

**Working Group on Transparency
in Government Procurement**

TRANSPARENCY-RELATED PROVISIONS IN EXISTING INTERNATIONAL
INSTRUMENTS ON GOVERNMENT PROCUREMENT PROCEDURES
AND IN WTO AGREEMENTS

Note by the Secretariat

Table of contents

**A. TRANSPARENCY-RELATED PROVISIONS IN EXISTING INTERNATIONAL
INSTRUMENTS ON GOVERNMENT PROCUREMENT**

	<u>Page</u>
I. Introduction	3
II. International instruments on procurement	4
III. Procurement methods	5
IV. Information on national legislation and procedures	7
V. Information on procurement opportunities, tendering and qualifications	8
(a) Notice of invitation to tender or prequalify	8
(i) How public notice should be given	8
(ii) Information content of notices of invitation	9
(b) Tender documents	11
(c) Clarification	16
(d) Promptness and timeliness of prior information and deadlines	16
VI. Transparency of decisions on qualification	18
(a) Transparency of criteria	18
(b) Notification and listing	18
VII. Transparency of decisions on contract awards	19
(a) Transparency of criteria	19
(b) Receipt and opening of tenders	21
(c) <i>Ex-post</i> information on contract awards	23
VIII. Review	24
IX. Other matters related to transparency	26
(a) Maintenance of record of proceedings	26
(b) Information technology	27
(c) Language	27

	<u>Page</u>	
X.	Information to be provided to other governments	28
	(a) Information on national legislation	28
	(b) Notification of national legislation	29
	(c) Information on contract awards	29
	(d) Statistical information	29
B.	TRANSPARENCY PROVISIONS IN WTO AGREEMENTS	
I.	Introduction	30
II.	Publication	30
	(a) Publication	30
	(b) Timing of publication	34
III.	Public notice of proposed regulations	35
IV.	Provision of information in response to requests from other Members	35
V.	Provision of information in response to requests from economic operators	37
VI.	Treatment of confidential information	38

1. As requested of the Secretariat at the first meeting of the Working Group on Transparency in Government Procurement held on 23 May 1997, this note provides factual information on the provisions related to transparency in international instruments on government procurement (Part A) and in the WTO Agreements (Part B). In compiling Part A, information on the following international instruments has been included:

- UNCITRAL Model Law on Procurement of Goods, Construction and Services (1995) (Model Law)
- Guidelines on Procurement under IBRD Loans and IDA Credits (1996) and Guidelines on Selection and Employment of Consultants by World Bank Borrowers (1997) (World Bank Guidelines, respectively for goods and works and for consultants' services)
- WTO Agreement on Government Procurement (1994) (GPA).

2. The contents of the note should not be taken to prejudice what is encompassed by the term "transparency", which is a matter for the Working Group. Its purpose is to provide background information that may be useful to the Working Group in its study of transparency in government procurement practices.

PART A

TRANSPARENCY-RELATED PROVISIONS IN INTERNATIONAL INSTRUMENTS ON GOVERNMENT PROCUREMENT

I. INTRODUCTION

3. Promoting transparency in procurement procedures is one of the explicit considerations that guide the requirements in the Model Law (Preamble, paragraph (f)), the GPA (Preamble, paragraph 3), the World Bank Guidelines for goods and works (paragraph 1.2(d)) and the World Bank Guidelines for consultants' services (paragraph 1.4(e)). Transparency can be viewed as a linchpin of the other common objectives of these instruments, which are, among others: maximizing economy and efficiency in procurement; fostering and encouraging participation in procurement proceedings by suppliers; giving all suppliers equal opportunity to compete regardless of nationality and thereby promoting liberalization of international trade; and promoting the integrity and fairness of and public confidence in the procurement process.

4. The transparency provisions of the three international instruments are aimed at three sets of interested parties:

- Suppliers. The fulfilment of the objectives of procurement regimes requires that potential suppliers should be able to obtain readily adequate information on procurement opportunities, on the conditions to be met to qualify for them and on all matters relevant to the preparation and submission of bids. Their participation will also be enhanced if procurement procedures are perceived by them as fair and equitable.
- Legislatures and the general public. Transparency is a necessary condition for procurement regimes and decisions to be accountable, in particular in the use of public or, in the case of the World Bank, international funds. For this purpose decisions must not only be impartial, but also seen to be impartial. This calls for objective criteria, made known in advance, for the taking of such decisions, the receipt and opening of tenders under procedures guaranteeing the regularity of the tender openings and ex-post information on the contracts awarded as well as review possibilities.
- Other governments. Under the WTO Agreement on Government Procurement, each Party accepts obligations vis-à-vis other Parties to the Agreement, not only to ensure that the suppliers of those Parties benefit from adequate information and transparent procedures, but also to provide information directly to other Parties on its procurement procedures and decisions taken under it.

5. Part A of this note starts by outlining the main characteristics of the three instruments (Section II). It then looks at the preferred and supplementary procurement methods provided for in them and the relation of these methods to transparency considerations (Section III). The remaining sections of Part A concern particular aspects of transparency: information on national legislation and procedures (Section IV); information on procurement opportunities, including tendering and qualification (Section V); transparency of decisions on qualification (Section VI); transparency of decisions on contract awards (Section VII); review (Section VIII); other matters related to transparency (Section IX); and information to be provided by governments (Section X).

II. INTERNATIONAL INSTRUMENTS ON PROCUREMENT

6. There exist at present three international instruments on the procedures and practices of governments in the area of procurement:

(i) The UNCITRAL Model Law on Procurement of Goods, Construction and Services was drawn up by the United Nations Commission on International Trade Law (the UNCITRAL)¹ 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. As a framework law, the Model Law is intended to provide all the essential principles and procedures for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. In line with the mandate of UNCITRAL to promote international trade and the notion underlying the Model Law that the wider the degree of competition the better the value received for public expenditures, the Model Law as a general rule promotes non-discrimination. Under the Model Law this is given effect by the procedures designed, for example, to ensure that non-national suppliers are given adequate transparency. At the same time the Model Law recognizes that the enacting States may in some cases wish to restrict participation by foreign suppliers with a view to protecting certain domestic industries or for other legitimate reasons. However, with a view to promoting transparency, any such restrictions are subject to the requirement that the imposition of the restriction by the procuring entity should be based only on grounds specified in the procurement regulations or in other legislation.²

(ii) The Guidelines for Procurement under IBRD Loans and IDA Credits and the Guidelines for Selection and Employment of Consultants by the World Bank Borrowers have the purpose of informing those World Bank Borrower countries or their agencies (Borrowers) carrying out a project that is financed in whole or in part by a loan from the International Bank for Reconstruction and Development (IBRD) or a credit from the International Development Association (IDA) of the arrangements to be made for procuring the goods and works and the procedures for selecting, contracting and monitoring consultants³ required for the project. In most cases the Bank requires its Borrowers to obtain goods and works through International Competitive Bidding open to all eligible suppliers and contractors, with allowance for preferences for domestically manufactured goods and works under prescribed conditions.⁴ The World Bank

¹UNCITRAL is an organ of the United Nations General Assembly established to promote the harmonization and unification of international trade law, so as to remove unnecessary obstacles to international trade caused by inadequacies and divergences in the law affecting trade.

²UNCITRAL Model Law Guidelines p.58 and Model Law Article 8(1) and (2)

³For the purposes of the World Bank Guidelines, the term "consultants" includes a wide variety of private and public entities, including consulting firms, engineering firms, construction managers, management firms, procurement agents, inspection agents, auditors, UN agencies and other multilateral organizations, investment and merchant banks, universities, research institutions, government agencies, non-governmental organizations and individuals. Bank Borrowers use these organizations as "consultants" to help in a wide range of activities - such as policy advice; institutional reforms; management; engineering services; construction supervision; financial services; procurement services; social and environmental studies; and identification, preparation, and implementation of projects - to complement Borrowers' capabilities in these areas.

⁴World Bank Guidelines on goods and works, paragraph 2.54 and Appendix 2

Guidelines also allow for National Competitive Bidding for procurement of goods or works which, by their nature or scope, are unlikely to attract foreign competition.⁵

(iii) The WTO Agreement on Government Procurement of 1994 establishes an agreed framework of rights and obligations, among WTO Members Parties to the GPA, with respect to their national laws, regulations, procedures and practices in the area of government procurement with a view to achieving greater liberalization and expansion of trade and improving the international framework for the conduct of world trade. The cornerstone of the rules in the GPA is non-discrimination between the supplier and suppliers of WTO Members Parties to the GPA. The GPA applies to the procurement of goods and services, including construction services, above certain threshold values and defined by the schedules of each Party contained in Appendix I to the GPA.⁶ Certain derogations or exceptions are specified in the Schedules of individual Parties in Appendix I to the GPA. In order to ensure that the basic principle of non-discrimination is followed and that access to procurement is actually available to foreign products, services and suppliers, the GPA lays heavy emphasis on procedures for providing transparency of laws, regulations, procedures and practices regarding government procurement.

