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Current activities of international organizations in the area of public procurement: possible future work

Note by the Secretariat**

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** Submission of the present note by the secretariat of the United Nations Commission on International Trade Law was delayed owing to shortage of staff.

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I. Introduction

1. In 1981, the United Nations Commission on International Trade Law (UNCITRAL), at its fourteenth session, decided that to further strengthen the coordinating role of the Commission, the Secretariat should select, at appropriate intervals, a particular area for consideration and should submit a report focusing, inter alia, on the work already undertaken in that area, indicating topics suitable for legal unification and modernization.[1] The Secretariat has selected the law of procurement of goods, construction and services for such a discussion by the Commission, as described below.

2. The UNCITRAL Model Law on Procurement of Goods, Construction and Services,[2] (hereinafter referred to as the "UNCITRAL Model Procurement Law"), which was adopted in 1994, contains procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process and has proven to be an important international benchmark in procurement law reform. Legislation based on or largely inspired by the UNCITRAL Model Procurement Law has been adopted by more than 30 jurisdictions in different parts of the world and the use of the UNCITRAL Model Procurement Law has resulted in widespread harmonization of procurement rules and procedures. The Commission may find it useful to consider the experience of law reform based on the UNCITRAL Model Procurement Law, together with issues that have arisen in the practical application of the Model Law since its adoption.

3. One area of experience concerns the increased use of electronic commerce for public procurement, including methods based on the Internet, which are capable of further promoting the objectives of procurement legislation. For example, in addition to being efficient, electronic auctions can increase transparency over traditional tendering, while information technologies can be harnessed to improve supplier information. It has been argued, however, that, while many electronic procurement practices can be accommodated through the interpretation of existing laws and rules, undesirable obstacles to the use of electronic commerce in procurement may still remain. Some such obstacles are related to electronic procurement procedures and may not be fully addressed by uniform legislation, in particular the UNCITRAL Model Laws on Electronic Commerce and on Electronic Signatures, that is based on the principle of functional equivalence of electronic and paper-based messages.

4. In addition, the Commission may wish to be informed about the activities of selected international and regional organizations in the area of government procurement since the adoption of the UNCITRAL Model Procurement Law in 1994. These activities reflect the growing importance of procurement regimes for the development of national economies and for regional and interregional integration. They also highlight the need for harmonized and modern models and for coordination of efforts by international bodies active in the field of procurement.

5. In view of the scarcity of its resources, the UNCITRAL secretariat is not submitting detailed comments on the above issues at this stage. Additional studies may be conducted if the Commission decides to consider the matter further.

II. Current activities of international and regional organizations in the area of government procurement

6. Government procurement is considered an important aspect of international trade by international lending institutions and international and regional trade institutions. This is evidenced by the development of regional and international regimes on government procurement since the adoption of the UNCITRAL Model Procurement Law. It is also evidenced by the recent activities of the major international lending institutions and international as well as regional trade institutions, to revise their respective regimes on government procurement in order to adapt them to new requirements so as to more effectively achieve their objectives.

7. This section contains summary information on the activities of selected international and regional organizations in the area of government procurement since the adoption of the Model Procurement Law. It is intended, in particular, to bring to the Commission's attention issues that have arisen in the area of government procurement, including in the practical application of the Model Law. The host of bilateral agreements that have been concluded in the area of government procurement since 1994 are outside the scope of the present report.[3]

A. World Bank

8. Procurement of goods, works or services funded by the World Bank (comprising the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA)) are carried out by the relevant government bodies of the State receiving loans or credits from the Bank. The World Bank has established rules, to be followed by borrowers for the procurement of goods, works and services in Bank-financed projects. These rules are detailed in the Guidelines for Procurement under IBRD Loans and IDA Credits (the Procurement Guidelines) and in the Guidelines for Selection and Employment of Consultants by World Bank Borrowers (the Consultant Guidelines) (see www.worldbank.org). These guidelines are incorporated by reference into the loan agreement for each specific project and are binding on the borrower. Additional instructions and guidance material on procurement are provided in the Bank's Procurement Manual and Consultants' Manual.

9. Over the last few years, the World Bank guidelines have undergone some fundamental revision. In both guidelines, new clauses have been introduced to reflect the Bank's increased focus on the issue of corruption and fraud in World Bank procurement. This focus is prompted by the Bank's identification of corruption as the single greatest obstacle to economic and social development, since corruption "undermines development by distorting the rule of law and weakening the institutional foundation on which economic growth depends" (see www1.worldbank.org/publicsector/anticorrupt). Although the previous guidelines contained general measures to control corruption in Bank-financed projects, it became clear that the measures were not sufficient to detect and eradicate corruption. The revised guidelines therefore contain additional and specific measures to detect and eradicate corrupt or fraudulent practices in Bank-financed projects. Furthermore, new provisions have been added to the Consultant Guidelines to reflect the changing nature of the services required in Bank-financed procurement. These

provisions are designed to place more emphasis on price in the selection of consultants, increase overall transparency in the selection process and provide incentives for local consulting firms in borrowing countries.

