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Transparency in Government Procurement

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1 Background

Government procurement policies can be used to provide protection for a significant share of a country's economy but have been effectively excluded from the scope of the multilateral trade rules, including its basic national treatment and most favoured nation provisions, first under the GATT[1] and then under the WTO.[2]

Efforts were made at a relatively early stage in the GATT's existence to reduce barriers to trade created by government procurement laws and practices as part of an effort to reduce non-tariff measures in general. The results of these efforts were embodied in a series of separate agreements, commonly referred to as the Tokyo Round Codes, one of which was the GATT Government Procurement Agreement (GPA). This agreement did not oblige its signatories to liberalise their government procurement across the board, but only procurement by a negotiated list of entities. However, it attracted fewer signatories than any of the other codes and all of these were either developed countries or high-income developing countries.

Opposition to the incorporation of the GPA in WTO when it was created in 1994 was so great that it remains a plurilateral agreement outside the WTO's single undertaking.[3]

There are a number of different reasons for this opposition. Government procurement practices provide one of the most effective and, under present multilateral rules, legitimate ways of providing protection to local producers. Many countries seem to have concluded that they would have difficulty in taking advantage of the export opportunities created. Many governments look for reciprocal benefits when negotiating trade agreements – or, in the case of developing countries, expect to give less than full reciprocity. In a stand-alone agreement such as the GPA, this balance has to be found within the agreement itself. India applied to accede to the GPA in 1981 but decided not to pursue its application when the very short list of entities it offered was considered insufficient by the members of the GPA. Yet another problem that governments see is the heavy administrative burden created by the GPA's procedural requirements and the difficulty of ensuring that listed entities at different levels of government conform to the detailed requirements laid down by the GPA.

Opposition among non-signatories to the GPA to continued attempts by both the USA and the European Communities to get the liberalisation of government procurement onto the agenda of the WTO led them to lower their sights and aim, if not for

liberalisation, at least for transparency in government procurement. They therefore sought a mandate at the first WTO ministerial conference, held in Singapore in December 1996, to launch a negotiation on procurement among all WTO Members 'to develop an interim arrangement on transparency, openness and due process in procurement of goods and services'.[4] For both, this was very much second best, but for the USA transparency was an important goal since they saw it as a way to deal with 'problems of bribery and corruption and the lack of transparency in government procurement'.[5] Negotiations in Singapore took place in an informal group of about 30 countries. Many of these supported work on transparency in government procurement, Malaysia and India contributing actively to the development of a compromise decision on the subject that does not mention an 'interim' agreement, 'openness and due process', or bribery and corruption, and recognises the need to take into account participants' development priorities. Many more delegations were prepared to go along with this text.

So, in 1996 paragraph 26 of the Singapore Ministerial Declaration established a 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.*

Transparency in government procurement was one of four issues added to the WTO agenda at that meeting. The others were: the relation between trade and investment; the interaction between trade and competition policy; and trade facilitation (often referred to as the four Singapore issues).

2 Discussions on the Working Group

The working group has done a large amount of technical work in the six years since it was established at Singapore.

One of its first tasks was to review the provisions in existing international instruments and national procedures and practices on the basis of a WTO Secretariat document on this subject, issued as far back as 1997.[6]

By 1999, its study of transparency in government procurement had enabled the chairman of the working group to identify 12 elements that might be included in a WTO transparency agreement and the WTO Secretariat to summarise the discussions that had already taken place on each of these.[7] These 12 elements are:

I. Publication of Information on National Legislation and Procedures;
II. Procurement Methods;
III. Publication of Information on National Legislation and Procedures;
IV. Information on Procurement Opportunities, Tendering and Qualification Procedures;
V. Time-Periods;

VI. Transparency of Decisions on Qualification;
VII. Transparency of Decisions on Contract Awards;
VIII. Domestic Review Procedures;
IX. Other Matters Related to Transparency (including maintenance of records of proceedings, information technology, language, and fight against bribery and corruption);
X. Information Provided to other Governments (Notification);
XI. WTO Dispute Settlement Procedures; and
XII. Technical Co-operation and Special and Differential Treatment for Developing Countries.