III. PROCUREMENT METHODS

7. Various methods of procurement are used by government entities, according to circumstances. All three of the instruments covered by this note describe the specific procurement methods that may be used and define the parameters for their use. The instruments provide that more transparent methods of procurement are to be favoured where possible as being more likely to be effective in realizing the objectives of procurement systems, but these instruments allow less inherently transparent means when circumstances warrant it and, in some instances, subject to special conditions often related to ensuring adequate transparency.

8. As the method of procurement in normal circumstances, the Model Law foresees the use of *tendering* for procurement of goods and construction services and, for other services, *principal method for procurement of services*, a method designed to give due weight in the evaluation process to the qualifications and expertise of the service suppliers. For the purposes of the GPA, the *open tendering procedures* where all suppliers may submit a tender is a preferred method. The World Bank Guidelines prescribe the use of *International Competitive Bidding* in the procurement of goods and works and *Quality- and Cost-Based Selection* for the selection of consultants' services as the main method.

9. For exceptional and well-defined circumstances, in which the above preferred methods are not considered by the procuring entity to be an appropriate or feasible method for procurement, the three instruments offer alternative methods of procurement which provide a lesser degree of competition among suppliers compared to the principal method. Therefore, conditions on the use of other methods have been included in all three instruments to avoid unjustified resort to these methods of procurement and to limit their use to exceptional cases, while safeguarding the objectives of non-discrimination among suppliers and transparency of the procurement process. The Model Law gives the options of *two-stage tendering*, *requests for proposals* and *competitive negotiations* where it is not feasible for the procuring entity to formulate specifications to the degree of detail required under the tendering method for goods, for example in the procurement of high technology goods or under the principal method of procurement for services. These methods give the procuring entity an opportunity to negotiate with suppliers with a view to settling upon technical specifications and contractual terms. With regard to the selection

⁵World Bank Guidelines on goods and works, paragraph 3.3 and 3.4

⁶GPA Article III:2

of suppliers, the Model Law offers a *restricted tendering* method which permits the procuring entity to solicit participation only from a limited number of suppliers for procurements of a technically complex or specialized nature; a *request for quotations or shopping* method with simplified and accelerated procedures under which the procuring entity is allowed to solicit quotations from a small number of suppliers for cases of low-value procurement of standardized goods or services; and *single source procurement* for exceptional circumstances, such as serious economic urgency due to catastrophic events. With a view to providing transparency as regards decisions of procuring entities to use an exceptional method of procurement rather than the method that is normally required, the Model Law contains a requirement that any such decision should be supported in the record of procurement proceedings provided under Article 11 of the Model Law by a statement of the grounds and circumstances on which the entity has relied to justify the use of the method in question.⁷

10. The GPA prescribes two methods of procurement other than open tendering procedures. Under *selective tendering* procedures, those suppliers invited to do so by the entity may submit a tender.⁸ In order to ensure optimum effective international competition under this method, purchasing entities are required to invite tenders from the maximum number of domestic and foreign suppliers consistent with the effective operation of the procurement system. A number of safeguards to ensure non-discrimination in the procedures and conditions for qualification of suppliers are set out in Article VIII. Under *limited tendering* procedures, the entity contacts the potential suppliers individually.⁹ Because of the inherently non-transparent nature of this method, the GPA closely circumscribes the situations in which it can be used; it is permitted, for example, in the absence of responsive tenders under open or selective procedures, when the product or service can be supplied only by a particular supplier, or for reasons of extreme urgency brought about by events unforeseeable to the entity.¹⁰ The GPA subjects this method to special transparency conditions which require entities to prepare a report in writing on each contract awarded which should include, *inter alia*, a statement of the conditions referred to in Article XV that justified the limited tendering. Furthermore, entities may hold *negotiations* with suppliers making tenders, provided this is indicated in the initial tender notice or it appears from the tender evaluation that no one tender is the most advantageous, and subject to specified safeguards to ensure that such negotiations do not discriminate between suppliers.¹¹

11. The World Bank Guidelines allow *Modified International Competitive Bidding* with simplified advertising and currency provisions to be used in the case of quick disbursement loans or in procurement of commodities. Other methods of procurement which are used in circumstances which necessitate departures from the International Competitive Bidding method procedures are: *Limited International Bidding* which is essentially International Competitive Bidding by direct invitation and without open advertisement and used where the contract values are small or where there is only a limited number of suppliers or other exceptional reasons¹²; *National Competitive Bidding*, normally used for public procurement in the country of the Borrower, which is considered to be the most efficient and economical way of procuring goods or works which, by their nature or scope, are unlikely to attract foreign

⁷Model Law Article 18(4)

⁸GPA Articles VII:3(b) and X

⁹GPA Article VII:3(c)

¹⁰GPA Article XV

¹¹GPA Article XIV

¹²World Bank Guidelines on goods and works; paragraph 3.2

competition¹³; *Shopping* (international and national) which is based on comparing price quotations obtained from several suppliers to assure competitive prices and is appropriate for procuring readily available off-the-shelf goods or standard specification commodities that are small in value¹⁴; and *Direct Contracting Without Competition (single source)*¹⁵ used under conditions similar to those of single source procurement under the Model Law or limited tendering under the GPA. As alternatives to the principal method of selection of consultants, *Quality- and Cost-Based Selection*, the World Bank Guidelines prescribe *Quality-Based Selection* for complex or highly specialized assignments or for those which invite innovations.¹⁶ Other methods of selection of consultants under the World Bank Guidelines, with specified conditions for their use, include *Selection under a Fixed Budget*, *Least-Cost Selection*, *Selection Based on Consultants' Qualifications* and *Single-Source Selection*.¹⁷

12. While many of the specific requirements relating to transparency referred to in the later sections of this note concern transparency under any of the allowable procurement methods, it should be noted that some of the specific requirements relate more directly to preferred methods of procurement.

IV. INFORMATION ON NATIONAL LEGISLATION AND PROCEDURES

13. Government procurement activities are generally regulated through laws at the central or sub-central levels of government supplemented by administrative rulings and directives of general application. The Model Law and the GPA require the public accessibility of the relevant texts.¹⁸ The GPA explicitly requires the GPA Parties to publish any law, regulation, judicial decision, administrative rulings of general application and any procedure regarding government procurement (including standard contract clauses) in such a manner as to enable other GPA Parties and suppliers to become acquainted with them. The publications in which individual GPA Parties publish their respective national legislations have to be identified in Appendix IV to the GPA.¹⁹ The World Bank Guidelines are published by the World Bank and made available to Borrowers.²⁰

14. The GPA also provide for other means by which suppliers and/or other governments can obtain information on national procurement procedures. Under the GPA each entity shall, on request from a supplier of a GPA Party, promptly provide an explanation of its procurement practices and procedures.²¹ The GPA Parties are also required to provide the challenge procedures under Article XX in writing and make them generally available.²²

¹³World Bank Guidelines on goods and works, paragraph 3.3-3.4

¹⁴World Bank Guidelines on goods and works, paragraph 3.5-3.6

¹⁵World Bank Guidelines on goods and works, paragraph 3.7

¹⁶World Bank Guidelines on selection of consultants, paragraph 3.2-3.4

¹⁷World Bank Guidelines on Selection of consultants, paragraph 3.5 to 3.11

¹⁸Model Law Article 5; GPA Article XIX:1

¹⁹GPA Article XIX:1

²⁰World Bank Guidelines on goods and works, paragraph 1.1; World Bank Guidelines consultants' services, paragraph 1.1

²¹GPA Article XVIII:2(a)

²²GPA Article XX:3

V. INFORMATION ON PROCUREMENT OPPORTUNITIES, TENDERING AND QUALIFICATION

15. The three instruments recognize that timely, sufficiently detailed and readily available information on opportunities to bid for specific contracts is essential for guaranteeing effective competition. They lay down detailed provisions on the advance information that entities must provide on their intended procurements. Where prequalification is a necessary condition for tendering, information must be provided on the procedures and criteria that have to be fulfilled in order for an interested potential supplier to qualify.

