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## **Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services—issues arising from the use of electronic communications in public procurement**

### **Electronic publication of procurement-related information: study of national, regional and international practices with the publication of procurement-related information not covered by the Model Law**

**Note by the Secretariat**

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## **I. Introduction**

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “UNCITRAL Model Procurement Law” or the “Model Law”)<sup>1</sup> is set out in paragraphs 5 to 34 of document A/CN.9/WG.1/WP.37.

2. As regards electronic publication of procurement-related information, at its sixth and seventh sessions (Vienna, 30 August-3 September 2004, and New York, 4-8 April 2005, respectively), the Working Group, inter alia, considered whether any additional information relevant to potential suppliers, which the Model Law did not currently require to be published, might be brought within the scope of any existing or new provisions of the Model Law or guidance given. It agreed to study the usefulness of publication, in particular of (i) regulatory acts pertinent to procurement not covered by current article 5 of the Model Law, such as internal guidelines or instructions of administrative bodies, and (ii) information on general forthcoming procurement opportunities. The Working Group requested the Secretariat to review the relevant practices under domestic procurement regimes and present the results of such a review for its consideration at a future session. (A/CN.9/568, paragraph 28 and A/CN.9/575, paragraphs 24 and 31).

3. This note and addendum thereto (A/CN.9/WG.1/WP.39/Add.1) are submitted, pursuant to that request, for consideration by the Working Group at its eighth session.

## **II. Publication of procurement-related information not covered by the Model Law: study of national, regional and international practices**

### **A. General remarks**

4. Some information not required to be published under the Model Law is required, encouraged or permitted to be published or is published in practice in some jurisdictions reviewed. Issues such as the content of the published information, whether the publication is mandatory or optional, and whether the means of publication is specified vary greatly from jurisdiction to jurisdiction. For the purpose of this study, a distinction should be drawn between information that has historically been required to be published, and further information, the publication of which has been enabled by electronic means of communication.

#### **1. Information historically required to be published**

5. Most of the information that has historically been required to be published was considered by the Working Group when the Model Law was prepared. Some such information, such as invitations to tender and notices on contract awards, was included in the Model Law’s provisions on publication, while the inclusion of other information was ultimately rejected for various reasons, for instance because of concerns over confidentiality, collusion of suppliers or market manipulation.<sup>2</sup> The

type of information that was ultimately included in the Model Law's provisions was not necessarily considered in depth by the Working Group.

6. For example, the then Working Group did not spend much time in the consideration of article 5 of the Model Law (public accessibility of legal texts), analysed in more detail in section B below. Nor did it substantially consider the publication of information on procurement contract awards (article 14 of the Model Law).<sup>3</sup> As a result, practices with the publication of similar information under domestic, regional and international regimes were not considered by the then Working Group.<sup>4</sup> Some information considered by the then Working Group to be useful for disclosure to the public in general was not ultimately subjected to mandatory publication under the Model Law, as is the case in legislation of some of the jurisdictions reviewed, but rather was dealt with in the provisions of the Model Law on the records of procurement proceedings<sup>5</sup> or in the provisions that require making available certain types of information to any member of the public upon request.<sup>6</sup> The then Working Group considered that some other information required to be published in some jurisdictions should be disclosed to interested suppliers or contractors only.<sup>7</sup>

7. On the other hand, some other information required to be published in some jurisdictions reviewed was not considered for publication by the then Working Group at all, for example, a notice on complaints filed with a supervisory body about procurement proceedings.<sup>8</sup> Some information was not considered by the Working Group at that time probably because it was considered that such information fell outside the scope of the Model Law or was linked to procurement procedures that the then Working Group did not consider, for example, framework agreements, or decided from the outset not to include in the Model Law, for example, suppliers' lists.<sup>9</sup>

8. Overall, the drafting history and some provisions in the Guide to Enactment of the Model Law<sup>10</sup> indicate that drafters of the Model Law were cautious of the costs and efforts of publishing procurement-related information, preserving its integrity and keeping it up to date. Those concerns were understandably present at that time, as the Model Law was drafted primarily for a paper-based environment and "the procedures in the Model Law reflected a practice that was rooted in paper-based documentation."<sup>11</sup> As a result, the Model Law requires the publication of the minimum information necessary to achieve transparency in the procurement process and at the same time to avoid what was thought at that time the disproportionately onerous burden on an enacting State generally and on a procuring entity in particular.

## **2. Information, publication of which has been enabled by electronic means of communication**

9. The above trend has been reversed in those jurisdictions where electronic means of communication are widely used for the publication of procurement-related information. Savings in costs, time and effort resulting from such use have led to a trend of making available as much information for the benefit of suppliers as possible.

