The attached draft provisions relating to national treatment and non-discrimination, technical specifications and tendering procedures for a possible Code on Government Procurement have been received from the Delegations of Canada, Finland, Sweden and Switzerland for consideration by the Sub-Group. These delegations have submitted these drafts as discussion papers without prejudice to their negotiating positions following the invitation of the Sub-Group at its last meeting (MTN/NTM/33, paragraph 7). These papers are not intended to be a complete Code as they do not deal with a number of important issues, including differential treatment for developing countries. The relevant paragraphs of MTN/NTM/W/81 have been identified in the left-hand margins of the papers to facilitate their consideration by the Sub-Group.
NATIONAL TREATMENT AND NCN-DISCRIMINATION

1. With respect to all laws, regulations, procedures and practices affecting government procurement covered by this Agreement, signatories shall provide immediately and unconditionally to the products and suppliers of all signatories offering products originating within the signatory countries, treatment no less favourable than:

(a) that accorded to domestic products and suppliers;

and

(b) that accorded to products and suppliers of any other signatory.

2. The provisions of paragraph 1 shall not apply to customs duties and charges of any kind imposed on or in connexion with importation, the method of levying such duties and charges, and other import regulations and formalities.

3. This agreement does not prevent advantages over and above, or procedures other than, those contained herein being accorded or applied between parties to this agreement who are members of the same Customs Union or Free-Trade Area.
(a) Technical specifications laying down the characteristics of the products to be purchased such as quality, performance, safety and dimensions, testing and test methods, symbols, terminology, packaging, marking and labelling, and conformity certification requirements prescribed by procurement agencies or entities, shall not be prepared, adopted or applied with a view to creating obstacles to international trade nor have the effect of affording protection to domestic production of any signatory or discriminating among signatories.

(b) Any technical specification prescribed by procurement agencies or entities shall, where appropriate:

   (i) be in terms of performance rather than design; and

   (ii) be based on recognized international standards, national technical regulations, or national standards.

(c) There shall be no requirement or reference to a particular trade mark or name, patent, design or type, specific origin or producer, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tenders.
TENDERING PROCEDURES

1. Procurement agencies and entities shall use either open tendering procedures under which all interested suppliers may submit a tender or selective tendering procedures under which only those suppliers invited by the agencies or entities concerned may submit a tender, unless the conditions specified in paragraph 12 below apply. For the purposes of this Agreement, a supplier is any legal or natural person who, within his current activities, is in a position to deliver the products and incidental services described in the notice of proposed purchase or in the tender documents.

Qualification of suppliers

2. Procurement agencies and entities, in qualifying suppliers, shall not discriminate among foreign suppliers or between domestic and foreign suppliers. Qualification procedures shall be consistent with the following:

(a) any conditions for participation in tendering procedures shall be made known to interested suppliers /in adequate time/ to enable them to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;

(b) any conditions for participation required from suppliers, including financial guarantees, technical qualifications, information necessary for establishing the financial, commercial and technical capacity of suppliers as well as the verification of qualifications, shall be no less favourable to foreign suppliers than to domestic suppliers and shall not discriminate among foreign suppliers;

(c) the process of and the time required for, qualifying suppliers shall not be used to keep a foreign supplier off a suppliers' list or from being considered for a particular proposed purchase. Procurement agencies and entities shall recognize as qualified suppliers such domestic or foreign suppliers which meet the conditions for participation in a particular proposed purchase. Suppliers requesting to
participate in a particular proposed purchase who may not yet be qualified may also be considered, pending completion of the qualification procedure;

(d) procurement agencies and entities maintaining permanent lists of qualified suppliers shall ensure that all qualified suppliers so requesting are included in the lists within a /reasonably short time/;

(e) any supplier having requested to become a qualified supplier shall be advised, upon request, of the decision of the procurement agencies or entities concerned as to whether or not he has been recognized as a qualified supplier. Qualified suppliers included on permanent lists by procurement agencies or entities shall also be notified of the termination of any such lists /as well as the establishment of related lists for which they might wish to be included/;

(f) nothing in paragraphs (a) to (e) above shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions of this Agreement.

Notice of proposed purchase and tender documents

3. Procurement agencies and entities shall publish a notice of each proposed purchase in the publications listed in Annex C. Such notice shall constitute an invitation to tender /in the case of open tendering procedures and an invitation to submit a request to become a qualified supplier in the case of selective tendering procedures/.

