

**DOMESTIC REVIEW MECHANISMS RELATED TO TRANSPARENCY
IN GOVERNMENT PROCUREMENT**

Communication from the European Communities

The following communication, dated 30 January 2003, has been received from the Permanent Delegation of the European Commission with the request that it be distributed to all Members.

1. Introduction

The Chairman's checklist of issues¹ refers to domestic review procedures in point VIII. This issue was the object of a communication from the United States of 24 June 1999 (WT/WGTGP/W/23) and has been discussed at the Working Group on several occasions.

In the light of previous discussions and submissions, the European Communities (EC) want to contribute to the further elaboration of this issue in full consideration of the new Doha mandate, in particular the limited scope of the future agreement to transparency only. In this perspective, this paper intends to cover all aspects relating to transparency of domestic review procedures in government procurement. In addition, it examines the kind of provisions that should be envisaged in the future agreement on transparency in government procurement to ensure that parties' measures subject to a future agreement can be reviewed through domestic procedures.

A future agreement would thus, on the one hand, ensure the transparency of the domestic review procedure and, on the other hand, ensure suppliers' right to challenge a procurement in breach of transparency provisions.

2. Transparency of domestic review procedures

All government procurement regimes contain legislative and regulatory provisions to review decisions of procuring entities although the extent, details and procedures may vary in each country.

¹ Last update of the note by the Chairman, "List of Issues Raised and Points Made", JOB(99)/6782, dated 13 November 1999.

The future agreement would ensure that domestic review procedures are transparent. This is nothing new: the GATS², the GATT³, the Agreement on Rules of Origin⁴, the Agreement on Import Licensing⁵, the Agreement on Customs Valuation⁶ and the Agreement on Trade-Related Aspects of Intellectual Property Rights⁷ all contain provisions relating to the transparency of domestic review procedures. Document WT/WGTGP/W/3 prepared by the Secretariat reproduces all these relevant provisions.

Issues requiring further elaboration are as follows:

2.1 Access to review procedure rules

The parties would ensure that existing rules governing the review process for a given tender are available to any bidder who has an interest in this particular tender. Suppliers affected by a measure during the procurement process should also have access to existing rules allowing them to exert their right to launch a challenge.

2.2 Decisions taken by the domestic review body

Decisions taken or the lack of decision taken by the review body should be communicated to the complainant bidder and to any other bidder who may be affected by the decision or lack of decision in writing, in a timely and comprehensive manner allowing complainants to respond accurately to any decision.

3. Challenge procedures within a future agreement on transparency in government procurement

A future agreement on transparency in government procurement should contain provisions allowing suppliers to challenge a procurement in breach of the provisions related to transparency of the procurement process (i.e. breach of obligation to publish a tender notice or contract award notice or any other obligation arising from the Agreement).

This is nothing new: the GATS⁸, the GATT⁹, the Agreement on Rules of Origin¹⁰, the Agreement on Customs Valuation¹¹ and the Agreement on Trade-Related Aspects of Intellectual Property Rights¹² all contain rules requiring Members to have in place domestic review bodies, and the plurilateral Agreement on Government Procurement (GPA)¹³ contains provisions for domestic review procedures where it is alleged that the GPA has been breached. Document WT/WGTGP/W/3 prepared by the Secretariat reproduces all these relevant provisions.

² Articles III.1 and VI.2.

³ Articles X:1 and 3(b).

⁴ Articles 2(g) and (j) and 3(e) and (h).

⁵ Article 1, paragraph 4(a).

⁶ Articles 11 and 12.

⁷ Articles 41 to 61.

⁸ Article VI:2.

⁹ Article X:3(b).

¹⁰ Articles 2(j) and 3(h).

¹¹ Article 11.

¹² Articles 41 to 61.

¹³ Article XX.

3.1 Independence of the review body

Decisions on procurement covered by a future agreement should be subject to review by a body independent from the procuring entity. Discussions with WTO Members have brought to light the differences of understanding about the independence, objectivity and impartiality of the review body. The EC considers that sufficient independence from the procuring entity would be secured if this independence is foreseen at any one step of the review procedure.

3.2 Challenge procedure

WTO Members would remain sovereign to maintain any judicial, arbitral or administrative procedures to review the correct implementation of the provisions and principles related to transparency in government procurement following a similar approach to the GATS¹⁴ and the TRIPS Agreement.¹⁵

The challenge procedure could be governed by the following principles:

- the review body renders prompt and timely decisions, preserving suppliers' commercial interests,
- no discrimination between domestic bidders and those from other parties;
- decisions taken by the review body are effective and enforceable;
- challenge procedures provide for adequate measures to correct proven infringements of the agreement and to protect suppliers' interests in a tender.

Domestic review bodies in many WTO parties often apply provisional measures such as the suspension of the tendering process or provide for remedies such as compensation for the loss or damage suffered (i.e. cost of tender documents). The EC is conscious of the heterogeneity of parties' legal regimes and level of development and consequently understands the difficulties to discuss remedies at this stage. Reference to provisional measures and remedies in this paragraph is intended to provide more clarity and illustrate what the borders are around the domestic review procedures related to transparency in government procurement.

4. Special and differential treatment for developing countries

Within a specific chapter on special and differential treatment that the future agreement may contain, the EC would propose a flexible approach to implement domestic review provisions taking into consideration the outcome of the future agreement.

¹⁴ Article VI.2(b).

¹⁵ Article 41.5.