10. Additional procurement-related information usually required, enabled or encouraged to be published by electronic means includes (i) solicitation documents,

including specifications and modifications, encouraged to be published in their entirety on the Internet;<sup>12</sup> (ii) information on forthcoming procurement opportunities, analysed in more detail in document A/CN.9/WG.1/WP.39/Add.1, section I; (iii) various lists of standardized goods;<sup>13</sup> (iv) various types of statistical reports inter alia on the results of procurement and contracts concluded;<sup>14</sup> (v) information on the status of ongoing procurement proceedings, including notices on suspension; (vi) procedures cancelled; (vii) records of procurement proceedings; and (viii) any useful general information, such as information on a contact point for general inquiries. In practice, more information than required or authorized by law is usually made available to the public. Apart from various additional information, new features and services also appear.<sup>15</sup>

11. The publication of some additional information is encouraged, for example, in the EU public procurement directive (the “EU directive”).<sup>16</sup> The EU directive provides that if the specifications and additional documents related to procurement are published in their entirety on the Internet from the date of publication of the contract notice and the contract notice specifies the Internet address at which this documentation is accessible, procuring entities are allowed to shorten the time limits for receipt of tenders.<sup>17</sup> Similar provisions are also found in some national legislation of EU countries.<sup>18</sup>

12. Publication of some additional information may be necessitated by new electronic procurement techniques and features, such as e-catalogues, dynamic purchasing systems or electronic reverse auctions (ERAs). Although in the jurisdictions reviewed, most of the needs for disclosure of information to the public arising from the use of those techniques and features have been accommodated by information traditionally made public, such as notices of contracts and notices of contract awards, as well as records of procurement proceedings, provision of further information to the public may be necessary. Some specific publication requirements are found, for example, with respect to the records of ERA proceedings in Brazil (see A/CN.9/WG.1/WP.35/Add.1, paragraph 37).

## **B. Publication of additional regulatory texts not covered by article 5 of the Model Law**

### **1. Scope of article 5 of the Model Law**

13. When the Model Law was prepared in the 1990s, the then Working Group worked on the basis that clear and readily accessible laws and regulations relating to procurement would promote transparency and create predictability and confidence in the procurement process.<sup>19</sup> Several articles, primarily article 5 (public accessibility of legal texts), were intended to promote public accessibility of rules regulating public procurement.

14. The original text of article 5 was broadly based on article VI (1) of the 1981 GATT Agreement of Government Procurement,<sup>20</sup> except that the latter, apart from referring to laws, regulation and administrative ruling of general application, also referred to judicial decisions and any procedures (including standard contract clauses) regarding government procurement.<sup>21</sup> The then Working Group did not spend much time in the consideration of the original text of article 5 and made only

one substantive change in it by adding the requirement of “systematic maintenance” of the texts referred to in the article.<sup>22</sup>

15. Under article 5, as its title “Public accessibility of legal texts” suggests, the requirement of public accessibility and systematic maintenance applies to legal texts regulating procurement. The commentary to the article in the Guide to Enactment also states that the article “is intended to promote transparency in the laws, regulations and other legal texts relating to procurement by requiring public accessibility to those legal texts.” Legal texts listed in article 5 are “this Law, procurement regulations and administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof.”

16. “Procurement regulations” are defined in article 4 of the Model Law as those to be promulgated by an authorized organ to fulfil the objectives and to carry out the provisions of the Law. The need to ensure public availability of procurement regulations was specifically highlighted as such regulations may be used to exclude the application of the Model Law under its article 1 (2)(c).<sup>23</sup> In the context of article 4, an attempt was made to expand the scope of “procurement regulations” referred to in that article to include administrative directives, rulings and guidelines issued not only by organs authorized to promulgate procurement regulations but also by organs authorized to promulgate such directives, rulings and guidelines. The then Working Group, however, rejected that suggestion, proposing instead for the commentary to note that in addition to the law, various types of directives, rulings and guidelines might be applicable in particular procurement proceedings.<sup>24</sup> No such wording was included in the Guide to Enactment, and article 5, by referring to “administrative rulings and directives of general application” alongside “procurement regulations”, makes it clear that these two categories of documents are distinct.

