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**Committee on Government Procurement
Negotiations under Article XXIV:7 of the GPA 1994**

**CHECKLIST OF ISSUES RAISED IN INFORMAL CONSULTATIONS REGARDING
MODALITIES FOR THE REVIEW OF THE AGREEMENT ON
GOVERNMENT PROCUREMENT***

NOTE BY THE SECRETARIAT

Revision

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* Pursuant to the relevant Decision of the Committee on Government Procurement ([GPA/CD/5](#) (16/11/2023)), this document (informal document symbol: gpa98) was derestricted on 8 November 2023.

The following attempts to set out points made by Parties to the Agreement in the informal consultations held since February 1997 pursuant to the decision of the Committee in its 1996 Report to the Ministerial Conference that it would "undertake an early review, starting in 1997 with an examination of modalities, with a view to the implementation of Article XXIV:7(b) and (c)" ([GPA/8](#), paragraph 22).

The list may not be exhaustive and will, of course, need to be amended and updated as further discussion develops.

A. AREAS TO BE CONSIDERED

1. The point has been made that the key to the review lies with the issue of simplification and improvement of the Agreement and that, if this aspect were to be satisfactorily resolved, then the other two elements of the review would also largely have been addressed. In this connection, it has been suggested that an improved and simplified Agreement would be likely to result in a reduction in the number of exceptions to the Agreement and would therefore lead to a more uniform application. On the other hand, the point has been made that the work on all three elements of the review should be advanced simultaneously and in parallel. The concept of reciprocity had been at the basis of the rationale for the present coverage of the Agreement. Therefore, it could not reasonably be expected that a mere improvement and simplification of the Agreement would lead to the expansion of its coverage.

2. It has been stated that the elements of the review on the elimination of discriminatory measures and practices which distort open procurement and on the expansion of the coverage of the Agreement were linked in many respects. Since it might be difficult to make a distinction between these two aspects, future negotiations on the two issues should be held simultaneously.

3. It has also been stated that the discussion of the review item on discriminatory measures should not be made dependent on the discussion of the other two elements of the review.

1. Simplification and improvement of the Agreement

(a) General

4. It has been emphasized that simplifying and providing greater flexibility to the procedures under the Agreement should not lead to a weakening of commitments and thus result in less open markets. Rather, simplification should aim at obtaining effective but more easily applicable disciplines and should improve the balance between the advantages of certain requirements and the administrative burden of complying with them. Compatibility between the concepts of simplification and effective disciplines should be secured. For example, any flexibility on the requirements on deadlines should be accompanied by the elaboration of objective criteria for providing sufficient time for bidding by domestic and foreign suppliers.

5. With regard to the Committee's stated aim that the review shall seek the expansion of membership by making the Agreement more accessible to non-Parties ([GPA/8](#)), the point has been made that improving and simplifying the procedural provisions of the Agreement would increase its appeal to non-Parties. Simplifying the Agreement would also help in promoting the common objective sought by the review of the GPA, of the Working Group on Transparency in Government Procurement and of the Working Party on GATS Rules which is to establish a set of rules and principles that could ultimately be adopted on a multilateral basis.

6. The point has been made that Parties should take into account the costs that may have to be borne by procuring entities and suppliers in adapting to new changes in the procedures under the Agreement which has been in force for only three years. Simplification of the provisions should be limited to what is absolutely essential for the purposes of the efficiency of procurement regimes.

(b) General principles in the Agreement

7. It has been suggested that consideration might be given to whether some provisions of the Agreement could be expressed in terms of more general principles that were widely accepted in day-to-day procurement practices such as transparency, equality of opportunities,

non-discrimination, proportionality, competition, liberalization and expansion of world trade. While such principles were already included in the Preamble or were implicit in some of the main provisions, they should be clearly spelled out as operational principles of general application.

8. The following points have been made regarding the application of such principles in the Agreement:

- "proportionality" was an underlying principle in a number of provisions, for example in the term "unnecessary obstacles" in Article VI on Technical Specifications and the term "within a reasonably short time" in Article VIII(d) on Qualification of Suppliers. Moreover, it was essential that any requirements relating to technical, financial or professional capacity of suppliers should be strictly limited to what were necessary and justified with respect to the objectives of the procurement in question;
- the principle of proportionality might be introduced as one of the objectives of the Agreement in the Preamble. However, it might be difficult to set out clear criteria for determining the proportionality of a given procedure to the objective sought. Any unclear criteria regarding such principles would constitute an element of legal uncertainty;
- the non-discrimination principle was an explicit requirement in Article III. On the other hand, it might be difficult to incorporate obligations based on the abstract notions of competition, liberalization and expansion of world trade in the operational articles.

(c) Enforcement and monitoring mechanisms

9. The point has been made that an approach of providing greater flexibility and more general principles may result in the need for a re-examination of the mechanisms aimed at ensuring the effective enforcement of the Agreement. There was room for the improvement of the functioning of the Agreement by increasing the effectiveness of the existing enforcement mechanisms that guaranteed the rights of suppliers. On the other hand, it has been said that a case had yet to be made that the greater flexibility in the rules that might be envisaged as a result of the process of simplification and improvement of the Agreement that was presently under way would give rise to the need for improved mechanisms for enforcement and monitoring. The outcome of the discussions on the simplification and improvement of the Agreement might show that there was no relationship between the two processes.

10. The suggestion has been made that Parties should consider to what extent Article XX on bid challenge procedures had been effective in achieving this objective. In addition, or as an alternative to, enforcement mechanisms based on the bid challenge procedures under Article XX and dispute settlement procedures between governments under Article XXII, independent enforcement agencies could be established in individual Parties to address allegations of violations of the principles of the Agreement by aggrieved suppliers or investigate and monitor the application of procurement rules and procedures on their own initiative since suppliers might often be reluctant to bring cases against procuring entities.

11. A note addressing the issue of enforcement and monitoring mechanisms, in particular in the light of the EC's own experience on the enforcement and monitoring mechanisms of public procurement rules, has been circulated in Job No. 3871.

12. Whether the Agreement should prescribe in detail how government authorities should organize their interaction with suppliers has been questioned. It has been said that the establishment of independent review bodies in individual Parties provided for under Article XX:6 would reduce the need for any additional procedures in this respect.

13. With regard to the suggestion relating to the addition of new provisions concerning the establishment of independent authorities, a view has been expressed opposing this suggestion. More time was needed for the evaluation of the operation of the arrangements under Article XX which was a new feature of the 1994 Agreement. A case had yet to be made that the current procedures in the Agreement on review, consultations and monitoring had not been adequate and that there was need for new requirements and additional mechanisms. The fact that only a limited number of cases had been reported under formal challenge procedures did not necessarily mean that the aims of

Article XX had not been achieved. It had not been established that suppliers had been ignorant of, or had been intimidated from using the procedures available to them under Article XX. It has also been said that paragraph 1 of Article XX required Parties to encourage the complainant supplier to seek resolution of its complaint in consultation with the procuring entity before resorting to challenge procedures. Suppliers might have used the route of informal consultations for resolving their disputes with procuring entities and promoting mutual understanding and good relationships between them. Further views on this matter have been included in a non-paper by Hong Kong, China circulated in Job No. 5269. The point has also been made that any further procedures relating to enforcement might be perceived as an additional burden by those non-Parties that were considering accession to the Agreement. Moreover, the use of information technology as a vehicle for monitoring and enforcement should not lead to additional reporting requirements.

14. The following have been mentioned as among the other mechanisms which could be envisaged to guarantee transparency of procurement proceedings and accountability of procurement agencies and to limit the scope for arbitrary dealings and discrimination in procurement practices: publication of a schedule of prices offered which would show whether the contract had been awarded to the lowest price bidder; and a declaration that all complaints, including anonymous complaints, would be investigated. It has also been said that the Agreement included provisions relating to information on contract prices or the highest and lowest offer that had been taken into account in the award of the contract (Article XVIII:1(c)).

15. It has been said that transparency through public scrutiny and monitoring by other suppliers was more effective in promoting compliance than the institution of additional bureaucratic procedures.

16. In this connection, another view has been expressed that a review of the operation of Article XX should be without prejudice to whether or not Parties should consider alternative enforcement mechanisms. Another view has been that a layer of obligations relating to enforcement and monitoring mechanisms additional to the challenge procedures of Article XX might deter non-Parties considering membership of the Agreement. Other views expressed on the matter have questioned the way in which independent mechanisms could operate in Parties with federal governments. On the other hand, the point has been made that independent enforcement mechanisms offered the possibility of arriving at rapid resolution of disputes and also avoiding the inconvenience of formal court proceedings. Provisions requiring the establishment of such mechanisms would provide an additional incentive to non-Parties to join the Agreement.

(d) Information technology

(i) General

17. It has been suggested that, in accordance with the terms of Article XXIV:8, the Agreement should be adapted to take into account advances in the area of information technology since the conclusion of the Agreement. In this connection, it has been suggested that the text of the Agreement should be amended to provide flexibility and to clarify any ambiguities with respect to the use of information technology.

18. The need to continue the information-gathering process in response to the revised questionnaire on information technology was referred to.¹

19. It has been said that new obligations in the Agreement regarding the use of electronic publications and any requests to acceding countries to undertake commitments in this respect would cause them to incur considerable costs. Another view has been that, introducing electronic means of publication would be less complicated than organizing new paper-based publication systems. It has also been said that, in view of the objective of expanding the membership of the Agreement, technical cooperation could be provided to those countries that did not have the means to use information technology in government procurement.

¹ Responses to the revised questionnaire ([GPA/W/24](#)) were submitted by Norway ([GPA/W/24/Add.1](#)), Canada ([GPA/W/24/Add.2](#)), Korea ([GPA/W/24/Add.3](#)), Hong Kong, China ([GPA/W/24/Add.4](#)), the European Community ([GPA/W/24/Add.5](#)), the United States ([GPA/W/24/Add.6](#)) and Singapore ([GPA/W/24/Add.7](#)).

(ii) Non-discrimination

20. It has been stated that information technology should be accommodated in such a way as to enhance rather than undermine the basic objectives of transparency and non-discrimination in the Agreement. The use of information technology tools should not put at a disadvantage the suppliers of actual or potential Parties less well-equipped in information technology or without adequate links to international networks and should take into account the limited capacity in developing country Parties in this respect. Concern has been expressed that, unless appropriate safeguards are established, the use of information technology in government procurement may lead to de facto discrimination against foreign suppliers. It has also been mentioned that the use of information technology may create or widen the gap between entities and suppliers which can effectively operate in the information age, and those, in particular SMEs, which cannot, thus creating a competitive advantage in favour of the former group.

21. The point has been made that the non-discrimination aspect of the use of information technology should be considered against the background of the existing procedures and practices under the Agreement. The paper-based method of publication and other tendering procedures might also have some form of unequal impact on different suppliers. The discussion of this matter should focus on the relative discriminatory effects of introducing information technology. Attention has been drawn to the arguments put forward in section 1(c)(iii) below as to why electronic dissemination of tender information would be more effective in reaching all interested suppliers than paper-based methods.

22. With regard to the suggestion that the Agreement should include a provision to the effect that the means of communication in submission of bids can be specified by the procuring entity, it has been said that if a procuring entity only allowed communication by electronic means, this might discriminate against suppliers that did not have the required information technology tools. In this respect, it has also been said that there should be a general non-discrimination provision, which would ensure that procuring entities did not make choices, for example by asking supplier from other Parties to use a special information technology tool with a view to discriminating among suppliers from other Parties. However, to the extent that individual suppliers had the possibility of using the required information technology, for example by taking a subscription with an Internet provider or by using email, purchasing entities should be allowed to require the use of electronic means of communication, irrespective of the individual decisions of suppliers. The comment has been made that the provisions on the use of information technology which would allow entities to favour only those suppliers who had access to information technology would be inconsistent with Articles VI:4 and VII:2 of the Agreement.

23. The point has also been made that fears that technical and content-related compatibility issues in connection with the use of information technology might lead to de facto discrimination against foreign suppliers were largely resolved through the use of the Internet. Nevertheless, Parties' willingness to accept electronic bids would proceed at different speeds because of considerations related to security of data transmission issues and feasibility for large and complex bids.

