TRANSPARENCY IN GOVERNMENT PROCUREMENT

In The Context Of The Doha Development Agenda

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Note: Views expressed are personal and in no way reflect those of the Institution with which the author is currently associated.

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EXECUTIVE SUMMARY

1. Government Procurement has been historically out of the GATT/WTO discipline. It entered the agenda of the WTO through a plurilateral Agreement on Government Procurement, first negotiated in the Tokyo Round and subsequently renegotiated in the Uruguay Round.

2. The WTO Ministerial Conference at Singapore gave a mandate "to establish a working group to conduct a study on Transparency in Government Procurement Practices, taking into account national policies and, based on this study, to develop elements for inclusion in an appropriate agreement".

3. The Doha Ministerial Conference decided that "Negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations". The mandate limited the negotiations to only transparency aspects and did not cover market access and national treatment.

4. Transparency in Government Procurement by itself can have a positive impact on market access. Further, there are already transparency provisions in the WTO system, e.g., Article X of GATT and Article III of GATS. However, there is a fundamental difference in the way transparency is seen in these provisions and the way it can be seen in the proposed Transparency Agreement. The focus in Government procurement is on transparency as such, rather than on transparency as a vehicle for mandatory market access commitments, as in the case of Article X of GATT (Chapter 1).

5. The Government procurement market is thought to be large but precise estimates on a cross-country basis are extremely rare. One OECD study

has carried out this exercise for more than 130 countries. The major conclusions of the study are:

- For the OECD countries as a whole, the share of total procurement (consumption and investment expenditures) for all levels of Government is estimated at 19.96 percent or USD 4 733 billion and for the non-OECD countries (106 is the sample size) at 14.48 percent or USD 816 billion in 1998.
- The value of potentially contestable government procurement market is estimated at USD 1 795 billion for the OECD or 7.57 percent and for the non-OECD countries at USD 287 billion or 5.10 percent of GDP in 1998.
- Benchmarked against world trade in goods and services, the value of the world-wide contestable part of the Government procurement market is estimated at 30.1 percent of global merchandise and services trade in 1998.

6. All these figures reveal that if an internationally acceptable Transparency Agreement on Government procurement is negotiated, it will apply to a much larger market segment than what is currently covered under the Agreement on Government Procurement.

7. OECD study has also estimated the Government procurement market for select developing countries in the Asia-Pacific region. An analysis of these data reveal that while in absolute terms, the Government procurement market in the developing Asia may not be very high, their importance is significant in proportionate terms. For example, in Pakistan, Thailand and Sri Lanka, the percentage share of Government procurement, inclusive of defence, is almost equal to 10 percent of GDP (Chapter 2).

8. The Working Group set up under the mandate of Singapore Ministerial Conference has raised and clarified the main issues involved in the proposed Transparency Agreement in Government Procurement. There are 12 such issues as listed below:

   I. Definition and scope
   II. Procurement methods
   III. Information on national legislation and procedures
   IV. Information on procurement opportunities, tendering and qualification procedures
   V. Time periods
   VI. Transparency of decisions on qualifications, transparency of decisions on contract awards
   VII. Domestic review procedures
   VIII. Other matters related to transparency
   IX. Information to be provided to other Governments (notification)
   X. WTO dispute settlement procedures
   XI. Technical cooperation
   XII. S&D treatment for developing countries

9. The deliberations in the Working Group have revealed wide-divergence of views on all these issues. Essentially, the divergence arose out of the differing perceptions of the countries with respect to possible benefits of the agreement. As a result, there is a closer convergence of views on the technical issues of procurement while the disagreement is much more acute when either an implicit market access element is perceived to exist or an extra burden would have to be accepted by the developing countries because of the agreement (Chapter 3).

10. Governments quite often seek to achieve certain societal objectives through their procurement operations. The primary objective of any

procurement activity is to get best value for money. However, sometimes Governments accept a trade-off between this procurement objective and other socially desirable but non-procurement related objectives, hereafter referred as secondary objectives. A major policy issue is how to strike an appropriate balance between the free trade goals on the one hand and the legitimate domestic and other policies of member Governments on the other.

11. Given the extensive usage of secondary objectives, the first step towards an International Agreement on Transparency in Government Procurement will be to accept their social and legal legitimacy. This is feasible if it is considered that it is sufficient from a transparency objective, if secondary policies are formulated and publicized in advance.

12. Transparency in Government Procurement by itself should help the developing countries as it can increase foreign participation which in term will promote competition, ensure value for money, clear decision making and reduced possibilities of corruption.

13. Since the Doha Mandate decouples national treatment and market access commitments from the Transparency Agreement, incrementality in terms of business can come only to the extent lack of transparency is a market access barrier.

14. For the developing countries, the following business implications can be inferred:

    First, as to the transparency factor as a market access barrier, they may not gain much because the large domestic procurement markets in OECD countries are already following transparent procurement practices. However, the developing countries as a group may gain because of more

procurement from within developing countries by the developing countries due to higher level of transparency.

Second, there is the crucial issue of supply side capability. Not many developing countries have competence to participate in global Government procurement programmes.

Third, there are, however, several developing countries in the Asia-Pacific region which can participate effectively in the global Government procurement market. Construction services, software design and implementation among services, pharmaceuticals and other medical supplies among goods are some examples. Countries like China, India, Malaysia, Singapore, among others, stand to benefit (Chapter 4).

15. Developing countries are unenthusiastic of an Agreement on Transparency on Government Procurement basically because they feel that potential gains from such an agreement will be minimal for them. The delinking of extending national treatment to foreign suppliers and market access commitments from the Transparency Agreement was expected, at least to a limited extent, to take care of the reservations of the developing countries. However, the record of discussions in the Working Group reveals no convergence of views on the substantive elements of the Transparency Agreement. While the developed countries want the agreement to be legally binding and a part of single undertaking, making it subject to WTO's dispute settlement system, many developing countries prefer the agreement to be, at best, a voluntary code, taking it outside the rule-bound discipline of WTO.