4. Each notice of proposed purchase shall contain the following information: (a) the nature and quantity of the products to be supplied; (b) whether the procedure is open or selective; (c) any delivery date; (d) the address and final date for receiving tenders or applications to qualify for the suppliers' list /whether permanent or not/ as well as the language or languages in which they must be submitted; (e) the address of the agency or entity awarding the
contract and providing any information necessary for obtaining specifications and other documents; (f) any economic and technical requirement, financial guarantees and information required from suppliers; (g) the amount and terms of payment of any sum payable for the tender documentation. In the case of contracts of a recurring nature, or intended to be renewed, where the total value of purchases to be made under these contracts is likely to exceed the threshold, the first notice of the proposed purchase shall contain an estimate of the volume of purchases envisaged in the first year.

5. Procurement agencies and entities maintaining permanent lists of qualified suppliers for specific products or groups of products, shall be deemed to have met the provisions of paragraphs 3 and 4 above providing they publish the existence of their specific or grouped product lists in the relevant publications in Annex C, including additions to and deletions from such lists, together with sufficient information to enable potential suppliers to initiate the qualification process.

6. To ensure maximum effective international competition under selective tendering procedures, procurement agencies and entities shall send invitations to tender to the maximum possible number of qualified domestic and foreign suppliers, consistent with the economic and practical considerations related to the proposed purchase. They shall select the suppliers to be invited to tender from among those who meet the conditions for participation as stated in the notices. Suppliers requesting to participate in a particular proposed purchase who may not yet be qualified may also be considered, pending completion of the qualification procedure.

7. If after publication of a notice to purchase but before the time set for opening or receipt of tenders as specified in the tender documents, it becomes necessary to amend or reissue the notice, the amendment, or the reissued notice shall be given the same circulation as the original documents upon which the amendment is based. Any significant information given to a supplier in respect of a particular proposed purchase shall be sent simultaneously to all other suppliers concerned in adequate time to permit the suppliers to consider such information and to respond to it.
8. Any time limit prescribed in the notice of proposed purchase or the tender documents shall be adequate to allow foreign as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedures. In determining any such time limit, procurement agencies or entities shall, consistent with their own reasonable needs, take into account such factors as the complexity of the proposed purchase, the extent of sub-contracting anticipated, and the normal time for transmitting tenders by mail from foreign as well as domestic points.

9. Tender documents provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including the following:

   (a) the address of the procurement agency or entity to which tenders should be sent;

   (b) the address where, and time limit within which, requests for supplementary information should be sent;

   (c) the language or languages in which tenders and tendering documents must be submitted;

   (d) the closing date and time for receipt of tenders and the length of time during which any tender would be open for acceptance;

   (e) the persons authorized to be present at the opening of tenders and the date, time and place of this opening;

   (f) any economic and technical requirement, financial guarantees and information or documents required from suppliers;

   (g) a complete description of the products required or of any requirements including technical specifications, conformity certification to be fulfilled by the products, necessary plans, drawings and instructional materials;

   (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders and the cost elements to be included in evaluating tender prices, such as transport, insurance and inspection costs, and in the case of foreign products, customs duties and other import charges, taxes and currency;

   (i) the terms of payment;

   (j) any other terms or conditions.
10. (a) In open procedures, the purchasing entities shall forward the tender documents at the request of any supplier participating in the procedure, and shall reply to any request for explanations relating thereto \[within six days\] \[promptly\] following receipt of the request for the tender documents, or for explanations.

(b) In selective procedures, the purchasing entities shall forward the tender documents at the request of any supplier invited to submit a tender, and shall reply to any request for explanations relating thereto, \[within six days\] \[promptly\] following receipt of the request for the tender documents, or for explanations.

(c) The purchasing entities shall reply to any reasonable request for relevant information submitted by a supplier participating in the procedure \[within six days\] \[promptly\] following receipt thereof, on condition that such information does not give that supplier an advantage over its competitors in the procedure for the award of the contract, \[and to the extent that the purchasing entity considers that such notification is not detrimental to the proper functioning of the procedure\].

