received greater attention from researchers. As is usual economic research differentiates between two types of question: what is the effect of a specific government measure on market outcomes? And what is the effect of that measure on national welfare, which aggregates the benefits that purchasers (including the government) and suppliers derive from market exchange? Most of the scholarly attempts to answer these questions have focused on the effects of procurement discrimination in a single market or auction. However, it is important to realise that international trade research stresses actions in one market can have knock-on effects in other markets, an approach which emphasises so-called "general equilibrium" effects.

Table 5: Japanese procurement composition by product and by origin, 1997 (¥ 100 million, per cent)

No.	Products	Total value	Share	
			Domestic	Foreign
1.	Products from agriculture, and from agricultural and food processing industries	1.9	84.5	15.5
2.	Mineral products	199.1	12.0	88.0
3.	Products of the chemical and allied industries	33.7	62.4	37.6
4.	Medicinal and pharmaceutical products	261.1	73.5	26.5
5.	Artificial resins and plastic materials, cellulose esters and ethers, and articles thereof; rubber, synthetic rubber, factice, and articles thereof; raw hides and skins, leather, furskins and articles thereof, other than articles of apparel and clothing accessories of leather, saddlery and harness, articles of animal gut	40.2	99.2	0.8
6.	Wood and articles of wood; wood charcoal; cork and articles of cork; paper making material; paper and paperboard and articles thereof; manufactures of straw of esparto and of other planting materials, basketwork and wickerwork	407.1	99.9	0.1
7.	Textiles and textile articles, footwear, headgear, umbrellas; sunshades; walking sticks, whips, riding crops and parts thereof; travel goods; hand-bags and similar containers; articles of apparel and clothing accessories, of leather or composition leather	106.8	98.8	1.2
8.	Articles of stone, plaster, asbestos, mica and similar materials; ceramic products, other than sanitary fixtures; glass and glassware, other than illuminating and signalling glassware and optical elements of glass, not optically worked nor of optical glass	14.6	100.0	0.0
9.	Iron and steel and articles thereof, other than boilers and radiators for central heating, air heaters and hot air distributors not electronically heated	167.1	99.2	0.8
10.	Non-ferrous metals and articles, other than lamp and lighting fittings	124.9	93.2	6.8
11.	Power generating machinery and equipment	52.4	91.5	8.5
12.	Machinery specialised for particular industries	89.8	93.3	6.7
13.	General industrial machinery and equipment, and machine parts	196.3	99.3	0.7
14.	Office machines and automatic data processing equipment	2,613.8	90.0	10.0
15.	Telecommunications and sound recording and reproducing apparatus and equipment	968.3	98.2	1.8
16.	Electrical machinery, apparatus and appliances, and electrical parts thereof	160.6	95.1	4.9
17.	Road vehicles	379.3	97.7	2.3
18.	Railway vehicles and associated equipment	56.8	56.8	43.2
19.	Aircraft and associated equipment	104.1	6.7	93.3
20.	Ships, boats and floating structures	23.7	100.0	0.0
21.	Sanitary, plumbing, heating and veterinary equipment	1.2	100.0	0.0
22.	Medical, dental, surgical and veterinary equipment	509.1	56.5	43.5
23.	Furniture and parts thereof	79.0	99.4	0.6
24.	Professional, scientific and controlling instruments and apparatus	887.0	68.3	31.7
25.	Photographic apparatus, equipment and optional goods; watches and clocks	82.0	81.8	18.2
26.	Miscellaneous articles	136.4	82.3	17.7
	Total	7,696.3	83.9	16.1

Source: Information provided by the Japanese authorities, as reported in the latest Trade Policy Review for Japan.

II.2.1.1 General equilibrium analyses

One effect of discrimination against foreign suppliers is on the levels of demand for different goods and on the inputs that are used to make them. Suppose that a government decides to no longer buy a certain good from abroad, effectively favouring the domestic suppliers of that good. This will raise the relative price of that good (the price of that good compared to other goods) because the additional resources that favoured domestic firms need to use, in order to satisfy the government's higher demand for their products, must be lured away from other productive resources. Immediately, then a procurement ban will affect the payments to factors of production, such as land, labour, and capital. The factor of production that gains (loses) from the imposition of this procurement ban is the one which is used most (least) intensively in the production of the good that the government is now buying solely from domestic firms. For example, if the amount of capital used per worker to produce one unit of steel is greater than one unit of textiles, then increased government demand for domestically-produced steel will raise the demand for capital more than the demand for labour, with predictable consequences for the payments to capital owners and workers. *The first knock-on effect of procurement discrimination in the domestic goods market is felt in domestic labour and capital markets.*

The second knock-on effect is on the quantity of exports and imports. There are two mechanisms at work here: one which works through relative prices and one that works in industries where higher output levels translate into higher productivity levels. To consider the first mechanism, it is useful to return to the steel and textile example introduced in the last paragraph. The imposition of a procurement ban on foreign steel raises the relative price of steel. There are two cases to be distinguished. First, if the nation was already exporting steel before the procurement ban, then the ban's imposition will raise the relative price of steel to all purchasers—including foreigners—that in turn buy less domestically-produced steel. In other words, the procurement ban would lead to a fall in domestic exports. Second, if the nation was importing steel before the procurement ban is imposed, then the increased relative price of steel would reduce the total (government plus private sector) domestic demand, and therefore, the imports of steel fall. In both cases, the total quantity of steel traded internationally falls as a result of the procurement ban.¹⁰ More importantly, both cases involve the world price of steel (relative to textiles) being affected by the nation's procurement ban. Not many nations are likely to have such clout over the world price of even a few goods. In contrast, the mechanism described in the next paragraph can operate when a nation's procurement ban has no effect on world prices.

Suppose that technological and managerial capabilities of a firm are such that the amount of labour and capital needed to produce a unit of a given good falls as the production runs lengthen. (That is, output per worker employed and output per machine rise when production is higher.) Taking up the steel and textile example again, what are the effects when a government stops making purchases of foreign steel and when this procurement ban has no effect on world prices? The government switches its demand for foreign steel to domestic steel producers, that may increase output. Any increase in output will require the use of less labour and capital and so incremental production costs fall. This increases the incentive for domestic steel production to expand sales to other markets—including the export market. In sum, an expansion the procurement ban can increase exports as well as the production of domestic steel. This is a consequence of the assumptions made about the technology available to a firm and the opposite effect can be generated if the amount of labour and capital needed to produce an additional unit of a good rises as production runs lengthen. Even so, whatever technologies firms employ, *it is quite possible for a domestic procurement ban to have knock-on effects in export markets.*

II.2.1.2 Partial equilibrium analyses

The first influential analyses of procurement discrimination examined the effects on outcomes in a single market. The essential feature of these analyses is that there are two sources of supply (domestic and foreign) and *two sources of domestic demand* (the government and consumer). The principal finding, which may seem a little counterintuitive at first, is that a procurement ban on foreign purchases by the government will affect output levels, imports, and prices only if government demand exceeded domestic supply at the moment the ban was imposed. An example will make this a little clearer: Suppose that in the market for cars before the procurement ban was imposed, government demand was 60 cars, private sector demand was 40 cars, the domestic private sector supplied 45 cars, and 55 cars were imported. Initially, then the government must

¹⁰ Both cases are based on the reasonable assumption that the demand for steel falls as its relative price increases.

have imported at least 15 (60-45) cars. So at the prices that prevailed before the ban was imposed, government demand exceeded domestic supply. In this case, when the ban is imposed the price of cars paid by the government must increase to encourage domestic supply to expand to meet government demand. At this higher price government demand equals domestic supply at, say, 52 cars. In which case, government demand has fallen by 8 cars, domestic production has risen by 7 cars, and imports have fallen by at least 15 cars.

The effect on the domestic (non-governmental) consumers depends critically on whether the initial pre-ban price was determined by world prices or by domestic market forces. If the world price determined the pre-ban price, then the domestic consumers are unaffected by the procurement ban. After all, domestic consumers do not need to pay the higher post-ban price charged to domestic government, as they can buy all the cars they want on world markets at the world price. In contrast, if foreign producers customise their cars to the domestic market, the procurement ban leaves foreign producers with at least 15 cars which they used to sell to the domestic government but are now prevented from doing so. Since these cars were customised for a specific market (suppose they have steering wheels on the left hand side), then the possibility of selling these cars on the world market is remote. The foreign car suppliers are left with little choice but to offer additional cars to domestic consumers at lower prices. In this case, domestic consumers actually gain from a government ban on purchases from foreign cars—as the ban creates a temporary surplus of foreign goods which results in lower prices being paid by domestic consumers.

The arguments in the last two paragraphs considered the case when the government demand for cars (60 in this case) exceeded domestic private sector supply (45) at the time the procurement ban was imposed. Now, suppose that government demand was less than or equal to domestic private sector supply, then the imposition of a procurement ban would have *absolutely no effect* on imports, output, or national welfare. To see this, the preceding example need be changed in just one respect—assume now that before the ban is imposed government demand is 45 cars and domestic private sector supply is 60 cars. (Everything else in the example is as before.) In this case, the procurement ban would merely reshuffle demand between foreign suppliers and the domestic producers of cars. To see why, suppose originally the government bought 5 cars from abroad then those 5 cars must now be supplied by domestic firms, which in turn would have 5 fewer cars to supply the domestic consumers. However, foreign firms have exactly 5 unsold cars which they can now supply to domestic consumers, making up any apparent shortfall. Therefore, when government demand is relatively small, a procurement ban merely reshuffles sales between domestic and foreign firms, with no effect on overall imports, output, or prices. This striking result was first pointed out in Baldwin and Richardson (1972), and implies that *there are circumstances under which procurement discrimination has no effect on market access*.

Unfortunately, the clear-cut nature of these predictions only provide a test of whether the *future* imposition of a procurement ban will affect market outcomes; specifically, a procurement ban on a good by a nation's government will only affect market outcomes if the level of government demand before the ban exceeds domestic private sector supply. This test, however, yields no information as to whether an *existing* procurement ban restricts market access to foreign firms. More constructively, if government demand after the ban is imposed is less than domestic private sector supply, then the argument in the last paragraph applies and removal of the ban will have no effect on market outcomes, including imports. However, if observed government purchases equal the quantity supplied by the domestic private sector after a ban is imposed, then one cannot tell if the ban has distorted market outcomes. This is because this equality could have prevailed before the ban—in which case the imposition of the ban would have had no effect on imports. Thus, this simple test does not always provide a reliable guide about the market-access reducing effect of an existing *de facto* or *de jure* procurement ban.

In sum, this framework is useful as it implies that procurement discrimination effectively segments the domestic market into a market to supply domestic government and a market to supply other domestic customers. The domestic government forgoes the benefits of foreign competition and may pay a higher price and purchase few units—if its pre-ban demand was relatively large (compared to domestic supply). Domestic producers can gain (only if they have to be coaxed into supplying goods more with higher prices) and the effect on domestic consumers depends on whether domestic prices were initially set by world prices or by domestic market forces.

II.2.1.3 Allowing for firm entry

The framework described in the last section has been extended to consider the implications of firm entry (see Evenett and Hoekman, 2000a). In the case where procurement discrimination raises the price paid by the government, domestic firms expand output and see their profits rise. As is typical in a market economy, profits act as a signal to entrepreneurs who are deciding which industry to set up production in. New “domestic” firms want to enter this protected industry—and if they do, then the number of firms who can supply the domestic government increases, and the price paid by the government will tend to fall until the incentive to enter this market (the higher-than-usual profits) has gone. Indeed, the principal consequence of allowing free entry into the market is that the price paid by the government may now fall to equal the world price—potentially eliminating any price wedge between that paid by consumers and that paid by the government.

Whether entry occurs depends on the prevalence of natural—and policy-induced barriers—to entry. Entry by domestic entrepreneurs may be frustrated by rules, regulations, and licensing. Entry by foreign entrepreneurs, that could set up production facilities in the nation which has imposed the procurement ban, depends upon a slew of policies towards foreign direct investments. Therefore, the long term consequences of a procurement ban are determined in part by domestic competition policies and restrictions on foreign direct investments. The fewer the barriers to entry the smaller the difference between the prices paid by the domestic government and by the domestic consumer, and the smaller the distortion to government consumption decisions. However, if the new entrants have long run costs of production that exceed those of overseas producers, then the elimination of the procurement ban will still improve market access—that is, if domestic suppliers cannot take steps to lower production costs in the face of increased foreign competition.

II.2.1.4 Corruption

Another important consideration is the effect of corruption and bribery on the benefits of procurement liberalisation. It has been widely acknowledged that corrupt government officials can solicit payments from actual and potential suppliers of goods and services to the public sector. Naturally, the nature and extent of corrupt practices differ across the world, and it is impossible to give a comprehensive account of corruption in the space available here. Instead, the focus here is on two distinct lines of argument developed in Evenett and Hoekman (2000b, 2002). The earlier of these two papers considered the impact on procurement and procurement reform when a corrupt government official took bribes in a transparent fashion. The second paper considers the case when a corrupt official shifts government expenditures towards goods where the procurement process is relatively more non-transparent, which in turn facilitates the collection of bribes.

The first paper proceeds from the assumption that a procurement official cares about two factors: the quantity of goods that the official’s government agency buys (which is associated with size of its agency and the prestige of the agency), and the benefit the official derives from spending any income it receives as bribes from the firms which supply its government agency. Now suppose that these firms can also sell in the world market at a price of \$1. This means that these firms’ revenues from supplying the government, net of bribes paid to the official, can never fall below \$1, otherwise the firms would concentrate on supplying the world market. The official has to decide what bribe b (per unit of good sold to the government) has to be paid by the firms. Competition among the firms ensures that they charge the government $\$(1+b)$. In making its choice the official knows that a lower bribe will increase the quantity that its agency purchases, which increase the official’s welfare, but may reduce its total income from graft. The official will choose that bribe level which equates the incremental benefits of the former to the incremental benefits of the latter. Under quite standard assumptions on the official’s preferences, this will result in positive bribes being set. (A bribe of \$0 would, of course, result in no income from bribery.) Now the corrupt official does not, in this set up, really care whether a domestic or foreign firm pays the bribe, so long as the bribe is paid. Therefore, it is perfectly possible for a corrupt official to buy some goods from abroad.

As argued above, bribery raises the price paid by the government and reduces the quantity purchased. The reduction in the quantity purchased also determines whether or not the *subsequent* imposition of a procurement ban has any effect. The following example underlines this point. Suppose that the government only decides to buy 5 units of a good when the official is corrupt. Before the procurement ban is imposed those 5 units were supplied by both domestic and foreign firms. If the domestic industry supplies more than 5 units to all buyers when bribery occurs then, just as Baldwin and Richardson found, a procurement ban

merely reshuffles demand between domestic and foreign suppliers. This is because the domestic firms need not change their production plans in order to meet all of the government's demand. Furthermore, the greater is the reduction in government demand due to bribery, the higher the likelihood that a procurement ban has no effect.

However, if the domestic firms initially supply less than 5 units, then the imposition of the procurement ban will result in government demand exceeding these firms' pre-ban output. To meet the governments' demand the domestic firms have to expand output and can only be induced to do so if the price (charged to the government) rises. Just like the Baldwin and Richardson model, procurement bans can distort market outcomes. However, in this framework the greater the effect of bribery on government demand, the less likely is a subsequent procurement ban to distort prices, outputs, and market access. *Put another way, the number of markets in which the removal of an economy-wide procurement ban will improve market access and result in lower prices paid by the liberalising government will be less in those nations where official corruption influences procurement from more sectors.* (Notice that the argument developed above did not need to invoke non-transparency in order to come to this finding.)

In a later paper Evenett and Hoekman (2002) introduced an additional realistic wrinkle: that the procurement processes for differentiated products tend to allow for more discretion by procurement officials—potentially presenting opportunities for corrupt officials to collect bribes. The first step in Evenett and Hoekman's argument was to appeal to the following finding, which is supported by a growing body of empirical literature on the nature and effects of corruption in procurement settings, namely,

“that corrupt officials deliberately expand expenditures on goods and projects—such as aircraft and construction—which are highly differentiated and for which there are few, if any, comparable reference prices in world markets. Recent econometric analysis supports the contention that governments which are perceived to be more corrupt spend more on military procurement and on arms imports. Put simply, officials with an interest in rent collection are likely to employ non-transparent procurement regimes to expand government spending on those items where the opportunities for self-enrichment are greatest (page 11).”

This finding suggests that the composition of government spending is shifted towards goods and services that have relatively less transparent procurement processes. In addition, Evenett and Hoekman pointed to separate evidence which suggested that small and medium enterprises are less willing to bid for government contracts if they have to bribe government officials. In economic terms, to the extent that non-transparent procurement procedures reflect the desire to collect bribes by corrupt government officials, then the willingness of firms to supply the government's needs here is smaller than it would otherwise be.

These two stylised facts were used to analyse the effects of *successfully* eliminating non-transparency in procurement procedures¹¹, perhaps as part of an international trade agreement. Evenett and Hoekman argued that such an agreement would shift government demand away from more differentiated towards more homogenous goods, and would increase the number of firms willing to bid to supply differentiated products. In most of the cases analysed in their paper, Evenett and Hoekman found that the demand for imported differentiated products would fall—suggesting that eliminating transparency need not raise foreign market access in total. It would be very interesting to see if subsequent research comes to a similar conclusion as it would call into question the value (from a market access perspective) of negotiating additional disciplines on transparency in government procurement at the WTO. This is not to say that enhanced transparency would not have other development-friendly effects.

II.2.2 Economic analyses of procurement discrimination in auctions

In the analyses of procurement discrimination in markets outlined in the last two sections, the discrimination never resulted in a fall in the market price paid by the government—underlying the presumption that zero discrimination maximises both government purchases and the benefits derived from scarce government resources. However, many government purchases are not made through markets, but with are in fact made

¹¹ Thus, this argument does not take a stand on whether national or international measures can successfully eliminate non-transparency in procurement practices. The purpose of the argument in the body of the text is gauge the most that could be obtained from measures to improve transparency.

after procuring entities seek bids from suppliers. The question arises as to whether this presumption carries over to so-called procurement auctions.

Typically, each firm submits a bid price at which it is willing to complete the contract and also takes into account the price it thinks other firms are bidding for the contract. If the price paid to the contractor were the only consideration, the government would choose the bid with the lowest price. Economists have developed theories of auctions to examine such bidding behaviour, and the discussion here concentrates on what these theories imply about the effects and desirability of discriminating against one class of bidders (specifically, foreign bidders).

The first finding is that outright bans on foreign bids unsurprisingly reduce the competition faced by each domestic bidder, that in turn all submit higher bids. The government then finds itself choosing from a range of higher bids, and the overall cost of the contract rises. This finding establishes a strong presumption against forms of discrimination that exclude foreign bidders, and evidence from simulated auctions reported McAfee and McMillan (1989) implies that *restricting the number of bidders (from any source) considerably increases procurement costs*.

The second finding is that *any measure that increases the cost of one group of bidders results not just in that group raising their bids (or possibly not bidding at all) but also in other bidders raising their bids too*. This is because each relatively favoured bidder takes into account the higher prices that the disfavoured bidders are expected to submit and raises their bid by a smaller percentage, so increasing *both* the probability that one of the favoured bidders wins the contract and the profit-margin made in that eventuality. As every bidder submits higher prices, the government will see its procurement costs rise. This outcome could be result from *de facto* discrimination against foreign bidders. For example, suppose that a government decided that all bidders for state contracts—both domestic and foreign—must incur costs to verify that they can meet or have met certain domestic health and safety standards. Furthermore, assume that even though domestic firms faced the same requirements the latter are enforced less rigorously for domestic firms. This asymmetric enforcement would effectively discriminate against potential foreign bidders by raising their costs. This would result in higher bids by all firms—domestic and foreign—and higher procurement costs. In simulations of such procurement auctions, Deltas and Evenett (1997) found that such *de facto* “cost” discrimination against foreign firms can raise procurement costs significantly. However, comparing their findings with McAfee and McMillan’s simulations, the outright prohibition on foreign bidding tends to raise the expected procurement outlays more than cost discrimination.

