
**Working Group on Transparency
in Government Procurement**

REPORT ON THE MEETING OF 7 JUNE 2000

Note by the Secretariat

1. The Working Group on Transparency in Government Procurement held its tenth meeting on 7 June 2000 under the chairmanship of Ambassador Ronald Saborío Soto (Costa Rica).

2. The agenda for this meeting consisted of: (i) transparency-related provisions in existing international instruments on government procurement and national procedures and practices; (ii) observer status of international intergovernmental organizations; and (iii) other business.

A. TRANSPARENCY-RELATED PROVISIONS IN EXISTING INTERNATIONAL INSTRUMENTS ON GOVERNMENT PROCUREMENT AND NATIONAL PROCEDURES AND PRACTICES

3. The Chairman said that he had made available, on his own responsibility, an annotated draft agenda which aimed to facilitate discussion in the Working Group by suggesting issues under each of the substantive agenda items that, in his view, could be the subject of further discussion. The list of issues in the annotated agenda did not purport to be exhaustive and delegations should feel free to raise other issues which they considered important. The note by the Chair "List of the Issues Raised and Points Made" (Job(99)/6782) continued to be the basis of the discussion of the Working Group. As an auxiliary informal paper for the use of Members wanting to draw on it, delegates also had available to them a revision of the informal note by the Secretariat "List of Proposals on Items II-VII of the Checklist" (Job(00)/3276).

(a) Proposal for a work programme on technical assistance

4. Before the Working Group took up the discussion of the substantive agenda items, the representative of the United States introduced a proposal for a work programme for coordinating international technical assistance with implementation of a potential agreement on transparency in government procurement (WT/WGTGP/W/28). The work programme would proceed simultaneously with ongoing work of the Group in developing the elements of an appropriate agreement. The United States believed that working concurrently in both those areas would help the Group to move forward and would help to ensure that all Members could fully benefit from the results of the work undertaken by the Group. The need for capacity building in this area had already been raised by some delegations during the past discussions of the Working Group. Capacity-building issues had already been factored into many of the proposals that had been made with respect to specific elements of transparency. Those proposals were intended to be flexible enough to be effectively implemented in a wide range of circumstances in different Members' domestic procurement systems. Nevertheless, it was understood that there were concerns about the capacity of some national systems to consistently apply the elements that had been discussed throughout their procurement systems. To address that issue, the United States envisaged a work programme that would be designed, first, to identify specific capacity-building needs relating directly to the transparency elements that had been discussed

and, second, to identify available international sources of technical assistance which were best suited to addressing such needs. This phase of work could draw on the previous submissions made to the Working Group on this issue in 1997 and 1998 (listed in document Job No. 3414). In order to make the best practical use of the information that would be gathered, the information could be organized into categories, such as issues relating to the development of legal and administrative rules and procedures, human resources development, and physical infrastructure and other technical needs. Once that work had been completed, a second phase of the work programme could focus on finding ways to operationalize the information as efficiently as possible. He suggested that the Chairman might hold informal consultations on this issue prior to the next meeting so as to enable the Working Group to agree on a concrete plan of action for addressing the issue of capacity building at the next meeting.

5. The representative of Pakistan, joined by the representatives of Malaysia, India and Egypt, said that the proposal by the United States to provide technical assistance in relation to the elements of an appropriate agreement made the assumption that there was already such an agreement and, hence, was premature. The representative of Brazil stated that the proposed work programme should not prejudice the final establishment of an agreement.

6. The representatives of the European Communities, Switzerland, Venezuela, Norway, Canada, Australia, Iceland, New Zealand, Hungary, the Czech Republic, Iceland, Israel, Korea and Hong Kong, China said that their delegations supported the broad thrust of the United States proposal. It was an attempt to address some of the administrative and technical challenges in applying the principles of transparency in government procurement that had been raised in the Working Group and were reflected in the Chair's note "List of the Issues Raised and Points Made". The representative of New Zealand said the work programme could help to point out the elements that should be addressed in the Group and thus could be seen as working in parallel with the Group's discussions. The representative of Australia stated that Members' capacity to implement a future agreement was an issue that needed to be examined seriously in the context of drawing up any potential agreement. The representative of Korea said that there was a need to address the work programme as soon as possible.

7. The representatives of the European Communities, New Zealand and Australia said that Members would need to have a better understanding of a number of issues in relation to the United States proposal, for instance how the technical cooperation would work in practice and how it would be financed. The representative of Norway said that the question of financing in the long run should be borne in mind in developing a work programme.