(a) Notice of invitation to tender or to prequalify

(i) *How public notice should be given*

16. The relevant provisions in the three instruments set forth a set of minimum procedures for giving public notice of tendering opportunities that the procuring entity should follow in order to obtain expressions of interest in a specific procurement from potential suppliers. Under the Model Law and the GPA, the information on an intended procurement must be advertised primarily through a notice of invitation to participate in the intended procurement.²³ The publications in which individual GPA Parties publish their notices of invitations to tender have to be identified in Appendix II to the GPA.²⁴ The World Bank Guidelines require the Borrower country to notify the projects which include procurement of goods and works on the basis of International Competitive Bidding or any expected consultancy assignments through a General Procurement Notice on the basis of a draft prepared and submitted to the Bank by the Borrower. The Borrower country must notify the international community in a timely manner of the opportunities to bid for specific procurement of goods and works through invitations to bid advertised in the form of Specific Procurement Notices.²⁵ For selection of consultants, the preparation of requests for proposals shall involve a Letter of Invitation which shall state the intention of the Borrower to enter into a contract for provision of consultancy services.²⁶

17. All three instruments foresee the publication of a notice of invitation to participate in an official gazette or other official journal.²⁷ Moreover, to create awareness of the procurement opportunity in the international community, the Model Law and the World Bank Guidelines require the notice of invitation to tender also to be published in a newspaper or a relevant trade publication in a language customarily used in international trade, in a technical magazine or a professional journal of wide international circulation.²⁸ Under the World Bank Guidelines the invitations to bid for goods or works or lists of consultancy assignments which are advertised in the General Procurement Notice and the

²³Model Law Articles 24(2), 37(2) and 48(2); GPA Article IX:1

²⁴ GPA Article IX:1

²⁵World Bank Guidelines on goods and works, paragraph 2.7, 2.8 and 2.10 and on consultants' services

²⁶World Bank Guidelines on consultants' services, paragraph 2.9

²⁷Model Law Article 24(1) and GPA Article IX:1

²⁸Model Law Article 24(2); World Bank Guidelines for goods and works paragraph 2.8 and on consultants' services, paragraph 2.5

Specific Procurement Notices are published in *Development Business*.²⁹ World Bank Borrowers are also encouraged to transmit invitations to embassies and trade representatives of countries of likely suppliers and contractors.³⁰

18. The GPA requires that any amendment or re-issue of a notice of invitation to tender, after publication of an invitation to participate in an intended procurement but before the time set for opening or receipt of tenders, shall be given the same circulation as the original documents upon which the amendment is based.³¹

(ii) *Information content of notices of invitation*

19. All three instruments require entities to include a minimum amount of information in their invitations to tender sufficient to enable suppliers to assess their interest in the intended procurement and to facilitate their participation in tendering procedures.³² The three instruments refer broadly to the same elements. The specific elements identified in one or more of these instruments are listed below, with the instrument that explicitly contains that element identified in the footnotes:

on the *intended procurement*:

- the name and address of the entity responsible for the procurement, awarding the contract and providing any information necessary for obtaining specifications and other documents³³ or details of the client of consultancy services³⁴;
- the scope of the procurement with details on the nature and the quantity of the goods and services to be procured or the construction to be effected³⁵;
- any options for further procurement; the nature and quantity of any recurring contracts³⁶;
- the time-table for the supply of goods, the provision of services or for the completion of the construction.³⁷ If possible, an estimate of the timing when any option for further

²⁹*Development Business* (UNDB) is a publication of the United Nations Department of Public Information, UN Plaza, New York, New York 10017, USA. A *Development Business* office is maintained at the World Bank, 1818 H Street, N.W., Washington D.C., 20433, USA.

³⁰World Bank Guidelines on goods and works, paragraph 2.8 and on consultants' services, paragraph 2.5

³¹GPA Article IX:10

³²Model Law 25(1); GPA Article IX:6-8

³³Model Law Articles 25(1)(a) and 37(1); GPA Article IX:6(e); World Bank Guidelines on goods and works, paragraph 2.7

³⁴World Bank Guidelines on consultants' services, paragraph 2.9

³⁵Model Law Articles 25(1)(b) and 37(1); GPA Article IX:6(a); World Bank Guidelines for goods and works, paragraph 2.7 and on consultants' services, paragraph 2.3

³⁶GPA Article IX:6(a)

³⁷Model Law Article 25(1)(c); GPA Article IX:6(c)

procurement may be exercised; in the case of recurring contracts an estimate of the timing of the subsequent tender notices³⁸;

- the place of delivery of the goods to be supplied, the location where services are to be provided or where the construction is to be effected³⁹;

regarding *suppliers*:

- any economic and technical requirements, financial guarantees and information required⁴⁰;
- the criteria and procedures to be used for evaluating the qualifications of suppliers.⁴¹

To facilitate obtaining *tender documents or prequalification documents* by suppliers interested in bidding for the intended procurement, the procuring entity shall also provide information regarding :

- the means of obtaining the documents and the place from which they may be obtained⁴²;
- the price charged⁴³ and the currency and means of payment for documents⁴⁴;
- the scheduled date for the availability of the documents⁴⁵;
- the language or languages in which the documents are available⁴⁶;

and information regarding *submission of applications to tender or to prequalify*:

- the address for submitting an application to be invited to tender or for qualifying for the suppliers' lists as well as for submission or receiving tenders⁴⁷;

³⁸GPA Article IX:6(a)

³⁹Model Law Articles 25(1)(b) and 37(1)

⁴⁰GPA Article IX:6(f)

⁴¹Model Law Article 25(1)(d)

⁴²Model Law Articles 25(1)(f), 25(2)(a) and 37(1)

⁴³Model Law Articles 25(1)(g), 25(2)(b) and 37(1)

⁴⁴Model Law Article 25(1)(h) and (2)(c); GPA Article IX:6(g)

⁴⁵World Bank Guidelines on goods and works, paragraph 2.7

⁴⁶Model Law Article 25(1)(i) and (2)(d)

⁴⁷GPA Article IX:6(d); Model Law Article 25(1)(j); World Bank Guidelines on goods and works, paragraph 2.43 and on consultants' services, paragraph 2.9

- the deadline for the submission or receipt of tenders⁴⁸;
- the language or languages in which application to be invited to tender or qualify for the suppliers' list must be submitted.⁴⁹

20. Under the World Bank Guidelines on consultants' services, the document prepared for the assignment called the Terms of Reference shall define the objectives, goals and the scope of the assignment and provide background information to facilitate the consultants' preparation of their proposals. Terms of Reference shall also list the services and surveys necessary to carry out the assignment and the expected results, for example reports, data, maps or surveys.⁵⁰

21. Under the GPA, invitations to tender shall contain *certain other specific information*, including information concerning the method of procurement applied (open, selective, negotiated procedures)⁵¹ and on the mode of procurement (purchase, lease, rental or hire purchase).⁵²

22. Since the GPA obligations only apply to procurement by those entities explicitly covered in the schedules of individual GPA Parties in Appendix I to the GPA subject to exceptions contained therein and to goods and services above specified threshold values, the notices of invitation to participate in intended procurements or the publication in which such notices appear should indicate whether the procurement for which tenders are sought is subject to the obligations of the Agreement.⁵³

23. Finally, under the GPA, being an intergovernmental agreement subscribed to by Parties using different languages, entities must publish in an appropriate publication listed in Appendix II, for each case of intended procurement, a summary notice of the invitation to tender in one of the official languages of the WTO. The notice shall contain at least information regarding the subject matter of the contract, the time-limits set for the submission of tenders or an application to be invited to tender, and the addresses from which documents relating to the contracts may be requested.⁵⁴

(b) Tender documents

24. The information contained in tender documents describes the needs of the procuring entity and establishes a set of standards which enables the procuring entity to compare the tenders submitted in an objective and fair manner.⁵⁵ Tender documents also set out the rules and procedures with which a prospective tenderer should comply in preparing and submitting a responsive tender. The level of detail and complexity of tender documents may vary with the size and nature of the intended procurement but they should include, at least, the information that is required to be published in the notice of intended

⁴⁸Model Law Article 25(1)(j); GPA Article IX:6(d); World Bank Guidelines on goods and works, paragraph 2.43 and on consultants' services, paragraph 2.9

⁴⁹GPA Article IX:6(d)

⁵⁰World Bank Guidelines on consultants' services, paragraph 2.3

⁵¹GPA Article IX:6(b)

⁵²GPA Article IX:6(h)

⁵³GPA Article IX:11

⁵⁴GPA Article IX:8

⁵⁵UNCITRAL Guidelines p.80

procurement.⁵⁶ The three instruments refer broadly to the same elements.⁵⁷ The specific elements identified in one or more of the three instruments are listed below, with the instrument that explicitly specifies those elements identified in the footnotes:

regarding the *procuring entity*:

- the address of the entity to which tenders should be sent⁵⁸;
- the address where requests for supplementary information or requests for clarification should be sent⁵⁹ and the name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate with suppliers in connection with the procurement proceedings, without the intervention of an intermediary⁶⁰;

regarding the *intended procurement*:

- a complete description of the products or services or construction to be procured⁶¹, a brief description of the consultancy assignment⁶²;
- where the procurement is for goods, the quantity of or a list of the goods to be procured⁶³;
- any requirements (including technical and quality specifications, standards, minimum performance requirements, conformity certification) to be fulfilled and the test methods that will be used to assess the conformity of the equipment or works with those specifications⁶⁴;

⁵⁶Model Law Articles 26 and 27(a); GPA Article XII:2

⁵⁷The World Bank Borrowers use Standard Bidding Documents (SBDs) published by the Bank for various types of procurement (World Bank Guidelines on goods and works, paragraph 2.12). Where no SBDs have been issued, the Borrower uses other standard conditions of contract or contract forms acceptable to the Bank. For selection and employment of consultants the Borrower uses the standard Request for Proposals (RFPs) which includes a letter of Invitation, Information to Consultants (ITC), the Terms of Reference, and the proposed contract (World Bank Guidelines on consultants' services paragraph 2.8 and 2.10 and Appendix 2).