Discussions on these elements in the working group were given a new impetus in November 2001 by the adoption of the Doha Declaration by the fourth WTO ministerial conference, paragraph 26 of which reads:

> *Recognising 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* [now scheduled to be held in Cancún on 10–14 September 2003] *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.*

In Doha, the chairman also made a final statement declaring that this wording would, in his view,

> *give each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Ministerial Conference, until that member is prepared to join in an explicit consensus.*

The latest official summaries of the discussions that have taken place in the working group on each of the possible elements that might be included in a WTO transparency agreement are contained in two documents, circulated by WTO Secretariat in May and October.[8]

These summaries reveal widely different views on the content of an agreement, which bear on most of the individual elements discussed in the group. One of the main reasons for this is that participants have widely different interpretations of the Doha

mandate, in which the Ministers recognised the case for a multilateral agreement on transparency in government procurement without specifying which elements should be dealt with in an agreement.

The US aim has been stated as: 'to forge a consensus on the elements of an agreement that establishes a common set of procedures to ensure that governments' purchasing decisions are done in an open, transparent fashion'.[9] The European Communities have been the other main proponent from the outset. Other delegations supporting this approach include Australia, Canada, Chile, Hungary, Korea, Japan and Switzerland, which had given its support while taking its own situation into account. A number of other governments, such as Brazil, Costa Rica, Mexico and Sri Lanka, have demonstrated a readiness to follow this general approach.

At the present time, government procurement laws, regulations and practices can give protection to domestic supplies and suppliers in two different ways. First, procuring entities may simply have wide discretionary powers that can be used to favour certain supplies or suppliers. Second, governmental procurement policies may be embodied in laws and regulations laying down requirements designed to achieve their socio-economic goals, which may include protection of domestic supplies or suppliers, small and medium-sized enterprises, enterprises run by ethnic and minority groups, or the promotion of employment in labour surplus areas. These can take different forms, including domestic content requirements, licensing of technology requirements, investment requirements or counter-trade requirements. Other requirements may function through the price mechanism, for instance by giving domestic suppliers a specified preferential price margin.

Distortions caused by the use of discretionary powers are very much more opaque than those caused by laws and regulations. The proposals for a WTO agreement made in the Working Party on Transparency in Government Procurement are designed to limit the discretionary power of purchasing entities to distort conditions of competition, both among domestic suppliers and among domestic and foreign suppliers. However, in line with paragraph 26 of the Doha Declaration, these proposals would not limit the freedom of governments to protect domestic suppliers either by using offsets or price preferences.

At the other end of the spectrum of opinion stands a group of participants, of which Egypt and India are the most categorical, with Indonesia, Malaysia, Pakistan and Philippines adopting a similar stance. These participants (the opponents) would argue that, within the limits set by their own laws and procedures, their governments and their government entities have been able to pretty much decide for themselves how their purchases of goods and services, which account for a sizeable part of gross domestic product, are made and that this discretion provides them with one of their most effective tools to support national socio-economic policy objectives, such as protecting domestic producers (including small companies and ethnic groups), reduc-

ing outflow of foreign exchange and transferring technology to local industries. These participants apparently fear that a transparency agreement could be used as a stepping stone to an agreement providing for full market access. They take the view that the intention of paragraph 26 of the Doha decision was that the primacy of these rights should be maintained and that an agreement should simply ensure that governments provide transparency on their laws, regulations and practices as they exist, but should not oblige governments to change these. They would be prepared to accept an agreement that follows the approach embodied in transparency provisions already in WTO, such as Article X of GATT 1994, but argue that a transparency agreement should not go beyond this and object to suggestions which they consider would have the effect of improving conditions of access to their markets.[10]

The basic differences of approach outlined above have not been openly discussed as such in the working group, since it has avoided a philosophical debate on the meaning of transparency and has concentrated on individual elements of a possible agreement. However, the differences come out clearly in the discussions on these elements.