16. A middle position has to emerge if a consensus has to be reached in the next Ministerial Meeting. The steps towards that will involve, inter alia, the following:

- A precise definition of 'transparency.' As the discussions in the Working Group clearly demonstrates, there is hardly any consensus on what constitutes transparency. A more compact and limited definition might help in securing a consensus.
- The second is to be more precise on what is the objective of the Transparency Agreement. If the objective is limited only to addressing the issue of non-transparency as a market access barrier, it needs to be clearly so stated. If there are other objectives, these are to be precisely defined, because possible contents of the Transparency Agreement will depend upon what the objectives are.
- Developing countries may not stand to lose, possibly gain marginally, if the agreement is restricted strictly to transparency. This will, however, require an explicit acceptance of the secondary procurement objectives which the developing countries may pursue, so long as their usage and application procedure are transparent.
- Based on the experience of S&D provisions in various WTO agreements negotiated under the Uruguay Round, developing countries should seek S&D treatment as part of the substantive provisions in the agreement.
- It is inevitable that the developing countries will have to bear additional burden to put more information in public domain, develop systems for records–keeping, for ex-post review procedures, set up enquiry points, etc. There is, therefore, a prima facie case to seek offsets from other negotiating issues. The leverage can come from the perceived benefits of transparency in

the developing country Government markets for the developed countries.

- Technical assistance and capacity building, clearly formulated, should form an integral part of the Transparency Agreement (Chapter 5).

CHAPTER – 1

The Background And The Existing Government Procurement System Under the GATT/WTO

1.1 Introduction

The complex economic and societal dimensions of government procurement are possibly the reasons for its exclusion from the discipline of GATT. Art III:8 of GATT provides exemption for government purchases of goods for their own use. Further GATT Article XVII:2 provides the same exemption when purchases are made through the State Trading Enterprises. Government procurement came under the GATT through a plurilateral arrangement. An Agreement on Government Procurement was negotiated under the Tokyo Round of Multilateral Trade Negotiations. This came into effect on 01.01.1981 and had only 12 signatories. The Agreement provided for signatory countries to extend MFN treatment in government procurement to other signatories. The Agreement also provided for national treatment and rules on transparency.

An identical status continued under the GATT 1994 and GATS (Art XIII:1). The earlier agreement was brought into WTO through a plurilateral Agreement on Government Procurement (GPA) under the Uruguay Round. The plurilatarity means that this is outside the single undertaking provision. The GPA applies to only those WTO members who explicitly accept it.

The first WTO Ministerial Conference held in December 1996 at Singapore gave a mandate to seek a multilateral agreement on transparency in government procurement.

> 21. 'We further agree to establish a Working Group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study,

to develop elements for inclusion in an appropriate agreement.'

Accordingly, WTO set up a Working Group on Transparency in Government Procurement.

The Doha Ministerial Conference took the following decision:

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

It is to be noted that the mandate is very limited in its scope. Negotiations will have to be restricted to only transparency rules and not include market access. However, better transparency rules may have an indirect beneficial impact on market access (Box 1.1).

Box – 1.1

Impact of Transparency on Market Access

The channels through which this can work out include supporting existing policies limiting discrimination (under national law or regional agreements), by making discrimination difficult to conceal; improving access for foreign suppliers to procurement that is already open – for example, by improving information; supporting future market-opening negotiations, by providing market information and making it difficult to conceal discrimination that contravenes future commitments; controlling corruption (which both limits the impact of market-opening measures and operates as a distinct barrier to trade) : and disseminating and developing technical knowledge.

Source: Sue Arrowsmith, Reviewing the GPA, Journal of International Economic Laws, December 2002.

1.2 The WTO Agreement on Government Procurement

During the Uruguay Round (1986-94), the Agreement on Government Procurement, negotiated in the Tokyo Round, was renegotiated. The New Agreement became operative with effect from 1 January 1996. (WTO 1994) The Agreement is plurilateral and is open to only WTO-member states.[1]

The member countries currently include, Canada; the EC and 15 member states; Hong Kong, China; Iceland, Israel, Japan, Liechtenstein, Norway, Singapore, South Korea, Switzerland and USA. (WTO 2002a) An important development is the increasing number of countries which have applied for accession. This list includes Albania, Bulgaria, Estonia, Jordan, Oman, Kyrgyz

[1] For a Comprehensive discussion on GPA, see Hockman and Marroidis (Eds) 1997) Law and Public Policy in Public Purchasing: The WTO Agreement on Government Procurement. University of Michigan Press. For the text, see WTO website www.wto.org.

Republic, China-Taiwan. The reason for the increased interest lies, atleast partly, with the pressures from outside, apart from the economic costs and benefits of a membership of the GPA. It has been reported that some GPA members have demanded accession to GPA as a condition to WTO membership by new applicants. Further, the European Union requires its new members to join the GPA.

Objectives

The GPA provides in the preamble:

> "… that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;
>
> "… that it is desirable to *provide transparency of laws, regulations, procedures and practices regarding government procurement,"*

The Agreement, therefore, seeks to provide non-discriminatory treatment to foreign suppliers and establish transparency in all stages of the procurement process.

Scope and Coverage

As to the scope and coverage, the GPA has the following principal features:

- It applies to all laws, regulations, procedures and practices regarding any procurement by entities subjected to the GPA. (entities are not defined but listed)

- Procurement covers all contractual forms, such as purchase, hire purchase, leasing etc.
- Procurement by listed entities are subject to GPA discipline only if the threshold levels as defined in the Agreement are exceeded.
- As to procurement of goods, all are covered unless otherwise specified in the Annex (to the GPA). Defence-related procurement of goods is on the basis of a positive list.
- Positive list approach is also applicable to the procurement of services.