17. The reference to “administrative rulings and directives of general application” appears only in article 5, and the term is not further defined. Except for the note in the original commentary that article 5 does not intend to cover administrative rulings and directives directed or concern individual contractors or suppliers,<sup>25</sup> no further guidance was given by the then Working Group as to the scope of the term. (On the other hand, references to “laws” and “procurement regulations” are also found in articles 27 (t) and 38 (s) of the Model Law that require the procuring entity to refer to the law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings in the solicitation documents/requests for proposals for services).<sup>26</sup>

## **2. Practices under international systems**

18. Most procurement-related international instruments require the publication of “any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement.” This wording is found in article XIX (1) of the current Agreement on Government Procurement (GPA)<sup>27</sup> of the World Trade Organization (WTO) and, in a slightly amended version, in particular with a reference to precedential judicial decisions, in article 1019 (1) of NAFTA (Chapter 10).<sup>28</sup> Similar wording has been considered for inclusion in article 10 of Chapter XVIII (Government Procurement) of the draft FTAA agreement.<sup>29</sup> The APEC non-binding Principles on Government

Procurement refer in paragraph 5 to transparency of “the laws, regulations, judicial decisions, administrative rulings, policies (including any discriminatory or preferential treatment such as prohibitions against or set aside for certain categories of suppliers), procedures and practices (including the choice of procurement method) related to [government procurement],” and in paragraph 61 to establishing and making know clear “procurement laws/regulations/policies, practices and procedures.”<sup>30</sup>

19. In the context of the negotiations of an agreement on transparency in government procurement in WTO, two approaches to the scope of information on procurement-related legislation and procedures to be required for publication under a future agreement were considered: (i) a formal approach that would require, for example, all laws, ministerial ordinances, administrative guides or internal rules and procedures to be published; and (ii) an approach that would consist of determining the substance of the information that should be made available, irrespective of the legal form. It was argued in WTO that preference should be given to the latter approach since what was of importance was the substance of the information to be made available; the objective of transparency would not be achieved if the publications that contained the relevant laws and regulations did not cover important aspects of national procurement practices and procedures.<sup>31</sup>

### **3. Practices under some domestic procurement regimes**

20. The amount of information regulating public procurement that is made available to the public varies from jurisdiction to jurisdiction depending on legal systems and traditions, in particular the sources, form and nature of domestic rules and procedures regulating procurement, as well as the level of transparency in public procurement in a given jurisdiction. States parties to the relevant international instruments, like the GPA and NAFTA,<sup>32</sup> are bound by requirements on transparency of procurement-related regulatory texts that may be broader than those applicable domestically to the public disclosure of other regulatory texts.<sup>33</sup>

21. As regards the sources, form and nature of domestic rules and procedures regulating procurement, the attention of the Working Group is drawn to the report of the Secretary-General on procurement (A/CN.9/WG.V/WP.22)<sup>34</sup> submitted in 1989 to the then Working Group that drafted the Model Law, which in its paragraphs 7 and 30 to 38 addresses these issues. The relevant findings in the report remain pertinent and are reflected below.

22. In jurisdictions where procurement is regulated by binding and mandatory legal norms, comprising a majority of those reviewed for the present study, most rules regulating public procurement would be encompassed by article 5 of the Model Law as they would be considered “legal” or “normative” acts. As such, they are subject to the general principle of publicity of normative acts, usually enshrined in the Constitution and further elaborated in the administrative law, under which to be legally binding a normative act has to be published in the specified media. Procurement-related laws and regulations are usually published in the Official Gazette, while administrative rulings and directives may be published in the same or a different medium. In some jurisdictions, administrative rulings of only some bodies are subject to mandatory publication.<sup>35</sup>

23. In some countries, public procurement is essentially regulated by internal rules and directives for financial and economic control of government administration adopted under a legislative act, for example a general finance administration act.<sup>36</sup> The disclosure of those rules is usually required by specific acts.<sup>37</sup> Under those rules, substantial discretion as regards the conduct of procurement process is often given to the heads of procuring entities. Such a broad delegation of authority enables heads of a procuring entity to formulate procurement rules on an ad hoc basis.<sup>38</sup> No specific requirement on their publication may exist,<sup>39</sup> although a general requirement of transparency in public administration may apply. Whether such rules are “legal texts” within the meaning of article 5 of the Model Law is open to question.

24. The conduct of procurement in some countries may also be regulated by internal memoranda, circulars, letters of information from ministers and instructions issued within ministries or procuring entities. Some of them could be addressed to state officials rather than to the public in general; however, they may still have bearing on the procurement process as a whole. In addition, generic and topic-specific procurement handbooks and manuals are often prepared by central or local authorities, but could also be issued by procuring entities or agencies responsible for maintaining government procurement websites.<sup>40</sup> The use of some manuals or handbooks by all procuring entities could be mandatory,<sup>41</sup> most however are issued only for reference and guidance. Those documents are generally not considered to be “legal texts” and are therefore not covered by article 5 of the Model Law. They are usually not subject to the same rules of publicity that are applicable to “legal texts” in their domestic jurisdictions. In practice, it has been usually difficult to locate them. Some of them may be commercially published although in some jurisdictions ministerial circulars could be published in the same medium where laws and regulations are.<sup>42</sup> Some of these texts have been made available to the public through the Internet usually free of charge but in some instances a fee is charged.