8. The representative of Switzerland suggested that the work programme should be demand-driven. Those countries that faced challenges in relation to the various areas under discussion in the Working Group should come up with proposals identifying their concerns that could be addressed through technical assistance.

9. The representative of Indonesia stated that technical assistance and capacity building were not issues exclusive to the area of government procurement. They should be considered in a comprehensive manner since the same problems existed in many areas covered by WTO agreements.

10. The representatives of Canada, Argentina and the Czech Republic said that there would be value in the Chair conducting informal consultations in advance of the next meeting to explore the most efficient way the work programme might be structured. The representatives of Malaysia, Pakistan and Egypt said that they were not in a position to join any consensus to request the Chair to hold informal consultations on this issue prior to the next meeting.

11. The representative of Pakistan said that basic information on the technical assistance activities of international intergovernmental organizations had been made available to the Group (WT/WGTGP/W/20 and Addenda 1-8). Supported by the representatives of Hong Kong, China and Korea, he suggested that the Secretariat might be requested to prepare a note compiling this information in a succinct form in order to enable delegations to consider how this issue could be developed further. The representative of Argentina said that the Group should also consider the survey recently initiated by the Secretariat, through the Director-General, in which all Members and intergovernmental organizations were invited to identify sources of technical assistance relating to WTO agreements.

12. The representative of the United States stated that its proposal was intended to be a positive response to the concerns that some delegations had raised in the past. The United States supported the view that a demand-driven work programme would enable delegations that had specific problems related to capacity building to contribute to the establishment of a framework for proceeding with the work in this area. He stressed that his delegation had deliberately left open a number of questions, including how this type of work programme might be developed, because the United States wanted to hear the views of other delegations as to how a process, that the Group would be comfortable with, could be developed by consensus. His delegation saw benefit in addressing these issues proactively during the process leading up to a potential agreement and to mitigate future problems rather than waiting until the Working Group finalized its work. This process would be without prejudice to what might be included in a future agreement.

13. In concluding the discussion on the proposal by the United States, the Chairman said that the Group should revert to the proposal by the United States at its next meeting. The Secretariat would prepare a note summarizing the information that had been made available to the Group or elsewhere to the WTO on technical cooperation activities of intergovernmental organizations in the area of government procurement.

(b) General comments

14. By way of general comments under this agenda item, the representative of India reiterated the views that his delegation had expressed at the earlier meetings of the Working Group. He said that the Working Group should confine itself to the Singapore mandate. The Group's work was still in the study phase which Members, especially developing country Members, would use to fully understand the issues involved and to appreciate their rights and obligations. As indicated by the note by the Chair "List of the Issues Raised and Points Made", there were serious differences of view among Members on basic issues. Not all Members were at the same level of development and, therefore, it should be appreciated that Members at lower levels of development would find it difficult to agree on some of the elements that might appear to be very basic to other Members. It was important for the developed country Members to appreciate the concerns and problems of developing country Members before reaching a common understanding regarding the various elements of transparency in government procurement. He also stressed the following points as important to his delegation. First, government procurement was an important tool available to governments to pursue their social and developmental objectives. Governments should be able to retain flexibility in this regard as they were fully obliged to pursue these objectives to deal with problems such as poverty, illiteracy, social backwardness and to provide food security. Secondly, the transparency exercise should not include procurement that was open only to domestic bidders. Members, especially developing country Members, should retain the flexibility of providing price preferences to domestic bidders. Thirdly, India was opposed to introducing market access issues into the work of the Working Group. Fourthly, the right of governments to make domestic public procurement rules and regulations and to modify them should be maintained. He added that India was committed to transparency in government procurement and that, in fact, that principle was being broadly followed in India's domestic policy.

15. The representative of Egypt stated that Egypt agreed with the main thrust of India's statement, in particular the reference to the need to pursue social and developmental objectives in developing countries.

16. The representative of Malaysia said that the agreement should not be prescriptive in nature; it should merely serve to ensure the provision of information on the procurement practices of governments.

17. The representative of Canada stated that Canada supported continuing work on the elements of an agreement in transparency as outlined in the Singapore mandate. In relation to transparency, a simple and realistic approach with regard to what could be achieved was preferable from Canada's point of view.

18. The representative of Indonesia stated that the Working Group needed to continue exploring the issues that were being discussed with the intention of increasing awareness as well as creating a certain level of confidence for delegations. Thus the study, as mandated by the Singapore Ministerial Declaration, should be carried out before the Group could embark upon any negotiations on an agreement. Discussions should be limited to transparency issues. A transparency agreement should not be seen as a building block for an agreement on market access. There should be no review provisions in the agreement allowing the possibility of further negotiations on market access. The discussion on transparency should be based on national policies and objectives and should respect Members' domestic legislation and their right to regulate in this area.