(iii) Publication requirements

24. The view has been held that procuring entities should be allowed to choose between the use of electronic publications and/or hard copy means in order to comply with their publication obligations under the GPA. Publication of information on tendering opportunities only through the use of electronic media should be sufficient to meet the relevant requirements under the Agreement. It has also been said that denying easy access to information on procurement opportunities through the use of the most up-to-date publication and dissemination systems would go against the objectives of the Agreement of opening procurement markets to competition and fostering transparency. Another view has been that a Party that had limited access to information technology tools should be allowed to continue the use of paper-based publications. Any modifications to the Agreement should be limited to provisions allowing the use of information technology in parallel with the paper system currently in use.

25. It has been said that Article IX:1 required publication of tender notices in "the appropriate publication" listed in Appendix II. If electronic publication was considered to be an "appropriate publication", there would not be a need for any additional provisions specifically stipulating the use

of electronic publications. The introduction of electronic means for publication of tender notices in individual Parties could be indicated through notification of changes to publications listed in Appendices II and III. It has also been said that provisions relating to the availability of paper backups to electronically transmitted information or their accessibility by telephone or telex would provide the necessary safeguards to potential suppliers who did not have access to electronic networks.

26. It has also been said that the use of information technology was the best means of meeting the overall objectives of the Agreement, including transparency. Paper-based publication of tender notices was no longer the best means of ensuring transparency of tender information on a worldwide level. It has been suggested that the reference in Article IX:1 to publication of tender notices in the appropriate publication in Appendix II should be deleted and be replaced by a general requirement to publish notices through means which offered the widest possible and non-discriminatory access to interested suppliers from all Parties.

27. Moreover, it has been said that, while databases on procurement opportunities could be decentralized, there should be a provision in the Agreement requiring Parties to guarantee access to the relevant information in their countries through a single point of entry and free of charge. Other comments have been made expressing doubts about the feasibility of providing access to information through a single point of entry in an agreement with a wide scope and questioning whether the Agreement should have provisions stipulating how governments should organize the dissemination of tender notices, for instance whether entities should charge fees for providing access to tender documentation. It has been said that dissemination of tender documents in paper form reduced the costs relating to equipment, maintenance, updating and providing sufficient telephone lines for access and downloading of information. Contracting out the operation of electronic tendering systems could also reduce such costs, which were in the range of \$10 to 20 per tender, on entities. Another view has been that tender documents for big contracts usually already prepared in the form of electronic files, could be placed on the Internet at minimal or no cost.

28. It has been said that, whatever the means used, publications should be accessible and recordable. The question has been asked whether a website would need to have certain features of publications that were essential to the users for instance relating to record keeping or legal evidence, the core elements of transparency and due process. The point has also been made that more conventional means, such as facsimile or CD-ROMs or responses to telephone requests could be considered as fail-safe alternatives for safeguarding the accessibility of procurement information to those without ready access to electronic networks.

29. Another view has been that the provisions on the use of electronic publications should be set out as an option rather than as a requirement in the Agreement. While the Agreement should not exclude the possibility of publishing in hard copy version, it should allow Parties to review the need for continuing with paper-based publication, for example for advertising tenders in the area of advanced technological systems and information technology.

30. Suggestions have been made concerning the provisions of the Agreement relating to publication requirements (Article IX on invitation to participate regarding intended procurement); Article XI on time-limits for tendering and delivery; Article XVII on transparency; Article XVIII on information and review as regards obligations of entities; and Appendices II and III to reflect the practice of electronic publication of notices (Job Nos. 3481-1999 and 5211-1997). (These suggestions are reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

31. It has been stated that increased transparency of procurement opportunities was one of the main benefits of the electronic dissemination of tender notices. The Internet permitted viewing of notices anywhere in the world, regardless of where those notices may have originated. Appendix II currently contained references to the websites that were being used in some Parties to disseminate tender information. Another view has been expressed questioning the use of websites as Appendix II publications. It has been suggested that the Agreement should include provisions requiring Parties to provide, in the GPA Appendices, the addresses of any Internet sites that gave procurement opportunity information in their country. This would help suppliers from countries Parties to the Agreement to locate and easily access information on procurement opportunities that was currently published electronically. Parties should also update and supplement this information as necessary. On the other hand, a view has been expressed that providing addresses of Internet sites in the GPA

Appendices should not be a requirement in the Agreement. In most countries, tender notices were authentic only in hard copy form published in a government gazette. With the present technology it was not possible to verify the date of appearance of the electronic version of tender notices on the Internet whereas there could be no problem in proving the date of publication of the hard copy form. Another suggestion on this matter has been that the WTO Home Page could be used to provide the addresses of sites with information on procurement opportunities in individual countries. In this connection, it has been said that it might not be necessary to stipulate such practices in the Agreement itself.

32. The point has been made that advances in information technology had the greatest potential for achieving efficiency gains in public procurement in the area of the publication of procurement opportunity information. Electronic publication would have the following benefits:

- the timeliness of dissemination of tender notices and documents to all suppliers irrespective of their location. Transmission of paper copies of voluminous documents by mail were subject to delays which varied depending on the distance. Suppliers saved time by receiving information of procurement opportunities on a real-time basis and by ordering tender documents instantaneously;
- the extension of the reach of dissemination of information to suppliers. The experience of Parties showed that the number of suppliers using electronic publications was substantially higher than those who subscribed to hard copy publications;
- the cost-effectiveness of obtaining information. The cost of subscription, downloading and printing of electronic publications was significantly lower than the cost of publishing and mailing documents in the paper format; in particular, those suppliers who may be interested in only a few specific tendering opportunities per year would not need to subscribe to numerous paper publications;
- the increased rapidity of obtaining information. Searching by word, the code number or the date of issue of notices for specific products or services in user-friendly versions of electronic publications was less time-consuming and costly than the process of scanning through and obtaining hard copy publications on procurement opportunity; and
- the widening of the scope of accessible data. The establishment of links between tender notices and tender documents and any other information relevant to a procurement would widen the scope of the information available to suppliers. For example, tender notices published in the electronic version of the US Commerce Business Daily had links to the US Federal Acquisition Virtual Library which provided policy guidance and information on current trends in procurement procedures as well as data on procurement legislation.

33. It has been suggested that, in order to ensure continued open access by all suppliers, Parties choosing to only utilize electronic publishing methods should use an electronic system that was accessible on the Internet. Alternatively, Parties could use other electronic means as long as they provided convenient and universal access through a single point of entry, for instance by establishing a website that would be linked to several websites. In connection with the use of the Internet it has been said that, while the Internet was currently the most widely used means of electronic distribution, a generic term should be used in the Agreement for electronic networks in order not to prejudice the selection of the actual mechanism used for electronic transmissions and to allow for future evolution of information technology, for instance in the area of interactive broadcasting. The relevant provisions in the Agreement should be in the form of basic obligations requiring Parties to use the means of publications which, at a given point in time, maximized the ease of access to the broadest range of suppliers from the GPA member countries.

34. It has been said that a requirement to publish tender notices on the Internet would discriminate against those Parties who did not have the necessary resources to maintain two parallel systems, especially if publications on the Internet were to be in a non-national language. In addition, a country that used a non-western alphabet would have the additional cost of maintaining electronic data systems in the characters of both alphabets.

35. It has been suggested that Parties could be invited to provide addresses of any sites on the Internet that give information on procurement opportunities in their countries. There was also a need to examine how information was structured in national databases. In this respect, it has also

been mentioned that some national electronic tendering systems may not cover all procurement covered by the Agreement.

36. With regard to the question of whether electronic publications should be accessible to suppliers in GPA Parties at minimal or no cost, it has been said that, in the absence of evidence that the cost of using electronic publications represented a true barrier to access, the Agreement should not have provisions regulating the charging of fees for electronic or hard-copy publications. In this connection, it has been mentioned that governments had been increasingly devolving the activities relating to information technology to private sector service providers which might imply that access to tender information and documentation would not be free of charge to suppliers. It has been suggested that Parties should have the flexibility to consider, having regard to overall policies, whether to charge a reasonable fee.

(iv) Electronic submission and receipt of tenders and other communications between the tenderer and the procuring entity

37. Suggestions have been made concerning the provisions of the Agreement relating to submission of tenders (Article XIII:1 and Article IX:6) and to communications between tenderers and the procuring entity (Article X:4) to allow entities to require electronic submission of bids and to allow electronic means for other communications (Job Nos. 5211 (1997), Job Nos. 3842 (1998) and 3481(1999). (These suggestions are also reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

38. It has been said that certain changes to the Agreement would be necessary to address the concerns related to the security of bids submitted electronically. Procuring entities would be able to choose, on a case-by-case basis, the most effective means of bid submission and notices of proposed procurement should indicate the means to be used. This would allow for situations where bids had not been converted to paper (i.e. were assessed on the computer screen or on-line). (The suggestions in this respect are contained in a non-paper by Canada circulated as Job No. 3481 and also reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

39. Certain suggestions for modifications to the Agreement have also been made regarding the methods by which Parties could accept requests for participation in selective tendering from suppliers. The means of communication to be used for such requests should be specified in the notice of proposed procurement. These modifications would allow entities to make decisions on a case-by-case basis regarding the most effective means for the submission of request for participation. (Suggestions in this respect are contained in a non-paper by Canada (Job No. 3481) and are also reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

40. With regard to the provisions in the Agreement concerning negotiation (Article XIV) and review as regards obligations of parties (Article XVIII), it has been said that the current provisions of the Agreement did not preclude electronic means, but only required that notice be given in writing, which could be interpreted to include electronic documents. The inclusion in the Agreement of a footnote making it clear that the word "writing" included electronic documents would ensure consistency in the Agreement regarding this point and it would also reduce the need for a specific language in several places. (Suggestions in this respect are contained in a non-paper by Canada (Job No. 3481) and are also reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

41. The view has been expressed that it was premature to consider a requirement to provide all tender documents, in particular in the case of complicated works contracts, electronically on the Internet. It was further said that a requirement in the Agreement regarding electronic submission of tenders was also premature.

42. It has been mentioned that technical and content-related compatibility issues for the receipt of electronic bids could be resolved, particularly for routine transactions, through the use of the Internet. Widely available (and free) readers, such as the Adobe Acrobat Reader, would permit the sender and the recipient of a bid to be able to read and, if desired, print information in various word

processing formats. Using the Internet, "fill-in-the-blanks" bids could be completed on-screen or downloaded and e-mailed by return to the procuring organization.

43. It has also been said that, for suppliers other than of standardized and off-the-shelf products and services, electronic tendering could be more costly and time-consuming where tender documents were voluminous since the traditional methods of transmission were less costly than downloading and printing them.

44. Reference has also been made to legal and technical difficulties relating to the electronic submission of bids and transmission of documents between the tenderer and the procuring entity through public networks. In this connection, it has been suggested that the Agreement should contain provisions that address the use of electronic signatures. The UNCITRAL Model Law on Electronic Commerce, particularly Articles 5-7 relating to the legal recognition of data messages, writings and signatures, could provide guidance to revising the GPA in these areas. It has been said that such issues as preserving the confidentiality of the tender and security and integrity of data contents of electronically transmitted tenders and the legal effects of electronic signatures was a complicated issue and required careful consideration. With the aim of providing greater protection to entities, a suggestion has been made which would make it clear that entities could require a signed confirmation copy of the bid. With respect to the concerns that have been raised regarding the impermanence of electronic documents posted on websites or electronic bulletin boards, it has been said that there could be a provision requiring that electronic documents should be available for later review. This would put such types of documents on an even footing with paper documents, which were kept by most Parties in accordance with the requirements in national legislation.

45. In response to these concerns, the point has been made that transmission of tender documentation through electronic means could avoid some problems of confidentiality of information associated with more traditional systems, for instance with faxed transmissions.

46. It has been said that the work that was being carried out under the mandate of Article XXIV:8 to negotiate modifications to the Agreement in the light of developments in information technology was different from the work on possible changes in the tendering procedures under the Agreement to reflect new procurement methods. The discussion of the two topics should be kept separate.

(v) Commercially run websites

47. It has been said that commercially run websites which listed all or a selected range of suppliers of similar equipment and permitted a procuring entity to search for the best price were being used increasingly. The review should address the question of how would the rules of the Agreement apply to purchases made as a result of the use of such sites and whether their use could have the result of limiting opportunities of non-discriminatory access for suppliers from other Parties. In this connection, a comment has been made that any general provisions in the Agreement relating to the principles of equal treatment and non-discriminatory access to suppliers from other Parties would extend to such practices.