10. The World Bank and the African Development Bank are collaborating with regional institutions in Africa such as the *Union Economique et Monétaire Ouest Africaine* and the Common Market for Eastern and Southern Africa in regional public procurement reform projects in which the legal work is largely inspired by the UNCITRAL Model Procurement Law.

B. Asia-Pacific Economic Cooperation

11. The Asia-Pacific Economic Cooperation (APEC) was formally established in 1989 with a view to promoting economic cooperation within the Asia-Pacific region. In November 1993, at a meeting held at Blake Island in the United States of America, the APEC leaders adopted a declaration on their economic vision, in which they laid the foundations for a community of Asia-Pacific economies, which would, inter alia, make cooperative efforts to promote free trade and investment (see www.apecsec.org.sg). In November 1994, at a summit in Bogor, Indonesia, APEC leaders adopted a declaration of common resolve, in which they announced a political commitment to achieve free and open trade and investment within the region, with a target date of liberalization of 2010 for industrialized member countries and 2020 for all others (see www.apecsec.org.sg). At the subsequent summit in Osaka, Japan, the APEC leaders adopted the Osaka Action Agenda, which provided that APEC would achieve its long-term goal of free and open trade and investment by encouraging voluntary liberalization in the region (see www.apecsec.org.sg).

12. In 1999, APEC completed a set of Non-binding Principles on Government Procurement. These Principles are designed to bring about a voluntary liberalization of government procurement markets throughout the Asia-Pacific region in accordance with the principles and objectives of the declaration adopted at Bogor, Indonesia. Members are exploring how best to implement the Principles and to bring their systems into conformity with them. Other issues of government procurement, such as electronic government procurement, are also under consideration.

13. After completing the Non-binding Principles, members of the APEC Government Procurement Expert Group agreed at a meeting in 2000 to carry out a voluntary review of their Individual Action Plans with respect to the Principle relating to transparency. Through this process, members are continuing to explore how best to implement the Principles and voluntarily to bring their systems into conformity with them. In addition, the Expert Group will work more closely with other APEC groups, in particular the Steering Group on Electronic Commerce and the Small and Medium Enterprises Working Group, looking at a number of issues, including paperless trading. At its meeting in Mexico in August 2002, the Expert Group almost completed its voluntary reviews of the Principle relating to accountability and procedural fairness. The Group also agreed to begin voluntary review of the Principle relating to value for money at its next session, in February 2003.

C. European Community

14. In the European Community, two layers of regulations govern the award of public contracts. The first layer consists of the general provisions on free trade and competition, which are contained in the Treaty of Rome, the founding treaty of the European Community. These provisions are aimed at creating an internal market where goods, services and capital can freely move across the boundaries of the member States, by removing existing obstacles to trade in goods and services between member States and ensuring fair and non-discriminatory competition between different member States of the Community.[4] They also apply to the award of public contracts.[5] The second layer is composed of a series of six directives on government procurement, which transpose the general provisions on free trade and competition contained in the Treaty of Rome to the award of public contracts. These directives regulate the procedures for awarding major public contracts in the Community.[6]

15. The European Community directives on government procurement fall into two broad groups. The first group relates to public sector directives, which cover procurement by public bodies in general such as the State, local and regional authorities, associations formed by the above bodies and bodies governed by public law. The award procedures for contracts in this sector are regulated by three discrete directives, which cover procurement of supplies, works and services, respectively.[7] These three directives are complemented by a further directive, which lays down certain minimum standards for systems for national remedies.[8] The second group relates to utilities sector directives, which regulate procurement by bodies engaged in certain activities in the sectors of water, transport, energy and telecommunications (known as "utilities activities").[9] A single directive, the Utilities Directive, regulates the award procedures for all contracts in the utilities sector, including contracts for goods, works and services.[10] As in the public sector, that directive is complemented by a Utilities Remedies Directive,[11] which lays down certain minimum standards for systems for national remedies.[12] Following the conclusion of the Agreement on Government Procurement (GPA) by the European Community and its member States in 1994, both the public sector directives and the Utilities Directive were amended by two alignment directives[13] in order to align the directives with the requirements of the GPA.