(c) Issues raised

(i) Definition and scope of government procurement

19. A number of observations were made on the question of whether, in order to determine the scope of any commitments, a general definition of government procurement was necessary and, if so, whether this could be achieved by reference to the definitions in GATT Article III:8 and GATS Article XIII:2 or whether it would be sufficient to rely on the definition used by each Member as it was established in its national legislation. The representative of the United States, joined by the representatives of Canada, the European Communities, Egypt, Brazil and Mexico said that the Group could draw on the existing definitions of government procurement in GATT Article III:8 and GATS Article XIII:2 as a basis for its work to develop an appropriate definition in a transparency agreement. The representative of Korea, joined by the representatives of Brazil, Argentina and New Zealand, said that, while it would be useful to draw on the existing language in GATT and GATS, a mere reference to GATT Article III:8 and GATS Article XIII:2 would not be sufficient for the purposes of a future agreement. The representatives of Korea and Hong Kong, China said that, for example, the interpretation of the term "governmental purposes" in the relevant GATT and GATS Articles might cause problems. The representative of Brazil, joined by the representative of Indonesia, said that the Group should also consider the feasibility of relying on the definitions stipulated in the respective national legislation of Members. The representative of Mexico said that the definition of government procurement would depend on what was agreed in respect of other elements of the agreement as well as its scope.

20. Observations were made on the question of whether the rules of a transparency agreement should extend to procurement by entities at all levels of government or at the central level of government only. The representatives of Malaysia, Switzerland, Hong Kong, China, the European Communities and Norway stated that an agreement should cover entities at all levels of government including at sub-central levels. The representative of Switzerland said that, otherwise, a large part of government procurement would be left outside the scope of the transparency agreement. The representatives of Australia, Korea and Japan said an agreement should be applied to procurement by

central government entities and to entities at the highest level of sub-central governments. The representative of Argentina said that, even in the case of an agreement that focused on transparency, it would be difficult to ensure compliance at all levels of government. Developing countries with federal government structures should be accorded special and differential treatment with regard to obligations of entities at sub-central levels. The representatives of India, Egypt, Canada, Mexico, Indonesia and Brazil said that the scope of the agreement should be limited to procurement by central/federal government entities. The representative of Brazil stated that it would not be feasible to negotiate an international agreement on behalf of sub-central entities in his country without a mandate from them.

21. With regard to the question of whether purchases by state enterprises should be covered, and, if so, which, the representatives of the European Communities, Norway, Mexico and Switzerland stated that coverage should also include procurement by such enterprises. The representative of Switzerland said that state enterprises often had monopoly positions and, therefore, did not always pursue commercial interests. The representative of the United States stated that his delegation's preference would be to provide for coverage of state enterprises through an agreed definition of procurement. For instance, a state-owned enterprise that purchased for governmental purposes would presumably be covered under a definition of procurement which would refer to "procurement for governmental purposes". The representative of Argentina stated that, since in other WTO fora transparency was seen as a key to dealing with monopolies, the issue of coverage of state enterprises in an agreement focused on transparency might be further explored. The representatives of India and Egypt said that procurement by state enterprises should be excluded from the coverage of a transparency agreement. The representative of Korea stated that including state enterprises in the coverage of a transparency agreement might be burdensome for some Members. The representative of Indonesia stated that state enterprises should not be covered under a transparency agreement as GATT Article XVII already dealt with the issue.

22. With regard to the question of what the scope of an agreement should be in terms of coverage of goods and services, the representatives of Malaysia, India, Indonesia and Egypt stated that the scope should be limited to goods. The representative of Egypt said that the Group should consider, however, how to deal with cases where it was difficult to de-link goods procurements from services procurements. The representative of India said that public procurement in the services sector in the case of most developing countries was less systematized than that in the goods sector. He also said that the issue of procurement of services was already being handled by the Working Party on GATS Rules. The representatives of the United States, Australia, Switzerland, Brazil, Hong Kong, China, Canada, Norway, Argentina and New Zealand stated that the agreement should encompass both goods and services. There was no good reason not to apply transparency rules to services as well as to goods. Moreover, there were often mixed contracts that involved both goods and related services or services and related goods. In practice, it might be difficult in many situations to distinguish between a goods procurement and a services procurement. The representative of the United States said that any commitments that Members might make with respect to transparency would be without prejudice to other aspects of the trade regime including, for example, GATS commitments or border measures.