(vi) Ease of access to databases and use of information tools

48. It has been suggested that the ease of access to information sources (including establishing links between databases and ensuring interoperability) and use of information tools (including search devices and common nomenclatures) were some of the issues that should be addressed in this area.

49. With respect to ease of access to databases, it has been stated that databases generally differed in terms of their contents as well as their structure. The ease of use of information tools should be improved by harmonizing the presentation of information. This would also contribute to ensuring interoperability between the various systems. The full benefit of information technology could only be achieved if agreement on harmonized standards for coded information could be reached. This would facilitate the use of search devices to browse through the information contained in different databases. In this connection, it has also been stated that it would be necessary to develop tools that would make it possible to access databases in different languages. It has also been suggested that a harmonized/single multilingual vocabulary system specifically developed for procurement purposes should be used to describe purchases, as has been done at European Community level with the CPV (Common Procurement Vocabulary). CPV attributed a nine-digit code to some 6,000

terms commonly used in the procurement process. The use of standard terms in the CPV made it easier for potential suppliers of goods and services to understand contract notices and to identify the type of procurement contracts that were of particular interest to them. The CPV also helped to establish procurement statistical databases. Furthermore, the use of multilingual CPV in the eleven official languages in the European Union and of the standard forms provided in it had facilitated the translation of, at least, the most important elements of procurement notices. The delegation of the European Community expressed its willingness to come forward with an explanatory paper on the CPV.

50. With respect to ease of use of information tools, it has been said that access to essential procurement information would become more difficult because of the increase in the number of databases. A solution should be found whereby interested suppliers could search for information in a multitude of databases through a single search engine, for example one that could be developed jointly by the GPA Parties on the WTO website. It has also been suggested that Parties should share information on their experience relating to the technical aspects of this matter.

(vii) Maximum time-limits

51. Some delegations have advocated or indicated their readiness to explore reducing the minimum time-periods required in the various stages of the procurement process in order to improve the efficiency of the procurement process. It has been said that entities could be given incentives to use new technologies, for instance those entities that made tender documents available through electronic means at the time of publication of tender notices could be allowed the possibility of using reduced time-limits.

52. Another view was that interested parties could be given incentives to offer on-line access to electronic versions of tender documents on the Internet, for example by reducing the required deadlines.

53. The point has been made that any reduction in time-periods should be linked to the time saved by using electronic means and should not lead to discrimination against distant suppliers.

54. It has also been stated that the rationale underlying the specific deadlines in the GPA 1994 should be carefully considered before attempting any revision of the relevant provisions. Some objective criteria would need to be developed in this respect in order to ensure equal opportunity to bid to all suppliers, foreign or domestic. It was also mentioned that the current deadlines had been set up to ensure that bidders were informed of the procuring opportunities well in advance of the time for submission of bids. The deadlines in the present Agreement had been extended to 40 days from the 30 days set out in the Tokyo Round Agreement on Government Procurement of 1979. Some countries voluntarily extended the deadlines to 50 days.

55. It has been said that the objective of the criteria in Article XI:1(a) was to ensure that governments established adequate minimum time-limits. The possibility of recourse to bid challenge procedures under Article XX provided an additional safeguard. In cases where selective tendering was used, shorter time-frames were feasible since bid formats were usually standardized. The time required to prepare bids was dependent on the nature of the proposed procurement. Generalized time-limits would reduce efficiency without increasing access or reducing discrimination. The modifications proposed would allow procuring entities to use longer time-limits depending on the complexity of the procurement or the means of communication used. Suggestions have been made concerning the deadlines set out in the Agreement (Article XI) to take account of electronic tender and electronic bid receipt (Non-paper by Canada circulated as Job No. 3481(1999), Section 4).

56. On the other hand, the following points have been made to caution against any premature reduction in deadlines:

- while information technology advances certainly helped to shorten the time for submission, publication and dissemination of tender notices and tender documents, the time needed to prepare tenders was likely to remain the same in most cases. As long as submission by normal mail and electronic tools coexisted, it may be premature to allow entities using electronic transmission the advantage of shorter deadlines;

however, the GPA Parties might consider accepting shorter deadlines for pilot projects or certain sectors which were especially suitable for electronic tendering; and

- it may be premature to conclude that information technology could shorten tendering deadlines because the time gain arising from electronic transmission of documents could be relatively small compared to the total time needed for the preparation of responsive bids.

(viii) New issues related to electronic commerce

57. It has been stated that a wider use of electronic tools could call into question the traditional approach of government purchasing as it opened the way to full electronic tendering or electronic commerce between purchasers and suppliers. In addition, new electronic tools provided opportunities for purchasing entities to cooperate via the exchange of information, ideas and experiences. This option would require further consideration of data privacy and security aspects, interoperability of systems, and of legal questions such as the acceptance of digital signatures and electronic receipts. The traditional behaviour of contracting entities inviting suppliers to tender could be called into question by new technological opportunities which would facilitate, for example, electronic qualification procedures, tendering of framework contracts and the selection of off-the-shelf products from electronic catalogues.

(e) Procurement methods

58. It has been suggested that provisions on tendering procedures should be reviewed to accommodate the increasing and frequent practices of two-stage tendering and framework agreements, including those involving use of electronic catalogues. On the other hand, the question has been asked whether those two types of procurement would not appropriately fit in one of the tendering procedures defined in the current text of Article VII.

(i) two-stage tendering

59. The point has been made that the provisions on open and selective tendering procedures did not cover two-stage tendering as provided in Chapter V, Article 46 of the UNCITRAL Model Law on Procurement of Goods, Construction and Services. The main elements of two-stage tendering were:

- in the first stage, initial tender proposals were invited without a tender price. The proposal related to the technical and contractual aspects of the project, as well as the track records of the tenderers;
- in the second stage, those tenderers who had not been rejected as a result of technical evaluation were invited to submit final tenders with prices and according to a single set of specifications.

60. The UNCITRAL two-stage tender was constructed to deliberately separate technical evaluation from price evaluation, and there may not be any negotiations with any suppliers or any modifications of tender specifications throughout the entire tendering process. In the first stage, a purely technical evaluation was done. In the second stage, only those which satisfy the technical evaluation were invited to quote their price offers. The price evaluation might be done by a totally different committee from the technical evaluation, e.g. the entity may decide that the technical evaluation be done by a group of engineering experts, but the price evaluation be done by policy-makers. The two-stage tendering method was especially useful for complex projects where the procuring entity wished to separate technical evaluation from price evaluation, e.g. in complex engineering projects, for example the building of a nuclear plant. Technical experts were called upon to evaluate and shortlist technically acceptable tenders, but the final decision would be made by policy makers, taking into account the affordability and cost-effectiveness of the proposed tender as well as its technical feasibility. Many countries' legislation contained provisions on two-stage tendering based on the relevant provisions of the UNCITRAL Model Law.

61. The point has further been made that the two-stage appeared to have some similarities to the procedures on negotiations described in Article XIV of the GPA. On the other hand, the two-stage tendering method under the UNCITRAL Model Law was constructed to separate technical and price evaluations. The procedures under this method might not involve any negotiations with suppliers or

any modifications of tender specifications throughout the entire tendering process. The scope of the provisions on negotiations in the Tokyo Round Agreement had been expanded to include the concept of two-stage tendering in the 1994 Agreement. However, Article XIV envisaged negotiations arising from the process of evaluation of tenders, where it became apparent that no one tender was obviously the most advantageous. It has also been said that post-tender negotiations might benefit both suppliers and procuring entities, for instance in solving non-price issues such as environmental or safety considerations related to a procurement. However, the terms of Article XIV did not specify whether negotiations should be held before tendering, after tendering and before the award of contracts or after the award of contracts. The present text of Article XIV:4(d), which seemed to imply that procuring entities could initiate new negotiations with the remaining participants would need to be clarified. The point has also been made that negotiations under Article XIV with tenderers should be governed by the basic principles of non-discrimination, equal treatment and transparency. It has also been said that two-stage tendering was in compliance with the GPA if at the first stage the technical evaluation was carried out in a fair and non-discriminatory manner and suppliers who fulfilled the technical criteria were treated equitably in the second stage.

62. It has also been said that any new tendering procedures to be formulated under the Agreement should have the purpose of furthering compliance with the principles of transparency and non-discrimination.

63. A non-paper on the subject of two-stage tendering has been circulated by Singapore as Job No. 5295.

(ii) framework agreements or similar types of contracts

64. It has been said that procuring entities in many Parties frequently made use of contractual arrangements referred to as multiple award contracts (in the United States), framework agreements (in the European Community), standing offers and supply arrangements and supply arrangements (in Canada), schedule contracts, catalogue contracts and other purchasing methods based on the state-of-the-art technology developed by private companies. The review should address how these types of contractual arrangements fitted the current provisions of the Agreement and whether any new provisions would be necessary to accommodate their increasing use.

65. It has been said that the main purpose of using framework arrangements had been to accelerate the procurement process and to provide flexibility. The important benefits offered to both contracting entities and suppliers included: allowing supplies and services to be acquired when the exact times and/or exact quantities of future requirements were not known at the time of the contract award; significantly streamlining the procurement process and speeding up delivery times; allowing the reduction of deadlines in day-to-day procurement, in particular for purchases of off-the-shelf products and certain standardized services; eliminating the need for the solicitation and submission of repetitive bids and separate tenders when numerous similar transactions were required thus taking advantage of larger contract sizes; taking advantage of advances in technology and changes in agency priorities in a cost-effective manner; and facilitating the use of electronic commerce for improving the efficiency and effectiveness of the acquisition process.

66. It has been said that these types of arrangements practiced in various Parties appeared to have, among others, the following common characteristics:

- a framework agreement was concluded between a purchasing entity and one or a multiple number of selected suppliers offering a comparable good or service;
- multiple transactions with several suppliers could be involved. There could also be subsequent recurring transactions with one single supplier;
- a framework agreement was concluded for a fixed period;
- a framework agreement established the terms that would govern the contracts to be awarded during a fixed period, for instance the price, the quantity and conditions of delivery of the actual supplies;
- initially, a principal framework contract was awarded to one or more suppliers using, as appropriate, the open, selective or limited tendering procedures under the Agreement. Subsequent placements of specific orders (or the conduct of multiple tasks) under that

framework contract were carried out by the contracting entity, as and when its purchasing needs arose;

- a specific value was not associated with any particular supplier. A particular supplier could provide goods and services within a particular range of values for each supplier included in the contract;
- if contracting entities had awarded a framework agreement, at an initial stage, on the basis of competitive tendering procedures, a call for competition was not compulsory when contracts were awarded on the basis of that agreement at a later stage;
- framework agreements could be concluded jointly by several purchasing agencies. For example, in the European Community countries, several municipalities might conclude a framework contract with one or several suppliers. A new procuring entity could join subsequently in an existing framework agreement without the need to proceed with full tendering procedures. In the United States, in a number of instances multiple federal agencies had made arrangements for the participation in an existing contract of additional agencies that needed the type of goods or services that were being procured. The maximum values established under that contract still applied whatever the number of participating agencies.

67. With regard to the question of the extent to which the existing provisions of the Agreement were applicable to framework agreements and whether the increasing use of these types of contractual arrangements would require the inclusion of an additional definition or a new type of procurement procedure in the GPA, the view has been expressed that the use of framework agreements was consistent with the rules and principles in the Agreement concerning non-discriminatory access and no new provisions would be necessary to accommodate their use. Another view has been that framework agreements should not be used in a way that defeated the objective of opening procurement markets to competition from suppliers in all GPA member countries. The fundamental issue in this respect was how to ensure non-discriminatory, fair and equitable treatment of all listed suppliers as well as the application of conditions of competition to individual procurement opportunities under such contracts. Certain general principles governing framework contracts would need to be considered in the discussion of whether these types of procedures were covered by the current provisions in the Agreement.

68. It has further been said that the Agreement should be flexible enough to accommodate innovative procedures that were consistent with its objectives and without making its provisions unnecessarily complicated. The award of framework agreements constituted an act of procurement within the meaning of Article I:2 of the GPA. These types of contractual arrangements were concluded using the tendering procedures set forth in the Agreement and their use required no changes to Article VII:3. It has also been said that subsequent orders or individual transactions should not be considered separate contracts or acts of procurement within the meaning of Article I:2 of the GPA but as orders or purchasing decisions under the existing contract. However, entities should apply the principles of competition and due process in handling individual procurement contracts.