Under the first approach, the aim is necessarily an agreement covering all phases of member governments' procurement from the decision on the procurement method to be used to the award of the contract and any domestic procedures to review decisions on contract awards. Its proponents argue, for example, that entities' purchasing decisions will be transparent and predictable only if discretion is limited: if, for instance, *ex post* information is given on the use made of limited tendering; if time periods are long enough to ensure that sufficiently detailed, readily available information is given sufficiently in advance to enable interested suppliers to assess their interest in a particular procurement; if the evaluation of tenders is made on the basis of pre-published criteria; if any changes to these criteria are made known to all suppliers; if proper records are kept of decisions and actions during the procurement process; and if decisions are subject to domestic review procedures to introduce accountability into the process.[11]

Delegations adopting the second approach recall that the Doha mandate makes clear that 'the negotiations shall be limited to the transparency aspects ...' and argue against obligations which, in their view, relate to market access and not to transparency. Under this approach, an agreement would not deal with all the points in the chairman's check-list. These delegations argue that procurement opportunities open only to domestic suppliers can be of no interest to other WTO Members and should not be covered by a transparency agreement. In the discussions that have taken place on the individual elements in that list, they have taken the view that no justification should be given for the choice of procurement methods; that procurement entities should be given discretion to establish time periods on a case-by-case basis; that there should be no provisions on the design of domestic review procedures; and that there should be no provisions stating explicitly the form of records or for how long they should be kept.[12]

Another basic point on which the positions of the active delegations diverge is whether an agreement should be a legally binding agreement or whether it should take the form of guidelines or a code. Proponents of a prescriptive approach to an agreement understandably argue for a legally binding agreement, since they consider that provisions would be needed to enforce the obligations which it laid down. They therefore support the inclusion of provisions making the agreement's obligations subject to the WTO dispute settlement procedures in the same way as existing clauses on transparency in WTO Agreements. Delegations that support only a minimal agreement doubt whether WTO dispute settlement procedures could apply with significant results to an agreement that dealt only with transparency. Some question how dispute settlement procedures would work in practice in this area and some fear that a legally-binding transparency agreement with dispute settlement provisions would provide another excuse to introduce sanctions against their exports. Some would prefer that an agreement take the form of guidelines without dispute settlement provisions or a code, membership of which is voluntary.

The US delegation has recently gone some way to allay the concerns expressed about the application of WTO dispute settlement procedures in this area by proposing that a transparency agreement should provide explicitly that resort to these procedures would not be available to challenge a specific procurement and thus could not be used to overturn a contract award, and that there could be transitional periods for the application of dispute settlement procedures to certain provisions.[13]

There are also differences of view regarding the scope of an agreement. Some governments of federal states, such as Australia, Brazil and Canada, seem hesitant to accept suggestions that a transparency agreement should apply to government procurement at the state and local levels.

It has been argued in the working group that a transparency agreement along the lines suggested by the proponents would be 'a critical element of good economic governance'[14] and a contribution to reducing the incidence of bribery and corruption, but it has been stressed that the issue itself was not within the mandate of the working group and that the objective of fighting against bribery and corruption should not be stated in a WTO agreement.

It is common ground that technical co-operation would be important for ensuring the successful implementation of an agreement and a number of areas in which technical assistance for capacity-building would be beneficial have been suggested.

It has also been suggested that the issue of special and differential treatment and transitional periods might be addressed once the elements of a possible agreement were more clearly defined. A suggestion from the USA that the acceptance of obligations should be linked to technical assistance has not been developed in the working group.

The discussions summarised above have taken place among a dozen or so active

delegations and the great majority of WTO Members have not expressed their views, mainly because they have small administrations that do not have the resources to take part in all the many activities on the Doha agenda that concern them and because government procurement is not a priority for them in that context.