23. Observations were made on the question of whether the coverage of an agreement should be limited to procurements above a certain threshold level and, if so, what should that level be and should it differ according to the level of government, the level of development of the Member in question and/or the nature of the obligation in question? The representatives of Malaysia, India, Egypt, Korea, Japan, the European Communities, Brazil, Hong Kong, China and Canada stated that there should be a minimum threshold level below which transparency obligations would not apply. The representatives of India, Egypt, Malaysia and Indonesia said that threshold levels should be higher for developing countries. Including minor procurements within the scope of a transparency agreement might impose an undue burden on entities in developing countries. The representative of Mexico said that the objective of setting thresholds below which the rules would not apply was

important from the point of view of efficiency. Different threshold levels might apply according to the purchasing entity, whether a federal or central entity or a state enterprise, on the basis of the objective of the procurement or depending upon whether the procurement was for goods, services or construction services. Compliance with transparency obligations should not result in a situation that would be too onerous for the procuring entity, nor should the rules be a hindrance to the proper functioning of government procurement systems. The representative of Norway stated that, while, in principle, an agreement should not be limited to procurement contracts above a certain threshold level, certain provisions could be included to provide flexibility in the application of rules to small-value contracts.

24. The representatives of the United States, Australia and Switzerland stated that their delegations had an open mind on the issue of thresholds. The representative of the United States said that, for the purposes of transparency, particularly for open tendering procedures, the costs of transparency were generally very low and the benefits were very high. For that reason, it did not make sense to apply a high level of threshold for procurement under open tendering procedures. The representatives of Argentina and New Zealand stated that there should be transparency in all public procurement transactions whatever the size of procurement contracts. It was unclear why different levels of thresholds would be necessary in an agreement which would not set obligations on market access.

25. In response to the question of the extent to which concessions and BOT (build-operate-transfer) contracts should be covered and, if covered, how they should be defined, the representatives of Brazil, Malaysia, India and Mexico stated that the scope of the agreement should not extend to concessions. The representative of Mexico stated that, in Mexico's system, concessions were not regarded as falling within the scope of government procurement given that there were a number of juridical and legal differences between the two. The representative of Brazil said that the difficulty associated with extending the scope of an agreement to concessions was not simply a legal problem stemming from the fact that concessions and government procurement were regulated under different legislation. The philosophy and objectives underlying concessions were completely distinct from the philosophy and objectives of government procurement. In some cases involving concessions, what occurred was exactly the opposite of what occurred in the case of procurements. The representative of Argentina said that there might be services that were contracted by a government for its own purposes that were not concessions. The representative of the United States stated that the definition of a "concession" varied from system to system. In some systems, what was considered to be a concession was a fairly narrow range of government activities and, in other systems, it could be almost synonymous with the term "services". He also said that his delegation would be very concerned by suggestions that all services that were called "concessions" in some jurisdictions would not be subject to basic transparency requirements. It would be useful to consider this issue in more detail.

26. The representatives of Egypt, India and Argentina stated that BOT contracts should not be covered under a future agreement. The representative of the United States said that, in his delegation's view, arrangements relating to BOT contracts were simply a different arrangement of payment for a procurement of facilities. To the extent that that was the case, the United States could not see why these arrangements would be treated differently from a general procurement involving a simple transfer of funds. BOT arrangements might simply be a way of compensation other than a direct transfer of funds. If that were the case, the United States considered that such arrangements should be subject to general transparency requirements.

27. Following a suggestion by the representative of Pakistan, supported by the representative of New Zealand, the Working Group agreed to request the Secretariat to prepare a note identifying the various issues that were involved in concessions and BOT contracts from the perspective their treatment or not as a form of government procurement.

28. With regard to the question of whether there should be a general exception clause along the lines of GATT 1994 Articles XX and XXI, the representatives of Argentina, Canada, Egypt and Indonesia stated that an agreement should have a general exception clause along the lines of GATT Articles XX and XXI. The representative of Switzerland, supported by the representative of New Zealand, stated that whether or not exceptions were necessary would depend upon the specific commitments to be undertaken by Members. In an agreement with obligations limited to transparency, it might be unnecessary to include a general exception clause along the lines of GATT Articles XX and XXI. The representative of India stated that, in addition to the general exceptions provisions contained in GATT relating to security and other matters, Members should have the freedom to indicate additional exceptions such as procurement for public distribution systems, procurement for achieving social and development objectives and procurement for domestic price stabilization of essential commodities. With regard to procurement involving social policy and other objectives, the representative of the United States noted that a number of jurisdictions in the United States imposed, for example, recycled content requirements or energy efficiency requirements, which were aimed at meeting social and public policy goals in undertaking procurement. Nevertheless, the United States questioned why the use of those types of procurement objectives would in any way diminish a government's interest or capacity to achieve transparency. The United States believed that the interest to achieve transparency would be the same whether or not those types of objectives were incorporated into a procurement procedure.