The third finding differs from the first two in that *one form of discrimination—price preferences—can actually lower procurement costs*. McAfee and McMillan (1989) demonstrated this result in an analysis of optimal procurement auctions. *The significance of this finding is that it undermines the presumption that a procurement official that seeks to minimise state outlays would always choose not to discriminate against any bidder, domestic or foreign*. To understand the intuition underlying McAfee and McMillan’s result it is important to bear in mind two points. First, just as in the last paragraph, in most analyses of auctions, if one supplier raises its bid then other suppliers have an incentive to raise their bids too. The second point relates to the manner in which price preferences work. A price preference is only used to inflate the actual bids of foreign suppliers when comparing domestic and foreign bids. If a foreign supplier’s inflated bid is still the lowest, then the government awards the contract to that foreign supplier but only pays an amount equal to that stated in the winning bid. For example, suppose there is a 10% price preference for domestic firms. If a foreign supplier bids \$10 for a contract, then for the purpose of comparison with domestic bids the domestic government treats the foreign supplier as if it had bid \$11. Now if \$11 is the lowest amount that any supplier bids, then the contract is awarded to the foreign supplier and the latter is only paid \$10 (the actual pre-inflated bid).

McAfee and McMillan’s insight was to show that foreign firms set their bid prices knowing that a price preference will be used to inflate their bids. Foreign firms respond to high price preferences by lowering their actual bids, but not by enough so that their inflated bid falls. What is more, foreign firms accept a larger reduction in their profit margins as price preferences become more stringent. The inflated bids of the foreign firms reduce how much competition domestic firms effectively face. Since the price preferences raise the foreign firms’ (inflated) bids, then domestic firms respond by raising their actual bids and, therefore, their profit margins. The effect of higher price preferences on procurement costs is ambiguous; however, *if the probability of a foreign firm making the lowest bid is high, then increasing price preferences might actually reduce*

procurement costs because the actual amount paid by the government to any successful foreign bidder has gone down. In particular, McAfee and McMillan show that if the foreign firms have on average lower costs than domestic firms, then an increase in price preferences from zero will always reduce procurement costs because, under these circumstances, the probability of a foreign firm still winning the contract is so high.

In procurement auctions, domestic firms benefit from higher price preferences, because their profit margins expand if they win the contract and, so long as they do not increase their bids too much in response to the higher preferences, the probability of one of them winning the contract increases too. In sum McAfee and McMillan show that, compared to setting no price preference, there is *a certain range of price preferences* that will result in lower procurement costs for the government and higher expected profits for domestic firms. (McAfee and McMillan also show that if the government is prepared to trade off higher procurement costs against higher domestic profits, then the government should always impose price preferences. It is always possible to find a price preference that increases domestic firm's profits more than such preferences raise procurement costs.)

But how much of a reduction in procurement costs can be accomplished by using price preferences? Both McAfee and McMillan (1989) and Deltas and Evenett (1997) found in simulations of auctions that the cost reductions were very small (often less than 1%). Worse still, Deltas and Evenett found that if the government accidentally chose the wrong rate of price preference then these cost reductions would quickly become cost increases—even for small errors. This is particularly important as policy makers do not typically have access to all the relevant information (including the actual probability distributions of the costs of the domestic and foreign firms) to choose the optimal price preference. And even if they did, political factors would probably “encourage” policymakers to choose a higher-than-optimal price preference which benefits domestic firms. Indeed, Deltas and Evenett's simulations imply considerable gains in the expected profitability of domestic firms result from even quite modest (5-10%) price preferences. Overall, even though McAfee and McMillan (1989) demonstrated in theory that it is possible to reduce procurement costs by imposing price preferences, in practice the reductions are very small and given the realities of policy making will almost certainly never be realised. This form of procurement discrimination is bad policy too.

One final point is that, comparing across simulations of procurement auctions, three types of procurement discrimination in auctions can be clearly ranked in terms of their adverse consequences for procurement costs. Price discrimination tends to have the least adverse effect, followed by *de facto* cost discrimination, which in turn is less distortionary than outright bans on bids from foreign suppliers (or *de facto* measures that have the effect of eliminating all bids from foreign firms). Given these findings, it is noteworthy that the current WTO Agreement on Government Procurement Agreement has strong measures against *de jure* discrimination—such as price preferences—and effectively imposes much weaker disciplines on *de facto* discrimination, which can result in the other two forms of procurement discrimination discussed above.

II.2.3 Implications of these analyses for the impact of the GPA

Even though this assessment will be quite critical of selected aspects of the GPA, it should not be forgotten that this plurilateral agreement has expanded considerably the disciplines on public procurement practices. On the basis of available research, one can expect with a reasonably high degree of confidence that membership of this agreement translates into lower procurement costs, allowing members to spread stretched government budgets across a wider range of activities. (For sure, the extent to which procurement costs have fallen has yet to be established with confidence.) Nevertheless, the agreement falls short of its potential for two reasons. First, discrimination has only been tackled partially. Second, the benefits of membership of this agreement are highly contingent on the extent of bribery and corruption in an economy. Each concern is discussed in turn.

The provisions in the GPA allowing for *conditional* non-discrimination need to be rethought. Removing conditionality would increase the number of foreign suppliers that are treated similarly to domestic suppliers, encouraging competition for state contracts, and lowering procurement costs.

The more important concern about the GPA's disciplines on discrimination is that they *only* effectively ban *de jure* discrimination, such as price preferences. The GPA's provisions on *de facto* discriminatory measures against foreign firms in regard to their costs, or to their ability to bid for state contracts in the first place, are much weaker. This is a concern because price preferences tend to be the least (economically) costly form of

procurement discrimination (Deltas and Evenett 1997, McAfee and McMillan 1989). One implication is that the *status quo* is likely to encourage policymakers that want to circumvent the GPA's disciplines to substitute transparent price preferences for murkier forms of discrimination; so reducing the potential market access and welfare benefits of the GPA. (Of course, the GPA is not the only international trade agreement where possibility for substitution between trade policy instruments exists.)

One reform option might be to tighten up on the *de facto* cost-based and entry-based discrimination, through more stringent rules on transparency of public procurement practices and tougher domestic and international review procedures, and to relax the ban on price preferences. The goal here is to try to channel any protectionist pressures into higher levels of observable price preferences, whose level can then subsequently be negotiated down over time. In addition, one could modify the pre-selection procedures to allow firms that have not pre-qualified to bid to do so, but with a fixed price preference applied against them. Apart from this price preference, the bids of such unqualified firms would be treated identically to those firms who pre-qualified. The advantage of this provision is that it caps any distortions created by the pre-qualification process.

With respect to bribery and corruption, recent research has shown that this narrows the circumstances under which procurement reform yields benefits (Evenett and Hoekman 2002). To the extent that bribes and pay-offs to government officials result in a higher price being paid by taxpayers for a good, then this reduces the quantity demanded by government. This increases the likelihood that this government demand can in principle be met solely by domestic producers, which means that the subsequent imposition of a procurement ban (or other form of discrimination) against foreign bidders merely redistributes government sales from foreign firms to domestic firms, without the latter's output rising. Domestic consumers' demand shifts from domestic firms to foreign firms at exactly the same rate as government demand is shifting in the opposite direction. Under these circumstances, the net effect of procurement discrimination on imports (market access) is zero. By the same logic, the removal of such discrimination will not increase imports (market access) either. This implies that the benefits of membership of the GPA are contingent on the degree of bribery, corruption, and other governance-related problems in national procurement practices. This finding does not necessarily provide an argument against joining the GPA *per se*, rather it suggests that joining the GPA may have to be complemented with measures to improve governance practices if the maximum benefits of acceding to this international trade agreement are to be garnered.

II.2 The UNCITRAL Model Law on Procurement

At its twenty-sixth meeting the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services. This "Model Law" contains the elements of a procurement law that nations might adopt and as such it is a non-binding recommendation of best practices. Specifically, The Model Law contains the 57 articles organised into six chapters (titled General Provisions, Methods of Procurement And Their Conditions For Use, Tendering Procedures, Principal Method For Procurement Of Services, Procedures For Alternative Methods Of Procurement, and Review.) As the following discussion will make clear, by and large the UNCITRAL Model Law is consistent with the principles and provisions of the Uruguay Round GPA, although the latter contains some provisions that are not in the former. (A further comparison of the UNCITRAL Model Law and the GPA can be found in Appendix 3).

UNCITRAL has published a "Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction, and Services" (document number A/CN.9/403) from which the following quotations are drawn. UNCITRAL notes the following purpose of the Model Law:

"The Model Law on Procurement of Goods and Construction is intended to serve as a model for States for the evaluation and modernization of their procurement laws and practices and the establishment of procurement legislation where none presently exists" (page 46).

Moreover, UNCITRAL describes as follows the motivation for formulating the Model Law and stresses the important developing country-specific factors that were taken into account when devising the Model Law:

"The decision by UNCITRAL to formulate model legislation on procurement was taken in response to the fact that in a number of countries the existing legislation governing procurement is inadequate or outdated. This results in inefficiency and ineffectiveness in the procurement process, patterns of abuse,

and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds. While sound laws and practices for public sector procurement are necessary in all countries, this need is particularly felt in many developing countries, as well as in countries whose economies are in transition. In those countries, a substantial portion of all procurement is engaged in by the public sector. Much of such procurement is in connection with projects that are part of the essential process of economic and social development. Those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy” (page 46).

And,

“Furthermore, the Model Law may help to remedy disadvantages that stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries” (pages 46-7).

Many of these considerations have found themselves into the preamble of the Model Law:

“Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement of goods, construction and services so as to promote the objectives of:

- (a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and
- (f) Achieving transparency in the procedures relating to procurement.”

Interestingly, the Model Law was conceived as having the widest potential scope:

“In order to facilitate the widest possible application of the Model Law, it is provided in article 1(3) that, even in the excluded sectors, it is possible, at the discretion of the procuring entity, to apply the Model Law” (page 48).

Moreover, at least as far as procurement of goods is concerned, the Model Law requires the use of open tendering procedures:

“As the rule for normal circumstances in procurement of goods or construction, the Model Law mandates the use of tendering, the method of procurement widely recognized as generally most effective in promoting competition, economy and efficiency in procurement, as well as the other objectives set forth in the Preamble” (page 49).

Transparency is an important feature of the UNCITRAL Model as the following commentaries on Articles 5 and 11 of that Law (on “Public accessibility of legal texts” and “Record of procurement proceedings”) makes clear:

“This article [5] is intended to promote transparency in the laws, regulations and other legal texts relating to procurement by requiring public accessibility to those legal texts. Inclusion of this article may be

considered important not only in States in which such a requirement is not already found in its existing administrative law, but even in States in which such a requirement was already found in the existing applicable law. In the latter case, the legislature may consider that a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers and contractors on the requirement of adequate public disclosure of legal texts concerned with procurement procedures.” (pages 60-1).

And,

“One of the most important ways to promote transparency and accountability is to include provisions requiring that the procuring entity maintain a record of the procurement proceedings. A record summarizes key information concerning the procurement proceedings. It facilitates the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds” (page 63).

The Model Law also touches on a number of matters that are currently being discussed in the WTO. The first concerns the role of domestic review procedures. UNCITRAL notes:

“An important safeguard of proper adherence to procurement rules is that suppliers and contractors have the right to seek review of actions by the procuring entity in violation of those rules. Such a review process, which is set forth in chapter VI, helps to make the Model Law to an important degree self-policing and self-enforcing, since it provides an avenue for review to suppliers and contractors, who have a natural interest in monitoring compliance by procuring entities with the provisions of the Model Law” (page 54).

Similar remarks are made about Article 14 of the Model Law on publication of procurement awards. Article 15 concerns inducements from suppliers and contractors, and UNCITRAL motivates its provisions in this regard as follows:

“Article 15 contains an important safeguard against corruption: the requirement of rejection of a tender, proposal, offer or quotation if the supplier or contractor in question attempts to improperly influence the procuring entity. A procurement law cannot be expected to eradicate completely such abusive practices. However, the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption. In addition, the enacting State should have in place generally an effective system of sanctions against corruption by Government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process” (page 55).

Given the interest in international trade negotiations on matters of discrimination, it is worth observing that the Model Law contains detailed provisions on the use of preferences and the manner in which tenders are to be evaluated. Article 34 of the Model Law (on the “Examination, evaluation and comparison of tenders”) addresses the latter issue and the Guide accompanying the Model Law makes the following four remarks:

“Although ascertaining the successful tender on the basis of the tender price alone provides the greatest objectivity and predictability, in some tendering proceedings the procuring entity may wish to select a tender not purely on the basis of the price factor. Accordingly, the Model Law enables the procuring entity to select the “lowest evaluated tender”, i.e., one that is selected on the basis of criteria in addition to price. Paragraph (4)(c)(ii) and (iii) list such criteria. The criteria in paragraph (4)(c)(iii) related to economic-development objectives have been included because, in some countries, particularly developing countries and countries whose economies are in transition, it is important for procuring entities to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives. It is envisaged in the Model Law that some enacting States may wish to list additional such criteria. However, caution is advisable in expanding the list of non-price criteria set forth in paragraph (4)(c)(iii) in view of the risk that such other criteria may pose to the objectives of good procurement practice. Criteria of this type are sometimes less objective and more discretionary than those referred to in paragraph (4)(c)(i) and (ii), and therefore their use in evaluating and comparing tenders

could impair competition and economy in procurement, and reduce confidence in the procurement process” (page 76).

“Requiring that the non-price criteria should be objective and quantifiable to the extent practicable, and that they be given a relative weight in the evaluation procedure or be expressed in monetary terms, is aimed at enabling tenders to be evaluated objectively and compared on a common basis. This reduces the scope for discretionary or arbitrary decisions. The enacting State may wish to spell out in the procurement regulations how such factors are to be formulated and applied. One possible method is to quantify in monetary terms the various aspects of each tender in relation to the criteria set forth in the solicitation documents and to combine that quantification with the tender price. The tender resulting in the lowest evaluated price would be regarded as the successful tender” (page 76).

“Paragraph (4)(d) permits a procuring entity to grant a margin of preference to domestic tenders, but makes its availability contingent upon rules for calculation to be set forth in the procurement regulations. (See paragraph 26 of section I of the Guide concerning the reasons for using a margin of preference as a technique for achieving national economic objectives while still preserving competition.) It should be noted, however, that States that are parties to the GATT Agreement on Government Procurement and member States of regional economic integration groupings such as the European Union may be restricted in their ability to accord such preferential treatment. In order to promote transparency, resort to the margin of preference may be made only if authorized by the procurement regulations and approved by the approving authority. Furthermore, the use of the margin of preference is required to be predisclosed in the solicitation documents and reflected in the record of the procurement proceedings” (page 76).

“As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the tender prices of all tenders import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting tender prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less” (page 77).

UNCITRAL makes the following general remarks about the efficacy of using preferences to discriminate against foreign bidders, noting that a number of factors should determine the optimal level of preferences:

“It may be noted that the Model Law provides in article 34(4)(d) and 39(2) for the use of the technique referred to as the “margin of preference” in favour of local suppliers and contractors. By way of this technique, the Model Law provides the enacting State with a mechanism for balancing the objectives of international participation in procurement proceedings and fostering national industrial capacity, without resorting to purely domestic procurement. The margin of preference permits the procuring entity to select the lowest-priced tender or, in the case of services, the proposal of a local supplier or contractor when the difference in price between that tender or proposal and the overall lowest-priced tender or proposal falls within the range of the margin of preference. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition. It is important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. Accordingly, the margin of preference could be a preferable means of fostering the competitiveness of local suppliers and contractors, not only as effective and economic providers for the procurement needs of the procuring entity, but also as a source of competitive exports” (page 53).

Having said that, UNCITRAL does offer the following remarks about restricting competition generally and from foreign sources:

“In line with the mandate of UNCITRAL to promote international trade, and with the notion underlying the Model Law that the wider the degree of competition the better the value received for expenditures from the public purse, the Model Law provides that, as a general rule, suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality and that foreign suppliers and contractors should not otherwise be subject to discrimination. In the contexts of tendering proceedings and the principal method for procurement of services, that general rule is given effect by a number of procedures designed, for example, to ensure that invitations to tender or to submit proposals

and invitations to prequalify are issued in such a manner that they will reach and be understood by an international audience of suppliers and contractors.

“At the same time, the Model Law recognizes that enacting States may wish in some cases to restrict foreign participation with a view in particular to protecting certain vital economic sectors of their national industrial capacity against deleterious effects of unbridled foreign competition. Such restrictions are subject to the requirement in article 8(1) that the imposition of the restriction by the procuring entity should be based only on grounds specified in the procurement regulations or should be pursuant to other provisions of law. That requirement is meant to promote transparency and to prevent arbitrary and excessive resort to restriction of foreign participation. The reference in article 8 to exclusions of suppliers or contractors on the basis of nationality pursuant to provisions in the procurement regulations or other provisions of law, supported also by article 3 on the primacy of international obligations of the enacting State, also permits the Model Law to take account of cases in which the funds being used are derived from a bilateral tied-aid arrangement. Such an arrangement would require that procurement with the funds should be from suppliers and contractors in the donor country. Similarly, recognition is thereby given to restrictions on the basis of nationality that may result, for example, from regional economic integration groupings that accord national treatment to suppliers and contractors from other States members of the regional economic grouping, as well as to restrictions arising from economic sanctions imposed by the United Nations Security Council” (pages 52-3).

More generally, the Model Law was designed to be deferential to a nation’s international obligations:

“It provides that such international obligations (e.g., loan or grant agreements with multilateral and bilateral aid agencies containing specific procedural requirements for the funds involved; procurement directives of regional economic integration groupings) prevail over the Model Law to the extent of any inconsistent requirements” (page 48).

In sum, the UNCITRAL Model Law can be seen as an attempt to develop best practices that nations can incorporate into their procurement legislation. Although this international initiative is not binding on the members of the United Nations, it has become the foci for many discussions on procurement laws in developing and industrialised economies. Moreover, the Model Law does contain provisions that are the subject of current international trade disciplines on government procurement (transparency, discrimination, and review procedures) and is, more or less, consistent with the latter.

II.3 Provisions on government procurement in regional trading agreements

The 1990s also saw the signing of a large number of regional trade agreements (World Bank 2001). Many of these agreements contained provisions on government procurement and the question arises as to whether these provisions contradict or accord with those in the GPA and whether regional agreements offer a substitute to a new multilateral initiative on government procurement.