3 Discussion of Modalities in the General Council

Paragraph 26 of the Doha Declaration indicates that negotiations will take place after the fifth session of the ministerial conference at Cancún 'on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations [for a multilateral agreement on transparency in government procurement]'.

It is unclear what the word 'modalities' means in this context.

Proponents of a transparency agreement stress that, when agreeing to paragraph 26, Members committed themselves to reaching a consensus and entering into negotiations after Cancún. Some go on to argue that, since ministers have already agreed that negotiations would take place, a decision on modalities would only deal with matters of procedure, such as the timeline for the negotiations, the number of meetings, etc.

On the other hand, some delegations of developing countries refer to the statement from the chairman in Doha on this subject and stress that negotiations will only take place if an explicit consensus is reached on modalities. They conclude that any single WTO Member can therefore block a decision. Some of these delegations go on to say that lack of resources has prevented them from developing a position on all of the elements being discussed in the working group and that they therefore need to undertake further studies before any explicit consensus can be reached. It is, for instance, reported that when European Trade Commissioner, Pascal Lamy, and his Indian counterpart, Minister Arun Jaitley, discussed the current Doha Round trade negotiations in India on 13–14 March 2003, they disagreed on whether negotiations on transparency in government procurement and the three other Singapore issues should proceed after Cancún, with Jaitley saying that India opposes negotiations and that the issues should be further studied by a panel of developing country representatives.[15]

The European Communities has recently recognised that if a consensus is to be found, the decision will need to deal with more than purely procedural matters. It has recently put forward a proposal on modalities for all four Singapore issues,[16] stating that all four constitute a priority for the EC and their Member States and suggesting that the modalities for each could deal with the following three matters:

- ***Procedural issues:*** Number of meetings, timing, internal deadlines for tabling proposals, legal texts, etc.;
- ***Scope and coverage of the negotiating agenda:*** Concrete issues that should be the object of negotiation and structure of obligations in an eventual agreement;

- ***Special and differential treatment:*** Differentiation in commitments between WTO Members; differentiation in implementation periods; provision of trade-related assistance.

With regard to the concrete issues that should be the subject of negotiations in the area of government procurement, the EU proposes that 'negotiations on a multilateral transparency agreement should comprise as a starting point the key issues in the Chairman's checklist of issues', and with regard to the structure of obligations in this area, that 'the issue of thresholds could be examined with a view to allowing for a pragmatic and little burdensome approach towards the application of transparency issues'.

The question of modalities is not being dealt with in the Working Party on Transparency in Government Procurement but in the WTO General Council which supervises the Doha work programme as a whole. Important target dates set in the Doha Declaration relating to subjects of key interest to developing countries, such as implementation issues and concerns, special and differential treatment for developing countries, agriculture, market access for non-agricultural products, and the TRIPs Agreement and access to medicines, have been missed. The work programme may not have come to a complete standstill but little forward movement can be discerned. In each area, participants are tending to reiterate already well-known positions and to push important decisions into the future.

This situation is inevitably having an impact on the discussions on modalities for the negotiations on the four Singapore subjects, including transparency in government procurement, and little can be expected to move in this area unless there is movement on the key subjects.

4 Comments and Suggestions

The need for transparency and good governance in government procurement is not, in itself, a North–South issue. Most countries, including most developing countries, have adopted, or are in the process of adopting, procurement laws, regulations and institutional reforms under pressure to use public funds more efficiently and under pressure created by increased awareness for the adoption of transparent good governance policies. These new policies have often been based on the World Bank Guidelines[17] or the UNCITRAL Model Law.[18]

The question is, however, not whether transparency in government procurement is a good thing in itself, but whether an agreement on the subject should be negotiated in WTO and, if so, what the content of such an agreement should be. Even this is not a purely North–South issue. The main challenge now faced by many developing countries is to implement their government procurement policies effectively. Some, for example Sri Lanka to name only one, take the view that, given the problems that they face in this area and the nature of these problems, a suitable binding WTO trans-

parency agreement would not only be compatible with their policies but would reinforce their own domestic objectives.