Transparency in GPA

The transparency rules, in a broader sense, of the GPA provides that procurement is done through tendering system. It is normally thought that a tendering system, especially of the open and selective type, foster competition, ensures cost-effectiveness of procurement and transparency. The GPA accordingly favours those types of tenders. Art VII and Art. XV are the relevant provisions which read as follows.

Article VII. Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.

2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

3. For the purposes of this Agreement:

    (a) Open tendering procedures are those procedures under which all interested suppliers may submit a tender.

(b) Selective tendering procedures are those procedures under which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, those suppliers invited to do so by the entity may submit a tender.

(c) Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV.

Article XV allows limited tendering, under specified conditions, provided that it is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers.

There are several other provisions in the GPA which are directed to transparency. These include

Art. VIII (a) Qualification of suppliers

Art. IX: I Invitation to participate regarding intended procurement

Art. IX:6(f) "

Art. XII:2 Tender Documentation

. XVIII Information and review as regards obligation of entities.

These provisions have four main aspects

- Providing contract information to potential bidders at a proper time in an accessible manner.
- Prior information on contract award criteria and procedures.
- Developing a rule based system which limits discretion.
- Procedure to seek information on whether the set rules have been observed.

1.3 Transparency Under GATT and GATS

Article X of GATT 1947 (Publication and administration of trade regulations) provides the obligations of the contracting parties in terms of transparency which, *inter alia*, may cover government procurement. The major obligations are:

- 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 the 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….
- X:2 No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice or imposing a new or more burdensome requirement, restriction or prohibition on imports or on the transfer of payments transfer, shall be enforced before such measure has been officially published.

GATT provision, in contrast to GPA, does not put any obligation with respect to business opportunities or specific contract information. Similarly, firm-specific decisions are not covered under Art. X. An exception is also provided to allow non-disclosure of 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. (Art. X:1)

State Trading Enterprises

Art XVII of GATT deals with state trading enterprises but substantially circumscribes the obligations for 'imports of products for immediate or ultimate consumption in governmental use'. With respect to such imports, 'fair and equitable treatment' is to be accorded. It has been observed that such a treatment can be considered as equivalent to transparent treatment. (Sue p 74)

Art XVII provides an obligation to give information on request from a trading partner having substantial trade interest on the product, on import mark-up or prices, subject to the general exception on account of being prejudicial to public interest or legitimate commercial interest.

The understanding on the Interpretation of Art XVII of the GATT 1994 has introduced some obligations directed to greater transparency. Further, a Working Party has been set up on STEs.

Transparency in GATS

There is a generalized transparency provision in the GATS (Art III) which covers all services as well as modes of supply. The provision broadly provides for:

a) publication of all 'relevant measures of general application which pertain to or affect the operation' of the Agreement. There is no exemption for government procurement. If publication is not practicable, information shall be made otherwise publicity available.

b) respond promptly to all requests for specific information.

c) promptly, atleast annually, inform the WTO of introduction of any new or any changes to existing laws, regulations or administrative guidelines which significantly affect trade in services as covered under the GATS.

d) establish enquiry point (s) to provide specific information upon request on items covered under (c)

Transparency in the Proposed Agreement

There is a fundamental difference in the way transparency is seen in the GATT/WTO and the way it can be seen in the proposed Transparency Agreement. A WTO note observes that the focus in procurement 'is on transparency as such, rather than on transparency as a vehicle for monitoring market access commitments' as is the case in GATT Article X.

CHAPTER – 2

Government Procurement Markets

2.1 Estimated Size of Government Markets

Data on Government procurement markets are both scarce and non-standardised. It was estimated that the GPA opened $350 billion business in government contracts to international biding. This was considered a 10-fold rise over contracts subject to the preceding GATT Code. This estimated market is obviously only a part of the total government procurement market, since the GPA covers specified entities and contracts above specified threshold levels. In addition, these are other exceptions as well.

The most comprehensive attempt at standardised quantification of the government procurement markets has been made by the OECD (2002). The OECD Study observes: (Box 2.1).

Box – 2.1

Importance of Government Procurements

Government at central and sub-central levels and state-owned enterprises are significant purchasers of goods and services, and these markets represent huge opportunities for international trade. While the largest opportunities, in value terms, arise in the industrialised countries, emerging economies offer markets with considerable potential as well. Few studies are available on the quantification of government procurement markets, and their results are not necessarily comparable as they use different definitions of procurement.

The OECD study's broad conclusions are as follows. (For technical notes on the methodology of the estimates, see Annex II to IV of the study).

- For the OECD countries as a whole, the share of total procurement (consumption and investment expenditures) for all levels of Government is estimated at 19.96 percent or USD 4 733 billion and for the non-OECD countries (106 is the sample size) at 14.48 percent or USD 816 billion in 1998.
- The value of potentially contestable government procurement market is estimated at USD 1 795 billion for the OECD or 7.57 percent and for the non-OECD countries at USD 287 billion or 5.10 percent of GDP in 1998.
- Benchmarked against world trade in goods and services, the value of the world-wide contestable part of the government procurement market is estimated at 30.1 percent of global merchandise and services trade in 1998.

All these figures reveal that if an internationally acceptable transparancy agreement on government procurement is negotiated, it will apply to a much larger market segment than what is currently covered under the GPA.

Hoekman (1997) has attempted to quantify the value of business covered under the GATT code on the basis of data notified by the 20 signatory countries during 1983 – 1992. He estimated total purchases at USD 62 billion in 1992, representing 0.42 percent of GDP of the concerned countries.