69. The point has been made that a key question relating to the distinction between open and selective procedures in this context was whether all interested suppliers had an opportunity to compete to participate in the framework contract, following open publication of its requirements, or whether the procuring entity approached individually suppliers or private operators maintaining electronic catalogues. A view expressed in this connection has been that a way of fitting framework agreements within the existing provisions of the Agreement would be to consider framework agreements as a variation of selective tendering procedures. In many respects, framework agreements would appear to be similar to qualification procedures. No financial transactions were associated with a framework agreement. Its terms did not commit the purchasing agency or the listed suppliers for the actual procurements. Upon a request from new suppliers, a procurement agency would conclude a framework agreement with the suppliers that satisfied the evaluation criteria. However, if framework agreements were to be considered as a form of qualification procedure, the procuring agency would have to apply the procedures of the Agreement regarding qualification including those on transparency. Instead of creating a separate category of "framework contracts", it might be preferable to focus on the procedures for the qualification of suppliers and the relationship between such procedures and open and competitive procedures. It has also been said that the features that distinguished a framework agreement from the procedures under the

Agreement on qualification and open competitive tendering or under a two-stage tendering process should be identified. On the other hand, it has been said that the treatment of the initial award of a framework agreement to suppliers as a qualification procedure and the subsequent transactions as procurements under the GPA would significantly diminish the value of these types of arrangements. However, it has been said that, in the United States, these type of arrangements could not be considered to be a qualification procedure since participation of each supplier was associated with a minimum value.

70. It has been said that, in accordance with the principle of non-discrimination, all interested suppliers should be given an opportunity to participate in framework contracts. In the first stage, a framework contract should state upfront the terms and the rules by which the framework agreement would be run. With regard to specific purchases from suppliers in the subsequent stages under a framework agreement, it has been said that such purchases should also be made in a non-discriminatory manner. It has also been said that, in United States practice, the actual contract contained terms requiring that purchasing agencies that used that contract made purchases in a non-discriminatory way and that compliance with such requirements was subject to legal challenge. It has also been said that the application of the non-discrimination principle in Article III to individual purchases should be clarified in order to guarantee effective competition in the award of such contracts, for instance in order to avoid the placing of actual purchase orders predominantly with local suppliers to the detriment of overseas suppliers. It has also been said that, given the general applicability of the non-discrimination requirements of Article III, it might be not be necessary to include specific provisions in the Agreement to ensure non-discrimination. In case it would be necessary or desirable to add non-discrimination provisions specifically relating to multiple award contracts, Article III might be amended to include a specific language requiring non-discrimination between suppliers parties to such contracts (c.f. the section on Article-by Article Review and the note by the Secretariat on "Suggested Drafting Changes to the 1994 Agreement").

71. With respect to the actual award of framework contracts, it has also been said that competition should take place upfront under open or selective tendering procedures or qualification procedures and that the terms and conditions of the contract should be established under competitive conditions. Moreover, the number of suppliers should not be limited for very large contracts in order to avoid the presence of a dominant supplier in a given sector. Participation in an existing framework agreement should be open to additional suppliers at any time. It has been asked whether framework agreements should have explicit provisions guaranteeing non-discriminatory access to new suppliers.

72. It has also been said that, the Agreement might need to be revised in order to provide for the valuation of framework contracts. Since there was no specific values associated with a framework agreement, it was difficult to determine whether a framework agreement was covered by the GPA in terms of the threshold values. Article II:4 established formulas for the valuation of related contracts, each of which might be considered as a separate act of procurement within the meaning of the GPA. These formulas did not appear to be applicable to the valuation of "multiple award contracts" since each individual transactions under those arrangements did not constitute a separate procurement. It has been suggested that, in order to clarify the valuation formulas that should be used in these different situations, Article II should be amended to include language relating to the valuation of framework agreements for the purposes of the applicability of the threshold values provided for in the Appendix I of Parties (c.f. the section on Article-by Article Review and the note by the Secretariat on "Suggested Drafting Changes to the 1994 Agreement").

73. A non-paper on the subject of the treatment of multiple award contracts under the GPA, including a description of the use of such contracts in the United States, has been circulated in Job No. 2795. National descriptions of "framework contracts" or similar types of arrangements in Canada and Singapore have been circulated respectively as Job Nos. 3487 and 3655.

(iii) use of electronic catalogues

74. It has been said that, based on practice in the private sector, there appeared to be two main modes of purchasing through electronic catalogues:

- a commercially run website service which grouped all suppliers of similar equipment together and allowed a procuring entity to search for the best price. The site essentially

operated like a supermarket whereby similar products and services were grouped together and presented to the customer. For example, if a procuring entity wished to buy computer modems, the desired capabilities were searched. Products that fitted the criteria could be presented in increasing order of price. Alternatively, the entity might browse through the entire electronic catalogue. The main critique of this electronic catalogue approach was that suppliers who were not listed in the catalogue were excluded from the procuring entity's search; and

- the procuring entity or a group of entities might call for period contracts and operate an evaluated shortlist of suppliers. For example, the government central procurement office could call open tenders for airline tickets, photocopiers, computer equipment and the like. Several suppliers could be shortlisted. But because the product changed from time to time, e.g. air travel, the several shortlisted suppliers were invited to quote the price for air travel by the entities each time a procurement was made. The evaluation of the shortlisted suppliers was done through open tender, but the individual quotations within the period of the contract were limited to the shortlisted suppliers. At the end of the period in question, a fresh open tender was called, and the individual quotations within the new period were again limited to the successful shortlist of suppliers.

75. The question has been asked whether procurement through electronic catalogues belonged to the category of open tender procedures, in which all interested suppliers may submit a tender; or selective tendering procedures, in which shortlisted suppliers were invited to do so. It might well turn out that the current formulation in the GPA did not sufficiently cover the ground. In this respect, it has also been said that the use of electronic tendering, by itself, might not necessarily require a re-evaluation of the types of tendering procedures broadly described in Article VII. Some of the questions with respect to the use of new technologies related also to traditional ways of procuring. With regard to the question of whether the use of electronic catalogues in procurement might fall under open or selective tendering methods, it has been said that electronic catalogues served as a means whereby supply offers as contained in a framework agreement were communicated by the procuring entity to the various end users. If framework agreements covering several supplies were allowed under the Agreement, there should also be provisions allowing the use of electronic catalogues. In this respect, it has also been said that some form of electronic catalogues might be similar to framework agreements. However, the question of whether a particular type of procurement was compatible with the Agreement would depend how it was conducted. The GPA should accommodate the use of electronic catalogues, provided that the procedures for participation in an electronic catalogue system was consistent with the basic principles in the GPA on openness, competition and transparency.

76. A question has been asked whether electronic catalogues were used mainly for low-value procurement. If this were to be the case, use made of electronic catalogues would fall largely outside the scope of the Agreement. In this connection, it has been said that, while the value of individual items purchased from electronic catalogues might be relatively low, total values would be substantial if a series of items was purchased on a regular and frequent basis from the suppliers listed in commercial catalogues. The point has also been made that the issue of recurrent contracts would be relevant to the use of electronic catalogues in procurement. Another point has been that commercially run website services appeared to relate to direct purchasing under Article XV rather than to open competition.

77. A non-paper on the subjects of the use of electronic catalogues has been circulated by Singapore as Job No. 5295.

(f) Statistical reporting

(i) General

78. It has been said that statistical reporting was an area where simplification and streamlining of requirements should be considered. The statistical requirements under the Agreement were unduly complex, time-consuming, burdensome on both Parties and individuals and costly, notably because of the expansion of the coverage of the new Agreement. They were seen to be disproportionate to information to be derived from the statistics and in terms of the actual benefits to individual purchasers and suppliers. On the other hand, the point has been made that statistical reporting was an essential tool for enhancing transparency and monitoring compliance by Parties with the

obligations of the Agreement. Moreover, statistical reporting provided a useful information basis to suppliers and purchasers on the functioning and development of public procurement market opportunities. In any amendment of the existing requirements, Parties should try to strike a balance between the advantages of having less onerous requirements and the disadvantages of de facto providing for less transparency.

79. Non-papers on this topic have been circulated in Job Nos. 5212 (in 1997), 3246, 3855, 3869 and 5269 (in 1998). A note by the Chair, attempting to present a draft revision of the text of Article XIX:5(a), together with the comments made on that draft at the informal consultations held in February, May and June 1999 was circulated in September 1999.

(ii) Creating greater flexibility in GPA statistical reporting

80. It has been suggested that, in order to help reduce the administrative burden on Parties in collecting statistical data and producing reports to the Committee on Government Procurement, the Agreement should permit greater flexibility in terms of the manner in which statistical data were reported. Increased flexibility would allow Parties to submit reports that more closely conformed to each Party's domestic procurement reporting practices for collecting and reporting public procurement statistics, thereby reducing the administrative burden of preparing reports. Areas in which increased reporting flexibility might be considered included:

- permitting Parties to submit GPA statistical reports on a fiscal rather than a calendar year basis; or
- allowing Parties to report aggregate annual obligations per contract rather than the total value of contracts awarded, considering that the duration of many contracts was longer than one year.

81. It has also been suggested that Parties should explore further flexibility in the reporting of statistics for Annex 2 entities based on experience during the first years of implementation of the GPA. Given the decentralized nature of these procurement systems for many Parties, consideration could be given to not requiring a specific format for these statistics.

82. The point has been made that any measures permitting variation or flexibility in statistical reporting, however, should ensure a sufficient minimum level of statistical reporting by all Parties. Parties must continue to submit statistical data that are comparable in scope and breadth.

83. Finally, it has been suggested that Parties wishing to vary the manner in which they report statistical data to the Committee under the Agreement should be required to provide written notification to the Committee, and, in the absence of any objection within 30 days, the variance would become effective.

(iii) Statistics on the estimated value of contracts awarded (Article XIX:5, subparagraph (a))

84. The point has been made that the Committee had so far not devised any method for estimation in accordance with the provisions of Article XIX:5, subparagraph (a) which required entities listed in Annex 1, i.e. central government, to report on the estimated value of contracts awarded both above and below the threshold value. Until a proper method for such estimation was prescribed, both with respect to reliability and efficiency, reporting according to this provision would not be consistent between Parties. The relevant provisions of Article XIX:5(a) should be discarded or, alternatively, be amended to cover only procurement above the threshold value for Annex 1 entities. On the other hand, it has been said that these types of statistics were necessary for the assessment of Parties' compliance with the Agreement. It has also been said that participants might also provide statistics on small value procurement, for example regarding procurements using electronic catalogues or purchase cards.

85. Another suggestion has been that the Agreement should include an exception for procurements of very small value (a *de minimis* exception) to the Article XIX:5(a) requirements that statistical data for Annex 1 entities must be provided for tenders below GPA thresholds. Such a *de minimis* exception would eliminate Annex 1 reporting requirements for procurements below an agreed-upon amount. This would be likely to ease the administrative burden on Parties, as many Parties may not

ordinarily collect detailed statistical information on small-value procurements. Moreover, data on these smaller procurements tended to be less relevant to the underlying purposes of reporting statistical information under the Agreement, including the aim to achieve greater transparency and also to further GPA compliance monitoring efforts.

(iv) Uniform classification systems (Article XIX:5, subparagraph (b))

86. It has been suggested that the classification for statistical reporting should be done by standard customs classification, CPV classification or similar widely used standards. As most contracts covered several different products, a uniform and efficient method for dividing contract value according to different product categories would provide enhanced consistency of reported procurement.

87. On the other hand, it has also been said that Parties should be allowed to report statistics in other types of nomenclatures than that established under the GPA, for instance in the nomenclatures of the reporting countries, if the reporting was done only at the two-digit level (major category groups) accompanied by a description of those groups.

88. With regard to uniform classification systems, the point has also been made that, for the time being, it was very difficult to provide statistical reports based on the classification systems adopted for goods and services (the 26 product categories and the UN CPC) because no table of correspondence with the Common Procurement Vocabulary (CPV) existed. But this situation should soon disappear with the publication of a new CPV in 1998 and the possible establishment of a table of correspondence between the CPV and the other two uniform classification systems.