29. Comments were made on the question of whether transparency obligations should be applicable only to the extent that procurement was open to suppliers from other Members. The representatives of Japan, Mexico, Canada and Switzerland stated that a transparency agreement should apply to all procurement irrespective of whether or not a procurement was open to foreign suppliers. The representative of Argentina, joined by the representative of Canada, stated that the agreement should not call into question the preferences that a Member granted to domestic suppliers and should not require Members to modify their legislation in this regard. However, that did not mean that other Members could not have information made available to them on the relevant national legislation and procedures in other Members. The representatives of Malaysia, India and Egypt stated that an agreement on transparency should exclude procurement limited to domestic bidders. The representative of the European Communities asked for clarification as to how a transparency agreement which only applied to procurements that were open to foreign participation would work. Would there be two different legal systems relating to transparency in public procurement, one system that applied in cases where only domestic participants could participate in the procurement and a second system in cases where procurement was open to other countries? In response, the representative of India stated that India considered that there was no transparency issue involved in relation to procurement that was not open to foreign competition. The representative of Pakistan stated that Pakistan would have a separate system of rules for the two types of procurement. The representative of Malaysia stated that in his country transparency principles were applicable whether or not procurements were open to foreign participation. However, that did not mean that it should be agreed that contracts that were open for domestic bidding only should be subjected to the same rigorous obligations that would have to be adhered to under a WTO transparency agreement for procurement that involved foreign participation.

30. The representative of New Zealand said that a number of questions raised under definition and scope were intrinsically linked with some of the other elements under consideration in the Group. Accordingly, some of his delegation's views on the scope of an agreement might be affected by the outcome of the discussion on those other issues.

(ii) *Procurement methods*

31. Comments were made on the question of whether an approach should be adopted which called upon Member governments to be transparent about their actual use of limited tendering. The

representatives of the United States and Venezuela said that procuring entities in different Members used different criteria for determining which type of method would be appropriately used in the circumstances of a given procurement. National legislation set out such criteria based on national conditions and procurement policy objectives. The representative of the United States, joined by the representative of the European Communities, said that the most important consideration for ensuring transparency in the use of procurement methods was that, notwithstanding the difference in the selection criteria used by procurement entities in different Members, the decisions regarding the choice of a particular procurement method should be taken on the basis of the criteria that were established in national legislation and which were made known to suppliers in advance. The representative of India, joined by the representatives of Mexico, Egypt and the European Communities, said that a transparency agreement should not have provisions prescribing the particular method that should be used in a particular circumstance. The provisions should allow procuring entities to retain flexibility in applying the procurement method that was best suited to their objectives in a particular procurement in the interests of efficiency, competition and transparency. Procuring entities should decide which method to choose provided that they followed the criteria established in national legislation. The representative of New Zealand stated that transparency disciplines in a future agreement should not affect a Member's practice regarding the application of various procurement methods. The representative of the United States said that the draft text for an agreement of November 1999, submitted by the delegations of Hungary, Korea, Singapore and the United States, contained a provision requiring Members to have rules in their national legislation describing the conditions under which it was appropriate to use different procurement methods (WT/WGTGP/W/27, paragraph V.2). No provisions were suggested on what those conditions should be. On the question of whether an effort should be made to define the circumstances in which limited tendering could be employed, the representatives of India, Indonesia, Mexico and Egypt said that drawing up an illustrative list of such circumstances would not allow any flexibility to procuring entities in the use of this method. The representatives of Mexico, the United States, Venezuela and Egypt said that a transparency agreement should have a provision requiring Members to indicate in their national legislation the exceptional circumstances warranting the use of limited tendering.

32. With regard to procurement methods, the representative of Pakistan asked how the use of "Requests for Proposals" method where there could be direct negotiations between suppliers and the procuring entities after the receipt of initial proposals could be accommodated within a transparency agreement. In response, the representative of the United States stated that procedures or any requirements decided upon by the Group must be flexible enough to incorporate procurement procedures that may involve negotiations given that such procedures could be an extremely effective way for entities to achieve the value for money that taxpayers expected. There were at least three ways in which transparency was particularly important when those types of procedures were used: the first being at the initial announcement of a particular procurement opportunity or the announcement that a procedure was under way, as in the case of other procurement procedures; the second being that participating suppliers should have access on a non-discriminatory basis to information. Thirdly, there should be information on the contract award so that interested parties had information on the results of the procurement procedure and also were given an opportunity for receiving an explanation of the reason for the contract award.