Francies et al (1996) estimated the value of government procurement in USA under the GATT Code from the SNA-based data for 1992-93 at USD 1.1 trillion, accounting for 18.3 of US GDP.

2.2 Implications for Asia-Pacific Countries

The OECD study referred above is the only one which has estimated the government procurement for a large sample of countries. Summary estimates

are in Table 2.1 and detailed national data for developing Asian countries, as included in the OECD sample is in Table 2.2.

Table – 2.1

Value And Ratios Of Contestable Government Markets

	% GDP[1]	Value[1]	% GDP[2]	Value[2]
General Government	7.57	1795.3	5.10	287.7
Central Government	1.75	415.0	-	-

Note: Value in Billion USD

1 OECD
2 NON-OECD

Table – 2.2

Government Procurement Ratios in Non-OECD Countries by Regions

Percentage of GDP and USD billions

Region	Total expenditure (TE) %			GDP 1998 (USD billions)
General Government	TE	Excl. Comp.	Excl. Comp. & Def.	
Hong Kong China	11.00	4.81	-	166.45
India	13.29	6.18	4.46	420.31
Kyrgyzstan	21.60	12.88	-	1.87
Pakistan	16.29	10.03	-	64.13
Philippines	14.29	7.38	-	82.24
Sri Lanka	17.42	9.82	8.48	15.70
Thailand	17.31	10.72	-	117.04

Note: Comp. – Compensation to employees
Def. - Defence-related procurements

An analysis of all these data reveal that while in absolute terms, the government procurement market in the developing Asia may not be very high, in proportionate terms, their importance is significant. For example, in Pakistan,

Thailand and Sri Lanka, the percentage share inclusive of defence is almost equal to 10 percent of GDP. In comparison, the average share in OECD is only 7.57 percent. So, potentially, transparency agreement will have a greater coverage proportionately in these countries as well as most other countries in Asia, as against the developed countries.

CHAPTER – 3

Issues Raised in the W. Group on Transparency in Govt. Procurement

3.1 Background

The Singapore Ministerial Conference (December 1996) decided to set up a Working Group 'to conduct study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement'. The Doha Ministerial declaration says, inter alia, that negotiations for a multilateral agreement on transparency in government procurement will 'build on the progress made in the Working Group …'.

The Working Group has met several times in the last six years. The major issues raised and points made were listed by the Chairman, Working Group in an informal note. (WTO 1999)

There are **twelve** such issues, as listed below:

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

12. S&D treatment for developing countries

3.2 Issues Raised in Working Group

Discussions in the Working Group have been wide-ranging as is expected when the Working Group is in a study phase. Very little has emerged in the form of a consensus on specific issues, but more clarity has emerged on the nature of the issues involved.[1]

3.2.1 Definition and Scope : For the purpose of the study phase, there has been a general acceptance that a 'broad conception, without preconceived limitations' could be employed, subject to the understanding that the focus of the work is on transparency.

Coming to definition and scope for the purpose of rules that might be negotiated, two major points emerged:

a) whether a definition should be employed based on the language in the GATT and GATS,

b) scope of contractual arrangements entered into by government entities that should be considered to constitute government procurement.

As to (a), there is a view that GATT Article III: 8 and GATS Article XIII:2 may provide the basis for developing an appropriate definition. However, mere referencing might not be adequate. As to (b), the general view is that all contractual means, such as purchase, rental, leasing, etc., should be covered. The most contentious issue is the extent to which concessions and BOT (build-operate-transfer) contracts should be covered and if covered, how to define.

[1] This Chapter is based on the two documents prepared by the WTO Sectt., e.g., (a) Work of the Working Group on The Matters Related to Items I-V of the List Issues Raised and Point Made (WT/WGTGP/W/32), 23 May 2002 and (b) Document No.W7/WGTGP/W/33, 3 October 2002, which are on Item VI-XII.

Another major issue is the extent to which government procurement, as defined, should fall within the scope of commitments on transparency in government procurement. The following points were raised on which divergent views were expressed:

i) On whether the rules should apply to all or only some government entities, views expressed varied between inclusion of all government entities including those at sub-central level to only central government entities. It was also suggested that coverage of sub-central entities by developing countries with federal government structures could be a subject for S & D treatment.

   Different views were also expressed on the extent to which procurement by STEs should be covered with reference to Art XVII of GATT.

ii) As to the coverage of goods and services, one view is that the proposed Agreement should cover both, while the other view was to confine it to only goods, as services are covered under the work programme of services.

   The opposite view was that the Singapore Mandate did not make any distinction between goods and services. Moreover, in many cases, procurement of goods and services are closely linked.

iii) An important point was the possible use of threshold values for determining coverage. The following views were expressed:

   - the rules of a Transparency Agreement would not result in burdens which might necessitate the application of thresholds.

   - thresholds might be used only in those cases where burdens might be disproportionate to the potential benefits.

- there should a minimum threshold below which Transparency Agreement will not be applicable.
- such thresholds might be a subject for S&D treatment.

iv. On the question of whether procurement, not open to foreign competition, should be covered under the Transparency Agreement, one view was that it was not a legitimate concern of an international agreement while the opposite view was that foreign firms have interests in knowing from what contracts they are being debarred from participating.

v. There was discussion on whether the proposed agreement should have a general exception clause along the lines of GATT Articles XX and XXI. While there was no unanimity, there was also a view that exceptions might be necessary to respond to social and developmental objectives, including procurement for public distribution system and domestic stabilization programmes. It was, however, observed that these objectives need not be inconsistent with the objective of transparency.