The government of each developing country will consider the arguments for and against a transparency agreement as proposed:

- ***Arguments for:*** Procedures of the sort suggested by the proponents are essential to a predictable and efficient government procurement process and would contribute to obtaining value for money. An agreement restricted to the transparency aspects would promote good governance, reinforce reform measures adopted at the national level, and help combat bribery and corruption. It would not limit the right of governments to use government procurement policies to achieve their socio-economic goals, including protection of domestic producers (including small companies and ethnic groups), reducing outflow of foreign exchange and transferring technology to local industries but would, on the contrary, help to ensure that these aims are in fact achieved. It would do this by limiting the use of discretion by purchasing entities by obliging these entities to be transparent in their operations, thus reducing administrative obstacles to competition both on the domestic market and between domestic and imported goods and services, but it would not limit the ability of governments to protect domestic producers by using policy instruments such as offsets and price preferences. Its acceptance by all WTO Members would make government procurement in export markets more transparent and predictable.

- ***Arguments against:*** An agreement on transparency in government procurement should be resisted because it would inevitably lead to proposals for an agreement to liberalise access to government procurement markets. An agreement of the sort suggested by the proponents would go beyond the limits agreed in the Singapore and Doha Declarations because it would contain provisions not only relating to transparency aspects but also to market access. A legally binding agreement would be used as another excuse to impose sanctions on exports of developing countries. An agreement would require unnecessary government bureaucracy and involve a heavy administrative burden for procuring entities. Each additional WTO Agreement adds to the already heavy administrative burden of participation in the organisation.

The government of each developing country will make its decision on the subject in the light of its own individual situation and its own national priorities. For example, small developing countries that produce a very limited range of products and services may place less weight on the need to protect domestic production than countries with a more broad-based economy. Some developing countries may consider that they have less need to combat bribery and corruption than others. Each developing country may come down on one side of the debate or the other.

However, the fact remains that the main industrialised participants, with the USA and EU in the lead, have proposed the negotiation of an agreement on transparency in government procurement and the subject is on the WTO's work programme because they wanted it there. Developing countries are not the *demandeurs* in this area. The developing countries can, therefore, legitimately expect to receive benefits in other areas of the negotiations for any contribution that they make on transparency in government procurement.

It is also almost certainly true that even those governments of developing countries that actively favour the negotiation of an agreement on transparency in government procurement have a greater interest in other areas on the WTO agenda, such as agriculture, access to markets for non-agricultural goods, services, implementation issues, special and differential treatment, or the work programme on small economies.

It is therefore likely that all developing countries will wish to use their negotiating leverage to put forward proposals on the modalities of negotiations on transparency in government procurement designed to improve their negotiating position on other items on the Doha Agenda which of more interest to them.[19]

The Indian delegation has already suggested that developing countries need to study these four issues further and are, therefore, not in a position to agree to begin negotiations on them. The draft negotiating position of least developed countries for the Doha Round submitted to the Second LDC Trade Ministers' Meeting which took place 31 May–2 June 2003 in Dhaka, Bangladesh also suggested that 'studies need to be undertaken to understand the depth and breadth of any possible agreement [on transparency in government procurement] and how it would affect LDCs'.

It is therefore suggested that developing countries might propose in the General Council that the work done to date on the issue of transparency in government procurement has not yet provided an adequate basis for them to develop proposals for a decision on modalities of negotiations, and that the WTO fifth ministerial conference in Cancún should therefore instruct the working group to continue its work. If proponents of an agreement on transparency in government procurement point out that ministers agreed in Doha that WTO Members are committed to take a decision on modalities at Cancún, developing countries may recall that other target dates laid down in the Doha Declaration have been missed.