⁵⁸GPA Article XII:2(a)

⁵⁹GPA Article XII:2(b) and World Bank Guidelines on consultants' services, Appendix 2(c)

⁶⁰Model Law Article 27(u)

⁶¹Model Law Article 27(d); GPA Article XII:2(g)

⁶²World Bank Guidelines on consultants' services, Appendix 2(a)

⁶³Model Law Article 27(d); World Bank Guidelines on goods and works, paragraph 2.11

⁶⁴Model Law Article 27(d); GPA Article XII:2(g); World Bank Guidelines on goods and works, paragraphs 2.11 and 2.16

- necessary plans, drawings, designs and instructional materials⁶⁵;
- if alternatives to the characteristics of the goods, construction or services, designs, materials, completion schedules, payments terms, contractual terms and conditions or other requirements set forth in the tender documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared⁶⁶;
- the warranty and maintenance requirements⁶⁷;
- the location of delivery of the goods to be supplied, services to be provided or installation of the construction⁶⁸;
- the delivery time or schedule of completion of the goods, the construction to be effected or the services to be provided⁶⁹;
- if suppliers or contractors are permitted to submit tenders for only a portion of the goods, construction or services to be procured, a description of the portion or portions for which tenders may be submitted⁷⁰;
- the manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods, construction or services themselves, such as any applicable transportation and insurance charges, inspection costs as well as customs duties and other charges or taxes applicable to imported goods⁷¹;
- the currency or currencies in which the tender price is to be formulated and expressed⁷² and the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used⁷³;

⁶⁵Model Law 27(d); GPA Article XII:2(g)

⁶⁶Model Law Article 27(d) and (g); World Bank Guidelines on goods and works, paragraph 2.17

⁶⁷World Bank Guidelines on goods and works, paragraph 2.16

⁶⁸Model Law Article 27(d); World Bank Guidelines on goods and works, paragraph 2.16

⁶⁹Model Law Article 27(d); World Bank Guidelines on goods and works, paragraph 2.11 and 2.16 and on consultants' services, Appendix 2(p)

⁷⁰Model Law Article 27(h)

⁷¹Model Law Article 27(i)

⁷²Model Law Article 27(j); GPA Article XII:2(h); World Bank Guidelines on consultants' services, Appendix 2(i)

⁷³Model Law Article 27(s)

regarding *suppliers*:

- any economic and technical requirements, financial guarantees and any other information or evidence required from suppliers⁷⁴;
- requirements as to documentary evidence or other information that must be submitted by suppliers to demonstrate their qualification⁷⁵;
- the criteria and procedures relative to the evaluation of the qualifications of suppliers⁷⁶;

regarding *evaluation of tenders* or proposals:

- the criteria to be used by the procuring entity in determining the successful tender and for awarding the contract, including any margin of preference and any factor other than price to be considered in the evaluation of tenders, such as insurance and inspection costs, customs duties and other import charges, taxes and currency of payment for imported goods and the relative weight of such criteria⁷⁷ and the way in which such factors will be quantified or otherwise evaluated⁷⁸;

regarding *submission and receipt of tenders or proposals*:

- the manner, place and deadline for the submission of tenders, applications to prequalify or proposals⁷⁹;
- the closing date and time for receipt of tenders and the length of time during which any tender should be open for acceptance⁸⁰;
- the period of time during which tenders shall be in effect or consultants' proposals shall be held valid⁸¹;
- the language or languages in which tenders must be submitted⁸²;

⁷⁴GPA Article XII:2(f); Model Law Article 27(c)

⁷⁵Model Law Articles 7(3)(a)(iii) and 27(c)

⁷⁶Model Law Article 27(b)

⁷⁷Model Law Article 27(e); GPA Article XII:2(h)

⁷⁸World Bank Guidelines on goods and works, paragraph 2.11, 2.17 and 2.51 and on consultants' services, paragraph 2.10 and Appendix 2(d)

⁷⁹Model Law Articles 7(3)(a)(iv) and 27(n); World Bank Guidelines on consultants' services, Appendix 2(h) and (l)

⁸⁰GPA Article XII:2(d)

⁸¹Model Law Article 27(p); World Bank Guidelines on consultants' services, Appendix 2(o)

⁸²GPA Article XII:2(c)

regarding *opening of tenders*:

- the place, date and time of, and persons authorized to be present at, the opening of tenders⁸³;
- the procedures to be followed for opening and examining tenders⁸⁴;

regarding the *procurement contract*:

- the terms and conditions of the procurement contract, both general and special, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties⁸⁵;
- the terms of payment⁸⁶;
- any formalities that will be required, once a tender has been accepted, for a procurement contract to enter into force, including, where applicable, the signing of a written procurement contract and approval by a higher authority of the government together with the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval⁸⁷;

and regarding *certain other matters*:

- any requirements of the procuring entity with respect to any tender security to be provided by suppliers including the issuer and the nature, form, amount and other principal terms and conditions⁸⁸;
- any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to counter-trade or to the transfer of technology.⁸⁹

25. Under the Model Law, at any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the tender documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.⁹⁰

⁸³Model Law Article 27(q); GPA Article XII:2(e); World Bank Guidelines on goods and works, paragraph 2.44

⁸⁴Model Law Article 27(r)

⁸⁵Model Law Articles 7(3)(a)(ii) and 27(f); World Bank Guidelines on goods and works, paragraph 2.11

⁸⁶GPA Article XII:2(i)

⁸⁷Model Law Article 27(y)

⁸⁸Model Law Article 27(l) and (m)

⁸⁹Model Law Article 27(v)

⁹⁰Model Law Article 28(2)

(c) Clarification

26. Under the Model Law and the World Bank Guidelines the procuring entity is required to respond to any request by a supplier for clarification of the tender documents or prequalification documents within a reasonable time prior to the deadline for the submission of tenders or application to prequalify so as to enable the supplier to make a timely submission of its tender or application to prequalify. The procuring entity is also required, without identifying the source of the request, to communicate the clarification, any additional information, correction of errors or any other modifications to all other suppliers to which the procuring entity has provided the tender documents. The record of any meeting with any suppliers shall also be communicated to other suppliers.⁹¹

27. Under the GPA, entities are required to reply promptly to any reasonable request from suppliers for explanations relating to tender documentation under open and selective procedures. Entities are also required to reply to any reasonable request for relevant information from a supplier participating in the tendering process on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract.⁹² Also, any significant information given to one supplier regarding invitations to tender for a particular intended procurement shall be given simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.⁹³

28. Under the World Bank Guidelines, all prospective bidders shall be provided the same information, and shall be assured of equal opportunities to obtain additional information on a timely basis.⁹⁴ Borrowers shall provide reasonable access to project sites for visits by prospective bidders. For works or complex supply contracts, particularly for those requiring refurbishing existing works or equipment, a pre-bid conference may be arranged whereby potential bidders may meet with the Borrower's representatives to seek clarifications. Minutes of the conference shall be provided to all prospective bidders with a copy to the Bank.⁹⁵

(d) Promptness and timeliness of prior information and deadlines

29. The Model Law and the GPA emphasize the importance of promptness in the access to national legislation and the publication of texts of relevant legislation.⁹⁶ The World Bank Guidelines on goods and works emphasize that specific bidding opportunities should be advertised to all those interested in bidding and, in particular, to the international community in a timely manner to enable prospective bidders to obtain prequalification or bidding documents and prepare and submit their responses.⁹⁷

30. All three instruments provide that suppliers must be granted a sufficient period of time to prepare their tenders. The Model Law recognizes that the length of that period of time may vary from case

⁹¹Model Law Articles 28(1) and (3) and 7(4); World Bank Guidelines on goods and works, paragraph 2.18

⁹²GPA Article XII:3(a)-(c)

⁹³GPA Article IX:10

⁹⁴World Bank Guidelines on good and works, paragraph 2.18

⁹⁵World Bank Guidelines on goods and works, paragraph 2.18.

⁹⁶Model Law Article 5; GPA Article XIX:1

⁹⁷World Bank Guidelines on goods and works, paragraph 2.7 and 2.8

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.⁹⁸

31. The GPA prescribes certain minimum deadlines that must be allowed for the preparation, submission and receipt of tenders to enable responsive tendering. The relevant provisions also contain general considerations that should govern when entities set time-limits for tendering and delivery. Any prescribed time-limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining such a time-limit, entities shall, consistent with their own reasonable needs, take into account factors such as the complexity of the intended procurement, the extent of subcontracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points. Furthermore, each Party is required to ensure that its entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender.⁹⁹

32. Paragraphs 2 and 3 of Article XI of the GPA on deadlines specify the minimum periods that must be provided for the preparation and submission of tenders by suppliers after the issuance of notices of invitation to tender. The deadlines may be shortened under certain circumstances specified in that Article.