25. In another group of countries, where a binding and mandatory legal procurement framework does not exist,<sup>43</sup> public procuring entities have the flexibility to contract with other parties through procedures and upon terms they deem appropriate guided by such general principles as equal treatment of suppliers,<sup>44</sup> promotion of public interests and good governance. There may sometimes exist rules and regulations regulating public procurement issued by various agencies handling public procurement. In at least one jurisdiction, it has been found that such rules could be easily overridden or amended by ministers or officials in those agencies, the rules do not create legal rights and obligations, and it is unlikely that they will be enforceable in the courts.<sup>45</sup> As such, they are not “legal texts” and thus not covered by article 5 of the Model Law. They may be required to be made available to the public under the general principle of transparency of governance or under a specific act.<sup>46</sup>

26. In the legal systems where laws in part are developed on the basis of case law, precedents set out in judicial decisions and opinions could play a central role in defining national legislation and procedures, including in the field of public procurement. In some other legal systems, judicial decisions and opinions of higher courts may have value for interpretation and application of legislative rules and procedures. Under domestic regimes, such information may or may not be required



to be published. The criteria for publishing judicial decisions and opinions are usually established by a court.<sup>47</sup> Those required to be published are published in a specifically designated official publication, although in some jurisdictions no official publication for judicial decisions may exist.<sup>48</sup> Some decisions and opinions of courts not published officially could be commercially published and made available online. In at least one jurisdiction reviewed, a specific requirement is found to publish in the electronic system court orders issued in relation to the litigation arising from public acquisitions.<sup>49</sup>

27. An obligation may explicitly be imposed by law on an entity posting texts regulating public procurement to keep them up to date.<sup>50</sup> In most jurisdictions reviewed, such an obligation is implicit, as amendments to normative acts are not effective until published.

28. In some jurisdictions reviewed, provisions are found on the publication of decisions or conclusions made by an administrative body with supervisory functions over public procurement proceedings. Procurement legislation in some jurisdictions explicitly requires the publication of final rulings of such bodies taken in the course of procurement review proceedings.<sup>51</sup> In some other jurisdictions, it is left to a supervisory body to decide on the publication of its decisions and conclusions.<sup>52</sup> In some other jurisdictions, the obligation to disclose such information to the public may exist or be implied under general rules on public access to documents and information in the public administration.<sup>53</sup>

#### 4. Conclusion

29. **Some texts regulating public procurement, notably judicial decisions that the Model Law, unlike the GPA and NAFTA, does not require to be published, are not covered by article 5 of the Model Law. The Working Group may wish to subject some of them to the mandatory publication requirement under revised article 5 of the Model Law, for example, along the lines of article XIX of the GPA (see paragraph 18 above). The publication of other additional texts, such as procurement manuals, handbooks and guidance that are usually of a reference character, could be enabled in the revised Model Law, and a note in the Guide to Enactment may elaborate on the value of publication of such texts as well as all other texts that cover important aspects of domestic procurement practices and procedures. For drafting suggestions, see document A/CN.9/WG.1/WP.39/Add.1, section III.**

#### Notes

<sup>1</sup> For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum* (A/49/17 and Corr.1), annex I (also published in the *Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as “*UNCITRAL Yearbook*”), vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).

<sup>2</sup> See e.g., documents A/CN.9/331, para. 211, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; A/CN.9/343, paras. 153-155, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A; and A/CN.9/359, para. 71, reproduced in the

*UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C.

- <sup>3</sup> The requirement on the publication of a notice on contract awards was included in the Model Law only in 1994. See document A/CN.9/376/Add.1, comments by Japan with respect to article 32, and A/CN.9/377, proposed amendments as regards article 32 (6), both reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part two, I. Under the 1993 Model Law on Procurement of Goods and Construction, the notice of contract awards is given only to suppliers and contractors (article 35 (6)). For the text of the 1993 Model Law on Procurement of Goods and Construction, see *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part three, annex I). The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/pdf/english/texts/procurem/proc93/proc93.pdf>).
- <sup>4</sup> For example, while the publication of a notice on contract awards is generally required under domestic, regional and international regimes, the content of the notice varies greatly. For the current practices, see, e.g., article 35 (4) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union, No. L 134, 30 April 2004, p. 114, also available at [http://europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm)) (hereinafter the “EU Public Procurement Directive”), and article XVIII (1) of the World Trade Organization’s (WTO) Agreement on Government Procurement (hereinafter the “GPA”) (see annex 4 (b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations, available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf)). Some jurisdictions, in addition, require the publication of a summary of the awarded procurement contract as a pre-condition for its effectiveness.
- <sup>5</sup> The Model Law, for example, requires a procuring entity to include in the record of procurement proceedings a statement of the grounds and circumstances on which it relied to justify the use of non-tendering methods (article 18 (4)) and any decision taken by a procuring entities in connection with suspension of procurement proceedings and grounds and circumstances therefore (article 56 (5)). Similar information is required to be published in some jurisdictions reviewed. For example, the publication of a notice that a single-source procurement or procurement without a competitive method in case of emergency is utilized has to be published under the Virginia Public Procurement Act (VPPA), as amended, article 2, § 2.2-4303, paras. E and F (available at <http://www.eva.state.va.us/dps/Manuals/docs/VPPA.pdf>). The notice has to state that only one source was determined to be practicably available or that the contract is being awarded on an emergency basis, as applicable, and identify what is being procured, the contractor selected, and the date on which the contract was or will be awarded. The notice is to be published on the day the procuring entity awards or announces its decision to award the contract, whichever occurs first. As regards suspension of procurement proceedings, the publication of the notice to that effect is required for instance under article 6.3 of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.
- <sup>6</sup> See, for example, article 7 (6) of the Model Law regarding the names of all prequalified suppliers or contractors. For the consideration of the matter in the Working Group, see document A/CN.9/359, paras. 71 and 101, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C. The requirement to publish the list of all prequalified suppliers or contractors is found in some jurisdictions.
- <sup>7</sup> See, e.g., article 12 (3) of the Model Law which provides that the notice of the rejection of all tenders, etc., shall be given promptly to all suppliers or contractors that submitted tenders, proposals, offers or quotations. The same type of information is required to be published, for example, under article 80 of the Public Procurement Law of the Republic of Serbia, published in