3.2.2 Procurement Methods

There has been a broad acceptance of the view that the member-states should retain flexibility to use different procurement methods. Efforts should be directed to ensure transparency in the choice and use of the methods being followed rather than on the conditions governing the use of a specific procurement method. However, there was a general view that limited tendering is inherently less transparent and detailed rules might be required to minimize its use.

With regard to rules that might be negotiated on procurement methods, the following had emerged:

- a requirement that each member should specify in its national legislation the circumstances under which procuring entities may use different procurement methods.
- an obligation to ensure the compliance by the entities.
- a general commitment that, irrespective of the method used, transparency would be maximized at each stage of procurement, to the extent possible.

As to limited tendering, it was observed that 'spelling out the exact circumstances and conditions justifying the use of this type of method might go beyond the scope of a Transparency Agreement and impinge upon the ability of procuring entities to use the most appropriate procurement method in the circumstances of each case'. It was also observed that additional burden might be disproportionately high in the case of limited tendering because many of the contracts would be low-value contracts.

On the use of direct negotiations between the supplier(s) and the procuring entity, it was observed that there should be flexibility in terms of its use, subject to transparency being observed.

3.2.3 Publication of Information on National Legislation and Procedures

Discussions centred on (a) type of information to be made available and (v) modalities for making these available. On (a), the general view was to provide for publication or public accessibility of laws and regulations. There was also inconclusive discussions on what more information might be covered under the publication obligation as well as the burdens and the costs of such additional information. One alternative suggestion was to ensure that substantive information was made available rather than focusing on its legal form.

On (b), two approaches came out of the discussions: one was to require publication of information in readily accessible media. The other is only to

require that information is readily accessible, without specifically requiring 'publication'. The latter's advantage is presumed to be reduced burden. As to electronic media usage, the general view was that it should be left to the members to decide.

One important issue was the language in which information is to be provided. The general view was that the obligation is in terms of providing it in national language.

Another important point was to address the issue of whether there should be an 'enquiry point' from where the required information can be obtained by foreign suppliers. It was observed that any requirement of an enquiry point should be without prejudice to decentralized procurement system under a federal structure.

3.2.4 Information on Procurement Opportunities, Tendering and Qualification Procedures

Discussions generally endorsed the importance of timely, sufficient information on procurement as the basis of transparency. Such information should be sufficient for a supplier to assess his interests and submit bids, if he desires to participate.

On what specific bits of information to be provided, three alternatives emerged:

- to include a specific lists of minimum requirements
- to provide for an illustrative list
- no prescription is required, to rely on general principles.

A crucial issue was bid evaluation criterion with respect to preferences to national suppliers or any other measure in favour of domestic supplies or suppliers. The following views were expressed:

- while the nature and extent of such preferences is not within the scope of the Working Group, advance provision of information on such preferences is essential for transparency.
- Rules on information should apply only to cases where foreign suppliers are eligible to participate.

On making information available internationally also, there were two views: one view was that there should be no obligation as foreign suppliers are supposed to keep themselves aware of business opportunities. The other view is that efforts to disseminate information should be commensurate to the interest a particular contract might generate.

As to the applicability of prior information for selective and limited tendering methods, two opposing views were expressed:

- some basic information should be provided, irrespective of the method of tendering
- prior information obligation should apply only to open tendering.

On specifications as well, two contrasting views were expressed. One view was to question its relevance for a transparency agreement. The other view was to provide specifications, preferably based on international standards, in clear and objective manner.

3.2.5 Time Period

There was a broad agreement that provision on time periods should be formulated in terms of considerations to be taken into account for setting time periods rather than prescribing minimum periods.

It was observed that time periods should be sufficient for a supplier to seek information and submit bids; that there should be non-discrimination between domestic and foreign suppliers with respect to time periods, that

specifying time periods in tender documents and any subsequent change being made known to all would further transparency. One opposing view was to question the relevance of time period for transparency.

3.2.6 Transparency of Decisions on Qualifications

Discussions centred on (a) qualification criteria; (b) list of qualified suppliers and (c) provide-sion of information on qualification decisions.

On qualification criteria, it was stressed that to ensure transparency, decisions on qualifications of supplies should be taken only on the basis of criteria, identified and established at an early stage and disclosed to suppliers sufficiently in advance. As to application of qualification criteria, it was observed that these should be applied in a non-discriminatory manner as regards transparency, even if a discriminatory treatment in favour of domestic suppliers is built in the criteria itself. The opposing view was that application of the principles of objectivity and non-discrimination to pre-qualification criteria are outside the concept of transparency.

On lists of qualified suppliers, there was broad agreement that the system followed should not foreclose inclusion of new suppliers.

As to information, it was observed that the basis of selection and the process of selection should be publicly available or available on request. Procuring entities should provide unsuccessful suppliers, on request, reasons for their non-selection.

An opposing view was that providing ex-post information could be impractical in developing countries, especially when large number of suppliers are involved.

3.2.7 Transparency of Decisions on Contract Awards

Discussions in the Working Group stressed the importance of transparency of the evaluation criteria. Such criteria should be clear, be capable

of objective evaluation, should be pre-established and communicated and applied non-discriminately. However, it was also observed that a Transparency Agreement would not, as a general rule, set out what these criteria should be. Importance was also attached to following proper procedure for receipt and opening of tenders so that manipulation becomes difficult and any specific tenderer does not get to know commercial information on others on a preferential basis.

As to provision of ex-post information, one suggestion was that contract award decisions might be made publicly available, at least for less transparent methods of procurement. Another view was to leave it to the national practices. One suggestion was that, upon request, unsuccessful bidders should be provided with more detailed information as to the reasons for their failure and/or reasons behind the award being given to the winning bidder. An opposing view that providing such information might be burdensome and in some cases, might be inconsistent with national practices.

However, it was generally agreed upon that information considered confidential, on grounds of commercial or public interest, should be treated as such.

