

**Working Group on Transparency
in Government Procurement**

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CONSIDERATIONS RELATED TO ENFORCEMENT OF AN AGREEMENT ON TRANSPARENCY IN GOVERNMENT PROCUREMENT

Communication from the United States

The following communication, dated 27 January 2003, has been received from the Permanent Mission of the United States with the request that it be distributed to all Members.

Introduction

In September 2002, the United States proposed a work plan for the Working Group to build on the progress that it has made over the past several years (WT/WGTGP/W/35). In furtherance of that proposal, the United States makes this submission to address two potential elements of an agreement on transparency in government procurement (TGP agreement) that several Members, in particular developing countries, have singled out as of particular concern. Both elements relate to the enforcement of an agreement: the requirement of domestic review procedures and application of the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) to a TGP agreement.

Enforcement provisions in a TGP agreement

A TGP agreement would be an important addition to the rules-based international trading system by setting out basic transparency obligations that suppliers throughout the world could expect to find in the government procurement systems of all Members. These obligations should be subject to the same types of enforcement as existing commitments in other WTO agreements. However, it is important to emphasize that regardless of the enforcement mechanisms that may be built into a TGP agreement, such mechanisms could not be used to challenge domestic preference programmes, which the Doha Declaration has explicitly excluded from a TGP agreement.

With respect to the enforcement mechanisms in a TGP agreement, several Members have raised questions about the interaction between domestic review procedures and application of the DSU. Questions have also been raised about the relationship between application of the DSU and specific procurement decisions. These have included the potential overturning of procurement decisions and the authorization of sanctions if a dispute settlement panel were to find a Member to be in violation of the agreement and authorized retaliation in other sectors. To assist the Members in addressing these concerns, the United States offers the following considerations related to tailoring the most appropriate enforcement provisions for a TGP agreement.

While the Working Group need not decide the particulars of an enforcement mechanism for a TGP agreement until the full contours of the agreement are determined, it could consider how to structure the interaction between domestic review procedures and the application of the DSU in an agreement. The United States suggests that these provisions should serve different purposes and that the different roles should be reflected in a TGP agreement.

Domestic Review Procedures

A TGP agreement should require that Members make available domestic review procedures for both domestic and foreign suppliers to use if they had concerns that a particular procurement was not in compliance with the transparency provisions of an agreement. An agreement could specify that the use of such procedures would be the only method through which a specific procurement could be challenged.

As has been observed repeatedly in the Working Group, and most recently in the Secretariat's note (WT/WGTGP/W/33) of 3 October 2002, many Members maintain domestic review procedures "which allow aggrieved suppliers to lodge complaints against any alleged breaches of the applicable rules and to seek review of the procurement proceedings of an entity, including award decisions". Some Members have administrative mechanisms, while others have judicial mechanisms. Some Members have both.

Many WTO agreements provide for domestic review mechanisms to ensure that complaints or appeals can be raised and resolved under the jurisdiction of an individual WTO Member pursuant to national or local laws. The following are examples:

- GATT Article X:3(b) provides for "judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters".
- Article 2(j) and Article 3(h) of the Rules of Origin Agreement provide that administrative actions related to determinations of origin shall be "reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination".
- Article 5(e) of the Import Licensing Agreement requires that applicants for licenses "shall have the right of appeal or review in accordance with the domestic legislation or procedures of the importing Member".
- Article 11 of the Customs Valuation Agreement (Agreement on Implementation of Article VII of the GATT 1994) provides the right of appeal for valuation determinations. An "initial right of appeal" may be to the customs administration or an independent body, but legislation must also provide "for the right of appeal without penalty to a judicial authority".

Similarly, the Agreement on Technical Barriers to Trade and the Agreements on Subsidies and Countervailing Measures and Anti-Dumping Practices contain domestic review provisions. The TRIPS Agreement contains very elaborate provisions for domestic review and enforcement.

Drawing on these provisions, a TGP agreement could include a simple and flexible provision on domestic review procedures that would accommodate different Members' existing independent administrative or judicial tribunals and review procedures.

Application of the DSU

To address Members' concerns with regard to WTO dispute settlement for a TGP agreement, Members should consider the following:

- phasing-in application of certain provisions of a TGP agreement (and thus application of the DSU) for developing countries, linked to capacity building; and
- providing explicitly in an agreement that resort to the DSU would not be available to challenge a specific procurement, and thus could not be used to overturn a contract award.

Conclusion

The United States recommends that the Working Group at its February 2003 meeting specifically address Members' concerns related to enforcement of a TGP agreement. To frame the discussion related to the enforcement of a TGP agreement, the United States offers this submission.