(v) Contracts awarded under limited tendering procedures (Article XIX:5, subparagraph (c))

89. With regard to statistics relating to categories of entities in Annexes 1, 2 and 3 falling under each of the cases of limited tendering permitted under Article XV, the point has been made that the obligation to report on procurement by each procedure seemed to be too burdensome. Under ordinary circumstances, the share of total procurement accounted for by limited tendering procedures would be rather low. In any event, the information provided under this provision was inadequate in that it did not provide elucidation of the legality of the application of the limited tendering procedure employed in each case. It has been suggested that this provision should be simplified limiting the requirement to the provision of statistics:

- on the number and the total value of contracts awarded in all cases where limited tendering was used, rather than having a breakdown under each case in which limited tendering was permitted under Article XV. This would also enable the protection of the confidentiality of commercially sensitive information; and
- to two categories in Article XV relating, respectively, to contracts awarded for reasons of extreme urgency in terms of paragraph (c) and to additional deliveries in terms of paragraph (d). A third category of statistics would report on contracts awarded under all other conditions specified in Article XV.

90. Another suggestion has been to replace this provision by a provision allowing Parties to request additional information with respect to specific contract awards under limited tendering procedures in any other Party. In connection with this suggestion, it has been said that Article XIX:3 already allowed Parties to request such information.

(vi) Statistical reporting of derogations (Article XIX:5, subparagraph (d))

91. It has been suggested that there should be no requirement to report procurement under the derogations to the Agreement referred to in Article XIX:5(d). The following have been mentioned as reasons for the deletion of subparagraph (d): the provision was difficult to understand for those who were unaware of the context of derogations and was also difficult to comply with and monitor; the requirements to provide statistics on derogations were not cost effective; and the advantages of publication of such information were limited.

92. In this connection, it has also been said that, if such reporting requirements were to be continued, Parties should reach a common understanding on what was meant by the term "derogations" for the purposes of statistical reporting. It has also been stated that the provision of these types of statistics was essential for transparency purposes.

(vii) Provision of statistics on the country of origin of products and services

93. It has been said that information on the country of origin of supplies has been considered to be important, for instance in the context of national procurement policy considerations. Nevertheless, the requirements in Article XIX:5 should be eliminated because the accuracy of such information, mainly based on entities' declarations, was doubtful. Moreover, such information could be misleading, particularly in respect of technologically advanced industries, where components and equipment were usually produced and assembled in several different countries.

(viii) Reporting in national currency

94. The point has been made that it had been the practice under the GATT Agreement on Government Procurement to report statistics based on Special Drawing Rights (SDRs). Permitting GPA Parties to submit statistical reports in national currencies rather than SDRs would help ease the administrative burden on Parties of converting data into SDRs. In fact, Parties might find statistical data prepared in national currencies to be more useful than information provided in SDRs. Parties should list a conversion rate into SDRs in their statistical reports. In this connection, the comment has been made that statistical reports should be comparable for each Party over time and between Parties. Computer programs were now available for the conversion of values expressed in national currencies into SDRs.

(ix) Additional areas where statistical reporting may be useful

95. The point has been made that Parties were not currently required to report to the Committee on the total amount of government procurement (both GPA and non-GPA) taking place under each of the Annexes. This was an area where statistical reporting would be useful, but would only slightly increase administrative demands on Parties.

(x) Encouraging timely reporting of statistical data

96. The point has been made that the Agreement currently only required that each Party submit procurement statistics on an annual basis and did not set a deadline for the submission of statistical information. Under the GATT Agreement on Government Procurement, which also did not contain a deadline for the submission of statistical reports, it often took as long as two years following the end of a reporting period for Parties to submit statistical reports. It has been suggested that, with the objective of ensuring that statistical data were disseminated in a fashion that preserved their usefulness, GPA Parties should be encouraged to submit reports on a timely basis. It has been said that 12 months following the end of a Party's reporting cycle would generally be a reasonable period of time for submission of statistical data.

(xi) The use of information and communication technology

97. The point has been made that more complete statistical data on public procurement could be obtained by utilizing the advantages offered by Information and Communication Technology (ICT). It has been suggested that Parties should be able to obtain, under specified conditions, a general waiver from all the statistical reporting requirements, or a more specific waiver which only covered, for example, Annex 1 entities. This waiver should only be granted if certain conditions were met by the alternative system being used:

- Parties should be required to operate a system which enabled interested Parties to access data on awarded contracts through one single entry point. The archives of contract award notices published in each Party could be made available on a permanent basis on a website through the Internet. This would reduce the need for Parties to produce detailed statistics under Article XIX:5;

- the data provided should include information on at least the following: price information (provided confidentiality of commercially sensitive information was ensured); type of contract authorities; contractor's country (or subcontractor); number of offers received; type of contract or categories of products or services; award procedure chosen (open or limited); date of award of contract; and date of publication of tender notice; and
- the waiver might be extended only to those levels of government entities that provided their statistical data through ICT systems.

98. It has been said that providing statistical data through the existing ICT systems, without having to go through formal procedures, would greatly improve statistical reporting. It has also been said that information on contract award notices posted on individual websites, that could be extracted and collated through the use of ICT systems, could be made accessible through one single entry point. Under ICT systems statistical data would not need to be collected in a particular format. Rather, any interested party would be able to interrogate different databases at any point in time and develop a statistical report by using the parameters that were of particular interest, for example relating to the number of award of contracts by procuring entities during a period, average value of contracts, prices, etc. In this respect, it has been said that a distinction should be made between the data that was provided under the terms of the statistical reporting requirements and the data that was made available for research purposes.

99. The point has been made that the data obtained by using ICT systems should have a common basis with the data that must be reported under the requirements of the Agreement in order to enable comparisons of the data supplied by different Parties. In this connection it has been said that the use of a standard notice by entities for storing information in databases would facilitate comparison of data across countries. It has also been said that it might not be possible to derive all the elements of data required for statistical reporting on the basis of information in contract award notices. It has further been said that the use of ICT systems should not lead to further reporting requirements.

100. The European Community has been invited to present a more specific proposal on the matter.

(xii) Other issues relating to statistical reporting requirements

101. In order to ensure the effective implementation of the requirements in Article XIX:5, the following suggestions have also been made:

- the information content of statistical reporting requirements should be uniform among Annexes 1-3;
- a commonly accepted format for statistical reporting should be developed;
- statistics should be submitted in a WTO language;
- the possibility of using statistics on total public procurement from national accounts should be considered; and
- the availability of statistics on government procurement on the Internet would be useful to civil society as well as to governments.

(g) Article-by-Article review of the Agreement

(i) General

102. The desirability of simplifying some of the substantive rules of the Agreement and providing greater flexibility where possible under those rules has been widely stressed. It was suggested that, in doing this, Parties should consider to what extent the provisions of the current Agreement actually contributed towards achieving its objectives.

103. It has been said that in the review of the Articles of the Agreement, consideration should be given to the adaptation of the contents of specific provisions to take account of the experience gained during the application of the Agreement, as well as practical changes in government purchasing. One element of such adaptation is the simplification and improvement of the procedural rules. This

comprised the clarification of rules that had shown to be ambiguous. Furthermore where the ways and means of purchasing had changed Parties should examine the adaptation of the rules.

(ii) Individual Articles

Article I

paragraph 1

104. It has been suggested to include a definition of government procurement which would make it clear that a particular government procurement activity that fell under the exceptions in GATT Article III:8 or GATS Article XIII:1 was covered by the scope of the GPA. Such a wording would also indicate that the GPA represented a single set of rules in the WTO context relating to government procurement dealing with both goods and services.

105. The point has been made that the term "as specified" in Appendix I" reflected the negotiated understanding concerning the reciprocity-based coverage of the Annexes to Appendix I.

paragraph 2

106. It has been suggested that this paragraph should also include a reference to forms of procurement under new phenomena (partnerships between private and public sectors, multiplication of "Build Operate Transfer" (BOT) operations and joint ventures), which were difficult to classify under the structure of the current Agreement. On the other hand, a view has been expressed cautioning against any extension of the scope of the Agreement involving these types of phenomena.

paragraph 3

107. It has also been said that the provisions regarding enterprises not included under the coverage of the Agreement could be addressed by developing a definition of central government entities.

paragraph 4

108. Suggestions have been made that a negative list approach should be adopted in order to cover all central government entities in Annex 1 and that a definition of central government entities should be included in Appendix I.

109. It has also been said that the establishment of uniform threshold values in the Agreement would contribute to the elimination of the existing discriminatory provisions in this respect in the Schedules.

Article II

110. It has been said that purchasers in the private sector had the practice of maintaining open running contracts with several suppliers instead of awarding a contract to a single supplier. A master contract signed initially with several suppliers did not specify a value. Purchasers subsequently proceeded with the procurement by ordering from electronic catalogues. With the application of information technology, government entities might use this method of purchasing more commonly. This might present some ambiguity in the valuation of contracts under the Agreement.

new paragraph 5

111. It has been suggested that the provisions of the Agreement on valuation of contracts might need to be amended to take account of framework contracts and the use of new technologies in procurement which allowed procuring entities to slice up contracts. Individual transactions or contracts with values below the relevant threshold values resulting from such practices should also be subjected to the Agreement so as not to limit its coverage. In this connection, it has been suggested that Article II should be amended to include language relating to the valuation of multiple award contracts for the purposes of the applicability of the threshold values provided for in the Appendix I of Parties. (The suggested text of new paragraph 5 is reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

Article III*new paragraph*

112. It has been suggested to introduce a new paragraph setting out explicitly the general principles that governed government procurement. The suggested new paragraph is reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999. It has been said that a legally binding provision might not be the best way of incorporating such principles in the Agreement. It has also been said that the terms "reasonable" and "treating any supplier of any Party equally" in the suggested draft text should be clarified.

paragraph 2, subparagraph (a)

113. The point has been made that the term "foreign affiliation or ownership" seemed to apply both to Parties and non-Parties to the Agreement. It has been suggested that the consistency of the scope of this provision with that of Article III, paragraph 1, should be reviewed. In this connection, the point has also been made that certain Parties treated an established supplier as a domestic supplier regardless of its affiliation or ownership.

new paragraph 4

114. It has been suggested that a non-discrimination provision specifically relating to multiple award contracts might be added. (The suggested draft text is reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999).

Article IV*paragraph 1*

115. The point has been made that the need for any changes should be considered in the light of the results of the work programme for the harmonization of rules of origin for goods and the negotiations regarding trade in services. It has been suggested that the issue of rules of origin of services should be taken up in the discussion concerning the extension of the Agreement to services.

Article V

116. It has been suggested that Article V on Special and Differential Treatment for Developing Countries should be updated and simplified, for example by providing further flexibility in the evaluation of offers from developing countries with respect to non-discriminatory treatment and in the application of the procedural provisions. The provisions should also be improved to take into account the specific interests of developing countries and to give developing countries additional incentives to join the Agreement. It has been suggested that the provisions on technical cooperation should be extended to take account of the needs of developing countries to adjust to new developments in application of information technology to government procurement.

117. The suggested text of a new Article V, granting non-reciprocal access to developing countries to procurement markets of Parties for a limited number of years, is reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999. It has also been suggested that certain provisions in this Article should be in the form of a separate protocol that could be developed in cooperation with developing countries. It has been said that the appropriateness of creating an asymmetry between the obligations of developed and developing country Parties had to be carefully considered.

118. Moreover, observers have been encouraged to contribute on this provision in particular.

Article VI

119. It has been said that the inclusion of basic principles of non-discrimination or promotion of competition in the main provisions of the Agreement would make this Article more clear.

120. A comment has been made suggesting a rearrangement of the location of Article VI in the text of the Agreement in order to reflect the close association of the provisions on technical specifications with those on tender documentation.

paragraph 1

121. It has been suggested to add a provision in the present text that would allow procuring entities to lay down technical specifications in accordance with their needs, provided they complied with the general principles laid down in Article III and, in particular, ensured the principle of open and effective competition. It has been said that purchasing entities may need to take into account any innovative aspects of their project as well as the need for ensuring compatibility with the equipment already in use. (The suggested text is reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

122. It has been said that the meaning of the term "unnecessary obstacles to international trade" should be clarified.

paragraph 2, subparagraphs (a) and (b)

123. It has been suggested that there should be a hierarchy between paragraphs (a) and (b) since the provisions of subparagraph (a) should be the rule and those of subparagraph (b) the exception.