Submission, receipt and opening of tenders and awarding of contracts

11. The submission, receipt and opening of tenders and awarding of contracts shall be consistent with the following:

(a) Tenders shall normally be submitted by mail. If tenders by telex, telegram or telecopy are permitted, the tender made thereby must include all the information necessary for the evaluation of the tender, in particular the definitive price proposed by the tenderer and a statement that the tenderer agrees to all the terms, conditions and provisions of the invitation to tender. Any tender that does not include such a statement may, nonetheless, be taken into consideration. The tender must be confirmed by letter posted \[on the day on which the telex, telegram or telecopy is sent\] \[promptly\] or by the despatch of a signed copy of the telex, telegram or telecopy. Tenders presented by telephone shall not be permitted. The content of the telex, telegram or telecopy shall prevail where there is a difference or conflict between that content and any documentation received after the time limit. Requests to participate in a selective procedure may be submitted by telex, telegram or telecopy. \[They must be confirmed by letter\].
(b) The opportunities that may be given to tenderers to correct unintentional errors between the opening of tenders and the awarding of the contract shall not be permitted to give rise to any discriminatory practice.

(c) A supplier shall not be penalized if a tender is received in the office designated in the tender documents after the time specified because of delay due solely to mishandling on the part of the procurement agency or entity. Tenders may also be considered in other exceptional circumstances if the procedures of the procurement agency or entity concerned so provide.

(d) All tenders solicited under open and selective procedures by procurement agencies or entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings, as well as the availability of information from the openings. The receipt and opening of tenders shall also be consistent with the national treatment and non-discrimination provisions of this Agreement.

(e) To be considered for award, a tender must, at the time of opening, conform to the requirements of the tender documents.

(f) Unless in the public interest all tenders are rejected, procurement agencies or entities 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 or foreign products, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the tender documentation is determined to be the most advantageous for the contract in question;

(g) If it appears from evaluation in selective tendering that no single tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the tender documentation, the procurement agency or entity shall, in any subsequent negotiations, give equal consideration and treatment to all tenders within the competitive range.

(h) Commercially confidential information provided by a supplier at any stage of the procurement process shall not be revealed to any other supplier.
Exceptions to the use of open or selective tendering

12. The provisions of paragraphs 1 through 11 above governing open and selective tendering procedures need not apply in the following conditions, provided that these conditions are not applied in a manner which would constitute a means of discrimination among foreign suppliers or protection to domestic production:

(a) Where a specified proprietary product or a product with highly specialized technical characteristics is required for which no reasonable alternative or substitute exists;

(b) Where the proposed purchase is for products or replacement parts having to meet requirements of interchangeability with already existing equipment and a change of supplier would result in the purchase of equipment having different technical characteristics causing incompatibility or disproportionate technical difficulties of operation or maintenance;

(c) When after the fulfilment of the requirements concerning the notice of proposed purchase only one qualified source is known to the procurement agency or entity or when no responsive tenders are received from a qualified supplier;

(d) Where, owing to circumstances that could not have been reasonably foreseen by the procurement agency or entity, there is serious urgency for the purchase in question, and the products could not be obtained in time by means of open or selective tendering procedures.

(e) When the products concerned are manufactured only for and in the course of research, experiments, study, or development:

Where production and purchase are undertaken following design, development or research work, and it is impracticable to seek competition for production:

(i) because production contracts must be entered before development has been completed, or

(ii) because, although development has been completed, the requirement is of such a nature that the delay consequent on placing it with a new contractor would be unacceptable, or
(iii) because the purchasing entity has a contractual 
commitment arising out of the research and develop­
ment contracts, to consider the reasonable need of 
the design contractor for production orders to 
enable him to maintain his manufacturing and 
design capacity.

Public information

13. Any law, regulation, judicial decision, administrative ruling of 
general application, and procedure (including standard contract forms 
or contract clauses), affecting government procurement covered by this 
Agreement, shall be published promptly in the relevant publications 
listed in Annex C in such a manner as to enable other signatories and 
suppliers to become acquainted with them. Signatories shall, upon 
request, be prepared to explain their government procurement procedures 
to any signatory or supplier.

14. After the award of each contract, the procurement agencies and 
entities shall, upon request by any supplier, inform him of the reasons 
why his application to qualify for the suppliers' list was rejected, 
he was not invited to tender, or his tender was not selected, with such 
general information on the characteristics and relative advantages of 
the tender selected as they deem possible to disclose.

15. Note

There should be provisions relating to public information on 
contract awards which would, inter alia, specify the nature of such 
information as well as to whom and under which conditions it should be 
made available.