(iii) Publication of information on national legislation and procedures

33. On the question of whether there should be a requirement for the establishment of an enquiry point from which information on national legislation or procedures could be obtained by interested parties, the representative of India said that the establishment of enquiry points would require coordination among numerous government departments, hence the need for a careful study of its feasibility. The representative of Bolivia said that there was no need for the establishment of an enquiry point in his country since the relevant information was available in official publications.

34. Comments were made on a number of issues on points of detail such as the scope of the information on national legislation and procedures that should be made available, the mode through which this should be done and the treatment, if any, of costs. The representative of the United States said that the draft text for an agreement of November 1999, submitted by the delegations of Hungary, Korea, Singapore and the United States (WT/WGTGP/W/27, paragraph V.1), suggested that all national laws, regulations, and requirements of general application should be published. Joined by the representative of Bolivia, he said that this did not call for the publication of the details of the procurement procedures of individual procurement entities, but covered legislation and administration guidelines that applied to a broad range of procurement decisions. The representative of India said that the publication of information relating to judicial decisions, policy guidance and administrative guidelines would be onerous. The representative of Hong Kong, China said that there should be no requirement to publish or make available to the public in any other form administrative rules and regulations internal to the government. The representative of India said that Members should have flexibility in respect of the mode through which information should be made available. On the treatment of costs, he said that government entities should have the flexibility to impose appropriate fees for the provision of information on national legislation, provided that such fees were charged on a non-discriminatory basis. The representative of Hong Kong, China said that there should be a general exceptions provision with regard to the obligations on publication of information on national legislation and procedures along the lines of the provisions in Article XX and GATS Article XIV.

(iv) *Information on procurement opportunities, tendering and qualification procedures*

35. Comments were made on the question of the minimum information that should be made available on procurement opportunities during the procurement process. The representatives of the European Communities, Australia and Canada said an agreement should set out certain guiding principles regarding the minimum information content of the documentation on procurement opportunities. The representative of Argentina said that, rather than specifying in a transparency agreement what the minimum information content should be, there should be a provision requiring Members to set out the minimum information that should be made available in national legislation. The representative of India, joined by the representatives of Hong Kong, China and Indonesia, said that any provisions establishing a uniform set of rules in the agreement in respect of provision of information on procuring opportunities would be too prescriptive. The representative of India further said that the level of detail of information varied considerably in national practices depending on the particular procurement contract or the procurement methods used.

36. Comments were made on the question of whether national preferences or other measures favouring certain supplies or suppliers should be made known in advance in the tender notices and/or tender documents and, if so, whether such information should be set out in full; or whether it would be sufficient to make an explicit reference to the applicable legislation in those documents; or whether such information should only be required when it had not already been adequately provided through laws or regulations of general application. The representatives of Canada, the European Communities, Switzerland and Australia said that provision of advance information on national preferences allowing suppliers to make decisions on whether or not to bid for a procurement opportunity was critical. The representative of the European Communities said that a reference to the applicable legislation in the tender documentation would not be sufficient. Procedures relating to the application of national preferences should be clearly stated in tender documents. The representative of Switzerland said that an explicit reference to the applicable legislation could be considered adequate, although detailed information on the preferences would be preferable.

37. In regard to the question of what guidance should be included as regards the media used for the provision of information on procurement opportunities, tendering and qualification procedures, the representatives of India, Canada, the European Communities and Switzerland said that procuring entities should have the flexibility to choose the medium for providing information on procurement

opportunities. The representative of Canada said that it was important to specify the source through which the relevant information was made available.

38. On the issue of transparency on lists of qualified suppliers, the representative of Australia said that Members should be encouraged to provide information periodically on the timing and the frequency of the opening of qualification lists so as to enable the inclusion of new suppliers.

39. With regard to technical specifications, the representatives of Argentina and Indonesia said that, since in their view, they were not within the scope of a transparency agreement, any transparency agreement should thus not have any provisions relating to this matter.

40. In addressing the question of whether there should be a requirement to provide summary information on procurement opportunities in a WTO language, the representative of Switzerland said that this would enhance transparency. The representatives of Brazil, Australia, Argentina and Indonesia said that a mandatory requirement to publish tender notices in a language other than in a Member's national language would entail Members incurring burdensome translation costs.

41. The representative of India said that the obligation on provision of information on procurement opportunities should be limited to procurement open to foreign suppliers. The representative of Argentina said that procuring entities should provide such information regardless of whether the procurement opportunity was open or not to foreign suppliers and even under direct procurement procedures. The representative of Hong Kong, China said that there should be a general exception provision regarding the obligations on provision of information on procurement opportunities along the lines of GATT Article XX and GATS Article XIV.