OECD (2002) contains a detailed analysis of the procurement provisions of regional trading agreements. With respect to the procurement provisions in several regional trading agreements, OECD (2002) notes:

“In a number of recently signed RTAs government procurement is a major focus, with a whole chapter dedicated to the issue. This includes the EU-Mexico FTA as well as initiatives in the Pacific Rim region, such as the agreement between New Zealand and Singapore on a Closer Economic Partnership (CEP) and the Japan-Singapore Economic Partnership Agreement (JSEPA). These agreements contain extensive provisions dealing with transparency and various aspects of procurement procedures. Another important observation concerning regional initiatives in the procurement field is that developing and emerging economies are increasingly entering into bilateral or regional procurement agreements whether or not they are parties to the GPA. The Group of Three Accord¹² and other bilateral agreements concluded by Mexico, such as the Mexico-Bolivia FTA, the Mexico-Costa Rica FTA and the Mexico-Nicaragua FTA, show that developing countries are increasingly concluding regional procurement agreements with other developing countries. Likewise, NAFTA and more recently the EU-Mexico FTA demonstrate that it is possible to bring countries at different levels of economic development together in a liberalising agreement on public procurement” (page 5).

¹² OECD (2002) notes that parties to this Accord are Colombia, Mexico and Venezuela.

By and large the provisions in these regional trading agreements share many of the features of the GPA. One major difference is that some regional initiatives—such as the Asia Pacific Economic Cooperation (APEC) set of Principles on Government Procurement—are non-binding. (As noted earlier, the GPA is binding on its members.) OECD (2002) summarises the commonalities and differences as follows:

“The review of the procurement provisions in RTAs shows that there are many common elements, if not a symbiosis, between the procurement liberalisation process in the WTO GPA and the procurement reform process at the regional level. This reflects the recognition that foreign suppliers of goods and services require not only market access in the sense of non-discriminatory treatment; in order to compete effectively they also require transparent, predictable and fair procedures. These happen also to be the features that are needed as part of the ongoing modernisation and reform of procurement rules and systems at the national level” (page 4).

Moreover,

“Typically, RTAs include provisions that are similar to the WTO GPA, but to different degrees. There are two ways in which RTAs appear to have gone beyond or provide something in addition to the WTO Agreement. First, some RTAs have gone beyond the WTO by adopting obligations substantially similar to the GPA, but including countries that are not parties to the GPA. In the post-Doha scenario, particularly with the scheduled negotiations on transparency aspects of procurement, this can have a positive effect in that countries not Members to the GPA can gain experience in meeting the transparency requirements agreed to at the regional level. In this regard, it may be noted that a number of countries are seeking accession to the GPA.

“Second, some RTAs have gone beyond the WTO by providing for broader coverage or by allowing for the provision of additional information. For instance, several RTAs have expanded the procurement coverage, widened the scope by covering more entities or reduced the thresholds of procurement contracts covered.

“Another noteworthy point concerns the effects on third-party goods and services. Although procurement-related provisions contained in most RTAs are of a preferential nature, the procedures dictated in these provisions may help foster the practice of transparency more widely and so, eventually, yield more far-reaching benefits. In “addition, the regional experience may point the way toward confidence building among a wider group of countries, thereby helping extend WTO disciplines.” (page 5)

OECD (2002) goes on to identify for five procurement provisions any substantial divergence in the treatment in the Uruguay Round GPA and existing regional trading agreements. The differences have been collated and reported in Table 6 below.

Table 6: Differences identified by the OECD between the GPA’s disciplines and those found in regional trading agreements; other than the fact that the APEC Principles are non-binding.

Procurement provision	Divergence in provisions between GPA and those in regional agreements
Scope and coverage of respective agreement	“The EC Directives, for example, apply to purchases of supplies, works and services, including entities in the formerly excluded utilities field. The extended coverage includes purchases of products, works and services, by railway operators, entities active in the field of energy other than electricity and telecommunications providers. In contrast to the GPA, the entity coverage includes all entities, at the State, regional and local level, whether or not they are listed in annexes to the Directives” (page 9). “NAFTA, in contrast to the GPA, does not cover state and provincial governments. At the same time, NAFTA—which also comprises goods and services, including construction services—expands upon the obligations of the GPA by adopting lower thresholds and a negative list approach to the coverage of services procured by the listed entities. Consequently, all services are covered unless specifically exempted” (page 9). “In this connection, another interesting RTA is that signed by the EU and

	Mexico. In this Agreement, Mexico offers to the EU the lower thresholds of the NAFTA, while the EU offers to Mexico the higher thresholds of the GPA (and of the EC Directives). This has been done to facilitate the tender procedure through a transparent and widely-known rule identical for all tenderers within each of the Members, and to avoid, for both procuring entities and suppliers, the need to handle different thresholds and verify which agreement applies for each call for tender.” (page 10)
Non-discrimination	None identified other than the non-binding nature of APEC’s Principles (see body text).
Open and fair procurement procedures	Few differences were identified. However, in the case of the EC Directives on Procurement, OECD (2002) notes “the GPA covers issues that are not addressed in the Directives, such as specific rules on the opening of bids” (page 11).
Rules on transparency	No major discrepancies identified but OECD (2002) does note that the New Zealand and Singapore on a Closer Economic Partnership (CEP) is not as detailed as the comparable provisions in the GPA (page 13).
Accountability and due process	“With respect to bid challenge provisions [to the GPA], the ANZGPA adopts a different approach. The relevant procedures for dealing with complaints are designed to resolve problems and avoid recurrence through discussion and mutual agreement between the "designated bodies". The Agreement relies on the political will and commitment of the parties for compliance, rather than any legal redress. Thus, the final authority for decision is the relevant Minister in the purchasing jurisdiction. Should there continue to be serious concern on the part of one or more of the other jurisdictions, this would be raised and discussed in the Council at officials' and/or Ministerial level in order to reach a mutually agreeable outcome. But the Agreement does not contain any formal provision for negotiation of a solution at these levels” (page 14).

Source: Collated from OECD (2002).

In terms of economic impact, the conditional nature of any provisions on discrimination against foreign bidders is a feature of some regional trading agreements and the plurilateral GPA and, more importantly, can be a source of inefficiency. This is because the introduction of conditional non-discrimination can result in government contracts that were previously awarded to the lowest cost foreign supplier being switched towards higher cost—but no longer discriminated against—regional partners. (The analogy to trade in goods in a regional trading agreement is not quite complete as governments often do not collect tariff revenue on its own purchases from abroad; so the losses of tariff revenue that arise from forming regional trade agreements more generally do not arise in conjunction with provisions on procurement provisions.) In sum, both the current GPA and regional trading agreements can result in government contracts being shifted away from non-members, harming the latter’s export interests.

Another important implication of regional trading agreements concerns their provisions on transparency. To the extent that such an agreement results in improvements in the transparency of a nation’s procurement regime then it is quite likely that this will encourage more bids from *all* sources; that is, from both members and non-members of the regional agreement. This is because firms from non-members are going to have the same access to publicly available information as members to the regional trading arrangements. Unlike the provisions on conditional non-discrimination, then, the provisions on transparency can create opportunities for non-members. The overall effect on the latter of the provisions in regional trading arrangements (and the plurilateral Uruguay Round GPA, for that matter) will depend on which of these two effects dominates.

II.4 Summary

Although the 1990s saw many international initiatives on government procurement there is, as of yet, no international agreement that is comprehensive in membership, comprehensive in procuring entities covered and in provisions included, and binding and enforceable. This is not to say that these initiatives have not been used by some governments to introduce procurement reforms and to reduce discrimination against foreign

bidders for state contracts. Rather, it is a statement about just how far international initiatives on procurement reform could develop in the future.¹³ It is fitting, therefore, that the discussion now turns to proposals by some WTO members for further multilateral rules on government procurement practices.

¹³ That such initiatives *could* develop in the future does not mean they *should* develop. The efficacy of future international collective action on procurement matters is the subject of parts IV and V of this chapter.

Part III

PROPOSALS FOR NEW MULTILATERAL DISCIPLINES ON TRANSPARENCY IN GOVERNMENT PROCUREMENT LAW AND PRACTICE

A Working Group on Transparency in Government Procurement Practices was established after the 1996 WTO Ministerial Meeting in Singapore.¹⁴ The mandate of this Working Group was contained in that meeting's Ministerial Declaration and called for:

“the working group 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.”¹⁵

As noted in the Introduction to this chapter, WTO Ministers further clarified the mandate of the Working Group in Doha and noted that any

“[N]egotiations shall be limited to transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers” (WTO 2001, paragraph 26).

This statement appears to rule out negotiations over explicitly discriminatory policies, such as price preferences. It would seem that those practices included in the negotiating mandate must have some transparency-related aspect to them. Moreover, given the emphasis of some on trade impacts, would those practices that have a transparency-related aspect to them but do not affect trade flows fall within the negotiating mandate? As will become clear below, these questions have tended to recur in one form or another in the deliberations in the Working Group.

Although the focus of this part of the chapter is on the recent proposals for new multilateral disciplines on transparency in government procurement, an important point to bear in mind is that—if the submissions by WTO members are anything to go by—the Working Group was particularly active before the WTO Ministerial in Seattle in 1999. The principal submissions relating to proposals for new multilateral rules are summarised in Appendix 3. What is particularly noteworthy is that in November 1999 two submissions (one by the European Communities and the other a joint submission by Hungary, Korea, Singapore, and the United States) went so far as to propose text for a new multilateral agreement on transparency in government procurement.¹⁶ It appears that these proposed texts did not become the focus of subsequent discussions in the Working Group. Instead, discussions have centered around a number of procurement practices that are thought have a transparency-related aspect to them. To help structure discussions, successive Chairmen of the Working Group have issued and updated a “List Of The Issues Raised and Points Made.” This “List” identified the following twelve topics that have been examined to differing degrees in the Working Group:

1. Definition and scope of government procurement
2. Procurement methods
3. Publication of information on national legislation and procedures
4. Information on procurement opportunities, tendering and qualification procedures
5. Time-periods
6. Transparency of decisions on qualification
7. Transparency of decisions on contract awards
8. Domestic review procedures
9. Other matters related to transparency
10. Information to be provided to other governments (notification)

¹⁴ For an analysis of the origins of this Working Group, its relationship to the Uruguay Round GPA, and the likely consequences of strengthening transparency provisions in the GPA, see Arrowsmith (1997).

¹⁵ See “Singapore Ministerial Declaration—Adopted on 13 December 1996,” World Trade Organisation, document WT/MIN/96/DEC.

¹⁶ These two proposed agreements are reported in their entirety in Appendices 3a and 3b at the end of this chapter.

11. WTO dispute settlement procedures

12. Technical cooperation and special and differential treatment for developing countries

A number of WTO Members have made submissions on elements of this List and the contents of those contributions are summarised in Appendix 3. Since 1 January 2002, Canada, the European Communities, Japan, Korea, and the United States have made submissions that are supportive of the development of new multilateral rules on transparency in government procurement. Examination of the submissions in Appendix 3 and of the publicly available minutes of the Working Group's meetings (which it should be noted are at the time of writing only available through to the end of 2002), a number of more general observations can be made about deliberations in the Working Group. These observations are pertinent as they reveal much about the views and concerns of certain WTO Members about the efficacy of new multilateral disciplines. As will become clear, India and Malaysia have taken a consistently sceptical—if not critical—view of the proponents' proposals.

At the 29 May 2002 meeting of the Working Group, India and Malaysia offered the following interpretations of the Doha Ministerial Declaration's paragraph on government procurement and its implications for the discussions in the Working Group. These two delegations appear to be implacably opposed to any attempt in the Working Group to negotiate new provisions or to reach a consensus; these tasks are apparently those of Ministers. The minutes of this meeting report:

"The representative of India¹⁷ said that the mandate in the Doha Ministerial Declaration had to be read in conjunction with the statement by the Chairman of the Ministerial Conference prior to the adoption of the Declaration expressing his understanding in relation to Singapore issues. Since the Chairman's Understanding had been arrived at on the basis of consultations with Members and had not been opposed by any delegation, his delegation believed that it was binding on all Members even though it had not been included in the text of the Ministerial Declaration. His delegation therefore believed that there should be no attempt at consensus building on the various issues before the Working Group. Any Member would have the right to take a position that would prevent a decision on launching negotiations in this area at the Fifth Ministerial Conference. The study phase was solely aimed at furthering the understanding of Members on various issues. The representative of Malaysia said the Group was still at the study phase. The Ministers would have to agree on the modalities for negotiations by explicit consensus at the next Ministerial meeting before moving on to the negotiating phase" (WTO 2002c, page 1).

Moreover, India and Malaysia contend that some of the matters and government practices discussed in the Working Group are unrelated to transparency, and have implications for market access:

"The representative of India said that the mandate of the Working Group did not extend to market access issues, such as the grant of preferences to domestic suppliers and supplies. Therefore the main issue before the Group was to gain a greater understanding of the meaning of transparency in the context of government procurement. All the elements identified in the informal note by the Chair "List of Issues Raised and Points Made", were in fact elements common to procurement systems in place in any of the Members, but there had been differences among Members in identifying the transparency-related aspects of these elements. Elements such as procurement methods, time-periods, decisions relating to evaluation of offers and awarding of contracts, domestic review mechanism, and application of the WTO Dispute Settlement Understanding were not directly related to the issue of transparency, and hence should not form part of the work of the Group. In the context of the WTO, transparency involved the obligation to make information on related laws and regulations available and the obligation to provide notifications to WTO Members of these laws and regulations, including any changes thereto, without questioning the fairness and reasonableness of the laws themselves. The issue of the administration of laws and regulations related to government procurement did not fall within the purview of transparency. The representative of Malaysia said that there were elements in the Note by the Chairman "List of Issues Raised and Points Made" that were not related to transparency *per se*, and delved into the area of market access. In addition to the elements relating to domestic review procedures and making a transparency agreement subject to the WTO Dispute Settlement

¹⁷ As a matter of convention, minutes of meetings of WTO Working Groups underline the name of any WTO member that is reported therein.

Understanding, his delegation was prepared to consider other elements that may need to be deleted from the "List of Issues Raised and Points Made" for the purposes of the transparency agreement" (WTO 2002c, pages 1-2).

The difficulties in drawing a fine line between transparency-related and market access-related issues has been acknowledged by the United States, but it appears that the latter believes this should be the starting point of a discussion on clarifying the Doha mandate and not the end point. The minutes of the 29 May 2002 report:

"The representative of the United States said that his delegation recognized that that discussion on transparency aspects could to an extent creep into market access questions and consideration could be given to how this could be limited. It had to be recognized also that even issues that may delve into market access also had transparency components. In the course of its examination of individual elements, the Group should try to identify the specific characteristics which related to transparency. The delegation of Switzerland recognized that, although transparency and market access questions were not sometimes easy to separate, given the quantity of work accomplished on the basis of the "List of Issues Raised and Points Made", Switzerland believed that the Group should continue discussion on the basis of the issues listed in that document" (WTO 2002c, page 2).

Further evidence of disagreements over the mandate of the Working Group can be found in the divergent positions taken during discussions on specific elements of the Chairman's "List", as box 2 makes clear in the case of the time-limits for firms to respond to tenders.

Box 2: Do the time-periods to reply to tenders have a transparency-related aspect to them?

The following exchange between five WTO members indicates a degree of disagreement over the mandate of the Working Group in the first place:

"The representatives of India and Jamaica said that prescription of time-periods was not a matter of transparency. The representative of India said that time-periods should be set in a non-discriminatory manner and that entities should be able to decide time-periods on a case-by-case basis. The representative of Jamaica, joined by the representative of the United States, said that making known the specific time-periods applicable to a particular procurement was a transparency matter. The representative of India, joined by the European Community, said that information on time-periods, including any changes thereto, should be made available to suppliers. The representative of the United States said that time-periods should be sufficient to allow for responsive bidding, but that the period itself should be determined by national authorities or procurement entities as appropriate. The representative of Malaysia said that his delegation shared the view of the United States that the issue of time-limits was related to transparency to the extent that, if sufficient time was not provided or if sufficient time was provided to one party and not to others, transparency would be affected. Joined by the representative of Malaysia, the representative of India said that harmonization on this issue would not be advisable, on the basis of the wide divergence existing among national practices in this regard" (WTO 2002c, page 13).

"The representative of India said that, since time-periods *per se* were not an element of transparency for the purposes of the work of the Group, they should be deleted from the "List of Issues Raised and Points Made". The representative of the United States, joined by the representative of Malaysia, said that the issue of time-periods required further debate. The representative of the European Community said that the question of time-periods had to be discussed in light of the use of electronic means of communication which allowed quicker responses to tenders than in the past" (WTO 2002c, page 13).

In addition to disputing the mandate of the Working Group, a least one prominent WTO member has raised fears that the mandate may well be subsequently expanded to include market access issues. The following exchange between India and the European Communities during the 29 May 2002 meeting is telling:

"The representative of India expressed concern that the main agenda for the European Community was to use an eventual agreement on transparency to address market access issues. He noted that the representative of the European Community had referred to a 'springboard to move on to the next stage' and stated that the threat contained therein, to move further on market access issues on completion of the work of the Group on Transparency, diminished the support from developing countries for the development of rules on transparency. He said that India, as well as other delegations sharing similar

concerns, were opposed to any such movement. In that connection, he reiterated that the Doha Ministerial mandate had excluded any discussion which went beyond transparency. In response, the representative of the European Community said that the statement made by his delegation had been misunderstood, since the reference to using the discussions which would take place in the Working Group during the first and second meetings of 2002 as a 'springboard for the next stage' referred to the work which would be ongoing in 2003 and onwards towards the fifth Ministerial Conference. He reiterated that the European Community supported the mandate as it stood, including the reference to any agreement being limited to transparency issues" (WTO 2002c, page 3).

These disagreements over the mandate of the Working Group continued throughout 2002. At the meeting on 10-11 October 2002, Japan and the United States both made submissions that sought to clarify the elements for discussion in the Working Group with an eye to the forthcoming Cancun Ministerial Meeting. Japan began its submission (WT/WGTGP/W/37) with the following remarks:

"Since the transparency provisions in the Agreement on Government Procurement in Annex IV of the WTO Agreement are difficult for developing country Members to follow as it stands, the provisions of a transparency agreement should be flexible enough, so that all WTO Members could accept them" (paragraph 2(1)).

And,

"[A] transparency agreement should be legally binding and effective" (paragraph 2(2)).

Japan then argued that

"[I]t is a prerequisite that all WTO Members participate in a transparency agreement. Therefore, the framework of such an agreement should be simple, focusing on core principles such as transparency in procurement opportunities" (paragraph 2(3)).

This submission goes on to elaborate that the important elements of a transparency agreement are: non-discrimination in transparency; definition and scope; core transparency principles including preparation and publication of procurement rules and enquiry, publication of procurement opportunities, and transparency in decisions on contract awards; domestic review; consultations and dispute settlement; and technical cooperation and special and differential treatment for developing countries.

The United States' submission (WT/WGTGP/W/35) proceeds in a similar vein, noting that

"[W]hile Members use a myriad of procurement procedures and practices, there is no common set of transparency provisions. Thus, the primary focus of the agreement should be to establish core transparency elements that suppliers throughout the world can be assured of finding in the procurement system of every member" (seventh paragraph).

The US submission proceeds by arguing that the Working Group should identify those elements that it might be appropriate to include in a multilateral agreement. This submission suggests organising the possible elements of an agreement into the following four categories: general parameters of a potential agreement; transparency of procurement systems; transparency of specific procurements; and operational provisions to fulfil the objectives of a potential agreement. Having said that, the submission does state "[A]t this juncture, it is not necessary for the Working Group to decide how a particular element would be addressed in the agreement" (tenth paragraph).