33. The World Bank Guidelines also require that the time allowed for the preparation and submission of bids shall be determined with due consideration of the particular circumstances of the project and the magnitude and the complexity of the contract and, generally, no less than six weeks from the date of invitation to bid or the date of availability of bidding documents, whichever is later, shall be allowed for International Competitive Bidding.¹⁰⁰ The relevant provisions require that sufficient time should be allowed to prospective bidders to prepare their bids after they have been notified of the procurement opportunity. A lead time of eight weeks is prescribed between the publication of a General Procurement Notice for procurement on the basis of International Competitive Bidding and the release of the bidding documents to the public. The notifications on opportunities to bid for specific contracts, or to prequalify, in the form of Specific Procurement notices, shall be published in sufficient time to enable prospective bidders to obtain prequalification or bidding documents and prepare and submit their responses.¹⁰¹

34. The GPA has detailed provisions aimed at allowing a sufficient period of time for potential suppliers to prequalify. To this end, the GPA provides that any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and complete the qualification procedures¹⁰²; the time required for qualifying suppliers shall not be used in order to keep suppliers of other GPA Parties off a suppliers' list or from being considered for a particular intended procurement¹⁰³; entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are

⁹⁸Model Law Article 30(1)

⁹⁹GPA Article XI, paragraph 1

¹⁰⁰World Bank Guidelines on goods and works, paragraph 2.43

¹⁰¹World Bank Guidelines on goods and services, paragraph 2.7 and 2.8

¹⁰²GPA Article VIII: (a)

¹⁰³GPA Article VIII :(c)

included in the lists within a reasonably short time; if, after publication of a tender notice, a supplier not yet qualified requests to participate, the entity shall promptly start procedures for qualification.¹⁰⁴

VI. TRANSPARENCY OF DECISIONS ON QUALIFICATION

(a) Transparency of criteria

35. All three instruments contain provisions aimed at ensuring that decisions on the qualification of suppliers are taken and seen to be taken on the basis of criteria that have been previously disclosed, are capable of objective application and linked to the abilities of interested suppliers to perform.¹⁰⁵

36. The Model Law sets forth certain criteria that procuring entities may require the suppliers to meet in order to qualify for participation in procurement proceedings.¹⁰⁶ The GPA requires that any conditions for participation in tendering procedures be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. Entities shall recognize as qualified suppliers such domestic and foreign suppliers that meet the conditions for participation in an intended procurement.¹⁰⁷ The GPA also prescribes a number of procedures in Article VIII to ensure that qualification process is fair and does not lead to discrimination among suppliers. The World Bank Guidelines emphasize that qualification of suppliers be based entirely on their capability and resources to perform the particular contract satisfactorily and lists the factors that should be taken into account.¹⁰⁸

37. In order to guarantee fairness of and non-discrimination in the qualification process, the Model Law requires that the same criteria must be applied to all suppliers participating in the procurement proceedings; the procuring entity shall evaluate the qualification of suppliers in accordance with the qualification criteria set forth in the prequalification or tender documents and; in reaching a decision with respect to the qualification of each supplier, the procuring entity shall apply only the criteria set forth in such documents.¹⁰⁹ The World Bank Guidelines require that the scope of the contract and a clear statement of the requirement for qualification be sent to those who have responded to invitation to prequalify.¹¹⁰

(b) Notification and listing

38. The three instruments have specific requirements on the provision of information on decisions to qualify to the suppliers concerned and to the general public. Under the Model Law, the procuring entity shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been prequalified.¹¹¹ Each supplier submitting an application to prequalify

¹⁰⁴GPA Article VIII:(e)

¹⁰⁵Model Law Article 6; GPA Article VIII and World Bank Guidelines on goods and works, paragraph 2.9 and 2.10

¹⁰⁶Model Law Article 6(b)

¹⁰⁷GPA Article VIII:(b) and (c)

¹⁰⁸World Bank Guidelines on goods and works, paragraph 2.9

¹⁰⁹Model Law Article 6(3)

¹¹⁰World Bank Guidelines on goods and works, paragraph 2.10

¹¹¹Model Law Article 7(6)

shall be notified whether or not it has been prequalified.¹¹² Under the Model Law and the GPA, the procuring entity shall, upon request, communicate to suppliers whose application to qualify was rejected or whose qualification has been brought to an end the grounds therefor.¹¹³ The GPA requires the entity concerned to advise any supplier having requested to become a qualified supplier of its decision in this regard.¹¹⁴

39. Under the procedures of Article X of the GPA on selective tendering, entities maintaining permanent lists of qualified suppliers are required to publish annually in one of the publications listed in Appendix III a notice containing the following¹¹⁵:

- the enumeration of the lists maintained, including their headings, in relation to the products or services or categories of products or services to be procured through the lists;
- the period of validity of the lists, and the formalities for their renewal.

Entities are required to notify the qualified suppliers included on permanent lists of the termination of any such lists or of their removal from them.¹¹⁶

VII. TRANSPARENCY OF DECISIONS ON CONTRACT AWARDS

(a) Transparency of criteria

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

41. As stated above under the section on tender documents, all three instruments provide that tender documents should contain the criteria, including any factor other than the price, to be considered by the procuring entity in determining the successful tender and for awarding the contract. All three instruments also emphasize that entities should evaluate tenders only on the basis of the criteria that have been previously published.

42. The provisions of the Model Law on examination, evaluation and comparison of bids 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

¹¹²Model Law Article 7(6)

¹¹³Model Law Article 7(7) and GPA Article XVIII:2(b)

¹¹⁴GPA Article VIII:1(f)

¹¹⁵GPA Article IX:9(a)-(c)

¹¹⁶GPA, Article VIII(f)

of any criterion that has not been set forth in the tender documents.¹¹⁷ In evaluating and comparing tenders, a procuring entity may grant a margin of preference in favour of a domestic supplier; but any rules for calculation of such preference margins should be set forth in the procurement regulations and should be calculated accordingly. Moreover, the use of a margin of preference is to be predisclosed in the tender documents and reflected in the record of the procurement proceeding.¹¹⁸

43. The GPA also explicitly provides that awards should be made in accordance with the criteria and essential requirements specified in the tender documentation.¹¹⁹ Unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.¹²⁰

44. The World Bank Guidelines require that bidding documents shall specify the relevant factors in addition to the price to be considered in bid evaluation and the manner in which they will be applied for the purpose of determining the lowest evaluated bid.¹²¹ The Borrower is required to prepare a detailed report on the evaluation and comparison of bids setting forth the specific reasons on which the recommendation for the award of the contract is based.¹²² Under the provisions on domestic preferences, the Borrower may grant a margin of preference in the evaluation of bids under International Competitive Bidding procedures; but in such cases, the bidding documents shall clearly indicate any preferences to be granted and the information required to establish the eligibility of a bid for such preference.¹²³

45. 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 specifications¹²⁴ 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.¹²⁵ The GPA and the World Bank Guidelines require that technical specifications prescribed by procuring entities shall be based on international standards, where such exist, otherwise, on national technical regulations,

¹¹⁷Model Law Article 34(4)(a)

¹¹⁸Model Law Articles 27(e), 34(4)(d) and 39(2)

¹¹⁹GPA Article XIII:4(c)

¹²⁰GPA Article XIII:4(b)

¹²¹World Bank Guidelines on goods and works, paragraph 2.51

¹²²World Bank Guidelines on goods and works, paragraph 2.53

¹²³World Bank Guidelines on goods and works, paragraph 2.54 and Appendix 2

¹²⁴Such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the procedures and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities

¹²⁵GPA Article VI:1; Model Law Article 16(1)

recognized national standards or other equivalent standards, or building codes.¹²⁶ The GPA has an explicit preference for the use of specifications based on performance rather than design or descriptive characteristics. The Model Law requires that any specifications, plans, drawings, designs and requirements or descriptions be based on the relevant objective technical and quality characteristics of the goods.¹²⁷ All three instruments proscribe the use of brand names and other references pointing to, for example, a patent, specific origin, producer or supplier.¹²⁸ Moreover, the GPA requires entities not to seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.¹²⁹

(b) Receipt and opening of tenders

46. The GPA provisions require that procedures and conditions for 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.¹³⁰

47. 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 opening of tenders and at enabling suppliers to observe that the entity complies with the procurement criteria and procedures. To this end, these two instruments provide, *inter alia*, that:

- bids shall be opened at the time and place stipulated in the notice of invitation to tender or in the tender notice¹³¹;
- all suppliers that have submitted tenders or their representatives shall be permitted by the procuring entity to be present at the opening of tenders¹³²;
- the technical proposals, submitted separately from financial proposals, shall be opened immediately by a committee of officials drawn from the relevant departments (technical, finance, legal, as appropriate) after the closing time for the submission of proposals¹³³; the financial proposals shall remain sealed and shall be deposited with a reputable public auditor or independent authority until they are opened publicly¹³⁴;