124. It has been said that, while procuring entities could not exclude an offer that included a product, service or work that complied with the appropriate international standard, evaluation of a tender also involved other aspects that were not related to international standards. (The suggested text is reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

paragraph 3

125. A view has been expressed that the prohibition in this paragraph against requiring or referring to a particular trademark or trade name did not take into account the realities of procurement practice. Another view expressed has been that the underlying principle was important and should be kept.

Article VII

126. A suggested new text is reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.

paragraphs 1 and 2

127. It has been suggested that paragraphs 1 and 2 should be separated from paragraph 3 describing the types of procurement procedures and be placed in an article addressing the general principles of procurement.

paragraph 2

128. It has been suggested that the term "precluding competition" should read "negatively affecting competition".

paragraph 3

129. It has been suggested that the Agreement needed to be clearer about which of its procedural provisions apply to which tendering method as defined in Article VII:3.

130. With respect to a proposed definition of selective tendering, it has been said that the information in tender notices should be posted in a medium which was in the public domain even if this type of tendering was usually limited to qualified tenderers (see the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999).

131. It has also been suggested that the provisions on tendering procedures should be reviewed to accommodate the use of two-stage tendering and electronic catalogues. On the other hand, the point has been made that no modifications were required to this Article to accommodate the use of new procurement methods.

Article VIII

132. It has been said that the rules in Article VIII on qualification of suppliers were either of general application, for instance for repetitive purchasing or related to the establishment of permanent lists of qualified suppliers, or for a particular procurement, for instance related to a large one-time project. A new text has been suggested separating these two types of issues (see the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999). A further point has been made that qualification of suppliers was independent of the tendering methods used but related more to the technical, financial and commercial capacity of the firm for meeting the minimum standards set out in the contract.

paragraph (b)

133. It has been said that ways should be found to reduce administrative burdens on suppliers, particularly SMEs, regarding the procedures for the proof of their technical, financial and commercial capacity.

Article IX

134. It has been said that the problems with this Article included the following: many closely related but undefined terms were used to describe various types of procurement notifications; the terms "intended procurement", "proposed procurement", and "planned procurement" were not defined; some items on the lists of information to be included in some of these types of procurement notifications were redundant and, in some cases, unnecessarily burdensome; and there were many confusing cross-references to other paragraphs and Articles. (A new text suggested by the delegation of the United States has been circulated as [GPA/W/85](#) and is included in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

135. It has also been said that the suggested modifications would improve the Article by: streamlining the requirements that must be included in a notice of intended procurement, thus eliminating the need for different notice requirements among Annex 1, and Annexes 2-3 entities, except with respect to the requirements relating to notices of permanent lists of qualified suppliers in selective tendering procedures; eliminating the terms "notice of proposed procurement" and "notice of planned procurement" from the Agreement and, instead, referring to all procurement opportunity notices as "notices of intended procurement"; and moving the paragraph relating to annual publication requirements for permanent lists of qualified suppliers from Article IX:9 to Article VIII.

136. It has also been said that any effect of the changes suggested on other Articles in the Agreement would need to be considered. For example, modifications to Article IX might have an impact on Article XI:3(a), which provided for the reduction in the deadlines for the receipt of tenders if a separate advance notice had been published. Article XI:3(a) referred to information contained in Article IX:8, the deletion of which had been proposed.

137. Moreover, it has been suggested that notices of invitation to participate should be published through means which offered the widest possible and non-discriminatory access and which should be accessible free of charge through a single point. It has also been said that publication of tender documents electronically would reduce the need for detailed information in tender notices. (See a proposal by the delegation of the European Community circulated as [GPA/W/87](#) and included in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

paragraph 2

138. It has been said that this paragraph should specify clearly that Annex 1 entities had an obligation to publish a notice containing the types of information as provided for in paragraph 6. The present use of the word "may" might be interpreted to suggest otherwise.

paragraph 8(a)

139. It has been suggested to indicate the relevant CPV (Common Procurement Vocabulary) code in the published summary notice. In this connection, the delegation of the European Community expressed willingness to come forward with an explanatory paper on the CPV.

paragraphs 3 and 9

140. It has been said that the use of notices regarding qualification systems as invitations to participate should be clarified. Because the use of permanent lists of qualified suppliers might lead, in some cases, to the formation of a closed circle of suppliers, those suppliers who had not been inscribed on those lists should have the possibility of participation in the intended procurement.

141. It has also been said that the provisions on publication of tender notices made a distinction between entities in Annex 1 and entities in Annexes 2 and 3 with respect to invitation to tenders. The use of a notice of planned procurement as an invitation to tender was authorized only for Annexes 2 and 3 entities. It has been suggested that entities at all levels of government should be able to use all methods of invitation to tender.

142. It has also been suggested that the provisions in this Article should be restructured. For instance, the provisions of Article IX:8 on publication of a summary notice in a WTO language should follow the provisions of Article IX:1 on publication of an invitation to participate.

143. It has been said that further flexibility should be provided in the procedures on the use of a notice of planned procurement. The use of such notices would allow entities to make use of the state-of-the-art purchasing methods. For instance, entities might maintain such notices accessible in the electronic databases for the entire period of validity of the lists.

Article X*paragraph 4*

144. It has been suggested to amend the text of this paragraph to allow for electronic procurement. (The draft text is included in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

Article XI*paragraph 1(a)*

145. It has been suggested to delete the words "by mail" in order to allow for transmission of tender documents through other means, i.e. electronic means.

paragraphs 2 and 3

146. It has been said that the Agreement, rather than prescribing fixed deadlines that applied to all types of procurement, should allow procuring entities to decide the time-periods for the submission of tenders, having regard to the nature of the tender and other considerations, including the urgency of the procurement. The time required for the submission of tenders might vary considerably according to the complexity of the procurement and it was in the interest of the procuring entity to allow reasonable time-limits for the preparation of responsive bids. It has therefore been suggested that, instead of stipulating minimum time-periods that applied to all types of procurement, Article XI should have a provision stating the principle that reasonable time must be allowed for the preparation and submission of bids by all potential tenderers, including geographically distant tenderers. It has been suggested that each Party should make known its general policy on the time-limits for intended procurement in a medium which was in the public domain or readily available to both local and foreign suppliers.

147. On the other hand, a statement has been made expressing reservations regarding the elimination of the requirements on fixed time-limits. The proposed substitution of the existing provisions on deadlines would not provide a legally predictable environment to procuring entities.

Procuring entities might run the risk of being challenged by suppliers based on how they applied the subjective notion of "reasonableness" in time-limits. It has also been said that paragraph 1, requiring that the time-limits should be adequate to allow suppliers to prepare and submit responsive tenders, contained the basic principles, whereas the minimum periods referred to in paragraphs 2 and 3 were provided only as a safety net.

148. It has been suggested that the requirements in paragraph 3 could be made less rigid by including additional circumstances in which a reduction in the existing minimum time-limits may be warranted. For instance, the deadlines in the Agreement might be reduced when electronic means of publication had been used to provide tender information.

149. It has also been suggested that entities should provide for rapid responses to challenges by suppliers alleging the inadequacy of time-limits provided for a proposed procurement.

new paragraph

150. It has been suggested that deadlines may be further reduced in those cases where the procuring entity offered free and direct access to calls for tenders via a single point of entry.

151. The suggestions have been made to amend the relevant provisions in the Agreement by the delegations of Singapore (circulated as Job No. 3772), the European Community ([GPA/W/87](#)) and Canada (circulated as Job No. 3481). (The draft texts are included in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

Article XII

152. It has been suggested that this Article should contain references to the use of information technology in the communications between the procuring authority and the tenderers.

Article XIII

paragraph 1, subparagraph (a)

153. It has been suggested that Article XIII:1(a) should be amended in the light of the increasing use of electronic means of communication. (The suggested text is reproduced in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

154. It has been said that, since the information content of a submission was not affected by the means used for its transmission, the reference to telex, telegram or facsimile should be deleted. It has also been said that the provision on the confirmation of receipt of tenders appeared to be redundant and should be deleted.

155. A view has been expressed that electronic means of communication should not have to be used in parallel with paper-based systems. While, initially, procuring entities might choose to use electronic tendering in parallel with paper-based systems, provisions should be made allowing all tenders for a particular type of product to be submitted electronically in the future. The need for a paper-based system would mostly be confined to the purchase of basic commodities and low-technology products. For example, suppliers of computer hardware and software or of sophisticated medical and telecommunications equipment were already fully capable of submitting tenders by electronic means.

156. A further view expressed has been that any new provisions, while enabling entities to use electronic means of communication, should not permit them to reject a priori otherwise competitive tenders only because they were submitted by suppliers using a paper-based mode of delivery. The use of electronic tendering should not lead to discrimination among suppliers with varying degrees of technological advance in the use of information technology.

157. It has been said that, while electronic modes of communication were tools for increasing efficiency and productivity in procurement processes, electronic tendering could not be made mandatory in the present state of technology. The experience of the private sector had shown that it was impractical to transmit large documents through electronic means. In this connection it has

been said that a single format document could be used to submit tenders rapidly and efficiently through electronic means whereas any substantive information could be transmitted in a paper-based format.

158. Another concern that has been raised related to the interface between electronically transmitted documents and national legal systems for the settlement of disputes. It has been asked whether electronically transmitted documents had the same legal value as paper-based documents under national judicial systems. Safeguards should be devised to ensure that electronically transmitted documents that would have evidentiary value in an eventual dispute would not be modified.

paragraph 1, new subparagraph (b)

159. It has been suggested to add a provision regarding the opening of tenders in order to preserve integrity of data and confidentiality of tenders.

paragraph 1, new subparagraph (c)

160. It has been suggested to add a provision emphasizing non-discrimination regarding the means of communication or exchange of information used.

161. Section 1(c)(iv) of the present note is also relevant to the review of Article XIII:1.

paragraph 4, subparagraph (b)

162. It has been said that the reference to "specific evaluation criteria" in this subparagraph should be clarified in the light of the relevant terms in Article VIII(b) which emphasized that any conditions for participation in tendering procedures should be limited to those which were essential to ensure the firm's capability to fulfil the contract in question.

Article XIV

163. It has been said Article XIV should be modified in the light of the practice of post-tender or even post-contract award negotiations between procuring entities and tenderers.

164. It has also been said that this Article could be combined with Articles VII and X on tendering procedures.

Article XV

Paragraph 1(b)

165. It has been suggested to add the words "or group of suppliers" after "a particular supplier" in order to address the circumstances where the products or services were supplied by a limited number of suppliers, for instance by those holding exclusive rights such as patents and copyrights.

paragraphs 1(h) and 1(i)

166. It has been said that the question of the Agreement's coverage of procurements through commercially run websites should be examined in the light of the provisions of paragraphs (h) and (i) of Article XV relating to direct purchasing under certain conditions.

paragraph 1(k)

167. It has been said that the present terms of Article XV did not adequately cover the various circumstances under which limited tendering might be justified. Public sector purchasers might sometimes have to satisfy their end-users, on behalf of whom they procured, and who might have confidence only in a limited range of brands, in particular, for purchases related to life-preserving equipment, essential medical treatment or operation of emergency services. They might also find it easier to use a single brand of equipment, for example regarding specialized vehicles, in order to

simplify their needs related to spare parts, maintenance and training. Also, it might not always be easy to determine the required quality through technical specifications. The problem was compounded as it was not always possible to determine the reliability of alternative brands by objective tests prior to the award of a contract. While end-users should not have an unlimited choice, their legitimate preferences based on their working experience, for example in the case of divers' equipment, might need to be respected. Under such circumstances, the use of limited tendering might be preferable since more competitive tendering procedures might involve the application of biased technical specifications or evaluation criteria. It has been suggested, therefore, that a subparagraph should be added to the list of exceptions to open and selective tendering procedures to state that where end-users have specified strong technical or professional preferences for using particular suppliers, and are able to support their preferences on sound technical or professional reasons and that these suppliers should demonstrate that they are able to meet the requisite quality standards and delivery schedule over the terms of the contract.

168. The proposed additional subparagraph would provide the purchasing department with the greater flexibility needed to undertake limited tendering when circumstances arose where not all of the conditions open tendering had not been met and which were not covered by the present terms of Article XV. A non-paper explaining the concerns that the proposed amendment to Article XV:1(k) sought to address has been circulated by Hong Kong, China as Job No. 4.