Both of these attempts to prioritise the Working Group's discussions met with considerable resistance. The following reported statements by Malaysia, India, and Cuba suggest considerable unwillingness to conclude the post-Doha "study" phase of the Working Group's activities. The minutes from the 10-11 October 2002 report:

"The representative of Malaysia said that, while a convergence of views seemed to be emerging in some areas, it was premature to begin the categorization of issues at this stage. The Group had yet to conclude its work on the clarification of certain issues before it could reach consensus on any of the elements pursuant to the Doha Ministerial mandate. Developing countries had difficulties essentially with two elements, namely domestic review procedures and the application of WTO dispute settlement procedures. Although the details of some of the other elements might also cause some difficulties, by and large, they

were acceptable. The categorization of elements could only be feasible if there were an explicit consensus to proceed with the negotiations at the Cancún Ministerial meeting built on the progress achieved by that time” (WTO 2003, page 2).

“The representative of India said that the categorization of elements was premature. The Group's main task was to achieve a better understanding of what transparency in government procurement meant. Matters relating to administration of domestic laws and regulations did not fall within the purview of transparency. The Working Group should address any burden that future requirements might incur on developing countries. One question with respect to the benefits of transparency was whether the additional cost of a transparent procurement system could be justified by its incremental benefits. Transparency could not be the overriding priority in all procurement cases. It might have to be balanced against certain other objectives, for example providing local manufacturers with certain advantages under employment-generating programmes or better utilising locally available factors of production. The Group's work should focus on the type of information that should be provided to suppliers on a Member's government procurement system. On the other hand, the need for transparency in specific procurements would depend on the purpose of the procurement and the policy objectives sought. While the information provided in tender notices would have to be adequate for the preparation of responsive bids and should be uniformly provided to all suppliers, the provision of information on who should be eligible to respond to a particular tender should take into account policies targeting certain suppliers. As to the ramifications of transparency beyond government procurement, the fight against corruption required better policing, a matter which went beyond the concern of the WTO. Finally, Members generally agreed to the benefits of transparency but several elements discussed in the Group did not pertain to transparency at all and some only to the extent that the future requirements would be limited to provision of information. Whether a future agreement would be a binding agreement or a principle-based one could be decided once Members had a clearer view of what transparency meant. Her delegation was not convinced of the need for any linkage to the WTO Dispute Settlement Understanding given that only transparency in government procurement was under consideration” (WTO 2003, page 3).

“The representative of Cuba said that, in order to comply with the Doha mandate which referred to development priorities, the Group should carry out its work on the basis of the List of Issues. If the discussions were to be speeded up, the Group would find itself with the same problems that it had faced with the proposals that had been tabled prior to the Seattle Ministerial Conference. At that time, a number of developing country Members had not been in a position to go along with the proposals that had gone beyond the Singapore mandate” (WTO 2003, page 4).

Developing countries have raised other concerns about further potential disciplines on transparency in government procurement. Malaysia has highlighted the role that certain procurement policies have played in favouring specific economic, regional, and other interests, as the following remarks make clear:

“Joined by the representative of Malaysia, the representative said that government procurement played an important role in nation building. It was an important policy tool in relation to social and economic development in developing countries in particular for promoting the development of small and medium enterprises and disadvantaged regions. Given this aspect of government procurement, caution was required in moving forward in this area, albeit the work was limited to transparency. A transparency agreement should impose no obligation on Members to change their domestic laws and regulations given the near unanimous view in the Working Group that the primacy of the domestic rules and regulations should be fully preserved. In this regard, the representative of Malaysia added that the mandates on transparency in the Singapore and Doha Declarations recognized that any eventual agreement shall be based on national practices” (WTO 2002c, page 2).

Moreover, a number of developing countries have called for differential obligations in an potential multilateral agreement, as the following report of a discussion at the 29 May 2002 meeting of the Working Group highlights:

“On the question of threshold levels, the representative of India, joined by the representatives of Malaysia, Indonesia and the European Community, supported the use of threshold levels for the purposes of the application of requirements in a transparency agreement. The representative of Indonesia added that the inclusion of minor procurements within the scope of a transparency agreement could impose an undue

burden on entities in developing countries. The representative of India, supported by the representative of Malaysia, suggested having a higher threshold for contracts subject to any future obligations as a 'Special and Differential Treatment' provision for developing countries" (WTO 2002c, page 7).

Turning now to the specific elements of a potential multilateral agreement, even though transparency itself is seen as desirable¹⁸, some have called into question how an multilateral obligations might be structured:

"The representative of India said that, in spite of the generally shared view that transparency was important in all fields including in government procurement, differences remained among Members with regard to consideration of future obligations in this area. The issue was complex for India since numerous government departments were involved in government procurement. The complexity would remain even if future obligations were to be limited to central or federal government departments. The representative of the United States said that his delegation agreed with the delegation of India that government procurement was an important policy tool for realizing socio-economic and other benefits associated with nation building; however it remained unclear whether a lack of transparency in pursuing such a policy tool provided any benefits. He recognized that, although transparency was critical to nation building, the issue was more a question of the orientation of government procurement as a policy tool. In responding to the representative of the United States, the representative of India considered that the available policy options should be preserved in the context of government procurement. The domestic procurement process in India was as transparent as similar systems in other countries, including those existing in the United States" (WTO 2002c, page 2).

Another source of disagreement has been over the scope of the agreement, with India and Malaysia diverging markedly with two of the proponents of new multilateral rules (the European Communities and the United States). India has called for a "better understanding" of what different definitions might mean:

"The representative of the European Community, joined by the representative of the United States, said that, in the absence of lists of covered entities which provided certainty about the scope and coverage of rules, a definition of government procurement was especially important in a transparency agreement. His delegation considered that, although the contours of a definition remained a matter for further discussion, any definition which was eventually arrived at should be as broad as most Members could agree to. The representative of India, joined by the representative of Malaysia, said that a wide divergence remained in the Group on the question of definition. The study phase should be used for a better understanding of the various issues related to definition. This issue should be resolved through discussions in the Working Group rather than through negotiations" (WTO 2002c, page 5-6).

Moreover, Indonesia and Malaysia have joined India in arguing that services procurement should be excluded from the remit of any potential multilateral rules:

"With regard to the question of whether the scope of an agreement should include both goods and services, the representatives of India, Malaysia and Indonesia stated that procurement of services should be excluded from the scope of the work of the Working Group. The representative of India said a combination of goods and services should also be excluded given that the relationship between elements identified as related to the transparency aspect of procurement and their application in the larger context of procurement required further examination and clarification. The representative of India added that the services sectors in developing countries were not as advanced as those in developed countries. The representative of Indonesia said that, although his delegation recognized that in practice it could be difficult to distinguish between services and goods, and that often mixed contracts involved both goods and services, procurement in the services sector in developing countries was less systematized than that in the goods sector. There should be differentiation with regard to the procurement of services, given that the scope and coverage was different to that of goods. The United States, joined by the representative of Switzerland, stated that scope should include services" (WTO 2002c, page 7).

¹⁸ See, for example, the following statement of China:

"By way of general comments under this agenda item, the representative of China said that transparent procurement procedures enabled governments to obtain the greatest value for expenditure, contributed to a predictable and stable investment environment and to reducing and eliminating corruption" (WTO 2003a, page 1)

India and Malaysia have gone even further to constrain the scope of any potential disciplines, by arguing that procurement which is not open to foreign bidders should not fall within the scope of any multilateral agreement:

“The representative of India, joined by the representative of Malaysia, said that procurement not open to foreign suppliers should not form part of the discussions of the Working Group. In this regard, India had suggested the possibility of having different rules for procurement open to foreign suppliers and procurement reserved for domestic suppliers. In relation to the grant of preferences to domestic suppliers and supplies, and also in regard to pursuing policies of economic, social and regional development, there should be no restriction concerning procurement policy *per se*. The representative of the United States asked how a procurement that was not open to foreign suppliers would be defined. Would preferences to national suppliers qualify a procurement as open to foreign suppliers? Would a procurement restricted to domestic suppliers, goods or services, except where there was no domestic supplier, good or service, qualify that procurement as closed to foreign participation? In response, the representative of Malaysia said that, in its national practice, price preferences were clearly set out in the tender documents. If there was a price preference, the tender must necessarily be open to foreign suppliers. Transparency was in this way achieved, since foreign suppliers were not deceived into believing that they could make a successful bid without meeting these conditions. This national practice would continue to be followed as long as it remained to the developmental benefit of Malaysia. Supporting the view expressed by the representative of Malaysia, the representative of India added that procuring entities were free to determine whether individual tenders should be open to foreign suppliers. Where tenders were restricted to domestic suppliers, foreign suppliers would not submit their tenders. His delegation could not understand why any other WTO Member should be interested in these specific procurements. Entities should also be entitled to provide preferences, where procurements were open to foreign suppliers” (WTO 2002c, page 8).

Such arguments have not gone unanswered, as the following reported statement by Chile makes clear:

“The representative of Chile said that the Indian delegation should define what would be included in the scope and definition of government procurement and what would be the percentage of government procurement in India that would be subjected to a transparency agreement according to the definition suggested by India. In response, the representative of India said that its position was designed to address its national concerns, and that the exercise of the Group was not simply a matter of assuming negotiations on transparency” (WTO 2002c, page 8).

On the need to provide information about national procurement practices there appears to be a far amount of agreement at the Working Group. However, that agreement quickly dissolves once the type of information to be provided and other related matters are discussed, as the last three of the following four reports from the minutes of the 29 May 2002 demonstrates:

“The representative of India said that providing information on any aspect of the procurement process, whether information on national legislation and procedures or on procurement opportunities, was a transparency-related element, since complete disclosure of information aided efficient and fair procurement. Several countries had detailed web sites providing information on their procurement systems. Any efforts to expand the scope of information-related elements by proposing examination of the rules and laws, prescribing amendments to the laws, or listing out the content of the information would go beyond the mandate of the Working Group. The representative of Malaysia said that publication of information on national legislation and procedures was a key element in any transparency agreement. The representative of the European Community said that there appeared to be agreement in the Working Group that the availability of information on national legislation and procedures to all interested parties aided the efficiency of procurement and that common ground within the Group on this issue should be relatively easy to achieve” (WTO 2002c, page 10).

“On the question of the type of information to be made available, the representative of India said that requirements relating to the provision of complete information should take into account the administrative capacity of the procuring entity. The representative of the European Community considered that, at a minimum, all rules of general application should be published so as to increase procurement efficiency. The representative of Brazil said that this approach appeared to be similar to that in the provisions of Article X of GATT. The representative of Malaysia said that while it could be feasible to provide selected

information on a particular procedure, providing complete information regarding national regulations and procedures, especially in one of the WTO languages, would be too onerous. He considered that it would be sufficient to state that the relevant information was available and to list the salient or most important features of the particular regulation or law. The representative of the European Community said that, while his delegation recognized the concerns of some Members with regard to the capacity of certain entities to provide information where information requirements were burdensome, he nonetheless emphasized that an essential element of transparency was the facilitation of access to laws, regulations and rules applicable to procurement” (WTO 2002c, page 10).

“The representative of the European Community, joined by the representatives of Thailand and Brazil, considered that any requirement for a list of essential procurement information should attempt to meet a minimum set of information requirements without being overly prescriptive... The representative of India stated that the information content of tender opportunities should be left to that prescribed in the applicable national laws or in the procedures of the entities themselves. He said that any prescription regarding information on individual procurement opportunities had to be examined carefully, and that the requirement for providing information should take into account that limitations on providing information may exist due to low value of the procurement, the technology available to the procuring agency to disseminate the information, the cost of making such information available, and the tender being addressed to a small group of locally based contractors. He considered that several countries had detailed web sites providing information, including on individual procurement opportunities. The representative of the European Community said his delegation appreciated the difficulties that could be encountered by developing countries with regard to capacity in this area. His delegation recognized the possibility that developed countries could be required to apply a higher standard of information disclosure than that required from developing countries” (WTO 2002c, page 19).

“The representative of Thailand said that since government agencies in Thailand issued notices of invitation to tender throughout the year, translation requirements should be limited to big projects; otherwise, the requirement could become burdensome. The representative of Brazil, joined by the representative of Thailand, said that translation of all requests for tenders into an official WTO language would be problematic. In this regard, the representative of Brazil noted the existence of 2,500 entities at the federal level authorized to conduct government procurement in Brazil” (WTO 2002c, pages 19-20).

Since the 10-11 October 2002 meeting a number of submissions have been made on domestic review mechanisms, other review mechanisms, and Korea’s thoughts on the contents of any multilateral agreement. Unfortunately, the minutes of the Working Group’s meetings in 2003 are not yet available for analysis and it may well be the case that there has been a narrowing of positions from those stated in 2002 (and summarised above.) In the absence of any convergence of views, it appears that there is very little support—certainly from leading developing countries—for further multilateral rules on transparency in government procurement. A core group of industrialised economies support negotiations on such rules and in the light of such disagreement it may be useful to consider what, if any, is the basis for international collective action in this area; and that is the goal of the next part of this chapter.

Part IV

IS THERE A CASE FOR INTERNATIONAL COLLECTIVE ACTION ON THE REFORM OF PUBLIC PROCUREMENT PRACTICES?

So as to provide a benchmark, it will be useful to recall that in the case of tariffs on industrial goods, multilateral trade reform is said to break the political logjam that prevents policymakers from undertaking unilateral tariff reductions. The former galvanises domestic export interests whereas the latter does not. Moreover, the support of domestic export interests for multilateral trade reform is said to counter the opposition to reform by import-competing firms. (Private consumers, on this view, are said to be too numerous and individually to have too little at stake to organise effectively in the political arena on trade reforms.) The fourth part of this chapter is devoted to examining whether this political-economy logic carries over to multilateral reforms to discrimination and transparency in government procurement; and therefore examines whether there is a case for international collective action on public procurement reform.

It is important first to identify the different groups in society that might support or oppose reforms to state procurement systems. Even though they are likely to gain significantly from reform, taxpayers are assumed to be too numerous and to have too little at stake to organise politically on this issue and are left to one side (just as personal consumers were left out of the explanations in the last paragraph.) As far as domestic producer interests are concerned three types of interested party can be identified: those firms that already supply government contracts; those that do not; and those domestic firms that are actual or potential winners of foreign government contracts (“exporters”). Government officials are another interest group, especially if they are inefficient (or, more precisely, are resistant to greater workloads or to changes in procedures) or if they are corrupt. Of course, an inefficient official need not be a corrupt official, and *visa versa*.

With respect to reducing discrimination against foreign firms in a national procurement system, unilateral reform is likely to face opposition from domestic firms that currently win government contracts (that dislike the additional competition that results from less discrimination), from inefficient government officials (that dislike changes to their procedures and potentially higher workloads), and from corrupt officials (to the extent that more competition for government contracts reduces the profits that can be shared between the winner of the contract and the corrupt official.) Domestic exporters will not support unilateral reform as it does not offer the promise of greater market access abroad. Overall, then, unilateral reform of procurement discrimination faces pretty tough opposition and no clear supporters among producer interests.

Can multilateral reform of discriminatory procurement practices do any better? Multilateral reform does offer the prospect of winning contracts abroad, and the strength of that prospect will condition the degree of support that exporters provide for reform. Here two considerations are pertinent. First, as was discussed in section II.2.1.2 above, economic analysis has shown that when a given foreign government’s demand for a good is smaller than the amount actually supplied by that foreign nation’s own firms, then there is no improvement in market access of reducing procurement discrimination. This consideration, therefore, reduces the number of domestic export sectors or industries that have an interest in supporting multilateral reductions in procurement discrimination.

The second consideration is that a multilateral agreement to reduce *de jure* foreign discrimination against bids from domestic exporters may encourage some foreign procuring entities to engage in covert *de facto* discrimination. In other words, a transparent form of discrimination might be substituted for a non-transparent form of discrimination. (There are parallels here to the case of trade in industrial goods where it has long been argued that falling tariffs have been replaced by less transparent import barriers, such as antidumping measures.) To the extent that domestic exporters believe that such a substitution will take place, then their support for multilateral reform of *de facto* discriminatory practices will diminish.

One implication of the argument in the last paragraph is that domestic political support for multilateral reforms to procurement discrimination will be greater if it is accompanied by provisions on transparency and the like that make *de facto* discrimination more difficult or more costly to undertake. This logic may well account for the fact that the Uruguay Round Agreement on Government Procurement contained provisions on both discrimination and transparency. It may also account for the fact that transparency-related matters

become (or remain) a subject of international trade negotiations after multilateral provisions to reduce procurement discrimination have been adopted; here transparency measures can be seen as preserving the “original bargain” created by the prior reductions in procurement discrimination. To summarise, the foregoing arguments suggest that as far as maximising domestic political support for multilateral reform is concerned, future provisions on discrimination should be accompanied by new provisions on transparency.

What about the distinct matter of the degree of domestic support for reforming the transparency-related aspects of national procurement practices? Does multilateral trade reform offer the prospect of breaking political bottlenecks to unilateral reform? In what follows, it is assumed that improving transparency will encourage more domestic firms to bid for government contracts and may encourage more foreign firms to do so (assuming there are no other impediments for them to do so.)

Unilateral transparency reform will attract opposition from those firms that currently supply the government (that fear greater competition for state contracts), from inefficient officials (who oppose either greater workloads associated with more bidders or changes in their existing operating procedures), and from corrupt officials (if greater competition from state contracts reduces the total amount of inducements paid.) Domestic exporters will not support unilateral reform as it offers no prospect of greater sales abroad. The only domestic producer interest to support unilateral reform will be those domestic firms that believe that, after transparency is improved, their prospects of winning a profitable government contract at home have increased. Moreover, this support for unilateral reform will be attenuated to the extent that foreign firms are now more willing also to bid for domestic government contracts. In sum, then, these considerations suggest that the extent of domestic support for unilateral transparency reform is likely to be weak. Worse still, in order to maximise the support for unilateral reforms to transparency, a government may be tempted to couple such reforms with greater discrimination against foreign bidders, hence reducing the likelihood that new domestic bidders for state contracts face stiffer competition from foreign rivals.

Can a multilateral initiative to improve the transparency of government procurement practices mobilise more political support than unilateral reform? Here there are two additional factors to take into account. To the extent that domestic exporters feel that a multilateral initiative increases the probability of them winning profitable contracts from foreign governments, then they will lend their support. However, the extent of that support will depend critically on domestic exporters’ perceptions of the degree of existing foreign discrimination against their bids and whether more bids by domestic exporters in the future is likely to result in greater foreign discrimination against them. (Recall that a more transparent foreign procurement regime can still involve considerable *de jure* discrimination against domestic exporters.) Therefore, the extent of domestic political support for a multilateral initiative to improve the transparency of government procurement practices will be greater if such an initiative is coupled with measures to reduce discrimination against domestic bidders for foreign contracts. The case for international collective action to improve transparency and to reduce discrimination *together* is stronger than the case for collective action on either one alone; a finding that casts the Doha mandate on government procurement in a poor light.

Part V

RECOMMENDATIONS TO POLICYMAKERS

Almost all members of society, in particular the poor and the vulnerable, depend on the quality and extent of goods and services provided by governments and associated state bodies. It is for this reason that reforms to public procurement practices have been a priority for many national governments and for some international institutions. However, unilateral reform is difficult to accomplish and to sustain. A question therefore arises as to whether multilateral initiatives offer greater potential to mobilise support for procurement reform. This question is of considerable importance as WTO Members will soon have to decide in Cancun whether, and on what terms, to launch new negotiations on transparency in government procurement practices.