¹²⁶World Bank Guidelines on goods and works, paragraph 2.19 and 2.20

¹²⁷Model Law Article 16(2)

¹²⁸GPA Article VI:2-3; Model Law Article 16(2); World Bank Guidelines on goods and works, paragraph 2.19 and 2.20

¹²⁹GPA Article VI:4

¹³⁰GPA Article XIII:3

¹³¹Model Law Article 33(1); World Bank Guidelines on goods and works, paragraph 2.44

¹³²Model Law 33(2); World Bank Guidelines on goods and works, paragraph 2.44

¹³³World Bank Guidelines on consultants' services, paragraph 2.12

¹³⁴World Bank Guidelines on consultants' services, paragraph 2.12

- the name and address of each supplier whose tender is opened and the tender price or the total amount of each bid shall be read aloud to those persons present at the opening of tenders, and communicated on request to suppliers that have submitted tenders but that are not present or represented at the opening of tenders¹³⁵;
- the name and address of each supplier whose tender is opened and the tender price or the total amount of each bid shall be recorded immediately in the record of the tendering proceedings.¹³⁶

48. The three instruments set forth a number of other provisions that safeguard transparency at the bid evaluation stage. The procuring entity may ask bidders for clarifications of their tenders that are needed to evaluate them, but no changes are to be asked or permitted with a view to making unresponsive bids responsive except for the correction of arithmetical errors appearing on tender.¹³⁷ The GPA requires that any opportunity that may be given to tenderers to correct unintentional errors of form between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice.¹³⁸ The World Bank Guidelines preclude the alteration of bids after the deadline for receipt of bids.¹³⁹

49. Under the GPA, negotiations with entities may only take place where prior notice has been given or where no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth earlier in the notices or tender documentation.¹⁴⁰ To safeguard transparency in the course of negotiations, entities shall ensure that any elimination of participants is carried out in accordance with the criteria set forth in the notices and tender documentation; all modifications to the criteria and to the technical requirements are transmitted in writing to all remaining participants in the negotiations; all remaining participants are afforded an opportunity to submit new or amended submissions on the basis of the revised requirements; and when negotiations are concluded, all participants remaining in the negotiations shall be permitted to submit final tenders in accordance with a common deadline.¹⁴¹ The Model Law prohibits negotiations between the procuring entity and a supplier with respect to a tender submitted by the supplier.¹⁴²

50. The World Bank Guidelines require that information relating to the examination, clarification, and evaluation of bids and recommendations concerning awards shall not be disclosed to bidders or

¹³⁵Model Law Article 33(3); World Bank Guidelines on goods and works, paragraph 2.44

¹³⁶Model Law Article 33(2); World Bank Guidelines on goods and works, paragraph 2.44

¹³⁷Model Law Article 34(1)

¹³⁸GPA Article XIII:1(b)

¹³⁹World Bank Guidelines on goods and works, paragraph 2.45

¹⁴⁰GPA Article XIV:1

¹⁴¹GPA Article XIV:4(a)-(d)

¹⁴²Model Law Article 35

other persons not officially concerned with the bidding process until the successful bidder is notified of the award.¹⁴³

51. Under the procedures on negotiations in the Model Law and in the GPA, entities are required to treat information in tenders, in particular any technical, price or other market information, confidentially and not to provide information intended to assist particular participants to bring their tenders up to the level of other participants.¹⁴⁴

52. Under the World Bank Guidelines on consultancy services, information relating to evaluation of proposals and recommendations concerning awards shall not be disclosed to the other consultants that have submitted the proposals or to other persons until the award of the contract is notified to the successful firm.¹⁴⁵

(c) Ex-post information on contract awards

53. The three instruments lay down provisions requiring procuring entities to inform the public and, in particular, the suppliers that have participated in the procurement process of their award decisions. The Model Law and the GPA require entities to publish a notice award after the award of each contract.¹⁴⁶ 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. Such information shall relate to¹⁴⁷:

- the nature and quantity of products or services in the contract award;
- the name and address of the entity awarding the contract;
- the date of award of the contract;
- the name and address of winning tenderer;
- the value of the winning award or the highest and lowest offer taken into account in the award of the contract;
- where appropriate, means of identifying the notice of invitation to tender or justification for the use of limited tendering procedure; and
- the type of procedure (open, selective or limited) used.

¹⁴³World Bank Guidelines on goods and services, paragraph 2.46

¹⁴⁴Model Law Article 49.3 and GPA Article XIV:3

¹⁴⁵World Bank Guidelines on consultants' services, paragraph 2.28

¹⁴⁶Model Law Article 14(1) and (2); GPA Article XVIII:1

¹⁴⁷GPA Article XVIII:1(a)-(g)

54. In addition to 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.¹⁴⁸ 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.¹⁴⁹

55. The GPA confers on unsuccessful tenderers the right to obtain the necessary information on the contract award. Accordingly, each entity must respond promptly to requests for further information from a supplier of a GPA Party regarding its procurement practices and procedures. In order to foster transparency and accountability of the decisions of the procuring entity, the Model Law and the GPA allow an unsuccessful tenderer to seek and obtain pertinent information concerning the reasons why its tender was not selected. The GPA also requires the provision of information on the characteristics and relative advantages of the tender selected as well as the name of the winning tenderer. Under the Model Law, however, the procuring entity is not required to justify the grounds for its rejection of tenders.¹⁵⁰

56. 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 the public interest or would prejudice the legitimate commercial interests of particular enterprises or might prejudice fair competition between suppliers.¹⁵¹

57. 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.¹⁵²

VIII. REVIEW

58. 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.¹⁵³

59. 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

¹⁴⁸GPA Article XVIII:3

¹⁴⁹Model Law Article 36(6)

¹⁵⁰Model Law Article 12(1) and GPA Article XVIII:2

¹⁵¹GPA Article XVIII:4

¹⁵²Model Law Article 45 and Article 34(8)

¹⁵³Model Law Article 52; GPA Article XX:1

to an administrative review body.¹⁵⁴ 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.¹⁵⁵

60. If the matter is not settled at this stage, the complainant is entitled, under the Model Law, to seek an administrative review.¹⁵⁶ The functions of 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.¹⁵⁷ The Model Law also lays down certain procedures to ensure the openness and fairness of review procedures.¹⁵⁸

61. 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.¹⁵⁹

62. The World Bank Guidelines allow a bidder or a consultant who wishes to ascertain the grounds on which its bid or proposal was not selected, after notification of award, to address a request for explanation to the Borrower country or agency. If the bidder or consultant is not satisfied with the explanation given, it may seek debriefing with the World Bank.¹⁶⁰

63. 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.¹⁶¹ However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. The provisions of the Model Law also provide for suspension of procurement proceedings which take account of the

¹⁵⁴GPA Article XX:1

¹⁵⁵Model Law Article 53

¹⁵⁶Model Law Articles 54 and 55

¹⁵⁷Model Law Article 57

¹⁵⁸Model Law Article 55

¹⁵⁹GPA Article XX:6(a)-(g)

¹⁶⁰World Bank Guidelines on goods and works, Appendix 4, paragraph 15 and on consultants' services, Appendix 4, paragraph 15

¹⁶¹GPA Article XX:7(a)-(c)

need of the procuring entity to conclude a contract in an economic and efficient way without undue disruption and delay in the procurement process.¹⁶²

IX. OTHER MATTERS RELATED TO TRANSPARENCY

(a) Maintenance of record of proceedings

64. 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, 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.¹⁶³

65. Under the Model Law, the record of proceedings should contain, at a minimum, the following key information regarding the *procurement*, the *procuring entity* and *suppliers* and *evaluation of tenders*¹⁶⁴:

- a brief description of the goods, construction or services to be procured, or of the procurement need for which the procuring entity requested proposals or offers;
- the names and addresses of suppliers that submitted tenders, proposals, offers or quotations, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price;
- information relative to the qualifications, or lack thereof, of suppliers that submitted tenders, proposals, offers or quotations;
- the price, or the basis for determining the price, and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract, where these are known to the procuring entity;
- a summary of the evaluation and comparison of tenders, proposals, offers or quotations, including the application of any margin of preference;
- any information on rejection of tenders, proposals, offers or quotations under the relevant provisions of the Model Law including a statement to that effect and the grounds therefor;
- a statement of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

¹⁶²Model Law Article 56

¹⁶³UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment, pages 61 and 71

¹⁶⁴Model Law Article 11(a)-(m)

- in procurement proceedings in which the procuring entity, limits participation on the basis of nationality, a statement of the grounds and circumstances relied upon by the procuring entity for imposing the limitation;
- a summary of any requests for clarification of the prequalification or solicitation documents, the responses thereto, as well as a summary of any modification of those documents.