169. In connection with the suggestion to add a subparagraph (k) to Article XV, it has been said that any such amendment might lead to misuse of limited tendering procedures. A view has been expressed cautioning against any additional exceptions to the use of open and selective tendering and also against the use of any subjective criteria, such as the reliability of suppliers, in this connection. The purchasers' selection of specific brands or trade names might involve discriminatory practices. The point has also been made that a new subparagraph, if motivated by the need to allow entities to refer to a brand name that were perceived by end-users as having a better quality, would be inconsistent with the provisions of Article VI:3. The present provisions of the Agreement were sufficient to deal with the situations described in the proposal.

Article XVII

paragraph 1(c)

170. It has been said that a single point of access to tender notices should be promoted. A suggestion for amending the Agreement has been made by the delegation of the European Community ([GPA/W/87](#)). (The draft text is included in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

Article XIX

subparagraph 5

171. The discussion of statistical reporting is reflected in section A.1.(e) of the present checklist. A note by the Chair attempting to present a draft revision of the text of Article XIX:5 on that basis and the various comments made on that draft text at the meetings held in February and May 1999 was circulated in June 1999.

Article XX

paragraph 1

172. A suggestion for amending this paragraph has been made by the European Community ([GPA/W/87](#)). (The draft text is included in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

new paragraph 9

173. The European Community suggested the addition of a new paragraph 9 relating to the establishment of independent review bodies ([GPA/W/87](#)). (The draft text is included in the Note by the Secretariat "Suggested Drafting Changes to the 1994 Agreement" of 1 September 1999.)

Article XXIII

174. It has been suggested that the provisions of Article XXIII should be aligned with those in the corresponding provisions of GATT 1994.

Article XXIV*paragraph 6, subparagraph (b)*

175. It has been said that Article XXIV:6(b) recognized a Party's right to withdraw an entity from Appendix I if government control or influence over it had been effectively eliminated. The exercise of this right, however, might be frustrated by the lack of a clear guidance on what would constitute effective elimination of government control or influence. Even if withdrawal of an entity was appropriate in the light of the nature of the entity, the current text might give rise to some disagreement between trading partners regarding the extent to which the removal of government control or influence had actually occurred and the privatized entity was being managed on the basis of market economy principles. The objective of privatization was to apply market economy principles in the daily conduct of business including in the application of procurement procedures. The removal of government control or influence made it impossible to enforce the disciplines of the Agreement on the entity in question. However, market forces, rather than the disciplines of the Agreement, would be relied on to ensure market access. The Agreement might hinder the effectiveness of the privatization process if a privatized entity was compelled to conduct its procurement in accordance with the procedures of the Agreement. There was, therefore, a need for more transparent, operational, and privatization-friendly criteria for the withdrawal of privatized entities. The privatization of government-influenced activities facilitated the market-oriented functioning of the entity and was in itself a positive development in furthering the purpose of the GPA. A further comment has been that such an amendment would benefit the current GPA Parties, and would also facilitate accession to the GPA. The requirement for a compensatory adjustment might be perceived as hindering or delaying the privatization efforts in some Parties. Moreover, it might deter developing countries or economies in transition from acceding to the Agreement if they expected to remove certain entities from government control or influence at some point as part of the process of rationalization of government. Such countries might be cautious about offering certain entities if they would be expected to pay compensatory adjustment. The provisions should be clarified in order to address any concerns of future as well as present Parties in this respect. The clarification of the notion of "effective elimination of government control or influence" might also help avoid possible difficult dispute over which entities were considered to be already free from government control and influence.

176. It has also been said that, if a privatized entity operated in conditions similar to those of a private entity, there should be no obstacles to the withdrawal of the entity from Appendix I. The privatization would work better than the GPA did in opening the procurement market. The last sentence of Article XXIV:6(b) stipulated that "allowance shall be made for the market-opening effects of the removal of government control or influence". If, however, the government control or influence was effectively removed and "the market-opening effects" were anticipated, there should be no need for any compensation. In order to remove any legal ambiguity regarding requests for compensation, the existing Article XXIV:6(b) would need to be modified by specifying the criteria that would need to be satisfied for withdrawal of entities (c.f. the note on "Suggested Drafting Changes to the 1994 Agreement").

177. Another view in this connection has been that the present provisions were a carefully balanced outcome of the negotiations between Parties and reflected the uncertainties in market access opportunities which might be associated with the withdrawal of an entity from Appendix I, notwithstanding a claimed removal of government control or influence. The Agreement had been concluded to cover procurement by government entities which had been excluded from the rules of both GATT and GATS. The public or private nature of an entity would need to be defined in order to determine its coverage under the Agreement. At the time of the negotiation of the Agreement, Parties had aimed to achieve a certain balance between their respective offers regarding government entity annexes. The purpose of Article XXIV:6(b) was to ensure that any future changes to an agreed annex would not affect that negotiated balance. If the disciplines of the GPA no longer applied to an entity, this would no longer be a definitional matter but rather a matter of ensuring that procurement by that entity took place under conditions of full and effective competition.

178. It has also been said that the concern that the provisions of Article XXIV:6(b) might create an opportunity for a Party to object to the full privatization of an entity in another Party, for negotiating purposes, was unfounded. Privatization was recognized as beneficial by all. The concept of effective elimination of the government control or influence could not be considered a subjective matter. The exclusion of an entity from the coverage of the Agreement should not be based on whether it was a private or public company but rather on a determination that the company was subject to full and effective competition. Furthermore, the provisions of Article XXIV:6(b) could not be seen as creating a disincentive for privatization, since an entity operating under market principles should not have difficulty in following the process of open and competitive tendering procedures under the Agreement.

179. It has further been said that there was a presumption in this provision that there would not be any objection to modifications nor automatic requests for compensation if privatization involved effective elimination of government control or influence. There was no reason to believe that the relevant provisions would operate any other way than according to their original intention. Moreover, a delegation has indicated that its experience with privatization had not led to a need to provide compensatory adjustment. Parties might request compensation only in exceptional cases.

180. With respect to the criteria suggested for inclusion in Article XXIV:6(b) in order to establish whether government control or influence over the privatized entity had effectively been eliminated, it has been said that those criteria should be cumulative and all three had to be met for the withdrawal of the entity. It has also been said that the proposed criteria may not be the only ones for establishing that an entity was no longer under government control or influence. There might be other criteria that might be used as evidence of market opening effects. On the specific criteria, the following points have been made:

- regarding the requirement that the government not provide the entity with any special or exclusive rights, a wide variety of private companies were granted such rights by the government. For instance a corner store might be authorized to sell fishing licences or postage stamps;
- the requirement that the government did not appoint more than half of the members of the entity's management board might not be sufficient to ensure that the government control or influence was effectively removed. In response, it was asked what would be an appropriate percentage in this respect ?
- the criteria that the operation of the entity was financed by its revenue, not by government subsidies or equity infusion would need further clarification. In some cases government subsidies were used for the purpose of reducing the cost of a large-scale project undertaken with the aim of improving public welfare;
- the requirement that the operation of the entity was financed by its business revenue might not be appropriate in all cases. For instance, a number of entities in both Annex 1 and Annex 3 of the United States, while operating on the basis of their own business revenues, continued to be considered as government agencies conducting government procurement. If the entity was mainly financed by its business revenue, some non-voting equity infusions by the government would not affect the degree of government control or influence.

paragraph 8

181. It has been said that the provisions of Article XXIV:8 on information technology should be modified in the light of the ongoing work on possible amendments to the Agreement discussed in Section A.1(d) of the present note.

Possible additional article

182. It has been suggested that an article containing definitions of the various terms used in the Agreement should be considered.

(h) Improving the structure of the Agreement

183. It has been suggested that the structure and the presentation of the Agreement should be improved *à droit constant* in order to render it more logical and easy to follow by entities and suppliers. This could be achieved by rearranging the order of provisions so that they more closely followed the normal sequence of the steps in the process of public purchasing; grouping the provisions in accordance with their purpose in order to bring the structure of the GPA more into line with the practice followed in other WTO agreements; removing provisions whose applicability had expired, for example those relating to the entry into force of the WTO and transitional periods in Article XXIV:3(a), (b), (d) and (e); and shortening certain Articles by subdividing them into several Articles. (See Attachment to the Revised Note by the Secretariat On Suggested Drafting Changes to the 1994 Agreement circulated in Job No. 2244, dated 19 April 1999.)

184. In connection with Article XXIV:3(a), it has been suggested that it should be retained as a historical record in order to avoid any possible misunderstandings in respect of Korea's transitional arrangements and the beginning of its implementation of the decision on notification of threshold values in national currencies.

185. A new structure for the GPA that has been suggested in the document circulated in Job No. 6437 is reproduced in Attachment 2 to the present note. A comment has been made supporting the suggestion that the Articles of the Agreement be organized under different group headings.

(i) Appendices to the Agreement

186. It has been suggested that Appendix I to the Agreement might benefit from simplification, including the possibility of presenting the Annexes in the form of negative lists, starting with Annex 1. The Committee could define the general principles that would guide the Parties in determining which entities should be excluded from the coverage of the Agreement, for example for national security reasons. This would also have the effect of reducing the residual exceptions and derogations under the General Notes to Appendix I of individual Parties.

187. It has been stated that it was desirable to maintain the presentation of the Annexes in the form of positive lists for the overall consistency of the Annexes. While it might be feasible to present Annexes 1 and 2 in the form of negative lists, entities in Annex 3 could only be listed in the form of a positive list. In addition, Annex 4 could be presented as a negative list only after the uniform extension of the coverage of the Agreement in the area of services. In this connection, the point has also been made that Parties had the obligation to ensure that all the entities that had been specified in Appendix I complied with the requirements under the Agreement. A negative list approach could raise certain difficulties for Parties in this respect.

2. Elimination of discriminatory measures and practices which distort open procurement

(a) General

188. The point has been made that this element has prime importance for the review and that priority should be given to this review item. Discriminatory measures and practices which distorted open procurement were incompatible with the objectives of the Agreement and represented a serious derogation from the fundamental WTO principles of non-discrimination which were also enshrined in Article III of the Agreement. The elimination of discriminatory measures would give true effect to the principle of non-discrimination in the Agreement and would also be conducive to encouraging the accession to the Agreement of non-Parties. This matter related to provisions that discriminated between Parties, it being understood that there was a close link between this issue and that of coverage under which issues relating to extension of the scope of application of the national treatment principle would be taken up.

189. It has been suggested that, under this element of the review, consideration could be given to:

- elimination of current reciprocity-based exceptions and derogations in the coverage of the Agreement;

- establishment of a mutually agreed coverage of services.

190. With regard to the types of discriminatory provisions in the Appendices which were identified in the Note by the Secretariat circulated on 31 October 1997 (document with footer 'gpa38'), the following comment has been made:

- the purpose of the non-application provisions referred to in the last sentence of the first indent of paragraph 13(a) of the Note was to provide clarifications regarding the coverage of contracts. These provisions concerned all the obligations under the Agreement, including the obligation on national treatment and could not be classified as discriminatory measures.

191. With regard to the types of discriminatory provisions in the Appendices with respect to the "MFN" standard, the following comments have been made:

- these provisions could be eliminated to the extent that other Parties, who had previously been unable to cover certain areas, were prepared to open access to their procurement markets. Since the conclusion of the Agreement, negotiations had been held in the context of the Agreement for the removal of a number of derogations. It was essential to aim at the greatest level of coverage rather than to have a uniformity of coverage with the least common denominator;
- while the Agreement did not provide for the maintenance of exceptions to Article III, it was an in-built principle of the Agreement that opening up trade was subject to negotiations between Parties and was not granted automatically;
- negotiations on the elimination of discriminatory measures should be held both bilaterally and in the context of the Committee;
- reciprocity had been an effective tool in the negotiation of the schedules of commitments and, since then, in the elimination of the discriminatory provisions between a number of Parties. The ability to maintain discriminatory provisions had ensured a much larger coverage than would have been the case if those discriminatory measures had not been allowed. Any efforts to move away from the reciprocity approach should not undermine the balance that had been achieved in the negotiations of the current coverage of the Agreement;
- Parties might have to retain the possibility of introducing discriminatory provisions with respect to the MFN standard in negotiations with an acceding country as an incentive to enhance the coverage of its offer;
- drawing up Appendix I in the form of negative lists would also contribute towards elimination of discriminatory measures.