(v) Time-periods

42. Comments were made on the question of whether it was accepted that a transparency agreement should have a provision on time-periods couched in terms of the considerations that should be taken into account in setting those periods rather than in terms of prescribing minimum periods and, if so, what those considerations should be. The representatives of Argentina, Australia, the United States, Egypt, the European Communities and Mexico said that an agreement should not have provisions prescribing minimum time-periods. The representatives of Australia, the European Communities and Mexico said that a principles-based approach would be preferable. Joined by the representatives of the United States, Egypt and Cuba, the representative of Mexico said that procuring entities should retain flexibility to set appropriate time-frames according to the nature and the specific circumstances of a particular procurement. The representative of Indonesia said that provisions on time-periods should make reference to national legislation. The representative of India said that the issue of time-periods was not related to transparency. Given the divergences in national legislation in this respect, procuring entities should be able to decide time-periods on a case-by-case basis. The representative of the European Communities said that allowing procuring entities to take decisions on time-periods on a case-by-case basis would create uncertainty. The representative of Mexico said that, under national legislation, procuring entities might not be able to set time-periods in a discretionary manner and on a case-by-case basis.

43. With regard to the question of what consideration should be taken into account in setting time-periods, the representatives of Australia and Mexico said that suppliers should be allowed sufficient time for the preparation and submission of bids and the same time-periods should be applied to all bidders. The representative of the European Communities said that time-periods should be commensurate with the particular circumstances of the procurement and the complexity of the intended procurement. The representative of Mexico said that there should be provisions foreseeing the application of reduced time-periods in emergency situations.

(vi) Transparency of decisions on qualification

44. With respect to the transparency of decisions on registration and qualification of suppliers, the representative of the United States said that, whatever the qualification criteria procuring entities may use, the key principle was that the decisions be taken only on the basis of criteria that had been made known to suppliers in advance.

(vii) Transparency of decisions on contract awards

45. In addressing the question of whether the minimum information that contract award notices should contain should be specified and, if so, what should be included, the representative of the United States said that most national legislation contained a requirement to provide certain basic information in the notices of contract awards. The representative of India said that the type of information that contract award notices should contain should be left to the discretion of procuring entities.

46. In regard to the method for the provision of *ex post* information on contract awards, the representatives of the European Communities and the United States said that unsuccessful bidders should have the possibility to obtain information on the reasons for the rejection of their bids. Interested parties should have the ability to request explanations or additional information on contract award decisions. The representative of India said that decisions on contract awards should be conveyed to the bidders in accordance with national practices.

(viii) Domestic review procedures

47. On the question of whether there should be a requirement that a domestic review procedure be maintained, the representative of India said that the specification of minimum characteristics of domestic review mechanisms would go beyond the scope of a transparency agreement. Members should retain the right to design their own domestic administrative and judicial review mechanisms for ensuring that applicable domestic rules and regulations had been followed by all involved in a procurement process. The representative of Egypt said that there should be no provisions on domestic review mechanisms in a transparency agreement.

(ix) Other matters related to transparency

48. With regard to the question of whether there should be provisions stating in what form and for how long records of decisions and actions taken during the procurement process should be maintained by entities, the representative of Mexico said that the maintenance of records of procurement proceedings was an important guarantee of transparency. Record keeping was particularly useful in the review process of procurement decisions. The representatives of Brazil and Indonesia said that an agreement should not specify in what form and for how long records should be maintained by procuring entities.

49. On the question of how a transparency agreement might promote the use of information technology in government procurement, the representatives of the European Communities, Korea, Pakistan, Brazil, India, Egypt, Mexico, Indonesia and Cuba said that an agreement should have a best-efforts clause in this respect encouraging the use of information technology. The representatives of Pakistan, Australia and Cuba said that information technology was an area where technical cooperation might be relevant. The representative of Mexico said that Mexico had carried out technical cooperation in this area sharing its recent experience in the establishment of systems with other countries.

50. As regards the question of whether the link between transparency in government procurement and the fight against corruption and bribery should be explicitly recognized in a transparency agreement, the representatives of Hong Kong, China, Cuba, Pakistan, India and Indonesia said that the issue was not within the ambit of a WTO working group and was not within the scope of a transparency agreement. The representatives of Egypt and Indonesia said that the matters related to the fight against corruption might be best handled by Members at the domestic level. The representative of Brazil said that transparency in government procurement and the fight against corruption were separate matters. There should be no explicit recognition of the linkage that might exist between the two in a transparency agreement. The representative of Mexico said that, while her delegation considered that the WTO was not the appropriate forum for dealing with the subject, the establishment of an agreement on transparency in government procurement would be one of the best ways to fight corruption. The representative of Australia said that greater transparency was the key to removing corruption. The representative of Venezuela said that improving transparency in government procurement and the fight against corruption were complementary. Believing that all countries would benefit from transparency in the fight against corruption, he recalled that his delegation had submitted a non-paper that identified the elements of transparency that could contribute to the fight against corruption.