The discussion in this chapter has highlighted a number of matters that are relevant for policymakers. First, even among the current members of the Uruguay Round Agreement on Government Procurement, the proportion of goods contracts awarded to foreign firms is tiny; suggesting there may be considerable room for expanding access to national procurement markets. Second, even though there have been a number of arguably beneficial international initiatives in the 1990s to improve the transparency of government procurement practices and, to a lesser extent, to reduce discrimination against foreign bidders for state contracts, the effects of these measures are circumscribed by limited memberships and the scope of procuring entities covered.

Third, the decision of WTO Ministers in Doha to exclude from negotiations on government procurement practices measures that discriminate against foreign bidders is seriously misconceived. The primary goal of international collective action in government procurement is to stimulate sustainable domestic support for national reforms to procurement laws and practices. This objective is compromised if domestic exporters believe that improvements in the transparency of foreign procurement regimes offers them little prospect of winning more foreign government contracts because they will still face substantial formal discrimination.

Given the intensity of opposition by leading developing countries to new multilateral rules on transparency in government procurement practices, WTO Members may be better served by either abandoning negotiations all together or by expanding the Doha mandate to include negotiations on reducing preferences for domestic firms, thereby expanding access to national procurement markets. The latter option is likely to galvanise more support from domestic exporters than negotiations that are confined to transparency-related matters—and, more importantly, to the extent that this support translates into further reform, governments will pay lower prices for goods and services and a more efficient allocation of societal resources will ensue. Furthermore, putting market access-related matters back on the negotiating table is unlikely to run into more tangible opposition than has been generated by proposals for new multilateral rules on transparency, precisely because critics of the latter believe that proponents of such rules are motivated by the desire to improve market access for their exporters anyway.

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Appendix 1 Government procurement ratios in non-OECD countries, by regions

Regions	Final Consumption Expenditure (FCE)				Total Expenditure (TE)			GDP
General government (% of GDP)	FCE	ex. Com	ex. Def.	ex. C&D	TE	ex. Com	ex. C&D	1998 US\$ Billion
Africa								
Benin	12.59%							2.32
Botswana	27.10%							4.98
Burundi	17.36%							0.98
Cameroon	10.22%							8.70
Ivory Coast	16.76%	4.32%			20.39%	7.96%		11.10
Egypt	9.45%							82.71
Ghana	11.88%							7.17
Kenya	16.27%	3.16%	14.43%	2.75%	19.17%	6.06%	5.66%	10.37
Lesotho	17.06%							0.37
Madagascar	8.25%							3.75
Malawi	15.31%							1.69
Mali	14.91%							2.65
Mauritius	11.73%	3.23%	11.37%	3.07%				4.20
Morocco	16.59%							36.12
Mozambique	20.18%							3.82
Namibia	29.33%	9.89%			35.78%	16.34%		3.00
Niger	17.24%							2.01
Nigeria	3.89%	1.23%						36.14
Reunion	27.35%							7.25
Rwanda	21.28%							2.04
Senegal	13.26%							4.86
Seychelles	28.75%		24.98%					0.56
Sierra Leone	7.56%							0.65
South Africa	19.74%				21.77%			116.73
Swaziland	20.80%							1.18
Uganda	9.10%							6.06
Tanzania	8.29%		6.74%					8.09
Tunisia	16.29%	3.55%			21.60%	8.86%		20.02
Zambia	19.33%							3.35
Americas								
Anguilla	13.83%							0.09
Bahamas	14.06%	3.42%	13.47%	3.27%	14.62%	3.98%	3.83%	4.12
Barbados	19.75%							2.33
Belize	19.47%		18.24%					0.67
Bermuda	12.70%		12.48%					2.31
Bolivia	12.45%	1.84%						7.96
Brazil	16.46%	7.21%						776.94
Cayman Island	14.67%							0.93
Chile	9.54%				11.51%			74.32
Colombia	10.27%	1.55%	9.06%	1.02%	13.48%	4.75%	4.19%	90.41
Costa Rica	16.75%				18.36%			10.42
Dominica	20.16%							0.25
Dominican Rep.	4.23%							16.04
Ecuador	9.33%	4.21%	8.05%	3.63%	13.23%	8.11%	7.53%	19.30
El Salvador	9.74%				11.14%			11.86
French Guiana	34.54%				48.75%			1.50
Grenada	19.73%							0.31
Guadeloupe	30.35%				39.25%			3.50
Guatemala	6.34%				8.37%			19.01
Guyana	13.04%							0.74
Honduras	11.12%							5.34
Jamaica	7.56%							7.06
Martinique	28.75%				36.19%			4.38
Panama	16.37%	3.72%						9.82
Paraguay	19.33%							10.93

Notes:

Com=Compensation of state employees

Def.=Defense expenditures

C&D=Total of compensation of state employees and defense expenditures

Appendix 1 (continued) Government procurement ratios in non-OECD countries, by regions

Regions	Final Consumption Expenditure (FCE)				Total Expenditure (TE)			GDP
General government (% of GDP)	FCE	ex. Com	ex. Def.	ex. C&D	TE	ex. Com	ex. C&D	1998 US\$ Billion
Americas (continued)								
Peru	7.94%				9.87%			64.06
Puerto Rico	14.12%							50.51
Suriname	26.27%							0.82
Trinidad-Tobago	16.44%	2.59%						6.14
Uruguay	13.70%							20.95
Venezuela	8.60%	2.31%			10.28%	4.00%		95.02
Asia								
Azerbaijan	19.86%	4.24%	11.73%	2.11%				4.10
Bahrain	26.07%							5.35
Bangladesh	13.95%		12.53%					41.42
Bhutan	21.58%							0.36
China	12.84%							960.79
Cyprus	17.81%		13.49%					8.88
Fiji	17.44%							2.33
Hong Kong, China	8.69%	2.49%			11.00%	4.81%		166.45
India	10.54%	3.44%	7.42%	1.74%	13.29%	6.18%	4.46%	420.31
Indonesia	9.20%							215.00
Iran	11.06%	2.63%	8.00%	1.90%				187.42
Iraq	30.82%							4.60
Israel	25.95%	10.01%						91.32
Jordan	23.74%							7.45
Kuwait	37.30%							26.45
Kyrgyzstan	20.04%	11.74%			21.60%	12.88%		1.87
Malaysia	13.75%		10.76%					67.48
Maldives	21.97%							0.40
Nepal	8.72%							4.48
New Caledonia	33.02%							3.56
Oman	27.34%							14.96
Pakistan	12.87%	6.61%			16.29%	10.03%		64.13
Papua New Guinea	23.24%							3.71
Philippines	9.85%	2.94%			14.29%	7.38%		82.24
Qatar	34.44%							11.70
Saudi Arabia	33.86%							125.84
Singapore	9.35%							84.38
Sri Lanka	13.17%	5.57%	10.03%	4.24%	17.42%	9.82%	8.48%	15.70
Syrian Arab R.	14.34%							64.93
Thailand	9.67%	3.08%			17.31%	10.72%		117.04
United Arab Emirates	17.01%							47.23
Uzbekistan	22.71%							14.19
Vanuatu	28.24%	16.86%						0.25
Viet Nam	15.93%							24.60
Yemen	27.42%							5.33
Europe								
Albania	10.20%							3.03
Belarus	19.15%	10.54%	10.54%	5.62%	21.27%	12.65%	7.74%	14.28
Bulgaria	8.08%							12.06
Estonia	16.62%	8.06%	15.96%	7.75%	21.05%	12.50%	12.18%	5.11
Latvia	14.70%	7.79%			17.09%	10.18%		6.19
Lithuania	15.68%							10.69
Malta	17.56%	4.24%	15.20%	3.67%	21.87%	8.55%	7.99%	3.99
Romania	13.77%		8.49%					41.70
Russia	17.39%		12.70%					283.82
Slovenia	19.62%							19.99
Ukraine	15.77%	7.95%	9.33%	4.72%	18.15%	10.33%	7.10%	42.70

Notes:

Com=Compensation of state employees

Def.=Defense expenditures

C&D=Total of compensation of state employees and defense expenditures

Appendix 2: Comparison of the UNCITRAL Model Law's and the existing WTO Agreement on Government Procurement's (GPA) treatment of twelve matters that are the subject of discussion in the World Trade Organization's Working Group on Transparency in Government Procurement.

Please note that the source for all quotations in items I-V of the list below is WTO (2002a). The source for all quotations in items VI-XII of the list below is WTO (2002b). Occasionally, these documents refer to characteristics that are common to both the UNCITRAL Model Law and the GPA and in these instances, the relevant remarks are reported in only one column and a cross-reference from the other column is reported.

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
I	Definition and scope of government procurement	1. "The Model Law is designed to be applicable, in principle, to all types of procurement of goods, construction and services. What is meant by "goods", "construction" and "services" is listed in the Model Law" (page 2). 2. "In order to take into account the existence of procurement legislation at different levels of government, the Model Law presents two options as to the levels of government to be covered. The first option brings within the scope of the Model Law all governmental departments, agencies, organs and other units within the enacting State pertaining to the central government as well as to provincial, local or other governmental subdivisions of the enacting State. A second option allows States to enact the Model Law only with respect to the organs of the national government" (page 2). 3. "The Model Law allows a procuring entity engaging in low-value procurement in which there is unlikely to be interest on the part of foreign suppliers to forgo certain procedural requirements relating to announcements at the international level" (page 2).	1. "The Agreement on Government Procurement (GPA) covers the procurement of goods, and of all services and construction services that are specified in lists, found respectively in Annexes 4 and 5 of Appendix I. General Notes at the end of most Parties' schedules provide for a number of exceptions" (page 2). 2. "The GPA obligations under the Agreement apply to procurement by the procuring entities that each Party has listed in its schedule in Annexes 1 to 3 of Appendix I, relating respectively to central government entities, sub-central government entities and other entities such as public utilities" (page 2). 3. "The international instruments provide for the size of procurement contracts to be taken into account in determining the requirements to which they are subject. The provisions of the GPA apply to procurement in respect of procurement contracts above certain threshold values. Each Party indicates such thresholds applying to the procurement of goods and services under Annex 1, 2 and 3 entities" (page 2).
II	Procurement methods	1. "Under certain circumstances, in which the open procurement method is not considered to be appropriate, alternative methods are offered. The special conditions for the use of these other procedures are often related to ensuring adequate transparency. For example, the Model Law contains a requirement that decisions to use alternative methods should be supported in the record of the procurement proceedings by a statement of the grounds and circumstances on which the procuring entity has justified the use of the method in question" (page 6).	1. "Under the GPA, entities are required to prepare a report on each procurement awarded under limited tendering including a statement of the conditions which prevailed" (page 6).

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
III	Publication of information on national legislation and procedures	1. "The Model Law and the GPA require the public accessibility of relevant texts" (page 8).	1. "The GPA explicitly requires Parties to publish any law, regulation, judicial decision, administrative rulings of general application and any procedure regarding government procurement in such a manner as to enable other GPA Parties and suppliers to become acquainted with them" (page 8). 2. "Reference has also been made to the existing publication obligations contained in Article X of GATT 1994 and Article III of GATS relating to laws, regulations, judicial decisions and administrative rulings of general application. It has been observed that government procurement is not excluded from the scope of these provisions" (page 8).
IV	Information on procurement opportunities, tendering and qualification procedures	1. "The Model Law and the World Bank Guidelines require procurement notices also to be published in a specialized publication of wide international circulation. Under the Model Law and the World Bank Guidelines, the procuring entity is required to respond to any request for clarification submitted within a reasonable time, as well as communicating the clarification to all other participating suppliers" (page 10).	1. "Under the GPA, Parties are required to publish the tender notice in a publicly accessible publication as indicated in each Party's Appendix II to the Agreement" (page 10). 2. "Under the GPA, reasonable requests for explanations relating to tender documentation under open and selective procedures must be promptly replied to. Replies to such a request from a participating supplier shall be provided on condition that such information does not give that supplier an advantage over his competitors" (page 10). 3. "Under the GPA, entities must publish also a summary of the main elements of the information in a tender notice in one of the official WTO languages" (page 10).
V	Time-periods	1. "The Model Law recognizes that the length of that period of time may vary from case to case depending on the circumstances of the given procurement and it is left to the procuring entity to fix the deadline by which tenders must be submitted" (pages 14-5).	1. "The GPA prescribes certain minimum deadlines that must be allowed for the preparation, submission and receipt of tenders to enable responsive tendering and for potential suppliers to prequalify. The relevant provisions also contain general considerations that should govern when entities set time-periods for tendering and delivery" (pages 14-15).
VI	Transparency of decisions on qualification, specifically with reference to	1. "With regard to qualification criteria...[T]he UNCITRAL Model Law sets forth the range of criteria that procuring entities may require the suppliers to meet in order to qualify for participation in procurement proceedings" (page 2).	1. With respect to qualification criteria, the "Agreement on Government Procurement (GPA) requires that any conditions for participation in tendering procedures be limited to those which are essential to ensure the firm's capability to fulfil the contract in

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
	qualification criteria; fair and non-discriminatory application of qualification procedures; listing and registration of suppliers; and notification of qualification decisions.	2. With respect to fair and non-discriminatory application, "[T]he Model Law requires that same criteria must be applied to all suppliers participating in the procurement process" (page 2). 3. With respect to the provision of information on qualification decisions, "[U]nder the Model Law, each supplier that has submitted an application to pre-qualify must be notified whether or not it has been pre-qualified" and "the procuring entity must, upon request, communicate to suppliers whose application to qualify was rejected or whose qualification has been brought to an end the grounds therefor" (page 3).	question" (page 2). 2. With respect to fair and non-discriminatory treatment, the "GPA emphasizes that entities must not discriminate among suppliers of other GPA Parties and between domestic suppliers and suppliers of other Parties and among suppliers of other Parties with regard to conditions of participation. In certain cases, countries make the eligibility of suppliers of other countries to participate in a procurement depend on these countries providing reciprocal treatment to its suppliers" (page 2). 3. With respect to the provision of information on qualification decisions, "[T]he GPA requires the entity concerned to advise any supplier having requested to become a qualified supplier of its decision in this regard" and "the procuring entity must, upon request, communicate to suppliers whose application to qualify was rejected or whose qualification has been brought to an end the grounds therefor" (page 3).
VII	Transparency of decisions on contract awards: transparency of evaluation criteria	1. "...tender documents should contain the criteria, including any factor other than price, to be considered by the procuring entity in determining the successful tender and for awarding the contract. They [the relevant international instruments] also emphasize that entities should evaluate tenders only on the basis of the criteria that have been previously published" (page 5). 2. "The provisions of the Model Law on examination, evaluation and comparison of tenders require the procuring entity to evaluate and compare the tenders in order to ascertain the successful tender in accordance with the procedures and criteria set forth in the tender documents and prohibit the use of any criterion that has not been set forth in the tender solicitation documents" (page 5). 3. "Particular attention is given in the three instruments to ensuring the transparency and objectivity of technical specifications criteria and their evaluation. The GPA and the Model Law stipulate that technical specifications prescribed by procuring entities shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade" (page 6).	1. As point 1. in the UNCITRAL Model Law. 2. "The GPA also explicitly provides that awards should be made in accordance with the criteria and essential requirements specified in the tender documentation" (page 5). 3. With respect to ensuring the transparency and objectivity of technical specification criteria and their evaluation, the GPA requires "that technical specifications prescribed by procuring entities shall be based on international standards, where such exist, otherwise, on national technical regulations, recognized national standards or other equivalent standards, or building codes. The GPA has an explicit preference for the use of specifications based on performance rather than design or descriptive characteristics" (page 6). See also point 3. in the UNCITRAL Model Law. 4. With respect to non-discrimination, "[U]nder the GPA and in respect of procurement covered by the Agreement, governments Parties to the Agreement are required to give the products, services and suppliers of any other Party to the Agreement treatment "no less favourable" than that given to their domestic products, services

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
		4. "The Model Law requires that any specifications, plans, drawings, designs and requirements or descriptions be based on the relevant objective technical and quality characteristics of the goods" (page 6). 5. With respect to provisions concerning the application of the principle of non-discrimination in tenders and the award of contracts, the "The Model Law provides that any restrictions on procurement from foreign sources with the purpose of protecting certain economic sectors or on account of certain legal obligations should only be on grounds specified in the procurement regulations or should be pursuant to other provisions of law. The objective of transparency is promoted by requiring a procuring entity to declare any limitations on participation on the basis of nationality in the invitations to tender and to include in the record of the procurement proceedings a statement of the grounds and circumstances on which a procurement entity has relied for limitation of participation on the basis of nationality. In these cases, the procuring entity is exempted from the obligation to give wide international circulation to the invitation to tender or invitation to pre-qualify. The Model Law also provides for the possibility that, in evaluating and comparing tenders, a procuring entity may grant a margin of preference in favour of local goods, services and suppliers which permits the procuring entity to select the overall lowest-priced tender of a local supplier when the difference in price between that tender and the lowest-priced tender falls within the range of margin of preference. The rules for calculation of such preference margins should be set forth in the procurement regulations. Moreover, the use of a margin of preference is to be pre-disclosed in the tender documents and reflected in the record of the procurement proceedings" (pages 6 and 7).	and suppliers and not to discriminate among the goods, services and suppliers of other Parties (Article III:1). Furthermore, each Party is required to ensure that its entities do not treat a locally established supplier less favourably than another locally established supplier on the basis of the degree of foreign affiliation or ownership and do not discriminate against a locally established supplier on the basis of the country of production of the good or service being supplied (Article III:2). Certain derogations from the fundamental principles of the Agreement are provided for in national schedules appended to the Agreement. In addition, special and differential treatment for developing countries under Article V of the GPA allows for agreed exclusions from the requirement of national treatment under the GPA. Furthermore, the GPA prohibits the use of offsets which are defined as measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements. However, a developing country may at the time of its accession negotiate conditions for the use of offset requirements, to be used only for qualification of suppliers and not as criteria for awarding contracts (page 7).
VII	Transparency of decisions on contract awards: receipt and opening of tenders	1. "The Model Law and the World Bank Guidelines set forth detailed conditions which are aimed at preventing any non-transparent action or decision by the procuring entity in the process of the opening of tenders and at enabling suppliers to observe that the entity complies with the procurement criteria and procedures"	1. "The GPA provisions require that procedures and conditions for the receipt and opening of tenders guarantee the regularity of the openings and be consistent with the national treatment and non-discrimination provisions of the GPA" (page 8). 2. See also point 2. on UNCITRAL Model Law.