It is therefore suggested that all developing countries share an interest in making this proposal, but that they also need to prepare a fall-back position on modalities, to be used if and when horse-trading on the various elements of the work programme gets underway. If they do not do this they will not influence developments and risk being overtaken by events.

It is suggested that the modalities for the four Singapore subjects should not simply be considered together and accorded the same treatment, as at Doha, because they each have different implications for developing countries. This is the position taken

by a broad coalition of developing countries and China which, in a communication to the WTO of 6 June 2003, concluded that 'progress varies significantly across the four Singapore Subjects. Each issue should be treated on its own merits.'[20]

The EU proposal suggests that modalities on each of the Singapore subjects be considered under three main headings: procedural issues; scope and coverage of the negotiating agenda; and special and differential treatment – differentiation in commitments between WTO Members and differentiation in implementation periods, and provision of trade-related assistance. This is a step in the right direction in so far as it provides headings under which modalities for each of these subjects can be considered on their own merits. Another welcome feature is that it recognises that modalities should not only deal with procedural matters such as the number of meetings, timing and target dates for tabling proposals. This said, the discussions are likely to be difficult.

Most developing countries do not have the leverage necessary to participate actively and fully enough in the negotiations to influence their course once these are launched, or to stand in the way of a final agreement once this has been reached by the main participants. It is therefore necessary for them to protect their interests by building the necessary safeguards into the modalities from the outset of the negotiations. On the other hand, the proponents may be expected to argue that developing countries should not attempt to use the modalities for negotiations to determine the results of the negotiations themselves.

Developing countries will need to respond to the EU suggestion and to make suggestions of their own. These should be designed to safeguard their main interests. The following paragraphs make some suggestions in relation to each of the three headings in the EU's paper.

Procedural Issues

It is suggested that that the modalities should provide for a timetable for meetings and the tabling of proposals that is acceptable to delegations of developing countries.

Negotiating Agenda

It is suggested that the modalities should provide more explicitly than the Doha Declaration that a transparency agreement will not establish any disciplines on preferences embodied in laws and regulations, including offsets and price preferences. Offsets might be defined comprehensively as in footnote 1 to Article XVI:1 of the WTO Plurilateral Agreement on Government Procurement (which forbids their use by developed members of the agreement) 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'.

The EU suggestion that thresholds should be examined is a move to be welcomed by governments concerned with the administrative burden created by an agreement as proposed by the proponents, particularly since some of the proponents have argued that a transparency agreement would not result in burdens warranting the use of thresholds such as already used in the Government Procurement Agreement.[21] Developing countries might therefore suggest that the provisions of an agreement relating to individual procurements should not apply to procurements below threshold values to be specified in the agreement.

The EU suggests that 'negotiations on a multilateral transparency agreement could comprise as a starting point the key issues elaborated in a comprehensive manner during the seven-year-long study phase of the working group and compiled in the chairman's check-list of issues'. This suggestion is open-ended since it calls for negotiations on the 12 issues 'as a starting point'. It is suggested that developing countries will need to argue that the modalities should not be open-ended but should define the issues to be negotiated in this area.

Not all developing countries will have the same position on this question.

The discussions in the working party have made it very clear that some developing countries do not consider that a WTO transparency agreement would be in their interest and would use discussions on the modalities of negotiation to reduce the scope of an agreement as far as possible. The main way of achieving this aim might be for them to propose that the modalities specify that the aim of the negotiations would be a non-binding agreement relating to goods (but not services) that placed obligations on central government bodies (but not state and local government bodies). They might, in addition, propose, for instance, that an agreement would not contain obligations on the use of limited tendering, the publication of decisions on qualification and tendering, and domestic review procedures.

Other developing countries have indicated that a suitable agreement would reinforce their own national transparency policies. It is suggested that the main concern of these countries might be to ensure that the modalities mandate negotiations of an agreement that would contribute effectively to these objectives without creating unacceptable administrative burdens. It is also suggested that they might seek an agreement that would provide additional benefits in the area of technical assistance and capacity-building. The following suggestions are made in this respect.