192. With regard to the note by the Secretariat listing the types of discriminatory provisions in Appendix I of Parties relating to the "MFN" treatment standard (circulated in Job No. 810, dated 12 February 1999), the following comments have been made:

- most Parties' Schedules contained notes specifying the conditions for removal of non-application provisions. All other Parties maintaining discriminatory measures should set out the circumstances under which they would be prepared to remove them;
- non-application provisions in Parties' Schedules were mainly in the form of reciprocity-based derogations from the general commitment of non-discriminatory treatment under Article III.1(b);
- the note by the Secretariat demonstrated that the matter of elimination of discriminatory provisions was inextricably linked with that of coverage in that the need for a balance of overall coverage had led Parties to introduce such discriminatory provisions in their Appendices. The insufficient coverage of entities and areas of procurement in the Schedules of some Parties was at the basis of the reciprocity provisions in the Agreement. Those Parties that had made comprehensive offers in the coverage negotiations had included country-specific non-application provisions in their Schedules in order to maintain a balance of commitments with other Parties in certain specific areas. The two issues would need to be considered together;

- the note set out the rationale of some of the discriminatory provisions;
- since the conclusion of the Agreement in 1994, bilateral agreements between several Parties had led to the elimination of certain discriminatory measures. The note listing the remaining discriminatory provisions did not provide a clear picture of the extent to which the procurement markets had been opened through such negotiations.

193. With regard to the timetable and work programme for the elimination of discriminatory provisions, the following points have been raised:

- while the review work on discriminatory provisions and that on the expansion of the coverage of the Agreement were closely linked, the work on the latter element might go beyond the target date for the completion of the negotiations set out in the suggested timetable;
- the work on the elimination of discriminatory provisions should be carried out in parallel with the work on the simplification and improvement of the Agreement;
- the drawing up of a matrix of discriminatory provisions in the Schedules of individual Parties would show clearly any perceived imbalances between the commitments of Parties and identify where a new balance might lie as a result of the removal of discriminatory measures;
- Parties maintaining discriminatory provisions should explain the reasons for maintaining such restrictions and the circumstances under which they are prepared to remove them;
- Parties should conduct bilateral and/or plurilateral negotiations with a view to removing discriminatory provisions.

(b) Mutually agreed coverage of services

194. The point has been made that, while establishment of a mutually agreed coverage of services would have the effect of eliminating reciprocity conditions in various Parties, it was essential that Parties conducted negotiations in this area on the basis of the most-favoured-nation principle.

195. It has been stated that the current coverage of services in the Agreement was characterized by its diversity with respect to both the specific sectors covered by each Party as well as the overall level of services covered by each Party. It was the outcome of a perceived need for reciprocity in this area because of the divergences in the levels of coverage offered by Parties in the negotiations. Future negotiations should aim at a uniform level of coverage among all Parties, at least in terms of the quality of the coverage of services.

196. The view has been expressed that reciprocity-based services coverage should be eliminated but only on the basis of all Parties covering an approximately uniform level of services on a mutually agreed basis. It has been said that it would be possible to move towards an MFN approach in the coverage of some of the specific services sectors, such as business, distribution, education, medical, banking and financial services, provided that all Parties were willing to make sufficient offers relating to those services in an overall package. On this point, another view has been that the discriminatory provisions were the result of the pre-existing reciprocal arrangements which had not been plurilateralized, or of perceived imbalances in the commitments by Parties. Rather than seeking such a linkage, which might not produce the expected outcome, Parties should keep an open mind in carrying forward the mandate of improving the coverage of services under the Agreement.

197. With regard to the modalities for negotiations in this area, the following points have been made:

- the element of the review concerning the elimination of discriminatory measures and practices was independent of that on the expansion of coverage. On the other hand, the view has been expressed that the two elements would overlap and that the review should address not only the elimination of discriminatory measures and practices but also the expansion of coverage;
- the review should be initiated by simplification and elimination of derogations in Annex 4 in Appendix I of individual Parties;

- differing views have been expressed concerning the extent to which the work on this element should take its cue from that in the Working Party on GATS Rules.

198. In reviewing the services covered under Annexes 4 and 5 of Parties based on an informal note by the Secretariat, dated 8 December 1998 (Job No. 6771), comments have been made seeking/providing clarification concerning the following aspects of the services schedules:

- whether rental/leasing services (sector 1.E) were already covered by Article I:2 on lease, rental or hire purchase;
- whether leasing would be considered the purchase of a good rather than a service;
- some services covered under the Agreement might not be suitable for cross-border delivery. For example competition for legal services (sub-sector A.1.a) was limited in most countries;
- some services in Annex 4 of Parties might not be related to government procurement procedures under the Agreement. For example, it was questionable whether governments used tendering procedures for procuring legal services;
- the fact that there was no procurement business in a given service sector should not deter Parties from covering that category in their Annex 4;
- the negative list approach adopted by the United States in its Annex 4, which covered all services except those which had been specifically excluded, had made it difficult to verify the information contained therein. The problem had been aggravated by the fact that some of the exclusions were related to the end-use of the services, for example services purchased in support of military forces located overseas;
- whether the coverage of postal services (sector 2.A) in the United States Schedule meant that the government entities purchased such services from one supplier under the limited tendering method in Article XV.

3. Expansion of the coverage of the Agreement

199. It has been suggested that the coverage of the Agreement could be expanded with a view to achieving a balance of market access commitments among Parties. For this purpose, the following specific areas that might be addressed have been suggested:

- The review should address the establishment of national self-monitoring mechanisms whereby individual Parties would commit themselves to review domestically and periodically whether national programmes in the form of set-aside programmes and other preferential policies contributed towards meeting their vowed objectives and, if so, how effective they were in doing so, with a view to examining the scope for their elimination in the long term. It has also been said that the General Notes of Parties contained provisions excluding certain procurement from the coverage of the Agreement for domestic legal grounds. On the other hand, the view has been expressed that nothing should be done to legitimize set asides and other discriminatory programmes which were presently reflected in the Schedules of Parties as exceptions or reservations and to which some Parties had responded in their Schedules. Providing a national review mechanism in the Agreement itself might imply that the underlying policy objectives were deemed to be justified and that the programmes could be continued as long as they met their specific objectives. The aim of the review of derogations should be to explore ways of phasing them out as prescribed under Article XXIV:7(c). The ultimate aim should be to remove all discriminatory measures and to subject all procurement under the Agreement to the MFN and national treatment principles.
- Identification of potential sectors for extended coverage. Reference was made to the inclusion of the telecommunications, transportation and steel sectors. In response to this suggestion, the appropriateness of focusing work on the expansion of coverage in the telecommunications and transportation sectors has been questioned since many countries had made significant progress towards privatization in these sectors. It has been suggested that the review relating to this element should focus on the elimination of the derogations from coverage in some other sectors existing in Appendix I of Parties.

On the other hand, the point has been made that the process of privatization had not been significant in all countries and that a large number of public entities operating in the telecommunications sector remained outside the coverage of the Agreement.

- Further expansion of the coverage of services in the Agreement. The suggestion has been made that the review work in this area should be initiated by identifying the sectors of common interest to Parties based on domestic supplier surveys. On the other hand, the point has been made that, while certain sectors were not included in the scope of the Agreement, the provisions of the Agreement did not exclude the expansion of its scope to any additional sectors. Rather than defining the sectors that could be included horizontally within the scope of the Agreement, the extension of coverage should be handled, for the time being, through bilateral agreements. Another view was that, while negotiations on specific sectors might have to be carried out bilaterally, Parties should identify the specific sectors to be negotiated in a plurilateral context. Parties should seek a high level of commitment in terms of coverage and not the lowest common denominator.
- Lowering of the threshold values applicable to certain Parties. In response to this suggestion, the point has been made that, with the present threshold levels, Parties with larger procurement markets subjected a greater proportion of their overall procurement to the Agreement. The impact of thresholds on the scope of the commitments of individual Parties would need to be taken into account in considering the overall balance that had been struck under the Agreement between various Parties. On the other hand, the view has been expressed that such an approach would neither be procedurally feasible nor equitable. The suggestion was made that the Agreement should include provisions setting out uniform levels of thresholds applicable automatically to all Parties and independent of the size of their procurement markets and that Parties should no longer have the possibility of applying different threshold levels.

200. It has been stated that expansion of the coverage of the Agreement would require significant preparatory work. It was also stated that any further expansion of the existing coverage of the Agreement at the sub-central levels of government would be dependent on progress in the simplification and improvement of the provisions of the current Agreement.

201. A view has been expressed stating that there was a trade-off between the objective of increasing the membership of the Agreement and the burden that wider commitments might incur for the acceding countries. Another view has been that an improved coverage might be an incentive to those countries that sought increased market access to join the Agreement.

202. In addition, the need to obtain adequate experience with the domestic implementation of the Agreement before expansion of its coverage has been referred to.

B. INSTITUTIONAL/PROCEDURAL POINTS

1. Work on government procurement in other WTO fora

203. It has been suggested that, in the process of the review of the Agreement, Parties should take account of the work on government procurement in the Working Group on Transparency in Government Procurement and in the Working Party on GATS Rules.² The point has also been made that, while the level of obligations sought under each forum may not necessarily be the same, the overall outcome of work in these fora should be coherent and consistent. However, the review of the Agreement should not be delayed by the pace of other discussions.

204. It has been said that the delegations might need to consider the relationship between plurilateral Agreement on Government Procurement and a future multilateral agreement on transparency in government procurement. The plurilateral agreement might exist under the umbrella of a multilateral agreement. By way of example, it has been said that, whereas the obligations in GATS Part II applied to all Members, the obligations in GATS Part III applied only to those Members that had undertaken specific commitments. The special rules under the plurilateral agreement,

² The most recent reports of the Working Group on Transparency in Government Procurement and the Working Party on GATS Rules were circulated respectively in documents [WT/WGTGP/M/7](#) and [S/WPGR/M/23](#).

including those relating to market-access commitments, might continue to be binding only on those Parties that would have subscribed to them.

2. Institutional arrangements for the review

205. The discussion of the review since 1997 has been carried out mainly in informal consultations.

3. Participation of WTO Members in the review

206. It was noted that an objective of the review was the expansion of the membership of the Agreement. The review should serve the purpose of making the Agreement more attractive to other WTO Members as well as making accession of other WTO Members, including developing countries, easier. For this purpose, interested WTO Members should be given the opportunity to participate actively in the Committee's discussions on the review of the Agreement by becoming observers to the Committee in accordance with the Committee's Decision on Procedures for Participation of Observers ([GPA/1](#)).

207. As agreed by the Committee at its February 1997 meeting, the Chairman sent a communication to the WTO Members, through the Chairman of the General Council, drawing the attention of WTO Members, as well as governments which are in the process of acceding to the WTO, to the review and inviting them to participate as observers in the meetings of the Committee in accordance with the Committee's Decision on the Participation of Observers ([WT/L/206](#)).

4. Next steps

208. During the informal consultations held on 30 June 1999, it was agreed that the work at the next meeting would be carried forward in the following way:

- (i) the primary focus of the work would be put on the Article-by-Article review of the Agreement;
 - (ii) further discussion of a more conceptual nature would be warranted on the subject of procurement methods, in particular in regard to framework and similar types of contracts. For this purpose, delegations were encouraged to provide information in response to the illustrative list of questions on this subject. The Chairman would also prepare a short note aimed at crystallizing the basic issues and options that had been identified in this area;
 - (iii) progress in bilateral and plurilateral consultations with respect to the elimination of discriminatory measures would continue to be monitored;
 - (iv) as for documents, the Secretariat would update the Checklist and its two-column paper on Suggested Drafting Changes to the 1994 Agreement, to take into account the new proposals made;
 - (v) on statistics, the paper of the Chair would be updated to take into account the new suggestions and the comments made;
 - (vi) delegations were also encouraged to come forward with further papers. While new proposals were not ruled out but rather welcomed, papers of delegations should become increasingly directed to finding common ground and refining legal language. In this connection, the EC delegation expressed willingness to come forward with an explanatory paper on the CPV (Common Procurement Vocabulary).
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