the *Official Herald of the Republic of Serbia*, No. 39/2002, 43/2003 - the other Law, and 55/2004, available at <http://www.oecd.org/dataoecd/34/12/35016323.pdf>.

- <sup>8</sup> See, e.g., article 54 (1) of the Procurement Law of the Republic of Armenia, of 6 December 2004. Published in the Official Bulletin # 2004/72 (371), 28 December 2004.
- <sup>9</sup> For the publication requirements in connection with the maintenance of suppliers' lists, see, for example, article XI (9) of the GPA. For the consideration of the issue of suppliers' lists in the draft Model Law, see document A/CN.9/315, para. 44, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A, and document A/CN.9/331, para. 62, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A.
- <sup>10</sup> See, e.g., commentary to article 14 in the Guide to Enactment, para. 2, that inter alia reads: "in order to avoid the disproportionately onerous effects that such a publication requirement might have on the procuring entity were the notice requirement to apply to all procurement contracts no matter how low their value, the enacting State is given the option in paragraph (3) of setting a monetary-value threshold below which the publication requirement would not apply." For the text of the Guide to Enactment, see document A/CN.9/403, reproduced in the *UNCITRAL Yearbook*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex II. The Guide is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).
- <sup>11</sup> See document A/CN.9/359, para. 107, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C.
- <sup>12</sup> See, e.g., the EU Public Procurement Directive, annex VIII.
- <sup>13</sup> See, e.g., article 51 of the Public Procurement Law of the Republic of Montenegro, published in the Official Gazette of the Republic of Montenegro, No. 40/2001, also available at <http://www.rszz.cg.yu/procurement.doc>.
- <sup>14</sup> See e.g., article 35 (4), subpara. 4, and article 77 (2), of the EU Public Procurement Directive that requires the publication of statistical reports on the results of award procedures in lieu of the publication of an award notice for certain types of contracts for which the publication of award notice is not mandatory. See also, in Australia, article 6 and appendix C of the Procurement Guidance on Procurement Publishing Obligations, January 2005, available at [http://www.finance.gov.au/ctc/austender-annual\\_procurement\\_p.html](http://www.finance.gov.au/ctc/austender-annual_procurement_p.html) (hereinafter the "Australian Procurement Publishing Guidance"), and article 70 of the Public Procurement Law of the Republic of Montenegro (see endnote 13 above), mandating the publication of information on public contracts with value equal to or over the established threshold (in Australia, the relevant information has to be posted at the government procurement website within six weeks of entering into the arrangement; in the Republic of Montenegro, the Public Procurement Commission is required to publish such information at least once a year. In both countries, reports are to contain procuring agency details, contract details (such as start and end dates, procurement method, value, description sufficient to identify the nature and the quantity of goods or services procured or the period of standing offer) and supplier details (such as name, address and registration numbers)). Also in Australia, under article 8.1 of the Australian Procurement Publishing Guidance, Financial Management Guidance No. 15, January 2005, available at [http://www.finance.gov.au/ctc/docs/Procurement\\_Publishing\\_Obligations\\_-\\_January\\_2005.pdf](http://www.finance.gov.au/ctc/docs/Procurement_Publishing_Obligations_-_January_2005.pdf) (hereinafter the "Australian Procurement Publishing Guidance"), it is required to publish lists of public contracts with the value equal to or above the defined threshold which have not been fully performed or which have not been entered into in the previous 12 months. See also article 72 of the Public Procurement Law of the Republic of Montenegro requiring the publication of annual public procurement assessment reports.
- <sup>15</sup> For instance, in Chile, the official procurement website offers the Normative Orientation Service (Servicio Orientación Formativa) that provides legal advice on procurement rules. See [http://www.chilecompra.cl/portal/centro\\_informaciones/fr\\_ley\\_compras.html](http://www.chilecompra.cl/portal/centro_informaciones/fr_ley_compras.html).