66. The GPA stipulates that information on the opening of tenders shall remain with the entity concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures relating to the provision of information by entities (GPA Article XVIII), between governments (GPA Article XIX) and under the procedures for bid challenge (GPA Article XX) and dispute settlement (GPA Article XXII).¹⁶⁵

67. Moreover, given the more restrictive nature of limited tendering procedures under the GPA, entities using this method in a given procurement are required to prepare a report in writing on each contract awarded using the limited tendering method, rather than open and selective tendering. Each report shall contain the name of the procuring entity, value and kind of goods or services procured, country of origin, and a statement of the conditions for using limited tendering as stated in Article XV:1 which prevailed. This report shall remain with the entities concerned at the disposal of the government authorities responsible for the entity in order that it may be used if required under the procedures for information and review as regards obligation of entities and Parties (Articles XVIII and XIX) and on bid challenge and dispute settlement (Articles XX and XXII).

(b) Information technology

68. Information technology can play, and in some countries is already playing, a major role in enhancing transparency. With a view to ensuring that the provisions of the GPA do not constitute an unnecessary barrier to technical progress, Article XXIV:8 of the GPA foresees consultations, and if necessary, negotiations of modifications to the Agreement in view of developments in the use of information technology in government procurement. The consultations in the Committee shall, in particular, aim to ensure that the use of information technology promotes the aims of open, non-discriminatory and efficient government procurement through transparent procedures, that contracts covered under the Agreement are clearly identified and that all available information relating to a particular contract can be identified. The relevant provision of the GPA further states that when a Party intends to innovate, it shall endeavour to take into account the views expressed by other Parties regarding any potential problems. In the context of the three-year review 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 the recent developments in information technology.¹⁶⁶

(c) Language

69. Under the Model Law, there is a general requirement that documents relating to tendering proceedings shall be formulated in the official language or languages of the enacting state and, except in certain specified cases, in a language customarily used in international trade. An additional rule

¹⁶⁵GPA Article XIII:3

¹⁶⁶GPA/8

in the Model allows the formulation and submission of tenders in any language in which the tender documents have been issued or in any other language that the procuring entity specifies in the tender documents.¹⁶⁷ The GPA requires the submission of a summary of the invitation to tender in one of the WTO official languages.¹⁶⁸ The World Bank Guidelines require that the qualification documents be prepared in either English, French or Spanish but allow entering into contracts with local bidders in the national language of the Borrower.¹⁶⁹

X. INFORMATION TO BE PROVIDED TO OTHER GOVERNMENTS

70. The GPA is the only international instrument on government procurement that confers on governments that are Parties to it contractual rights and obligations. Therefore, the procedures described in this section concern the exchange of information between governments Parties to the GPA as required under the relevant provisions of the GPA.

(a) Information on national legislation

71. The GPA Parties are required to be prepared to explain their government procurement procedures in response to a request by any other GPA Party.¹⁷⁰ More particularly, the provisions on special treatment for developing countries require developed country Parties to establish, individually or jointly, 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, notices about intended procurement which have been published, 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 Committee on Government Procurement established under the Agreement may also set up an information centre to respond to enquiries by developing countries.¹⁷¹

72. 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. The definition of confidential information is identical to that in Article X of GATT 1994 with the addition of a reference to information "which would prejudice fair competition between suppliers".¹⁷²

¹⁶⁷Model Law Articles 17 and 29

¹⁶⁸GPA Article IX:8

¹⁶⁹World Bank Guidelines on goods and works, paragraph 2.15 and on consultants' services, paragraph 1.21 and 1.22

¹⁷⁰GPA Article XIX:1

¹⁷¹GPA Article V:11

¹⁷²GPA Article XIX:4

(b) Notification of national legislation

73. Under the GPA each Party has an obligation to inform the Committee on Government Procurement of any changes in the national legislation and its administration.¹⁷³ The Committee has adopted a Decision on procedures for the notification of national implementing legislation by the GPA Parties, including responses to a checklist of issues.¹⁷⁴

(c) Information on contract awards

74. Further to the obligations of entities under Article XVIII:2(c) of the GPA relating to the provision of information to an unsuccessful tenderer, the GPA allows the government of an unsuccessful tenderer which is a Party to the GPA to seek such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially. To this end, the procuring government is required to provide information on both the characteristics and relative advantages of the winning tender and the contract price. The government may disclose the information thus obtained provided it exercises this right with discretion. In cases where 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.¹⁷⁵ The GPA also imposes a general requirement on Parties to provide, upon request, to any other Party, information concerning procurement by covered entities and their individual contract awards.¹⁷⁶

(d) Statistical information

75. 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).

¹⁷³GPA Article XXIV:5(a) and (b)

¹⁷⁴GPA/1/Add.1

¹⁷⁵GPA Article XIX:2

¹⁷⁶GPA Article XIX:3

PART B

TRANSPARENCY PROVISIONS IN WTO AGREEMENTS

I. INTRODUCTION

76. WTO Agreements contain extensive transparency provisions aimed at ensuring the adequate provision of information on national trade measures both to economic operators and to other WTO Members. These provisions would appear to be motivated by three main underlying concerns:

- first, that traders and other affected economic operators should, as a basic principle, only be subject to measures which have been previously published or, at least, made otherwise publicly available;
- second, the need for adequate information on trading opportunities provided under the WTO to be available in order that economic operators can take advantage of them; and
- third, the need for information on national measures to be available to WTO bodies and other Members as a basis for monitoring the operation of WTO Agreements and, in particular, compliance with them.

77. This Part focuses on provisions in WTO agreements, in particular those in Annex I of the WTO, relating to the availability of information on national trade measures to traders and other economic operators. It thus deals with such matters as the publication or public availability of laws, regulations, judicial decisions and administrative rulings, advanced notice of proposed regulations, the provision of information in response to requests and the treatment of confidential information. Another important dimension of transparency is the notification of information by Member governments to other Members through the WTO. Rather than duplicating the considerable work that has been done on compiling information on these notification requirements, notably by the Working Group on Notification Obligations and Procedures, the attention of delegations is drawn to documents G/NOP/W/2/Rev.1 and G/L/112/Add.1 which list existing notification obligations under agreements in Annex 1A of the WTO Agreement.

II. PUBLICATION

(a) Publication

78. *Article X of GATT 1994* is at the origin of the provisions in other WTO Agreements which set forth specific obligations requiring Members to publish laws, regulations, judicial decisions and administrative rulings of general application effective in Members and which relate to the operation of the respective Agreements. Article X:1 of GATT 1994 reads:

"Article X

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party pertaining to the classification

or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published."

79. Transparency is part of the general obligations and disciplines in the *General Agreement on Trade in Services*. The requirement to publish, or make otherwise publicly available, is set out in the following terms:

"Article III

Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available."

80. The *Agreement on Trade-Related Aspects of Intellectual Property Rights* establishes the requirement to publish, or make publicly available, the relevant legislation as part of the procedures on dispute prevention or settlement.

"Article 63

Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published."

81. It may be noted that in the WTO Agreements cited above, the obligation to publish extends to international agreements in force between Members affecting the subject matter of the respective Agreements.

82. The *Agreement on Implementation of Article VII of GATT 1994* stipulates publication of domestic legislation by reference to Article X:1 of GATT 1994. The relevant provision reads:

"Article 12

Laws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement shall be published in conformity with Article X of GATT 1994 by the country of importation concerned."

83. The requirement on publication in the *Agreement on Preshipment Inspection* is set forth as part of the general transparency obligations imposed on user Members. These provisions read:

"Article 2

Obligations of User Members

Transparency

8. User Members shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them."

84. The disciplines governing the application of rules of origin during the transition period under the *Agreement on Rules of Origin* require Members to comply with the requirements on publication set forth in Article X:1 of GATT 1994. The relevant provisions read:

"Article 2

Disciplines During the Transition Period

Until the work programme for the harmonization of rules of origin set out in Part IV is completed, Members shall ensure that:

- (g) their laws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994."

85. Under the *Agreement on Import Licensing Procedures* the obligation imposed on Members to publish concerns, in particular, the specific procedures governing the application of licensing requirements and the lists of products subject to licensing requirement. The relevant provision reads:

"Article 1

General Provisions

4. (a) The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the

Committee on Import Licensing provided for in Article 4 (referred to in this Agreement as "the Committee"), in such a manner as to enable governments and traders to become acquainted with them."

86. The relevant obligations of central government bodies in the *Agreement on Technical Barriers to Trade* with respect to publication or public availability of all regulations and procedures read:

"Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

2.11 Members shall ensure that all technical regulations which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them."

"Article 5

Procedures for Assessment of Conformity by Central Government Bodies

5.8 Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them."

Moreover, the Code of Good Practice for the Preparation, Adoption and Application of Standards under the Agreement on Technical Barriers to Trade contains the following provision requiring standardizing bodies to publish the standards adopted by them:

"O. Once the standard has been adopted, it shall be promptly published."

87. *Annex B* of the *Agreement on the Application of Sanitary and Phytosanitary Measures* stipulates the publication of regulations (sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally) in the following terms:

"Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them."