16. The directives are designed to create an internal market, that is an area without internal frontiers in which goods, persons, services and capital can move freely between the member States, in the field of government procurement. To this end, the directives establish a comprehensive legal framework based on the principles of non-discrimination, transparency and competition.[14] The directives aim at ensuring that public contracts are awarded in the European Community in a transparent and non-discriminatory manner so that undertakings from member States other than that of the contracting entity have unfettered access to procedures for the award of public contracts and can effectively compete with domestic undertakings for these contracts.[14]

17. In 1996, the European Commission published a Green Paper on the Community public procurement rules,[15] which called for comments from entities involved in public procurement in the Community. While the Green Paper itself suggested that there would not be any major changes in the rules, the comments

received have led the Commission to revise that view. In its follow-up communication to the Green Paper,[16] the Commission recognized that there was a need for an amendment of the existing legal framework. In 2000, it submitted two proposals for amendment of the public sector rules and the utilities sector rules, respectively.[17] In 2002, the Commission submitted two amended proposals,[18] which incorporated changes to the original proposals following discussions with the European Parliament under the co-decision procedure[19] of the Treaty establishing the European Community.[20]

18. The objective of the amended proposals is threefold. First, the proposals seek to simplify and clarify the existing European Community directives so as to make them clearer and more comprehensible to everybody who is involved in public procurement, either as a buyer or as a supplier. The second objective is to modernize the directives in order to adapt them to modern administrative requirements, recent developments in the economic environment (particularly the emergence of the information society and the gradual withdrawal of the State from certain economic activities, particularly in the sectors of water, energy, transport and telecommunications) and new purchasing techniques. Finally, the proposals seek to relax some of the provisions of the directives, which were considered too inflexible to achieve the objective of best value for money in procurement.

D. Free Trade Area of the Americas

19. The Free Trade Area of the Americas (FTAA) was established at a summit of the leaders of 34 countries in South, Central and North America in December 1994. In 1995, ministers responsible for trade of the 34 FTAA countries, meeting in Denver, Colorado, agreed to establish a free trade area in which barriers to trade would be progressively eliminated (see www.ftaa-alca.org). In 1998, the trade ministers, meeting in Costa Rica, approved the structure and general principles and objectives for the FTAA process and formally launched negotiations, including on the progressive removal of barriers to trade in government procurement markets in the free trade area (see www.ftaa-alca.org). The general principles and objectives guiding the construction of the FTAA process provide, for instance, that the decisions will be made by consensus; that the FTAA agreement will be consistent with the rules and disciplines of the World Trade Organization; that the initiation, conduct and outcome of the negotiations will be treated as parts of a single undertaking that will embody the rights and obligations as mutually agreed upon; and that special attention will be given to the needs, economic conditions (including transition costs and possible internal dislocations) and opportunities of smaller economies, to ensure their full participation in the FTAA process. At the end of 1999, at a meeting at Toronto, Canada, trade ministers instructed negotiating groups to begin drafting negotiating texts for each chapter of the FTAA agreement (see www.ftaa-alca.org). Those texts, including a draft chapter on government procurement, were submitted to trade ministers at a meeting at Buenos Aires in April 2001 (see www.ftaa-alca.org).

20. The negotiations on market access in the field of government procurement were launched on 15 May 2002, with the broad objective of expanding access to the government procurement markets of the FTAA countries. More specifically, the objectives are to achieve a normative framework that ensures openness and

transparency of government procurement processes, without necessarily implying the establishment of identical government procurement systems in all countries; to ensure non-discrimination in government procurement within a scope to be negotiated; and to ensure impartial and fair review for the resolution of procurement complaints and appeals by suppliers and the effective implementation of such resolutions.

21. The objectives and principles upon which the FTAA negotiations on market access in the field of government procurement are based are similar to the objectives and principles embodied in the UNCITRAL Model Procurement Law.

E. Common Market of the Southern Cone

22. The Common Market of the Southern Cone (MERCOSUR) was established by the Governments of Argentina, Brazil, Paraguay and Uruguay under the Treaty of Asunción (A/46/155, annex) on 26 March 1991. The four countries decided to establish a common market, which was to be in place by 31 December 1994. Hence, the Treaty of Asunción has been defined as a "framework treaty", since it contains the fundamental elements for the creation of a common market and is based on the reciprocity of rights and duties of the States parties. In accordance with chapter I, article 1, of the Treaty, this market implies:

(a) Free movements of goods, services and factors of production (capital and labour), by means of, among other things, the elimination of customs duties and non-tariff restrictions on the movement of goods;

(b) Establishment of a common external tariff, undertaking a common trade policy vis-à-vis third States or groups of States and the coordination of positions in economic, trade, regional and international forums;

(c) Coordination of macroeconomic and sectoral policies between member States in the areas of foreign trade, agriculture, industry, fiscal and monetary issues, foreign exchange and capital, services, customs, transport and communications as well as others that are agreed upon, in order to ensure adequate conditions of competitiveness amongst member States;

(d) Commitment between member States to harmonize their legislation on relevant matters in order to strengthen the integration process.