- <sup>16</sup> See above, endnote 4.
- <sup>17</sup> The EU Public Procurement Directive, article 38 (6).
- <sup>18</sup> See, e.g., article 22 (1)(3) of the Law on Public Procurement of the Republic of Lithuania, No. IX-1217, 3 December 2002, available at <http://www.vpt.lt/admin/uploaded/lawonPP.pdf>.
- <sup>19</sup> See document A/CN.9/315, para. 20, reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, A.
- <sup>20</sup> As stated in paragraph 1 of the original commentary to article 5 in document A/CN.9/WG.V/WP.25, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, C.
- <sup>21</sup> The text of the 1981 GATT Agreement on Government Procurement is available at [http://www.wto.org/english/docs\\_e/legal\\_e/tokyo\\_gpr\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/tokyo_gpr_e.pdf).
- <sup>22</sup> For the drafting history of article 5 of the Model Law, see documents: A/CN.9/331, para. 35, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; A/CN.9/343, para. 65, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A; A/CN.9/359, para. 44, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C; and A/CN.9/371, paras. 39-40, reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part two, I, A.
- <sup>23</sup> See document A/CN.9/359, para. 20, reproduced in the *UNCITRAL Yearbook*, vol. XXIII:1992 (United Nations publication, Sales No. E.94.V.7), part two, III, C.
- <sup>24</sup> See document A/CN.9/331, para. 34, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A.
- <sup>25</sup> See document A/CN.9/WG.V/WP.25, article 5, para. 3, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, C.
- <sup>26</sup> For the drafting history of the relevant provisions in the Model Law, see A/CN.9/331, paras. 93-97, reproduced in the *UNCITRAL Yearbook*, vol. XXI:1990 (United Nations publication, Sales No. E.91.V.6), part two, II, A; A/CN.9/343, paras. 181-183, reproduced in the *UNCITRAL Yearbook*, vol. XXII:1991 (United Nations publication, Sales No. E.93.V.2), part two, II, A; and A/CN.9/371, para. 110, reproduced in the *UNCITRAL Yearbook*, vol. XXIV:1993 (United Nations publication, Sales No. E.94.V.16), part two, I, A.
- <sup>27</sup> See above, endnote 4.
- <sup>28</sup> Available at <http://www.dfait-maeci.gc.ca/nafta-alena/chap10-en.asp?#SectionD>.
- <sup>29</sup> The draft of 21 November 2003 is available at [http://www.ftaa-alca.org/FTAADraft03/ChapterXVIII\\_e.asp](http://www.ftaa-alca.org/FTAADraft03/ChapterXVIII_e.asp).
- <sup>30</sup> Available at [http://www.apec.org/content/apec/apec\\_groups/committees/committee\\_on\\_trade/government\\_procurement.html](http://www.apec.org/content/apec/apec_groups/committees/committee_on_trade/government_procurement.html).
- <sup>31</sup> See, e.g., reports of the WTO Working Group on Transparency in Government Procurement to the General Council (1998 and 1999), annex, para. 27 in the 1998 report, and para. 29 in the 1999 report. Both reports are available under “Annual reports” at [http://www.wto.org/english/tratop\\_e/gproc\\_e/gptran\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gptran_e.htm).
- <sup>32</sup> The following States are currently parties to the GPA: Canada, European Communities (including its 25 member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong SAR of China, Iceland, Israel, Japan, Korea, Liechtenstein, Netherlands

with respect to Aruba, Norway, Singapore, Switzerland, and United States. The following States are negotiating accession: Albania, Bulgaria, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Panama, and Chinese Taipei. Information is available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm). The NAFTA members are Canada, Mexico and the United States.