(x) *Information to be provided to other governments*

51. With regard to a requirement on the establishment of enquiry point(s) by each Member, the representative of Korea said that there should be a single access point for obtaining information free of charge. The representative of India said that the establishment of enquiry points would involve coordination with different government departments and agencies. The issue might need to be reconsidered once Members had a clearer idea of the scope and coverage of an agreement. The representative of Brazil said that, notwithstanding the difficulties of coordination among national authorities, the establishment of enquiry points would be useful.

52. Addressing the question of how adequate notification of laws and regulations should be secured, while ensuring that such requirements were not unduly burdensome, especially in regard to translation into a WTO language, the representative of Brazil said that an agreement should require Members to notify only the lists of basic laws and regulations in a WTO language. The representative of the European Communities said that according to the proposal submitted by his delegation in November 1999 concerning the notification of laws and regulations, Members should only be required to provide a list in one of the WTO languages of the relevant generally applicable instruments (WT/WGTGP/W/26, Article 11 on notification requirements).

53. On any statistical reporting requirements, the representatives of Brazil and Canada said that a transparency agreement should not have provisions in this respect.

54. In responding to the question of whether the government of an unsuccessful tenderer should be entitled to seek information on a contract award from the government whose entity had conducted the procurement in question, the representatives of Brazil and the European Communities said that this matter was linked to the issues under the item on the WTO dispute settlement procedures.

(xi) *WTO dispute settlement procedures*

55. The representatives of India, Egypt, Indonesia and Pakistan said that their delegations were opposed to the creation of a link between the rules on transparency and the WTO dispute settlement procedures. Members had domestic review mechanisms to address procurement disputes adequately.

56. The representatives of the United States, Switzerland and Japan said that disputes under a future transparency agreement should be governed by the DSU. Government-to-government dispute settlement procedures applied to the Agreement Establishing the WTO and other WTO agreements which incorporated procedural rules. The representative of the United States further said that any concern about the perceived implication that dispute settlement procedures might be used to pursue objectives that went beyond transparency had no basis in light of paragraphs 3.2 and 19.2 of the DSU. Under these paragraphs, the recommendations and rulings of the DSB or panel and appellate body recommendations could not add to or diminish the rights and obligations provided in the covered agreements.

57. The representative of Brazil, joined by the representatives of Japan, Bolivia and Argentina said the Working Group should discuss how and in what circumstances the WTO dispute settlement procedures could apply to the obligations under a transparency agreement.

(xii) *Technical cooperation and special and differential treatment for developing countries*

58. Addressing the question of whether transitional periods should be provided for developing countries, the representative of India said that provisions on special and differential treatment were necessary in light of the differences in capacity of WTO Members in the area of government procurement. The representatives of Indonesia and Egypt said developing countries should be provided long transitional periods. The representatives of Egypt, Malaysia and India said that transitional periods alone were not adequate for a meaningful special and differential treatment of developing countries.

59. On the question of what other forms of special and differential treatment might be provided, the representatives of Indonesia and Malaysia said that the issue of higher threshold values for developing countries and the extent to which sub-central governments should be covered for developing countries should be addressed. The representative of Bolivia said that any provisions on special and differential treatment should be formulated on a contractual basis and not as a statement of intent.

60. On the issue of technical cooperation, the representative of the European Communities said that all technical assistance should be based on requests formulated by recipient Members. This formulation of the needs by the recipient countries would minimize the cost involved as well as giving a certain focus in addressing such needs. The representative of Indonesia said that the provisions on technical cooperation should specify the areas in which technical cooperation might be provided, the form it might take and the resources available. There should be provisions for multilateral procedures aimed at monitoring the provisions of technical assistance on an ongoing basis under a WTO body.

B. OBSERVER STATUS OF INTERGOVERNMENTAL ORGANIZATIONS

61. The Working Group agreed to revert to the requests from intergovernmental organizations for observer status (OECD, SELA and OIC) in the light of the consultations that were currently being held by the Chairman of the General Council on this matter.

C. DATE OF THE NEXT MEETING

62. The Working Group agreed to hold its next meeting in late September 2000.