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
		(page 8). - Both the Model Law and the GPA “set forth a number of other provisions that safeguard transparency at the bid evaluation stage. The procuring entity may ask bidders for clarifications of their tenders that are needed to evaluate them, but no changes are to be asked or permitted with a view to making unresponsive bids responsive except for the correction of arithmetical errors appearing in the tender” (page 8). Furthermore, the “Model Law prohibits negotiations between the procuring entity and a supplier with respect to a tender submitted by the supplier” (page 8). - With respect to the confidentiality of tenders, “[U]nder the procedures on negotiations in the Model Law and in the GPA, entities are required to treat information in tenders, in particular any technical, price or other market information, confidentially and not to provide information intended to assist particular participants to bring their tenders up to the level of other participants” (page 8).	- With respect to transparency at the bid evaluation stage, “[T]he GPA requires that any opportunity that may be given to tenderers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice” and “[U]nder the GPA, negotiations with entities may only take place where prior notice has been given or where no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth earlier in the notices or tender documentation” (page 8). - See also point 3. on UNCITRAL Model Law.
VII	Transparency of decisions on contract awards: ex post information on contract awards	- See point 1. in the GPA column to the right. “Under the Model Law, the procuring entity is required to give a notice to other suppliers after it has entered into a contract with a supplier, specifying the name and address of the supplier and the contract price. Furthermore, the Model Law and the GPA allow an unsuccessful tenderer to seek and obtain pertinent information concerning the reasons why its tender was not selected” (page 9). “The provisions of the Model Law bar the procuring entity from disclosing certain information, including that relating to the examination, evaluation and comparison of tenders so as to safeguard the public interest or the commercial interest of parties involved in the proceedings” (page 9).	“The Model Law and the GPA require entities to publish a notice award after the award of each contract. The publications in which individual GPA Parties publish such notices are identified in Appendix II to the GPA. The GPA sets forth in detail the type of information that such notices, to be published within a specified time-limit after the award of each contract, must contain. In addition to the publication of a notice of contract award, the GPA goes on to require entities to promptly inform directly those suppliers that have participated in a tender of the decision on the contract award, in writing if requested” (page 9). “The GPA also requires the provision of information on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer” (page 9). “As regards the treatment of confidential information on contract awards, the GPA foresees that entities may decide to withhold certain information on contract awards where release of such information may impede law enforcement or otherwise be contrary to public interest or would prejudice the legitimate commercial interests of particular enterprises or might prejudice fair

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
			competition between suppliers" (page 9).
VIII	Domestic review procedures	1. See point 1. in the GPA column to the right. 2. See point 2. in the GPA column to the right. 3. "Under the Model Law, unless the complaint is resolved by mutual agreement, the procuring entity shall, within prescribed time-limits, issue a written decision including a statement on the reasons for the decision and indicating any corrective measures that are to be taken. If the matter is not settled through this procedure, the complainant is entitled, under the Model Law, to seek an administrative review. The functions of an administrative review may be vested in an existing appropriate administrative body or a body whose competence is exclusively to resolve disputes in procurement matters and which is independent of the procuring entity. The decisions of the review bodies or failure to make a decision within prescribed time-limits shall be subject to judicial review. The Model Law also lays down certain procedures to ensure the openness and fairness of review procedures" (page 12). 4. "The provisions of the Model Law also provide for the suspension of procurement proceedings which takes account of the need of the procuring entity to conclude a contract in an economic and efficient way without undue disruption and delay in the procurement process" (page 13).	1. "Review procedures are often considered a key component of transparency and accountability of government procurement practices. The rules set out in the Model Law and the GPA establish the basic features that national review mechanisms must have without going into great detail. The purpose of these provisions is to give suppliers believing that an entity has breached national law or, in the case of the GPA, the rules of the GPA itself, a right of review" (page 12). 2. "Under the Model Law and the GPA, as an initial step, complainants are encouraged to seek resolution of their complaints through consultations with the procuring entity itself prior to recourse to an administrative review body" (page 12). 3. "Under the GPA, Parties may confer the authority to hear challenges by suppliers on national courts or on an impartial and independent review body of an administrative nature. In the event that a bid challenge is heard by a review body which does not have the status of a court of law, either its decisions must be subject to judicial review or it must follow the criteria laid down in detail in Article XX:6(a)-(g). These minimum standards are mainly designed to ensure the openness, fairness and equity of the proceedings" (page 12-13). 4. "Under the GPA, a review body must have the authority to order the correction of a breach of the Agreement or compensation for the loss or damages suffered by a supplier, but this may be limited to costs for tender preparation or protest. Pending the outcome of the challenge, the review body must be able to order rapid interim measures, including the suspension of the procurement process, to correct breaches of the GPA and to preserve commercial opportunities. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied" (page 13).
IX	Other matters related to	1. See point 1. in the GPA column on the right.	1. "Both the Model Law and GPA have provisions for the

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
	transparency; maintenance of records of proceedings; information technology; language; and fight against bribery and corruption.	2. "The Model Law establishes an explicit requirement for the maintenance of a record of the key decisions and actions taken by the procuring entity during the course of the procurement proceedings. As is explained in the Guide to the Enactment of the Model Law, the maintenance of a record is one of the principal mechanisms for ensuring adherence to the rules and also facilitates the exercise of the right of aggrieved suppliers to seek review" (page 13). 3. See point 2 in the GPA column on the right. 4. "Under the Model Law, the language of documentation is generally the official language(s) of the enacting State, or, in certain specified cases, in a language customarily used in international trade. The formulation and submission of tenders can be in any language in which the tender notices have been issued or in any other language stipulated by the procuring entity" (page 19). 5. See point 4. in the GPA column to the left.	maintenance of records of procurement proceedings. The GPA requires that this information be retained by procuring entities for use, if required, under various procedures such as provision of information by entities (Article XVIII), between governments (Article XIX), under bid challenge procedures (Article XX) and under dispute settlement (Article XXII). Moreover, where limited tendering – rather than open or selective procedures have been adopted, the GPA requires a specific report to be prepared on each such occasion of limited tendering" (page 18). 2. Both the GPA and the Model Law "also set out the minimum content of information to be maintained; these cover the procurement requirement, the procuring entity, suppliers and evaluation of tenders" (page 18). 3. "The GPA recognizes the useful role that information technology could play in government procurement and, at Article XXIV:8, provides for the Committee on Government Procurement to consult regularly in the light of unfolding developments with the aim, in particular, of using information technology to promote transparent, efficient, open and non-discriminatory government procurement. In the context of the renegotiation of the Agreement under Article XXIV:7(b), the Committee on Government Procurement has initiated work on possible amendments to the relevant provisions of the GPA to reflect recent developments in information technology" (page 19). 4. "Under the GPA, a summary of the invitation to tender has to be submitted in a WTO official language, and, if an entity allows tenders to be submitted in several languages, then one of those must be an official WTO language" (page 19). 5. "Neither the GPA nor the Model Law have explicit provisions specifically directed at the fight against bribery and corruption" (page 20).
X	Information to the provided to other governments (notification)	1. No remarks on the Model Law.	1. "The GPA, being an international instrument that sets contractual rights and obligations between governments in the area of government procurement, includes provision on exchange of procurement-related information between governments. The

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
			relevant provisions relate to provision of information on national legislation; notification of national legislation; provision of information on contract awards; and statistical reporting" (page 22). 2. "The GPA Parties are required, in response to a request by any other GPA Party, to explain their government procurement procedures; supply copies of laws, regulations, judicial decisions, administrative rulings or other measures relevant to the Agreement; and provide information concerning procurement by covered entities and their individual contract awards" (page 22). 3. "As regards the establishment of enquiry points, the provisions on special treatment for developing countries in the GPA require developed country Parties to establish information centres to respond to reasonable requests from developing country Parties for information relating to, among others, laws, regulations, procedures and practices regarding government procurement, addresses of the entities covered by the Agreement, and the nature and volume of products or services procured or to be procured, including available information about future tenders. The coordinates of the contact points of GPA Parties have been notified to the GPA Committee" (page 22). 4. "As regards the notification of national legislation and any changes, the GPA Committee has adopted relevant procedures for such notifications, including responses to a checklist of issues. GPA Parties are required to submit the complete texts of their basic legislation (laws and regulations) on government procurement, including the basic legal instruments pursuant to which effect is given to the provisions of the Agreement, in the original language to the Secretariat. Each Party is also required to provide a summary of the implementing legislation in a WTO language" (page 22). 5. "Further to the obligations of entities under the GPA relating to the provision of information by procuring entities to an unsuccessful tenderer, the GPA allows the government of an unsuccessful tenderer to seek such additional information on the contract award

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
			as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government is required to provide information on both the characteristics and relative advantages of the winning tender and the contract price. The government may disclose the information thus obtained provided it exercises this right with discretion. In cases where the release of such information would prejudice competition in future tenders, this information shall not be disclosed except after consultation with and agreement of the Party which gave the information to the government of the unsuccessful tenderer" (page 23). 6. "The GPA has a general provision in Article XIX:4, requiring that confidential information provided to any government Party to the GPA shall not be revealed without formal authorization from the Party providing the information" (page 23). 7. "As a means of monitoring procurement covered by the GPA, Article XIX:5 of the GPA requires each Party to collect and provide to the Committee on an annual basis statistics on its procurements covered by the GPA. The type of information that such reports shall contain is stipulated in detail in Article XIX:5, paragraphs (a) to (d). Statistical reports of GPA Parties can be found on the WTO website" (page 23).
XI	WTO dispute settlement procedures	1. No remarks on the Model Law.	1. "Under the GPA disputes between Parties are subject to the procedures of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. Dispute settlement procedures are applicable to all the rules of the Agreement. Because of the area covered and of the plurilateral nature of the Agreement, GPA provisions on dispute settlement contain a number of special rules or procedures, for instance on composition of panels, time-periods for panel proceedings and disallowing cross-retaliation in case of disputes arising under other WTO Agreements. Moreover, under the GPA, the DSB has the authority to authorize consultations among parties to the dispute regarding remedies when withdrawal of violating measures is not possible. By their nature, the issue of government-to-government dispute

Item number	Aspect of the procurement process	Related provisions in the UNCITRAL Model Law	Related provisions in the WTO's Agreement on Government Procurement, and other related WTO agreements
			settlement does not arise in the other two international instruments" (page 25).
XII	Technical cooperation and special and differential treatment for developing countries	1. "The UNCITRAL Model Law ...do not have specific provisions related to technical cooperation" (page 27).	1. "The obligations of GPA Parties in this respect are set out in Article V of the Agreement under which developed countries are required to provide technical assistance which they may deem appropriate to developing countries. The provision of technical assistance is upon request, on mutual agreement between the Party making the request and the donor Party. The types of assistance envisaged in the GPA include the solution of particular technical problems relating to the award of a specific contract, translation of qualification documentation and tenders made by suppliers of developing countries into an official WTO language and resolving any other problems in the field of government procurement. There are also specific provisions for technical assistance to least-developed countries. These require developed country Parties to provide assistance to potential tenderers in such countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers, and likewise assist them to comply with technical regulations and standards relating to products or services which are subject of the intended procurement" (page 27).

Appendix 3: Submissions on potential new multilateral disciplines on transparency by WTO members to the Working Group on Transparency in Government Procurement, 1997-2003