3.2.8 Domestic Review Procedures

Review procedures lies at the center of the transparency requirement of public procurement. Discussions in the Working Group revealed a broad agreement that domestic review procedures fall within the domain of domestic legislation and the primacy of national legislation should be maintained.

There are, however, opposing viewpoints as to how this needs addressing. Proponents who argue for inclusion of this provision refer to the important role it plays in ensuring overall transparency and enforcement of underlying rules. Review procedures also help in introducing due process and public

accountability. In response, it was observed that no such provision should be included in the Transparency Agreement because domestic review process is in place for the purpose of public accountability at the domestic level. Further, this goes beyond the concept of transparency. Another proposal envisaged leaving the choice of review procedure to individual members, provided the review mechanism itself was transparent and independent. Another view was that provisions should be restricted to only providing information on national review mechanism and procedures.

An important issue deliberated in the Working Group relates to remedies. It has been observed that the review provision should allow remedies for protection of the interests of the suppliers and for ensuring compliance by the entities of the provisions on national review mechanism and procedures, as incorporated in the Transparency Agreement.

In contrast, it was observed that remedies provision falls outside the Transparency Agreement. Further, a strong provision might result in restricted access to foreign suppliers, as entities might feel constrained.

An extremely important issue was whether the WTO's dispute settlement system should apply to obligations to domestic review. In this connection, the distinction between the domestic review mechanism which involves suppliers and the procurement entities under the law of a country and dispute settlement between governments under the law and procedure of the WTO, was emphasized. A view was expressed that WTO dispute settlement should only apply in respect of obligations of governments in their capacity as regulators, i.e., issues relating to the consistency of laws of general application within the rules of a Transparency Agreement and not with respect to decisions on national review procedures concerning a specific public procurement. A view was also expressed that the provision should reflect the principle of exhaustion of domestic judicial review before recourse to WTO's dispute settlement system.

3.2.9 Other matters relating to Transparency.

3.2.9.1 One important subject discussed relates to the use of information technology to provide tender information in a cost-effective way. However, despite its obvious advantages, a view was expressed that given the wide disparity in the stages of IT development among the members, the use of IT could be disadvantageous to SMEs from developing countries. One suggestion made to take care of this problem was that the use of IT in Transparency Agreement might be promoted through the use of a best endeavour clause.

3.2.9.2 On language, there was a broad agreement that information on procurement opportunities need to be provided in the member's official language. However, certain types of information, such as notification of enquiry points, dispute settlement or consultations, should be made in an official WTO language.

3.2.9.3 On the issue of bribery and corruption, there was a view that transparency could be used to reduce their incidence in government procurement. In response, it was observed that transparency, by itself, is not enough. Another view was that there should be no explicit linkage between transparency and corruption & bribery in the Transparency Agreement which should be dealt through domestic legislation.

3.2.10. Information To Be Provided To Other Governments

The issues discussed included, inter alia, notification of national legislation, providing information on national legislation and procurement practices on request from members, and statistical reporting.

On the important issue of enquiry point, it was suggested that each member should establish enquiry point(s) and notify. However, it was also

observed that since establishment of a single enquiry point would necessitate 'close coordination among a large number of departments and agencies, it might present some difficulties…..'.

On statistical reporting, it was observed that statistical reporting should be voluntary.

3.2.11 WTO Dispute Settlement Procedures

It was observed that WTO dispute settlement system applies to its transparency provisions, such as Art X of GATT. Three of the draft texts of an agreement suggested following the provisions of GATT Article XXII and XXIII and GATS Articles XX and XXIII, as elaborated by the understanding on Rules and Procedures Governing the Settlement of Disputes under WTO Agreements.

The opposing view was that subjecting a Transparency Agreement to dispute settlement would not be necessary if its obligations would be of best endeavour type. Another view was that if WTO dispute settlement system has to apply, it would be necessary to make the Transparency Agreement a part of the single undertaking. One important point made questioned the application of dispute settlement procedures in the absence of any market access commitments. A view was also expressed that it would be premature to consider this issue before the elements of the agreements were more clearly identified and rules prescribed.

3.2.12 Technical Cooperation and Special & Differential Treatment for Developing Countries

3.2.12.1 TC & Capacity Building

Since compliance with the provisions of the proposed Transparency Agreement might necessitate amendments in national laws, rules and regulations as well as setting up new institutions, technical assistance for Capacity Building would be

required. Several areas where support might be needed were identified:

> 'Development and improvement of national legislation and procedures; institution building, access to information by suppliers including establishment of enquiry points, in particular provision of information to developing country suppliers as to what entities in developed countries usually procure; provision of information on national legislation and procedures; application of information technology including assistance related to hardware, software and the expertise necessary to disseminate procurement information; identifying ways in which suppliers in developing countries and small and medium-sized enterprises could participate in procurement by government entities in developed countries; training; divulging information on how government procurement could influence employment and development in general; technical advice and other experience; sharing activities such as twinning between developed and developing country agencies and study tours.'

As to the types of provisions for possible inclusion in the agreement, one suggestion was to follow the model provided by Article 66.2 and 67 of TRIPS. Some draft texts provided that technical assistance should be provided on request, on mutually agreed terms and conditions and specify the areas in which such assistance could be provided.

3.2.12.2 Special and Differential Treatment for Developing Countries

The discussions in the Working Group recognized the need for S&D treatment. As to how it should be dealt, a view was that it should get reflected in the substantive provisions of the agreement.

As to the types, suggestions made referred to transitional periods, application of higher threshold values and exemption from coverage, e.g., for entities at sub-central level or services. A transitional period of two years for LDCs and one year for others had been suggested, during which the agreement might be applied on best endeavour basis. There was also a view that a stand still clause might be provided for during the transition period.