- <sup>33</sup> In the context of WTO, government procurement is subject to transparency obligations not only under the GPA but also article X.1 of GATT and article III.1 of GATS, with the result that the number of States obliging to publish measures relating to government procurement is not limited to the States parties to the GPA.
- <sup>34</sup> Reproduced in the *UNCITRAL Yearbook*, vol. XX:1989 (United Nations publication, Sales No. E.90.V.9), part two, II, B.
- <sup>35</sup> See, e.g., appendix IV to the GPA listing publications utilized by States parties to the GPA for the publication of texts under paragraph 1 of article XIX of the GPA.
- <sup>36</sup> For example, in Australia, public procurement is largely governed by government procurement policies, consisting of Commonwealth Procurement Guidelines, Finance Circulars and Procurement Guidance, the latter including a range of web-based and printed guidance documents developed by the Department of Finance and Administration to assist agencies and officials to implement the Government's procurement policy. See article 2.7 of the Commonwealth Procurement Guidelines (CPG), January 2005 (hereinafter the "CPG"), available at [http://www.finance.gov.au/ctc/commonwealth\\_procurement\\_guide.html](http://www.finance.gov.au/ctc/commonwealth_procurement_guide.html). In the United States, federal government procurement is regulated by a detailed code of common procurement policies and rules (the Federal Acquisition Regulations (FAR)), available at [http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/01.htm#P52\\_10741](http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/01.htm#P52_10741), issued jointly by the General Services Administration, Department of Defense and the National Aeronautics and Space Administration. It prescribes different procedures, offers procuring entities alternative techniques and sets recommended and mandatory contract clauses and attached forms. See also the World Bank's OECS countries procurement assessment report, as revised in April 2003, available at <http://unpan1.un.org/intradoc/groups/public/documents/CARICAD/UNPAN010037.pdf>.
- <sup>37</sup> See, for example, the Freedom of Information Act of Australia, 1982, available at [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/833CC604CCEF2A25CA25702600029E3A/\\$file/FreedmInfo1982\\_WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/833CC604CCEF2A25CA25702600029E3A/$file/FreedmInfo1982_WD02.pdf). In the United States, under FAR 1.105-1, FAR is to be issued as Chapter 1 of Title 48 of the United States Code of Federal Regulations (CFR). Subsequent chapters are reserved for agency acquisition regulations that implement or supplement FAR. In addition, under FAR 1.301 (b), agency acquisition regulations are required to be published for comment in the Federal Register when "they have a significant effect beyond the internal operating procedures of the agency or have a significant cost or administrative impact on contractors or offerors."
- <sup>38</sup> See, e.g., in Australia, under article 3 of the CPG, the agency chief may issue executive instructions, internal procedures and operational guidelines providing the detailed operational guidance to an agency's officials on financial management, including procurement. In the United States, under FAR, procuring entities' competent persons assume substantial regulatory functions: heads of procuring agencies "may issue or authorize the issuance of agency acquisition regulations that implement or supplement FAR and incorporate, together with FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency, including any of its sub-organizations, and contractors or prospective contractors." FAR 1.301 (a) (1); and also "may issue or authorize the issuance of internal agency guidance at any organizational level (e.g. designations and delegations of authority, assignments of responsibilities, work-flow procedures, and internal reporting requirements)." (FAR 1.301 (a) (2)).
- <sup>39</sup> For example, under FAR 1.301 (b), internal agency guidance is not subject to the same public disclosure requirements as agency acquisition regulations (see above, endnote 37).