Note: Many submissions to the Working Group concern the specific procurement practices of WTO members and do not draw any implications for potential new multilateral disciplines on transparency in government procurement practices; consequently, those submissions were excluded from the table below. Moreover, submissions by international organisations—which mainly concerned on-going technical assistance efforts—were omitted from this table too.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
Hong Kong, China WT/WGTGP/W/11 19 December 1997: APEC Non-Binding Principles on Government Procurement: Transparency	This submission summarises the elements of and means of enhancing transparency in procurement practices that were identified by the APEC Government Procurement Experts Group (GPEG). These elements and means were endorsed by APEC Government Ministers at their meeting in Vancouver, Canada, in 21-22 December 1997. Before describing these elements and means, GPEC notes “that the elements of transparency in [government procurement] identified by the GPEC are non-binding and individual economies are in the best position to decide on the applicability of individual elements of transparency to them, and how best to translate these elements into practical measures, taking into account the specific circumstances of their economy and possibly the costs and benefits of adopting specific transparency measures” (paragraph 2). GPEC notes that “[T]he general principle is that sufficient and relevant information should be made available to all interested parties consistently and in a timely manner through a readily accessible, widely available medium at no or reasonable cost. This general principle is applicable to all aspects of [government procurement], including the general operational environment, procurement opportunities, purchase requirements, bid evaluation criteria and awards of contracts...” (paragraph 3). GPEC also states a preference for open and competitive tendering.	The need to provide sufficient and relevant information is justified as follows: “to enable potential suppliers to make informed decisions. For example, potential suppliers must have access to information on the conditions for participation and the requirements of the intended procurement in order to decide whether to participate and to prepare a responsive offer” (paragraph 3). The need to provide timely information is justified as follows: “to ensure that the information is valid when available to the receiver” (paragraph 3). The need to make information available to all parties is justified on the grounds that it will “ensure that the procurement process is fair to all participants and seen to be fair” (paragraph 3). Requiring the accessibility to information through a medium at no or reasonable cost is to “ensure that information is accessible in practice” (paragraph 3). The rationale for making transparent the laws, regulations, judicial decisions, administrative rulings etc covering procurement is to “let suppliers know the rules of the game so that they can decide whether to participate” (paragraph 6). Transparency in procurement opportunities is justified on the grounds that “[T]his would encourage wider participation leading to increased choices for the buyer	No national experience was cited. No economic evidence was cited.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	GPEC also notes that “[D]ue process and public accountability are essential elements of fair, open and impartial procurement procedures, and the availability of an avenue/channel for review of complaints is an element of transparency” (paragraph 15).	and enhanced competition, contributing to achieving better value for money in procurement activities” (paragraph 8). Transparency in purchase requirements is justified on the grounds that “this is to facilitate effective and efficient participation by potential suppliers in the procurement process. Also, because potential suppliers know the specific requirements, the non-responsive offers that the buyer may have to process can be minimized, increasing the operational efficiency of the buyers” (paragraph 10). Transparency in bid evaluation criteria is “to ensure fairness and integrity” (paragraph 12). The award of contracts should be transparent so as to “demonstrate government accountability to suppliers and the public” (paragraph 14).	
United States WT/WGTGP/W/15 19 February 1998 Review Mechanisms	States that a multilateral agreement should include review mechanisms that have the following three features: impartiality, “rapid decisions or possibility to suspend the procurement process,” and “adequate remedies” (second paragraph). The submission notes that “[R]emedies should include the possibility of retendering procurements or damages to cover legitimate claims” (second paragraph). Written records of decisions and deliberations of the review mechanisms should be kept.	These provisions are justified as follows: “[R]eview mechanisms can ensure due process and public accountability in the procurement process. In fact, the opportunity to seek review should be seen as a cornerstone of transparency. Public procurement authorities are much more apt to vigorously and conscientiously implement transparency provisions if their failure to do so may be challenged before an impartial body. Moreover, there is ample precedent in WTO agreements for review or appeal mechanisms” (first paragraph).	Referred to three WTO agreements as well as to Article X:2(b) of the GATT 1994.
United States WT/WGTGP/W/16 19 February 1998 Transparency In Procurement Methods	While recognising that there are legitimate circumstances under which a government may engage in single tendering, a plurilateral agreement should “set forth specific conditions on the circumstances under which single tendering is justified” (Introduction) “Additionally, a transparency agreement could provide that single tendering be conducted with a minimum level of	The need for disciplines on single tendering is justified as follows: “[I]f a government has unfettered discretion to utilize single tendering for any or all procurements, it could effectively escape the obligations of a WTO transparency agreement. To avoid such a potential loophole and ensure a common level of mutually agreed balance in obligations, WTO members may want to	Referred to United States’ statutes and regulations on single tendering. Cited three international instruments: the current GPA, the UNCITRAL Model Law, and World Bank Guidelines.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	transparency” (third paragraph). The submission lists the following circumstances under which single tendering could be justified: extreme urgency, absence of tenders or collusion in tenders, proprietary procurements, commodity markets and fire sales, and national security. This list is not intended to be exhaustive.	specify the general circumstances under which single tendering is justified” (third paragraph).	No economic evidence cited.
European Communities WT/WGTGP/W/17 25 May 1998 Ensuring That Transparency In Procurement Policies and Practices Is Achieved	States elements of potential multilateral disciplines on transparency as they relate to the following aspects of procurement processes: choice of procurement method, providing information on national legislation and procedures, publication of procurement opportunities and procedural requirements, information supplied, time-limits, decisions made on supplier qualification and contract award, domestic review procedures, language used in official documentation, and the use of information technology. The following general statement about transparency is made in this submission: “Transparency means ensuring that information on procurement rules, practices and opportunities are 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. Furthermore, procurement practices should be seen to be transparent and information provided should be respected” (second paragraph). The submission is said not to address “more horizontal issues which would need to be addressed in a developing a WTO transparency agreement, such as definition and scope, exchange of information between governments or technical assistance” (first paragraph).	The following statement is made about the effects of transparency: “...transparency can be a useful tool to encourage open and competitive procurement regimes, thereby helping both purchasers and suppliers to achieve economic benefits” (second paragraph).	Reference is made to EC procurement practice and to submission WT/WGTGP/W/6. No economic evidence is cited.
European Communities WT/WGTGP/W/18 25 May 1998 Technical Assistance	“Technical assistance is an important element to ensuring the success of a future transparency agreement” (first paragraph). “The EC fully supports the inclusion of a provision on technical assistance in any future transparency agreement and	Technical assistance “can and should play a role in helping WTO Members (present and future) to implement the agreement, in developing domestic regimes and in taking further practical steps to enhance transparency of	Describes EC technical assistance programmes. Refers to the TRIPS agreement.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	would advocate the use of language which mirrors that of Article 67 of the TRIPS Agreement” (fifth paragraph). The submission describes forms and reasons underlying EC’s programme of technical assistance in government procurement.	procurement policies and practices” (first paragraph).	No economic evidence cited.
Hong Kong, China WT/WGTGP/W/22 7 April 1999: APEC Non-Binding Principles on Government Procurement: Accountability and Due Process	This submission summarises the elements of the principle of accountability and due process in procurement practices that were identified by the APEC Government Procurement Experts Group (GPEG). These elements were developed at GPEG’s meeting on 4 February 1999. The submission notes that “the principle of accountability and due process to be developed by the GPEC is non-binding. Individual member economies are in the best position to decide on the applicability of individual elements to them, taking into account the specific characteristics of their economy and the costs and benefits of adopting specific measures” (third paragraph of the statement of “Non-Binding Principles.”) The submission states that “[T]he general principle is that government procuring agencies and individual procuring personnel should be, and are seen to be, accountable to their governments, the end users, the public and suppliers for the efficient, cost-effective and fair conduct of their procurement; and that mechanisms for scrutiny of the procurement process and avenues/channels for review of complaints should be available” (fourth paragraph). The submission goes on to state the following “elements of accountability and due process”: procurement process, record keeping, independent scrutiny, review mechanisms, and “openness and transparency” (final sub-section). In the case of record keeping, independent scrutiny, and review mechanisms, specific practical steps are also described that are supportive of the general principle enunciated above.	None offered.	No national experience or international accords are referred to. No economic evidence is cited.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
United States WT/WGTGP/W/23 24 June 1999 Domestic Review Mechanisms	The submission notes that discussions in the Working Group have differentiated between domestic review procedures and WTO dispute settlement procedures. In fact, these procedures are distinguished as follows: "...domestic review mechanisms are provided to resolve supplier complaints at a national level under the sovereign jurisdiction of a particular country, while WTO dispute settlement is available to resolve differences between WTO members relating to the implementation of WTO obligations" (third paragraph.) The submission goes on to note that many jurisdictions already have domestic review mechanisms and that many WTO agreements already provide for such mechanisms in different contexts. As far as proposals are concerned, the following statement is made in this submission. "We believe a transparency agreement should include a simple and flexible provision on domestic review mechanisms—one that can accommodate different Members' existing independent administrative or judicial tribunals and review procedures. Such a provision should ensure that there are transparent, timely and independent decisions on complaints or appeals relating to the transparency of procuring entities' actions and procedures" (seventh paragraph). The submission goes on to qualify this proposal as follows: "[T]he 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 this Agreement" (seventh paragraph). The submission contains the following proposed text for a provision on domestic review procedures in the context of a multilateral agreement on transparency in government procurement: "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	None offered.	Refers to GATT Article X:3(b), the Agreement on Rules of Origin, the Agreement on Import Licensing, the Agreement on Implementation of Article VII of the GATT 1994, the Agreement on Technical Barriers to Trade, the Agreement on Subsidies and Countervailing Measures, and the TRIPS Agreement.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	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" (ninth and final paragraph).		
Hong Kong, China WT/WGTGP/W/22 7 April 1999: APEC Non-Binding Principles on Government Procurement [: Final]	This submission includes the full and final set of non-binding principles agreed by officials from APEC member economies on 8 August 1999. These officials were convened as the Government Procurement Experts Group (GPEG). This group has identified the following elements of the non-binding principles on government procurement: transparency, value for money, open and effective competition, fair dealing, accountability and due process, and non-discrimination. On the "[E]lements of Transparency," the submission notes: "[T]he general principle is that sufficient and relevant information should be made available to all interested parties consistently and in a timely manner through a readily accessible, widely available medium at no or reasonable cost. This general principle is applicable to all aspects of [government procurement], including the general operational environment, procurement opportunities, purchase requirements, bid evaluation criteria and awards of contracts..." (paragraph 3); which is the same principle enunciated in submission WT/WGTGP/W/11 above. Of particular note is the "[E]lements of Non-discrimination," where the submission states that "[T]he general principle is that procurement laws, regulations, policies, administrative guidelines, procedures and practices should not be prepared, adopted or applied so as to afford protection/favour/preference to, or discrimination/bias against, the goods, services or suppliers of any particular economy/economies" (paragraph 70). The submission goes on to say of the non-discriminatory principle that "[T]his principle should apply to all stages of procurement" (paragraph 71). The submission goes on to list	See entry for submission WT/WGTGP/W/11 above for the rationale for adopting transparent procurement processes. The rationale offered for adopting a principle of non-discrimination is that "[T]he use of discriminatory practices in government procurement undermines the competitive process and thus the ability of member governments to active the best possible value for money outcomes" (paragraph 70).	None.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	seven forms of non-discrimination in procurement tendering (paragraph 72).		
European Communities WT/WGTGP/W/26 5 November 1999 Elements For An Agreement On Transparency In Government Procurement	This submission contains the draft text of 18 articles that might form a multilateral agreement. It is said that: “[T]he proposed text favours a “principles-oriented approach” to transparency in government procurement. In the European Communities’ view, it is not necessary in this context to impose one single set of rules onto Members that widely diverging systems and, in some cases, limited resources” (second paragraph of covering note). The EC states that it consulted with a number of delegations before this text was proposed and that “the attached draft has, on most points, struck a fair balance between the different views” (third paragraph of covering note). The EC goes on to note that “during this exercise it became clear that introducing multilateral rules on transparency in procurement will not be sufficient to resolve possible distortions in procurement practices. Therefore, further work on additional multilateral rules on government procurement is necessary. Obviously, commencing any such negotiations does not imply an automatic opening of procurement markets, but it will create a rules-based environment” (final paragraph of covering note). The draft text of a multilateral agreement in this submission contains 18 articles, organized into four parts. This text is reported in Appendix 3a of this chapter.	None offered.	Reference is made to the GATT 1994 (generally and specifically to Articles X:1, XX, XXI and XXII), the GATS (generally and specifically to Articles III:1, III:2, XIV, XIVbis, XXII, and XXIII). No reference is made to country experience or to economic evidence.
Hungary, Korea, Singapore, and the United States WT/GC/W/85 WT/WGTGP/W/27 9 November 1999 Preparations For The 1999 Ministerial	This joint submission contains a “draft consolidated text for an agreement on transparency in government procurement” (first paragraph of the covering note.) It is noted that the text “is the result of ongoing informal consultations with a number of delegations...” (first paragraph of the covering note). The text of the proposed agreement contains text on the following subjects: General Objective of the agreement, Non-Discrimination in Transparency, Scope and Application,	An extensive rationale for the proposed agreement is offered in this submission. The rationale is as follows: “Recent instability in global financial markets has underscored the importance of capacity building in the public sector and, in particular, of continuing to improve economic management. Members recognize that transparent and predictable procurement practices are a critical element of good economic governance, and help to	The submission refers to Articles X:1, XX, XXII, and XXIII of the GATT; Articles III:1, III:2, XIV, XXII, and XXIII of the GATS; and Article X of the Agreement Establishing the World Trade Organization.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
Conference	Transparency of Information on Procurement Opportunities, Exceptions, Transparency of Procurement Rules, Transparency in Qualification and Bid Documentation, Transparency of Decisions and Contract Awards, Other Provisions on Information Relating to Procurement, Domestic Review Procedures, Review and Institutional Provisions, Dispute Settlement, Technical Cooperation, and Final Provisions. The provision on “Non-Discrimination in Transparency” is as follows: “In carrying out its obligations under this Agreement, each Member shall accord to suppliers from any other Member treatment no less favorable than that which it accords its own suppliers or to suppliers from any other country” (third paragraph of draft agreement).	build public confidence, encourage long-term business commitments, and provide a solid foundation for sustained economic growth and development. “Transparency in procurement also helps to ensure that governments obtain the best value for money they spend, freeing up resources to address pressing economic and social needs. For example, the Ministry of Health of one Member recently reported that it was able to reduce by 20 percent the price of medicines supplied to patients as a result of the introduction of transparent procurement procedures. All Members can clearly benefit, often on an even greater scale, from the consistent use of such procedures” (third and fourth paragraphs of the covering note).	No economic evidence is cited, however the experience of one (unnamed) WTO Member is cited.
United States WT/WGTGP/W/35 30 September 2002 Proposal For A Work Plan To Build On The Progress Of The Working Group	After summarising certain aspects of the discussions in the Working Group, and describing the benefits of a transparent government procurement system, the submission goes on to state that: “[W]hile Members use a myriad of procurement procedures and practices, there is no common set of transparency provisions. Thus, the primary focus of the agreement should be to establish core transparency elements that suppliers throughout the world can be assured of finding in the procurement system of every member” (seventh paragraph). The submission argues that the Working Group should identify those elements that it might be appropriate to include in a multilateral agreement. Having said that, the submission does state “[A]t this juncture, it is not necessary for the Working Group to decide how a particular element would be addressed in the agreement” (tenth paragraph). This submission suggests organizing the possible elements of an agreement into the following four categories: General parameters of a potential agreement; Transparency of procurement systems; Transparency of specific procurements;	This submission offers an extensive account of the “Benefits of a Transparent Government Procurement System.” The relevant text is stated below: “Transparent government procurement systems engender benefits not only for domestic and foreign suppliers, but also ultimately for the governments themselves and their citizens. The full disclosure of information is essential to a predictable and efficient government procurement process. The use of transparent and predictable procedures will help to ensure that governments obtain the greatest value for their money, resulting in the purchase of better quality goods and services and leading to more efficient use of public resources. This will enable Members to provide more social services, economic and social infrastructure and other public goods to their citizens. Transparent procurement systems will also provide an important tool for Members to combat corruption in public procurement. “Ensuring transparency of government procurement systems also has ramifications beyond the government	No country experience, international agreements or rules, or economic evidence is cited.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	and Operational provisions to fulfil the objectives of a potential agreement. The draft text of a multilateral agreement in this submission contains 18 articles, organized into four parts. This text is reported in Appendix 3b of this chapter.	procurement sector. Transparent and predictable procurement procedures are a critical element of good economic governance. They help build public confidence in the management of government affairs, establish a stable and predictable commercial and investment environment, encourage long-term business commitments and provide a solid foundation for sustained economic growth and development” (paragraphs three and four).	
Canada WT/WGTGP/W/36 30 September 2002 Transparency of Contract Award Decisions	The submission begins by noting that WTO Members need to have flexibility in establishing criteria for deciding on the award of a contract, in criteria for the qualification of bidders, and the registration of bidders. The submission goes on to note that: “[W]ithin the context of flexibility for choice of award criteria, transparency of decisions can be assured by: • specifying the chosen award criteria and other requirements in the tender documentation, registration or qualification documentation or other information that is provided to all participating suppliers; • basing award decisions solely on the criteria provided to all participating suppliers; and • making information available to suppliers and other parties on award decisions” (paragraph two).	The submission provides an extensive rationale for these provisions. This rationale is reproduced below. “Benefits of transparency of award decisions <i>1. Efficiency of the international trading system:</i> • The importance of transparency, predictability and consistency in the application of measures relating to international trade has been recognized since the GATT 1947. • Government procurement is an important contributor to world trade. Most governments, like Canada, cannot supply all their government needs through domestic sources. Even where bidding can be restricted to domestic sources, those sources will need to draw on inputs from other parts of the world. <i>2. Economic efficiency:</i> • Procuring organizations and the taxpayer will get better value for their money through lower prices and better products. • By providing clear information on the basis for making decisions, potential suppliers will be able to make informed decisions about whether to bid. • Potential suppliers will be able to make better bids if they understand the government's needs and	No country experience, international agreements or rules, or economic evidence is cited.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
		priorities. • Providing information on local content or other requirements for domestic benefits permits potential suppliers, domestic and foreign, to seek effective and efficient ways of meeting these requirements; • Potential suppliers from other countries will understand whether they may bid, thus avoiding wasted effort bidding on requirements for which they are not eligible. • Potential sub-contractors will be able to make more effective proposals to possible prime contractors. • Providing feedback on the outcome of an award permits bidders to prepare better bids in the future. 3. Confidence in the procurement system: • Predictability and confidence in the government procurement system is ensured through consistency in describing applicable criteria and following the criteria for award of contracts. • Transparency of award decisions reduces the possibility of corruption. • Providing feedback on the outcome of the award of a contract establishes confidence that the criteria have been applied as described" (paragraphs two and three).	
Japan WT/WGTGP/W/37 14 October 2002 Japan's View On Transparency in Government Procurement	After citing the relevant paragraphs of the Singapore Ministerial Declaration and the Doha Ministerial Declaration, states that "Japan attaches a great importance to the following" [three points] (paragraph 2). The first point is as follows: "Since the transparency provisions in the Agreement on Government Procurement in Annex IV of the WTO Agreement are difficult for developing country	Much of the rationale for the positions taken in this submission are found in the quotations in panel to the immediate left.	The existing Agreement on Government Procurement is mentioned. However, no other international agreements or rules, nor country experience nor economic evidence are cited.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	Members to follow as it stands, the provisions of a transparency agreement should be flexible enough, so that all WTO Members could accept them” (paragraph 2(1)). The second point is that “[A] transparency agreement should be legally binding and effective” (paragraph 2(2)). The third point is that “[I]t is a prerequisite that all WTO Members participate in a transparency agreement. Therefore, the framework of such an agreement should be simple, focusing on core principles such as transparency in procurement opportunities” (paragraph 2(3)). The submission goes on to elaborate that the important elements of a transparency agreement are: Non-discrimination in transparency; Definition and scope; Core transparency principles including preparation and publication of procurement rules and enquiry, publication of procurement opportunities, and transparency in decisions on contract awards; Domestic review; Consultations and dispute settlement; and Technical cooperation and special and differential treatment for developing countries.		
United States WT/WGTGP/W/38 31 January 2003 Considerations Related To Enforcement Of An Agreement On Transparency in Government Procurement	The submission contains the following general statement, which is followed by more specific remarks about the enforcement of a potential multilateral agreement. “A [Transparency in Government Procurement] agreement would be an important addition to the rules-based international trading system by setting out basic transparency obligations that suppliers throughout the world could expect to find in the government procurement systems of all Members. These obligations should be subject to the same types of enforcement as existing commitments in other WTO agreements. However, it is important to emphasize that regardless of the enforcement mechanisms that may be built into a [Transparency in Government Procurement] agreement, such mechanisms could not be used to challenge domestic preference programmes, which the Doha Declaration has explicitly excluded from a	As noted in the panel of text to the left, the submission does provide a rationale for the manner in which potential provisions on the application of the WTO’s Dispute Settlement Understanding to government procurement could be tailored to meet the stated concerns of WTO Members.	The submission makes reference to GATT Article X:3(b), Articles 2(j) and 3(h) of the Agreement on Rules of Origin, Article 5(e) of the Agreement on Import Licensing, Article 11 of the Agreement on the Implementation of Article VII of the GATT 1994, the Agreement on Technical Barriers to Trade, the Agreement on Subsidies and Countervailing Measures, the Agreement on Antidumping

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	[Transparency in Government Procurement] agreement” (second paragraph). With regard to specific proposals on domestic review procedures, the submission states: “[A] [Transparency in Government Procurement] Agreement should require that Members make available domestic review procedures for both domestic and foreign suppliers to use if they had concerns that a particular procurement was not in compliance with the transparency provisions of an agreement. An agreement could specify that the use of such procedures would be the only method through which a specific procurement could be challenged” (fifth paragraph). The submission goes on to note that many existing WTO agreements already provide for domestic review procedures. The submission also notes that “a [Transparency in Government Procurement] Agreement could include a simple and flexible provision on domestic review procedures that would accommodate different Members’ existing independent administrative and judicial tribunals and review procedures” (ninth paragraph). The submission argues that to address some Members’ concerns—about the relationship between WTO Dispute Settlement Understanding and the domestic review procedures and the application of that Understanding and the potential to overturn or rescind particular enforcement decisions—it might be worth considering whether to phase-in the application of some of the provisions of a multilateral agreement on transparency in government procurement. Furthermore, a provision in such an agreement could be introduced that “resort to the [Dispute Settlement Understanding] would not be available to challenge a specific procurement, and thus could not be used to overturn a contract award” (tenth paragraph).		Practices, and the TRIPS Agreement. No mention is made of any national experience or economic evidence.

WTO member, document number, date, and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
European Communities WT/WGTGP/W/39 3 February 2003 Domestic Review Mechanisms Related To Transparency In Government Procurement	The submission notes that “it examines the kinds of provisions that should be envisaged in the future agreement on transparency in government procurement to ensure that parties’ measures subject to a future agreement can be reviewed by domestic procedures” (second paragraph.) Moreover, “[A] future agreement would thus, on the one hand, ensure the transparency of domestic review procedure and, on the other hand, ensure suppliers’ rights to challenge a procurement in breach of transparency provisions” (third paragraph). The submission goes on to describe the possible disciplines under three headings: Transparency of domestic review procedures, Challenge procedures within a future agreement on transparency in government procurement, and Special and Differential treatment for developing countries. The first includes provisions that the review procedures be transparent and notes that similar provisions are found in a number of existing WTO Agreements. The second would include a provision enabling suppliers to challenge a procurement proceeding that the supplier or suppliers think are in breach of the multilateral agreement. With respect to the third, the EC proposes a “flexible” approach to implementing domestic review provisions. With respect to the independence of the body undertaking the domestic review, the submission states that “[T]he EC considers that sufficient independence from the procuring entity would be secured if this independence is foreseen at any one step of the review procedure” (eleventh paragraph). The submission goes on to note that, although a domestic review procedure would remain within the sovereignty of the respective WTO member, under a multilateral agreement the procedure would have to meet the following criteria: to “render prompt and timely decisions, preserving suppliers’	None offered.	The submission makes reference to the GATS, the GATT, the Agreement on Rules of Origin, the Agreement on Import Licensing, the Agreement on Customs Valuation, the TRIPS Agreement, and the existing Government Procurement Agreement. No mention is made of any national experience or economic evidence.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	commercial interests”; to involve “no discrimination between domestic bidders and those from other parties”; “decisions taken by the review body are effective and enforceable”; “challenge procedures provide for adequate measures to correct proven infringements of the agreement and to protect suppliers’ interests in a tender” (thirteenth paragraph). In this submission the EC also proposes deferring a discussion of the appropriate remedies or measures that a domestic review procedure might have at its disposal. Moreover, the EC feels that there is a need for further elaboration as to which parties have access to review procedures and as to whom and in what manner the decisions and non-decisions of review bodies are communicated.		
Korea WT/WGTGP/W/39 3 February 2003 Work Ahead Up To The Cancun Ministerial	After summarizing the discussions in the Working Group and the Doha Ministerial Declaration, the submission notes “[K]orea also believes that the multilateral rules on [Transparency in Government Procurement] should be legally binding and subject to the [Dispute Settlement Understanding]. Otherwise, it would be difficult to ensure effective implementation of the rules, substantially diminishing the benefits of such rules” (fifth paragraph). The submission goes on to state that in the following six months the Working Group should “[I]dentify the core elements to be negotiated after the Cancun Ministerial. They do not have to be exhaustive and detailed down to the negotiating text”; “[I]dentify issues of particular concerns to developing countries, based on the core elements as above...”; and “[E]xplore ways to address those specific concerns” (seventh paragraph). In Korea’s view the following elements should be included in a multilateral agreement: Scope and definition; Non-Discrimination; Measures to ensure transparency through publication of procurement-related measures; Measures to ensure transparency in the procedures for award decision;	None offered.	No country experience, international agreements or rules, or economic evidence is cited.

WTO member, document number, date; and title of submission	Proposals made and matters raised	Rationale(s) offered	Evidence and agreements cited
	Transparent domestic review process; Exceptions; Dispute settlement and consultations; Special and differential treatment for developing countries; and Technical Assistance. The submission also notes three possible means for addressing the concerns of developing countries: transitional periods, “a set of flexibilities for developing countries and their phase-out,” and technical assistance (ninth paragraph).		

Appendix 3a:

Elements for an Agreement on Transparency in Government Procurement

As proposed by the European Communities in a Document WT/WGTGP/W/26 submitted to the WTO's Working Group on Transparency in Government Procurement on 5 November 1999

Text

Members,

Recognizing the need to further the objectives of the GATT 1994 and of the General Agreement on Trade in Services,

Desiring to render more transparent the legislation and administrative procedures applied in government procurement,

Taking into account the needs of developing country Members in particular with respect to trade and administration,

Realizing that further negotiations are necessary to ensure that governments obtain the best value for money in their procurement practices,

Desiring to provide for a consultative mechanism and the effective and equitable resolution of disputes arising under this Agreement, taking account of the peculiarities of government procurement,

Hereby agree as follows:

Article 1

General Objective

1. This Agreement aims at ensuring transparency throughout government procurement covered by GATT 1994 and GATS.
2. The requirements under this Agreement shall be met on a non-discriminatory basis.
3. Members shall adopt and apply their legislation in good faith so as not to undermine the aims of this Agreement.

Part I: Definitions and Scope

Article 2

Scope

1. This Agreement applies to procurement by governmental agencies of products¹⁹ and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale, without prejudice to Articles XX and XXI of GATT 1994 and Articles XIV and XIVbis of GATS, as appropriate.
2. Notwithstanding the obligation for any procurement to be transparent, any Member may limit the application of Articles 5.1, 5.2, 5.3, 6, 7, 8.3, 9.2 and 14.1 of this Agreement to procurement above the following amounts:

¹⁹ "Products" in the context of this Agreement include products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale.

Maximum threshold

Applicable for:

130,000 SDRs	central government contracts for supply of products and services,
200,000 SDRs	sub-central government contracts for supply of products and services,
400,000 SDRs	public enterprise contracts for supply of products and services,
5,000,000 SDRs	all contracts for public works,

provided Member's legislation contains clear and unambiguous provisions on contract valuation.

3. Members shall ensure that procuring entities do not divide intended procurements for the purposes of avoiding application of this Agreement.

Part II: Principles of transparency

Article 3

Public Accessibility of Domestic Legislation

1. Without prejudice to the obligations in Article X:1 of GATT and Article III:1 and 2 of GATS, each Member shall ensure that through a public medium its laws implementing this Agreement, procurement regulations and all administrative rulings of general application in connection with procurement, and all amendments thereof (hereafter: "laws and regulations"), are readily and easily accessible.

2. Members shall notify the WTO Secretariat of the (electronic) medium used. Information shall be provided at no more than the cost of copying and despatch.