Chapter – 4

Transparency Agreement; Its Developmental And Business Dimensions

4.1 Development Dimensions

Governments quite often seek to achieve certain societal objectives through their procurement operations. The primary objective of any procurement activity is to secure the best deal for the resources spent. However, governments are sometimes willing to accept a trade-off between this primary procurement objective and other socially desirable, but non-procurement related objectives, here-after referred to as secondary objectives. For example, a government may accord a price preference for products sourced from the SME sector. In such a case, the higher prices paid are justified on the logic of the societal objective of developing and strengthening SMEs. Similarly, governments can prefer an offer which has a higher domestic content with the objective of promoting indigenous supply capability.

Box 4.1

Primary and Secondary Procurement Objectives

Primary
- Maximise procurement efficiency
- Minimise procurement costs

Secondary
- Promote local industry
- Special preference for SMEs
- Special preferences for state-owned enterprises
- Maximise local content
- Promote technology transfer
- Organize offset programmes
- National security considerations.

Moreover, such secondary objective(s) need not always be economic. For example, US State of Massachusetts had a law (since declared unconstitutional by the US Supreme Court) that prohibited firms doing business with Myanmar from participation in the state's procurement programme because of Myanmar's human rights record.

Many countries have state policy objectives, such as preferential treatment of the disadvantage categories, embedded in procurement systems. A perusal of all such secondary objectives will reveal that some of them can be applied in a non-discriminatory way while in some cases, some discrimination may be unavoidable. There are two basic dilemmas in this context (Box 4.2)

Box 4.2

Two Dilemmas

The first is how to strike an appropriate balance between free trade goals on the one hand, and the legitimate domestic and other policies of member governments on the other. So far as domestic (internal) policies are concerned, this issue has been raised in the GATT/WTO jurisprudence in the context, in particular, of technical regulations and standards. How should the balance be struck between domestic interests, such as protecting consumers and the domestic environment, and the need to control the trade-restricting effects of technical regulations and standards? In the context of trade sanctions against regimes that do not comply with human rights or environmental standards, the question of how far sanctions should be permitted in government procurement reflects a much wider debate over the permissibility and role of trade sanctions under GATT/WTO laws.

> The second dilemma, which is particularly important for the GPA given its plurilateral nature, is how to balance effectiveness with wider coverage. A strict approach to secondary policies could increase the effectiveness of the GPA in relation to covered procurement, but might also encourage parties to retain or to add limitation on coverage and/or deter accessions.
>
> *Source: Sue Arrowsmith, Government Procurement in WTO, p. 326*

Apart from these two substantive issues, the central question in the current context is the relationship between the pursuance of secondary objectives and transparency. The applicability of non-commercial factors in the decision - making process on procurement almost by definition adds complexity, subjectivity and possibly opaqueness.

Further, the following considerations are important in this context:

- There are inherent limitations of transparency as a regulatory tool. Structural factors such as human resource dimension of procurement officials are possibly more critical.
- Some element of subjective commercial judgment is inevitable in any procedure, -- may also be desirable in some cases.
- Even the strictest and detailed procurement rules will 'fail if procurement officials are determined to circumvent it.'

Given the extensive usage of secondary objectives, the first step towards an international agreement on transparency in government procurement will be to accept their social and legal legitimacy, especially the latter where the MFN treatment becomes questionable.

"The transparency implications of these policies are not a major concern … and it is sufficient from a transparency perspective if secondary policies are formulated and publicized in advance." (Sue Arrowsmith, 2003 P. 354)

Transparency in government procurement by itself should help the developing countries as it can increase foreign participation which, in turn, will promote competition, ensure value for money, clear decision-making and reduced possibilities of corruption. Many developing countries in the Asia-Pacific region have a large part of the government procurement financed by multilateral agencies such as the World Bank and Asian Development Bank. The role of bilateral official aid is also significant in some countries. Procurement under these funds are already made following the rules of the funding agencies and are, therefore, subject to detailed transparency provisions.

Most governments have also domestic laws which provide for bidding procedures, directed to several objectives, including transparency. In such a context, the developing countries need not fear that a Transparency Agreement would be detrimental to their developmental and other societal concerns, provided the secondary objectives are allowed to operate, subject to their being transparent.

4.2 Business Implications

Keeping in view the Doha Mandate which clearly delinks non-discrimination and market access commitments from the Transparency Agreement, incrementality in terms of business will have to come only from one factor. Lack of transparency can be considered as a market access barrier. To the extent, the Transparency Agreement removes reduces this barrier, the import penetration of the government procurement market might improve.

What does it mean for developing countries? First, as to the transparency factor as a market access barrier, they may not gain anything so far as the

government procurement markets in OECD countries are concerned, because many of these are already observing such procurement practices. However, the developing countries as a group may gain because of more procurements from within the developing countries by the developing countries, due to higher level of transparency being imposed through the Transparency Agreement.

Second, there is the crucial issue of supply side capability. Not many developing countries have competence to participate in global procurement programmes. This competence may get more limited because of the threshold level which may be agreed upon for the transparency agreement. The threshold levels of the GPA may provide some benchmarks. For central government entities, there is a common minimum threshold of SDR 130,000 for purchases of goods and non-construction services. The threshold level goes up to SDR 15 million for construction services, procured by sub-central entities. Higher are the thresholds, lower will be the response capability of firms in developing countries.

Third, despite what has been observed above, there are several developing countries in the Asia-Pacific region which can participate effectively in the global government procurement market. Construction services, software design and implementation among services, pharmaceuticals and other medical supplies among goods are some examples. Countries like China, India, Malaysia, Singapore, among others, stand to benefit.