- <sup>40</sup> See, e.g., the “Handbook on IT-Procurement” at the website of the Federal Chancellor of Austria (IT-Beschaffungshandbuch); a number of reference materials on procurement at the website of the Bundeskartellamt of Germany, a federal government body supervising activities of monopolies (<http://www.bundeskartellamt.de/wDeutsch/merkblaetter/Vergaberecht/MerkblVergabe.shtml>), and the “handbook on procurement” providing assistance for the completing of electronic forms issued by the Ministry of Traffic and Construction of Germany (<http://www.bmvmw.de/Bauwesen/Bauauftragsvergabe-1535/Vergabehandbuch.htm>); and a series of manuals that clarify the procurement process, such as “Manual on Projects”, “Manual on Public Construction”, “Manual on Maintenance”, “Electronic Reverse Auction: Supplier’s Manual”, available at the official procurement website of the Brazilian Government ([www.comprasnet.gov.br](http://www.comprasnet.gov.br)).
- <sup>41</sup> See, e.g., in the Philippines, the Act providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for Other Purposes, Republic Act No. 9184 (the “Government Procurement Reform Act”), section 6, which states that the Government Procurement Policy Board shall pursue the development of generic procurement manuals, the use of which once issued shall be mandatory upon all procuring entities. The Act is available at [http://www.tag.org.ph/phillaw/Gov\\_Pro\\_Ref\\_%20Act.pdf](http://www.tag.org.ph/phillaw/Gov_Pro_Ref_%20Act.pdf).
- <sup>42</sup> See, e.g., appendix IV to the GPA listing publications utilized by States parties to the GPA for the publication of texts under paragraph 1 of article XIX of the GPA.
- <sup>43</sup> In New Zealand, for example, heads of procuring entities are free to manage their departments’ procurement operations. They do it within general principles of good governance and probity requirements found in acts regulating public finance and state sector in general as well as within a broad policy framework for procurement with such general procurement principles as life-cycle best value for money, open and effective competition, and full and fair opportunity for domestic suppliers. See the report of New Zealand to APEC in 2002, available at [http://www.apec.org/apec/documents\\_reports/government\\_procurement\\_experts\\_group/2002.html](http://www.apec.org/apec/documents_reports/government_procurement_experts_group/2002.html).
- <sup>44</sup> See, e.g., article 298 of the Constitution of India, 1950, available at <http://indiacode.nic.in/coiweb/coifiles/p12.htm>.
- <sup>45</sup> See, e.g., the findings in the Country Procurement Assessment Report of India by the World Bank, 2003, available at [http://www-wds.worldbank.org/servlet/WDS\\_IBank\\_Servlet?pcont=details&eid=000012009\\_20040402111746](http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20040402111746).
- <sup>46</sup> In India, no explicit requirement under law for the publication of internal rules of public authorities existed until recently. On 11 May 2005, the Parliament of India (Lok Sabha) adopted the Right to Information Act, 2005, that requires the public authorities to disseminate regularly and widely in a form and manner easily accessible to the public materials related to discharge of their functions, including “rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions.” See article 4 of the Right to Information Bill, 2005, as passed by Lok Sabha of India on 11 May 2005, available at [http://www.freedominfo.org/news/india/20050516/THE\\_RIGHT\\_TO\\_INFORMATION\\_ACT\\_2005-Final.pdf](http://www.freedominfo.org/news/india/20050516/THE_RIGHT_TO_INFORMATION_ACT_2005-Final.pdf).
- <sup>47</sup> The Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit, for instance, sets out the following criteria that the Court employs in determining whether to publish an opinion: “(1) the opinion resolves a substantial issue of first impression generally or an issue presented for the first time in this Court; (2) the opinion alters, modifies or significantly clarifies a rule of law previously announced by the Court; (3) the opinion calls attention to an existing rule of law that appears to have been generally overlooked; (4) the opinion criticizes or questions existing law; (5) the opinion resolves a conflict in decisions within the Circuit or creates a conflict with another circuit; (6) the opinion reverses a published district court or agency decision, or affirms it on grounds different from those in a published opinion of the district court; or (7) the opinion warrants publication in light of other factors that gave it general public interest.” See *USCS Ct App D.C. Cir, Appx § XII*

(2005). Most of these criteria are also found, for instance, in the Rules of the United States Court of Appeals for the Fifth Circuit where they are preceded by a general statement that “the publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinion that may in any way interest persons other than parties to a case should be published.” See *USCS Ct App 5th Cir, Loc R 47 (2005)*.

- <sup>48</sup> See, e.g., appendix IV to the GPA listing publications utilized by States parties to the GPA for the publication of texts under paragraph 1 of article XIX of the GPA.
- <sup>49</sup> Article 63 of Ordinance No. 20 of Romania of 24 January 2002 concerning public acquisitions by means of electronic bids. Published in the Official Journal of Romania, No. 86, of 1 February 2002. Available at <http://www.riti-internews.ro/og20.htm>.
- <sup>50</sup> See, for example, section 8 (1)(b) of the Freedom of Information Act of Australia, 1982, available at [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/833CC604CCEF2A25CA25702600029E3A/\\$file/FreedmInfo1982\\_WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/833CC604CCEF2A25CA25702600029E3A/$file/FreedmInfo1982_WD02.pdf); and article 4 of the Right to Information Bill of India, of 11 May 2005, available at [http://www.freedominfo.org/news/india/20050516/THE\\_RIGHT\\_TO\\_INFORMATION\\_ACT\\_2005-Final.pdf](http://www.freedominfo.org/news/india/20050516/THE_RIGHT_TO_INFORMATION_ACT_2005-Final.pdf).
- <sup>51</sup> See, e.g., § 108 of the Act of the Czech Republic on Public Contracts providing that “the supervisory body shall make known its final rulings awarded in the past calendar year in the Collection of Rulings of the Supervisory Body in the field of the award of public contracts and on Internet site of the supervisory body.” The Act is available at <http://www.oecd.org/dataoecd/54/21/35013316.pdf>.
- <sup>52</sup> See, e.g., article 7 (2) of the Act on the State Commission for Supervision over Public Procurement Procedure of the Republic of Croatia, 2003, providing that “major decisions or conclusions may be published in an anonymous form in the Official Gazette, should the State Commission so decide.” The Act is available at <http://www.oecd.org/dataoecd/54/63/35013282.pdf>.
- <sup>53</sup> See, e.g., § 7a of the Public Procurement Act of Norway, available at <http://odin.dep.no/nhd/norsk/p10002767/p10002770/024081-990048/index-dok000-b-n-a.html>.