If an agreement is to achieve these aims, it is suggested that the modalities might provide that:

- An agreement would cover goods and services and at least procurement by central government entities and entities at the highest level of sub-central government. It is, however, suggested that in order to limit the administrative burden, local government procurement would not be covered;

- All phases of the procurement process for contracts above the agreed thresholds, including records of procurement proceedings, would need to be covered.[22] The modalities might specify that existing independent domestic administrative or judicial tribunals and review procedures would be accommodated;
- The notification provisions would be limited to notification of a list of procurement laws and regulations;
- An agreement would be legally-binding but resort to WTO dispute settlement would not be available to challenge a specific procurement and thus could not be used to overturn a contract award.[23]

Special and Differential Treatment for Developing Countries.

Three types of special and differential treatment might be proposed for inclusion in the modalities.

Differentiation of substantive commitments of developing countries and least developed countries

It is welcome that the EU suggestions on modalities,[24] unlike those of the USA,[25] recognise that provisions on special and differential treatment in a transparency agreement might not be limited to transitional periods, but that the substantive commitments of developing countries might also need differentiated from those of other WTO Members.

Any modalities might state that the substantive commitments of developing countries and least developed countries would, where appropriate, be differentiated from those of other WTO Members and that this point would be further developed when the content of the general rules becomes clearer. It is therefore suggested that at the present stage developing countries should aim to ensure that their interests are fully safeguarded under the general rules.

Differentiation in implementation periods

It is suggested that the modalities might lay down that provisions of a transparency agreement would come into force for developing countries and least developed countries after a transitional period, the length of which would be negotiated when the content of the general rules becomes clearer.

Technical Co-operation

It is suggested that the modalities might provide that obligations on the provision of relevant technical assistance to developing and least developed countries would be an integral part of any agreement.

The modalities might, in addition, state that an agreement would contain provisions under which individual developing and least developed Members would be entitled to an extension of the transitional period if an independent evaluation concludes that they require additional technical assistance to build the capacity to implement their obligations under an agreement and/or the capacity of suppliers in these countries to take advantage of the transparency provided by the agreement at home and abroad.

Examples of possible technical co-operation activities, based on suggestions made by delegations in the working group, are listed in an Annex to this paper.[26]

The modalities might also provide that an agreement would contain provisions ensuring that all relevant multilateral, regional and bilateral technical co-operation activities are co-ordinated to ensure maximum effectiveness and that information on these activities is made available to all interested parties.

Annex

Areas in which technical co-operation and support for capacity-building might be beneficial.

Development and improvement of national legislation and procedures

- Preparation and/or revision of national laws, regulations and procedures;
- Preparation of administrative guidelines, including procedures for the publication of tender notices and tender decisions, etc.;
- Identification of practical steps to make procurement user-friendly by developing standard forms for tender documentation.

Institution building

- Establishment of procurement agencies;
- Establishment and implementation of domestic review systems.

Training

- Training of officials responsible for implementing new legislation, procedures and/or practices;
- Training of officials in charge of enforcement including those of domestic review bodies;
- Training local trainers in, for example, business schools or colleges of public administration;
- Study tours.

Application of information technology

- Development of information technology tools (hardware, software and the expertise) which could be used to disseminate information about procurement opportunities and practices, and/or to establish full electronic tendering, as well as to facilitate the collection of relevant economic data and statistics;
- Provision of office information technology and/or other equipment necessary for the implementation and enforcement of legislation, procedures and/or practices.

Access to information, including establishment of enquiry points

- Establishment of enquiry points, including the means to provide information on national legislation and procedures to developing country suppliers;
- Establishment of internet websites, search engines and databases to help provide information about opportunities to do business with governments at home and abroad.
- Identification of ways in which suppliers in developing countries and small and medium-sized enterprises could benefit from transparency of procurement by government entities, including entities in developed countries;
- Technical advice and other experience-sharing activities, such as twinning between developed and developing country agencies.