CHAPTER – 5

Negotiating Strategy for Developing Countries

5.1 Reservations on the Part of Developing Countries

Developing countries have been unenthusiastic of an agreement on transparency on government procurement. Reasons behind this attitude can be understood by analyzing their response to the existing GPA. Except Hong Kong, China and Singapore, no other developing country is a member of the GPA. Major reasons for non-participation are:

- Most developing country governments have secondary objectives, as explained in Chapter 4 above, which are considered important from the developmental or other social requirements. The GPA restricts the freedom of the governments to pursue such policies.
- The developing countries have limited supply capability. "The developing countries have few incentives to join a WTO agreement liberalizing public procurement markets. The payoffs for developing countries are likely to be very low. Countries with smaller economies (and transitioning) countries with few internationally competitive firms, may find that international competition will lead greater number of procurement awards made to foreign firms, with no compensating offset of awards to their firms in overseas procurement markets" (Linarelli 2003).

These need to be seen against the potential benefits.

- Potential gains from the increased market access is expected to be positive but low, because of supply deficiency.
- Efficiency gains arising out of lower costs of procurements. This will be proportionately higher in those countries where the domestic laws

are currently inadequate and/or the share of multilaterally-funded procurement to total government procurement is low.

One reason behind the Singapore Ministerial Decision to restrict the agreement only to transparency was the realization that there would be asymmetry in the distribution of potential benefits between the developed and the developing countries, if a GPA type of agreement was to be multilateralised and, therefore, would be unacceptable to the developing countries.

The effective delinking of extending national treatment to foreign suppliers and market access commitments from the Transparency Agreement was expected to take care of the reservations on the part of some developing countries. However, as the summary of discussions in the Working Group in Chapter 3 reveals that there have hardly been any convergence of views on the substantive elements of the Transparency Agreement. One reason behind this is the continuing perception of some developing countries that the Transparency Agreement might be only the initial step for a future multilateral GPA type of agreement, involving market access commitments.

It has been observed that both US and the EU have regarded the negotiations on transparency as part of a 'gradualist strategy' towards this goal. "If market access commitments were negotiated within the WTO, the transparency disciplines already developed could operate to support these commitments. Alternatively, accepting limited transparency obligations at an early stage might lay the ground work for participating in market access negotiations in other WTO fora, such as the GPA" (Sue Arrowsmith, 2003, P454).

While such a threat perception may not be realistic atleast for some time, there is enough evidence in the Working Group discussions that there were attempts to steer the deliberations in a way which might be seen to transcend the boundaries of a Transparency Agreement, as normally perceived. 'The focus of the Working Group has shifted subtly, from considerations of how to make

procurement practices transparent, to questions of market access about whether procurements should be open to international competition. The emphasis has shifted from rule-oriented transparency to politically oriented issues …. and …. how far the WTO members want to go in for disclosing protectionist practices'. (Linarelli 2003, P. 242).

5.2 Negotiating Strategy for the Developing Countries

The position of the developing countries to the Transparency Agreement ultimately will depend upon (a) whether the agreement can be formulated along the lines they consider to be beneficial or least damaging to them and (b) whether a relaxation of position on this agreement can be used as a negotiating leverage to secure benefits in some other negotiating issue under the Doha Development Agenda.

The main proponents of the Transparency Agreement now appear to be taking a position that wider acceptability of a set of core provisions on transparency would be the preferred objective than a strong rule-based system. Flexibility needs to be built into, as wide divergences in national procurement systems make one size fits all strategy unworkable. However, they expect the agreement to be legally binding and effective. This means making the agreement a part of the single undertaking and making it subject to WTO's dispute settlement system.

Many developing countries, especially those relatively more underdeveloped and LDCs, which have very little to gain from the agreement, may find such a position equivalent to make unilateral concessions. Therefore, they may go for a position which will be exactly opposite, i.e., to make the agreement a voluntary code or guideline, and thereby, taking it outside the legal, rule-bound discipline of WTO. Some countries may also stick to their off-repeated stance that no such transparency agreement is required.

A middle position has to emerge, possibly out of the discussions in the Working Group till the Cancun Ministerial, if a consensus has to be reached in that meeting. The steps towards that will involve, inter alia, the following:

- A precise definition of 'transparency.' As the discussions in the Working Group clearly demonstrates, there is hardly any consensus on what constitutes transparency. A more compact and limited definition might help in securing a consensus.
- The second is to be more precise on what is the objective of the Transparency Agreement. If the objective is limited only to addressing the issue of non-transparency as a market access barrier, it needs to be clearly so stated. If there are other objectives, these are to be precisely defined, because possible contents of the Transparency Agreement will depend upon what the objectives are.
- Developing countries may not stand to lose, possibly gain marginally, if the agreement is restricted strictly to transparency. This will, however, require an explicit acceptance of the secondary procurement objectives which the developing countries may pursue, so long as their usage and application procedure are transparent.
- Based on the experience of S&D provisions in various WTO agreements negotiated under the Uruguay Round, developing countries should seek S&D treatment as part of the substantive provisions in the agreement.
- It is inevitable that the developing countries will have to bear additional burden to put more information in public domain, develop systems for records–keeping, for ex-post review procedures, set up enquiry points, etc. How much of such additional burden can be offset through incremental gains from procurement efficiency will depend

upon the contestable government market size and the current status of relevant domestic laws & regulations. Obviously, the position will vary from country to country. There is, therefore, a prima facie case to seek offsets from other negotiating issues. The leverage can come from the perceived benefits of transparency in the developing country government markets for the developed countries. It has been roughly estimated that total government procurements, including those at the sub-central level, amounted to $600 billion in early 1990s (Evenelt & Hoekman 1999). The OECD study referred to in Chapter 2 has estimated the market at $287 billion in 1998.

- Technical assistance and capacity building, clearly formulated, should form an integral part of the Transparency Agreement.