Article 4

Methods of Procurement

1. Irrespective of the methods of government procurement used, they shall be specified in advance and applied in accordance with the laws and regulations. The procurement method chosen shall be transparent in accordance with the requirements of this Agreement.

2. Each procuring entity shall ensure that technical specifications are not prepared, adapted or applied in a manner that constitutes a disguised means of achieving objectives which are unrelated to that entity's procurement functions.

Article 5

Tendering Procedures

1. Wherever Members resort to government procurement through open tendering procedures, they shall publicise all necessary information and amendments thereof through an accessible source within sufficient time for potentially interested suppliers to respond in a meaningful manner.²⁰

2. The information referred to in paragraph 1 shall be adequate to allow suppliers to assess their potential interest in a particular procurement and, should they wish to participate in the procurement process, to submit responsive bids. Such information shall at least include:

- (a) name of the procuring entity;
- (b) the goods or services to be procured, and their specifications;
- (c) the procurement procedure used;
- (d) any (pre-)qualification requirements;
- (e) any restrictions on market access and/or domestic preferences granted;

²⁰ This paragraph also covers pre-qualification procedures, wherever applicable.

- (f) the contact details for obtaining tender documentation and additional information;
- (g) the award criteria;
- (h) the deadlines for the submission of tenders; and
- (i) the date and time for the opening of tenders.

3. Members shall ensure that the information referred to in paragraph 2 is made available through the use of tender notices, tender documentation, or by other means, provided they allow for broad and easy access to potentially interested suppliers or service providers.

4. Members shall ensure that their laws and regulations clearly prescribe the conditions and, if applicable, thresholds under which procuring entities may choose to utilise procurement methods in which information on the procurement opportunity is provided only to one supplier or to a limited number of suppliers selected in advance by the procuring entity. Members shall ensure that procuring entities do not utilise such methods for the purposes of restricting participation in the procurement process in a non-transparent manner.

Article 6

Bid Periods

1. Sufficient time should be allowed for the preparation, submission and receipt of responsive bids. Time-limits set should not undermine the principles and objectives of this Agreement. They should take account of the particular circumstances as well as the complexity of the envisaged procurement.

2. Members shall clearly define in advance their policy on whether and in what circumstances late tenders may be accepted.

Article 7

Decisions on (Pre-)qualification and Contract Awards

1. Decisions on (pre-)qualification and contract awards shall be taken on the basis of the conditions and criteria (including technical specifications) which have been made known in advance, e.g. through a tender notice or tender documentation. Notwithstanding Article 6.2, only bids of suppliers whose tenders have been received before the previously published final date for submission of tenders may be considered.

2. Once the contract is awarded, the participating suppliers shall be informed of the rejection of their bid. Unsuccessful bidders can, on request, obtain more detailed information as to why their bid was rejected and/or the winning bid was chosen.

Article 8

Domestic Review

1. Each Member shall maintain fair and transparent judicial, arbitral or administrative review bodies or procedures for the purpose, *inter alia*, of the prompt review of decisions of procuring entities creating legal effects.

2. Such bodies and procedures shall operate independently of the procuring entities and shall provide all interested parties that are directly and individually affected by a decision as mentioned in paragraph 1 with access to review.

3. Members shall ensure that each procuring entity is able to respond to requests for information on the way the procurement was carried out by maintaining a comprehensive administrative record of the procurement proceeding.

Article 9

Confidentiality

1. Any information which is by nature confidential shall be treated as such by the procuring entities. Such confidential information shall not be disclosed without specific permission of the party submitting it.

2. In case information is treated confidentially, where appropriate the procuring entities will furnish a meaningful non-confidential summary thereof.

Article 10

Language

Except if otherwise laid down in this Agreement, Members are encouraged to ensure that all information referred to in this Agreement is provided in a WTO language.

Part III: General provisions

Article 11

Notification Requirements

Laws and regulations shall be promptly notified to the WTO Secretariat. Members shall further provide a list in one of the WTO languages of the relevant generally applicable instruments. The WTO Secretariat shall endeavour to make such lists available to the general public through an electronic medium.

Article 12

Requests for Information

On request by another Member, Members shall provide information and explanations on their laws and regulations, procedures and practices affecting the implementation and operation of this Agreement.

Article 13

Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 or Articles XXII and XXIII of GATS respectively, as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement (hereinafter referred to as the "Dispute Settlement Understanding") shall be applicable within the limitations specified below.
2. The scope of paragraph 1 is limited to disputes among Members regarding the implementation of this Agreement and to decisions of the bodies mentioned in Article 8.1 for as far as such decisions concern procurements exceeding the maximum thresholds listed in Article 2.2.
3. In the case of a dispute in which provisions both of this Agreement and of one or more other Agreements listed in Appendix 1 of the Dispute Settlement Understanding are invoked by one of the parties to the dispute, paragraphs 1 and 2 shall apply only to issues of interpretation and application relating to this Agreement.
4. Panels established to examine disputes under this Agreement shall include at least one person qualified in the area of government procurement.

Article 14

Committee on Transparency in Government Procurement

1. The Committee on Transparency in Government Procurement ("the Committee") shall review promptly any particular matter which a Member considers to be detrimental to its interests under this Agreement and where consultations between it and the Member(s) concerned have failed to produce a mutually satisfactory solution. On such matters, the Committee may make such observations as it deems appropriate.
2. The Committee shall review the implementation and provisions of this Agreement, including the thresholds mentioned in Article 2.2, two years after its entry into force and periodically thereafter.
3. After the entry into force of this Agreement, the Committee shall initiate a study how to achieve "best value for money" in government procurement and develop elements for further multilateral rules for adoption in due course.

Article 15

Use of Information Technology

Members are encouraged to make use to the largest extent possible of tools of information technology to disseminate information, in particular for the dissemination of information about procurement opportunities and contract awards.²¹

Article 16

Technical Assistance

In order to facilitate the implementation of this Agreement, Members shall provide, on request and on mutually agreed terms and conditions, technical cooperation to developing and least developed country Members. Parties recognize in particular the need for developing countries to receive technical assistance to enable them to set up and operate electronic systems for ensuring transparency of procurements.

Part IV: Final provisions

Article 17

1. Members' implementation of the provisions of this Agreement shall not affect their rights and obligations, if any, under the WTO Agreement on Government Procurement.
2. This Agreement is without prejudice to Members' rights and obligations under GATT 1994 and GATS.

Article 18

Entry into Force

This Agreement shall be open for acceptance, by signature or otherwise, by all WTO Members. It shall enter into force on the date determined by Ministers at [...] and shall remain open for acceptance for a period of two years following that date. An acceptance following the entry into force of this Agreement shall enter into force on the thirtieth day following the date of such acceptance

²¹ Members recognize the difficulties which developing countries may have in applying tools of information technology.

Appendix 3b:

Draft Text For An Agreement On Transparency In Government Procurement

As proposed by Hungary, Korea, Singapore and the United States in a document WT/WGTGP/W/27 submitted to the WTO's Working Group on Transparency in Government Procurement on 9 November 1999

TEXT:

Members,

Recognizing that government procurement may provide a means of achieving or supporting Governments' social, environmental and economic objectives for the betterment of their communities,

Recognizing that efficient, effective and appropriate government procurement enhances the management of government resources, the quality of governance and the economic performance of the community as a whole,

Recognizing that transparency, integrity and predictability are integral to efficient and effective government procurement and to the functioning of the multilateral trading system, and

Desiring to establish a multilateral framework of transparency obligations to assure all parties that government procurement shall be conducted fairly, ethically and predictably,

Hereby agree as follows:

General Objective

This Agreement aims at ensuring transparency [, integrity and predictability] in government procurement. Each Member shall adopt and apply its procurement laws, regulations and requirements in good faith and in a manner that does not undermine the aims of this Agreement.

Non-Discrimination in Transparency

In carrying out its obligations under this Agreement, each Member shall accord to suppliers from any other Member treatment no less favorable than that which it accords to its own suppliers or to suppliers from any other country.

Scope and Application

1. This Agreement shall apply to any law, regulation or requirement governing the procurement by governmental agencies of goods and services purchased for governmental purposes and not with a view to commercial resale nor to use in the production of goods or services for commercial sale.

[2. This Agreement

Option 1: [applies to all procurement [within the jurisdiction] of a Member]

Option 2: [does not apply to procurement by government agencies other than those of a Member's central or Federal government and the highest level of sub-central government]

Option 3: [applies to all procurement of a Member's central or Federal government [, including departments that perform administrative, research, supervisory, advisory or regulatory functions of a governmental nature]].^[22]

3. This Agreement shall not apply to a procurement contract with a value of less than [the *de minimus* threshold specified in domestic procurement rules, which shall in no case be greater than]

²² [This Agreement shall not apply to the granting of exclusive rights by a Member.]

Option 1: [... SDRs]

Option 2: [... SDRs for goods and services and ... SDRs for construction services].

3.1 Each Member shall ensure that its procuring entities do not divide intended procurements for the purposes of avoiding application of this Agreement.

Exceptions

Nothing in this Agreement shall prevent any Member and its procuring entities from taking any action which that Member considers necessary for the protection of its essential security interests or any action which is necessary under GATT Article XX or GATS Article XIV. Any Member and its procuring entities may refrain from disclosing confidential business information or information that would impede law enforcement.

Transparency of Procurement Rules

1. Without prejudice to the obligations of Article X:1 of GATT and Article III:1 and 2 of GATS, each Member shall publish in a timely manner all laws, regulations, and requirements that specifically relate to government procurement and are of general application (hereinafter collectively referred to as "procurement rules") in officially designated media which are readily accessible to the public. Each Member shall publish in the same media and in a timely manner all additions and changes to its procurement rules.

[1.1 Members' procuring entities shall not be required to publish materials which could be prejudicial to the objective and non-discriminatory evaluation of bids or applications for qualification.]

2. *Option 1:* [Such procurement rules shall describe the conditions under which it is appropriate to use different procurement methods. A procuring entity's choice of procurement method shall be in accordance with those conditions.]

2.1 When a procuring entity uses a procurement method in which information on the procurement is provided only to one supplier or to a limited number of suppliers who are selected in advance by the procuring entity through a selection process other than a qualification process, it may depart from the provisions of Articles VI and VII [and VIII] of this Agreement.]

Option 2: [In selecting a procurement method, which may include open, sole source, pre-qualification arrangements, short-listing, staged procurement and other methods of procurement, entities may select the most efficient and effective method to achieve their procurement objective, taking into account market circumstances and the costs and benefits of each procurement method.]

3. Each Member shall, upon request by another Member, provide in a timely manner, information and explanations of their procurement rules, procedures, practices and policies, affecting the implementation and operation of this Agreement.

[4. Within one year from the date on which this Agreement takes effect, each Member shall notify to the WTO Committee on Transparency in Government Procurement a list of the titles of its laws, regulations and administrative rulings of general application specifically relating to government procurement [and its officially designated media for publishing information]. Such notifications shall be made in an official WTO language.]

[5. Each Member shall establish an enquiry point which shall disseminate information and provide answers to all reasonable questions from other Members and interested parties in other Members' countries or territories relating to government procurement policies and procedures. Each Member shall notify to the Committee on Transparency in Government Procurement, established in accordance with Article XI of this Agreement, the name, address and other appropriate contact information for this enquiry point.]

Transparency of Information on Procurement Opportunities

Invitations to participate in the procurement process

1. Whenever a procuring entity issues an open invitation for bids, or, where appropriate, an invitation to participate in a qualification process, it shall publish the invitation in a medium of general distribution which is readily accessible to the public.

1.1 Where an invitation for bids is extended only to suppliers that the entity has pre-qualified or selected in advance, it shall ensure that the invitation is provided to all such suppliers.

2. The invitations shall include sufficient information to allow suppliers to assess their potential interest in a particular procurement process and to submit responsive bids, and shall include at least the following:

2.1 a description of the proposed procurement, including the nature of the goods and services to be procured and all relevant time-periods;

2.2 the procurement method to be used and information on any applicable preferences or other conditions for participation [, or an explicit reference to procurement rules setting out applicable preferences or other conditions for participation]; and

2.3 information on how to contact the procuring entity to obtain relevant information on the bidding or qualification process and requirements.

Time-periods

3. Procuring entities shall disseminate such invitations in sufficient time to enable interested suppliers to obtain qualification documentation, where appropriate, and tender documentation, and to prepare and transmit responsive submissions.

3.1 Procuring entities shall ensure that such time-periods are the same for all suppliers.

3.2 Entities shall ensure that time-periods for the receipt of bids are determined with due consideration of the particular circumstances of the procurement, including the conditions and the complexity of the procurement.

Invitations relating to closed lists of qualified suppliers

4. Whenever a qualification process covers multiple procurements over a period of time and is not open at all times to applications from interested suppliers:

[4.1 an invitation to apply for qualification shall be published [at least once a year] [regularly]];

4.2 current lists of qualified suppliers shall, on request, be made available in a timely manner; and

4.3 each invitation to apply for qualification shall include the date and time for receipt of applications for qualification.

Changes to information provided

5. Procuring entities shall disseminate any changes to information provided in an invitation for bids or an invitation to participate in a qualification process in the same medium in which the invitation was provided.

Transparency in Qualification and Bid Documentation

1. With regard to qualification and bid documentation, procuring entities shall provide complete documentation in a timely manner to any interested supplier, upon request, and inform participating suppliers in a timely manner of any changes to the documentation.

2. Where a procuring entity uses a qualification process, qualification documentation shall clearly set out all the criteria that the entity will use to evaluate a supplier's qualifications to participate in the procurement process.

3. Bid documentation shall specify all the information necessary for an interested supplier to prepare and submit responsive bids. Such information, if not already provided in a prior invitation to participate, shall include:

3.1 all specifications and criteria the entity will use to evaluate the offered goods or services; and

3.2 the date and time for the receipt of tenders and, where appropriate, the date and time for the opening of tenders.

4. Procuring entities shall specify explicit and objective requirements that are, to the greatest extent possible, defined in terms of required functional performance.

5. *Option 1:* [Whenever a procuring entity obtains advice or assistance in the preparation or development of specifications from a supplier [that has a potential interest in the relevant procurement, the entity shall inform suppliers participating in the procurement of such advice or assistance and] [, such supplier shall not be eligible to participate in the relevant procurement].]

Option 2: [When an entity obtains advice or assistance on the development of specifications from a potential supplier, the entity shall apply that advice in a non-discriminatory manner.]

Transparency of Decisions on Qualification and Contract Awards

1. Procuring entities shall base contract award decisions and qualification decisions solely on the criteria and other requirements that have been specified in the bid or qualification documentation or other information that has been provided to all participating suppliers.

2. Having awarded a contract, entities shall:

2.1 inform suppliers that have submitted bids of the contract award decision;

2.2 provide suppliers, upon request, with information as to why their bid was rejected or, where applicable, the reasons for the denial of their request to become a qualified supplier; and

2.3 ensure that any debriefing provided by the entity is available to all participating suppliers.

Other post-award information

3. Each entity shall make information on contract awards [publicly available] [available to participating suppliers] for a reasonable period of time. Such information shall include the name of the procuring entity, a description of the goods and services procured, [and] the name of the winning supplier [, and the value of the contract award].

[3.1 In cases where procurements are conducted under conditions set forth in Article V:2.1, the entity shall cite in such information the condition in its procurement rules allowing the use of that procurement method.]

Other Provisions on Information Relating to Procurements

1. Procuring entities shall maintain [, and make available upon request by another Member,] records of tendering procedures relating to procurements subject to this Agreement. Such records shall be maintained for a period of at least three years.

[1.1 In cases where procurements are conducted under conditions set forth in Article V:2.1, the entity shall include in the records the condition in its procurement rules allowing the use of that procurement method.]

2. Members and procuring entities may utilise electronic or paper-based communication methods in all stages of the procurement process, provided that whatever media is chosen complies with the requirements of this Agreement. Members and procuring entities are encouraged to use, to the extent possible, electronic communications at all stages of the procurement process, provided that it complies with the requirements of this Agreement.

3. Except as provided for in Article V.4 of this Agreement, information required under this Agreement shall be provided either in an official national language or in an official WTO language.

Domestic Review Procedures

1. Members shall encourage the resolution of procurement disputes relating to the implementation of this Agreement, in the first instance, through consultations between the procuring entity and suppliers.

2. Each Member shall maintain fair and transparent judicial, arbitral or administrative bodies or procedures for the purpose of the prompt review of procurement practices or actions that may be inconsistent with the requirements of this Agreement, as implemented by the Member.

3. Such bodies or procedures shall be operated independently of the procuring entities and shall provide all interested parties who participated in the procurement process and are affected by the practice or action with access to review and timely decisions [that, as appropriate, can address any inconsistent practice or action].

4. Each Member shall ensure that information about domestic review bodies, procedures and decisions is publicly available. Each Member shall maintain an administrative record of the review proceeding for a three-year period.

Review and Institutional Provisions

1. A Committee on Transparency in Government Procurement (hereinafter referred to as "the Committee") shall oversee the functioning of this Agreement and perform such additional functions related to government procurement as assigned by the General Council.
2. The Committee shall review the implementation of this Agreement [two] years from the date on which it enters into force.

Dispute Settlement

1. Consultations and the settlement of disputes among Members regarding the implementation [in domestic procurement rules] of this Agreement shall be in accordance with Articles XXII and XXIII of GATT 1994 [and Articles XXII and XXIII of GATS], as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement [, except as otherwise specifically provided below].
2. Panels established by the Dispute Settlement Body to examine disputes under this Agreement shall include persons qualified in the area of government procurement.
3. [With regard to any dispute relating to the implementation of this Agreement, each Member should, as appropriate, encourage its interested parties to use the domestic review procedures provided for in Article IX of this Agreement before the Member invokes the provisions of Article XII:1.] [Members recognize that there must be no further judicial remedies available under domestic law against the inconsistent measure before the provision of Article XII:1 is invoked.]
4. [If a panel or the Appellate Body concludes that a measure is inconsistent with this Agreement, it shall only make recommendations that do not affect prior contract awards.]

Technical Cooperation

1. In order to facilitate the implementation of this Agreement, Members shall provide, on request and on mutually agreed terms and conditions, technical cooperation in favour of developing and least developed country Members.
2. In order to ensure the greatest possible efficiency of such technical cooperation, the Committee on Transparency in Government Procurement shall identify specific priorities for individual Members, including with respect to the following areas:
 - 2.1 development of national legislation and procedures;
 - 2.2 training;
 - 2.3 institution building;
 - 2.4 access to information by suppliers [, including establishment of enquiry points]; and
 - 2.5 the use of information technology.
3. The Committee on Transparency in Government Procurement shall develop a plan to assess and monitor assistance on an ongoing basis, and to coordinate such efforts with other relevant organizations.

Final Provisions

Acceptance and entry into force

- [1. Subject to Article X of the Marrakesh Agreement Establishing the World Trade Organization, this Agreement shall enter into force on 1 January 2001 for those Members which have ratified the Agreement by that date.]

Reservations

2. Reservations may not be entered in respect of any of the provisions of this Agreement.

[Transitional provisions]

Operation of other agreements

[3. Members' implementation of the provisions of this Agreement shall not affect their rights and obligations under the WTO Agreement on Government Procurement or any other international agreement covering government procurement.] [The rights and obligations of a Member under the WTO Agreement on Government Procurement or any other international agreement relating to government procurement to which a Member is a party shall prevail to the extent of any inconsistency between the rights and obligations of a Member under this Agreement and the rights and obligations of a Member under the WTO Agreement on Government Procurement or those other international agreements.]