88. The *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* requires Members to give public notice of the initiation of an investigation, of any preliminary or final determination, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. The details of information that such notices should contain, or otherwise make available through a separate report, are also set forth in the relevant provisions. The requirements on public notice also apply to the initiation and completion of reviews of anti-dumping duties and price undertakings and to decisions to apply duties retroactively.¹⁷⁷

¹⁷⁷Article 12

89. The *Agreement on Subsidies and Countervailing Measures* requires Members to give public notice of the initiation of an investigation of an alleged subsidy, of any preliminary or final determination, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. The details of information that such notices should set forth, or otherwise make available through a separate report, are enumerated under the relevant provisions. The requirements on public notice also apply to the initiation and completion of reviews of countervailing duties and to decisions to apply countervailing duties retroactively.¹⁷⁸

(b) Timing of publication

90. *Article X:2 of GATT 1994* requires that national legislation shall be published promptly. The *General Agreement on Trade in Services* requires that measures be published promptly and, except in emergency situations, at the latest by the time of their entry into force.

91. The *Agreement on Import Licensing* sets forth an obligation to publish licensing requirements and any amendments in advance of their entry into force and sets out specific time-limits. The relevant provision reads:

"Article 4(a)

... Such publication shall take place, whenever practicable, 21 days prior to the effective date of the requirement but in all events not later than such effective date. Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above."

92. The provisions on transparency in the *Agreement on Preshipment Inspection* also emphasize the importance of informing exporters of any additional procedural requirements or changes in existing procedures. They require that such modifications shall not be applied to a shipment unless the exporter is informed of these changes at the time the inspection date is arranged. An exception clause applies in emergency situations of the type addressed by Articles XX and XXI of GATT 1994 allowing the application of such additional requirements or changes to a shipment before the exporter has been informed.¹⁷⁹

93. Under the *Agreement on Technical Barriers to Trade*¹⁸⁰ and the *Agreement on the Application of Sanitary and Phytosanitary Measures*¹⁸¹, Members are required to allow a reasonable time between the publication of a measure and its entry into force to allow for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member. However, exceptions are allowed for urgent circumstances referred to in the respective Agreements.

¹⁷⁸Article 22

¹⁷⁹Article 2:6

¹⁸⁰Article 2.12 and Article 5.9

¹⁸¹Annex B, paragraph 2

III. PUBLIC NOTICE OF PROPOSED REGULATIONS

94. As an integral part of the procedures for the notification of proposed regulations and procedures, the *Agreement on Technical Barriers to Trade*¹⁸² and the *Agreement on Sanitary and Phytosanitary Measures*¹⁸³ require Members to give advance public notice of proposed regulations or procedures. Under these provisions, Members are required to publish a notice in a publication at an early appropriate stage in such a manner as to enable interested parties in other Members to become acquainted with the proposal to introduce a particular regulation. However, in case of urgent problems of safety, health, environmental protection or national security, Members are allowed to proceed with the adoption of regulations and procedures without giving advance public notice.

IV. PROVISION OF INFORMATION IN RESPONSE TO REQUESTS FROM OTHER MEMBERS

95. Certain WTO agreements contain obligations on Members to provide information bilaterally to another Member in response to a specific request.

96. Under the *General Agreement on Trade in Services*, the relevant provision included in Article III on transparency reads:

"4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1."

97. The obligation on the establishment of enquiry point(s) under the transparency provisions in Article III of the *General Agreement on Trade in Services* reads:

"4. ... Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations."

98. Under the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Members shall respond to requests for information from another Member concerning domestic legislation as well as on any specific judicial decisions or administrative rulings or bilateral agreements in the area of intellectual property. The relevant provision under the Article on transparency reads:

"Article 63

Transparency

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member,

¹⁸²Articles 2.9.1 and 5.6.1

¹⁸³Annex B, paragraph 5(a)

having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements."

99. The obligation in the *Agreement on Trade-Related Investment Measures* to respond to requests for information is stated in the following terms:

"Article 6

Transparency

3. Each Member shall accord sympathetic consideration to requests for information, and afford adequate opportunity for consultation, on any matter arising from this Agreement raised by another Member."

100. Under the *Agreement on Technical Barriers to Trade*, Members must set up a national enquiry point to provide information on any trade-related technical regulations, standards, conformity assessment procedures within the Member's territory whether proposed or adopted, as well as on the Member's participation in bilateral or plurilateral standards-related agreements, regional standardizing bodies and conformity assessment systems. The establishment of enquiry points to provide information on the standardization activities of non-governmental organizations is subject to a best-efforts obligation.^{184,185,186}

101. Annex B of the *Agreement on the Application of Sanitary and Phytosanitary Measures* setting forth transparency requirements gives details on the type of information which may be obtained by interested Members from enquiry points established under that Agreement.^{187,188}

¹⁸⁴Article 10.1, 10.2 and 10.3

¹⁸⁵Document G/TBT/ENQ/-, which is regularly updated, contains the list of names and addresses of enquiry points and any additional information provided by Members concerning their operation.

¹⁸⁶Subsequent to the Decisions adopted by Ministers on 15 April 1994 relating to the Agreement on Technical Barriers to Trade, a WTO Standards Information Service operated by ISO was established to provide information on the activities of the standardizing bodies which have subscribed to the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to the Agreement (G/L/1).

¹⁸⁷Annex B, paragraph 3

¹⁸⁸Document G/SPS/ENQ/-, which is regularly updated, contains the list of names and addresses of enquiry points and any additional information provided by Members concerning their operation.

V. PROVISION OF INFORMATION IN RESPONSE TO REQUESTS FROM ECONOMIC OPERATORS

102. The *Agreement on the Implementation of Article VII of the GATT 1994* provides as follows:

"Article 16

Upon written request, the importer shall have the right to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer's goods was determined."

103. The *Agreement on Preshipment Inspection* includes specific provisions which require the entities in user Members to provide information in response to requests by exporters. In this respect the Agreement reads:

"Article 2

Obligations of User Members

Transparency

6. User Members shall ensure that, when initially contacted by exporters, preshipment inspection entities provide to the exporters a list of all the information which is necessary for the exporters to comply with inspection requirements. The preshipment inspection entities shall provide the actual information when so requested by exporters. This information shall include a reference to the laws and regulations of user Members relating to preshipment inspection activities, and shall also include the procedures and criteria used for inspection and for price and currency exchange-rate verification purposes, the exporters' rights vis-à-vis the inspection entities, and the appeals procedures set up under paragraph 21."

104. The provisions on transparency to be provided by user Members in the *Agreement on Preshipment Inspection* requires the preshipment inspection offices maintained by preshipment inspection entities to serve as information points:

"Article 2

Obligations of User Members

Transparency

7. User Members shall ensure that the information referred to in paragraph 6 is made available to exporters in a convenient manner, and that the preshipment inspection offices maintained by preshipment inspection entities serve as information points where this information is available."

105. Enquiry points established under Article 10 of the *Agreement on Technical Barriers to Trade* is to answer all reasonable enquiries not only from other Members but also interested parties in other Members.

106. The provisions on increasing participation of developing countries in Article IV of the *General Agreement on Trade in Services* also require developed country Members to establish contact points to facilitate the access of developing Members' service suppliers to information. The type of information that such contact points should provide is also set forth. The relevant provision reads:

"Article IV

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

- (a) commercial and technical aspects of the supply of services;
- (b) registration, recognition and obtaining of professional qualifications; and
- (c) the availability of services technology."

VI. TREATMENT OF CONFIDENTIAL INFORMATION

107. It should be noted that many WTO Agreements contain provisions allowing confidential information to be withheld, notwithstanding the normal transparency obligation. Confidential information is generally defined as information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private. In this respect, Article X:1 of GATT 1994 reads:

"... The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private."

108. Furthermore, the Article of GATT 1994 on security exceptions in Article XXI has provisions on the treatment of confidential information which read:

"Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests."

109. Article IIIbis of the *General Agreement on Trade in Services* reads:

"Article III bis

Disclosure of Confidential Information

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private."

110. The language in the *Agreement on Trade-Related Intellectual Property Rights*, paragraph 4 of Article 63, allowing confidential information to be withheld is similar to that in Article X:1 of GATT 1994.

111. Article 6 of the *Agreement on Trade-Related Investment Measures* on transparency also makes a direct reference to the relevant provision in Article X:1 of GATT 1994 and allows Members not to disclose confidential information.

112. The *Agreement on Technical Barriers to Trade* allows the withholding of information related to essential security interests. The relevant provision reads:

"10.8 Nothing in this Agreement shall be construed as requiring:

10.8.3 Members to furnish any information, the disclosure of which they consider contrary to their essential security interests."

113. The provisions on the protection of confidential information are part of the General Reservations under the *Agreement on the Application of Sanitary and Phytosanitary Measures*. They read:

General Reservations

11. Nothing in this Agreement shall be construed as requiring:

(b) Members to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.

114. It might be noted that, while the above provisions of WTO Agreements allow Members to exempt confidential information from transparency obligations, certain other provisions of WTO Agreements mandate the protection of such information. These include Article 10 of the Agreement on Implementation of Article VII of the GATT 1994, Article 12 of the Agreement on Preshipment Inspection and Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.