Notes

1 GATT 1947, Articles III:8(a) and XVII:2.
2 GATT 1994, Articles III:8(a) and XVII:2. GATS, Article XIII.
3 Counting EU as one, still today only 13 out of the WTO's 145 Members are signatories to the GPA. It is nevertheless an important instrument. Its Members account for about 75 per cent of the total world trade and its coverage was increased ten-fold in negotiations among its Members held in parallel with the Uruguay Round.
4 USTR Annual Report on Discrimination in Procurement, Section III, 30 April 1996. See Google.com, cache of http://www.usembassy-israel.org.il/publish/press/trade/archive/may/et2_5-2.htm.
5 Ibid.
6 WTO document WT/WGTGP/W/6 of 14 October 1997: Synthesis of Information Available on Transparency-Related Provisions in Existing International Instruments on Government Procurement Procedures and on National Practices.
7 WTO document Job(99)/6728 of 12 November 1999: List of Issues Raised and Points Made.
8 WTO document WT/WGTGP/W/32 of 23 May 2002: Work of the Working Party on the Matters Related to Items I–V of the List of the Issues Raised and Points Made; and WTO document WT/WGTGP/W/33 of 3 October 2002: Work of the Working Party on the Matters Related to Items VI–XII of the List of Issues Raised and Points Made.
9 USTR, 2002 Trade Policy Agenda and 2001 Annual Report of the President of the United States on the Trade Agreement Programme, p. 4.
10 For an articulation of this fear see Martin Khor, *Government Procurement, the Real Aim of the Majors*, Third World Network.
11 WTO document WT/WGTGP/W/32.
12 Ibid.
13 WTO document WT/WGTGP/W/38
14 WTO document WT/WGTPG/W/35, paras 3 and 4.
15 International Centre for Trade and Sustainable Development (ICTSD), *BRIDGES Weekly Trade News Digest*, Vol. 7, No. 10.
16 'Singapore Issues, the Question of Modalities', Communication from the European Communities. WTO document WT/GC/W/491 of 27 February 2003.
17 Procurement under IBRD Loans and IDA Credits, worldbank.org/html/opr/procure/guideline.html
18 United Nations Commission on International Trade Law, Model Law on Procurement and Construction 1993, adopted by the United Nations General Assembly at its 49th Session, uncitral.org/english/texts/procurement/proc93.htm
19 The same logic applies with greater or lesser force to the three other subjects added to the WTO agenda at the Singapore Ministerial conference: the relation between trade and investment; the interaction between trade and competition policy; and trade facilitation.
20 Communication from Argentina, Bolivia, Botswana, Brazil, Chile, China, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Gabon, Guatemala, Honduras, India, Malaysia, Mexico, Morocco, Nicaragua, Pakistan, Paraguay, Peru, Thailand, Uruguay, Venezuela and Zimbabwe. WTO document TN/C/W/13 of 6 June 2003.
21 WTO document WT/WGTGP/W/32, para. 18.
22 Items I to IX in the Chairman's list of points – I. Procurement Methods; II. Procurement Methods; III. Publication of Information on National Legislation and Procedures; IV. Information on Procurement Opportunities, Tendering and Qualification Procedures; V. Time-Periods; VI. Transparency of Decisions on Qualification; VII. Transparency of Decisions on Contract Awards; VIII. Domestic Review Procedures; IX. Other Matters Related to Transparency (defined as maintenance of records of proceedings, information technology and language).
23 As suggested by the USA in response to concerns expressed by developing countries such as Brazil in WTO document WT/WGTPG/W/38 of 31 January 2003, next to last paragraph.
24 WTO document WT/GC/W/491 of 27 February 2003, section 4.
25 WTO document WT/WGTPG/W/38 of 31 January 2003, next to last paragraph.
26 WTO documents Job(99)6782 of 12 November 1999 and WT/WGTGP/W/33 of 3 October 2002, para. 111.