23. The Treaty of Asunción does not include any provisions on government procurement. However, the governing bodies of MERCOSUR have been dealing with the issue in cooperation with other international entities. For example, the MERCOSUR countries have engaged in discussions with the European Union on a negotiating text for government procurement.[21] Taking into account the convenience and benefits that MERCOSUR would obtain from provisions on government procurement, especially in the light of work undertaken by both the World Trade Organization and APEC, MERCOSUR is considering the inclusion of those two entities in its discussions. In addition, the Organization of American States is maintaining a list of American organizations working on provisions related to government procurement.

F. North American Free Trade Agreement

24. The North American Free Trade Agreement (NAFTA) (see ww.nafta-sec-alena.org) was signed on 17 December 1992 by the heads of State of Canada, Mexico and the United States of America and came into force on 1 January 1994. The Agreement contains a schedule for the elimination of most tariffs and reduction of non-tariff barriers, as well as comprehensive provisions on the conduct of business in the areas of investment, services, intellectual property, competition, cross-border movement of persons and government procurement.

25. The provisions of NAFTA on government procurement are contained in chapter 10 of the Agreement. The Agreement establishes a framework of rights and obligations, which is intended to expand trade within the NAFTA member countries. As set out in its preamble, the Agreement is designed, inter alia, to create an expanded and secure market for the goods and services produced in the territories of the member States; establish clear and mutually advantageous rules governing trade; ensure a predictable commercial framework for business planning and investment; and enhance the competitiveness of firms in global markets. Based on those principles, chapter 10 on government procurement is designed to expand trade within the NAFTA area by eliminating barriers to trade in national government procurement exceeding certain financial thresholds.

26. Parties are required to accord national treatment and most-favoured-nation status to suppliers of goods, services and construction services from other NAFTA countries. In addition, no party may treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership or discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for the particular procurement are those of another party.

27. Detailed and complex requirements are laid down for tender procedures to be followed by procuring entities, designed to ensure transparency and non-discrimination throughout the entire tender process. The preferred method of tendering under the chapter is open tendering. However, under certain circumstances such as extreme urgency, a procuring entity may resort to limited tendering procedures, provided this will not favour domestic suppliers. Negotiations between a procuring entity and suppliers are generally forbidden, unless the invitation to participate indicated the purchaser's intent to do so or the purchaser determines that no specific tender is the most advantageous. In such cases, negotiations are to be used primarily to identify strengths and weaknesses in the various tenders.

28. Each Party is required to maintain a system allowing suppliers to submit bid protests concerning all aspects of the procurement process. The adjudication of bid protests must by conducted by a competent body with no substantial interest in the outcome of the procurement. The reviewing authority must have the power to delay the award of a contract pending resolution of the challenge, except where delay would not be in the public interest. Further, it must be responsible for recommending the appropriate remedy for a challenge. This recommendation may include re-evaluation of offers or termination or re-initiation of the procurement in question. Upon conclusion of a protest, the reviewing authority is authorized to make written recommendations to the purchaser concerning all aspects of its

procurement process, including suggestions for revising its procedures to bring them into conformity with the chapter.

29. The parties are required to commence negotiations to expand the scope and coverage of chapter 10 of NAFTA before the end of 1998, with a view to further liberalizing their government procurement markets. In addition, the parties are required to establish a Committee on Small Business to help small businesses reap the benefits of the liberalized government procurement markets under NAFTA.

G. Government procurement under the framework of the World Trade Organization

30. The World Trade Organization was established on 1 January 1995 when the Agreement Establishing the World Trade Organization entered into force (see www.wto.org). The stated aims of the organization are to create predictable and growing access to markets, to promote fair competition and to encourage development and economic reform by entering into arrangements directed to the substantial reduction of tariffs and other barriers to trade with a view to eliminating discriminatory treatment in international trade relations. The primary legal measures to abolish discriminatory trade practices under the Agreement are the most-favoured-nation obligation, the national treatment obligation [22] and obligations relating to transparency.[23] All three principles, adapted to the respective markets, are embodied in the various agreements under the World Trade Organization.

31. The main agreements under the auspices of WTO concerned with the regulation of procurement of goods and services for governmental consumption are the General Agreement on Tariffs and Trade of 1994 (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Government Procurement (GPA). GATT and GATS are multilateral[24] agreements dealing with general aspects of trade in goods and services respectively. However, government procurement is effectively exempted from the non-discrimination disciplines of both GATT and GATS.

32. This disparity in the application of WTO disciplines was intended to be addressed by the plurilateral [25] WTO Agreement on Government Procurement, which establishes a legal framework of rights and obligations among the parties to GPA with respect to national laws, regulations, procedures and practices in the area of government procurement. This framework is aimed at achieving greater liberalization and expansion of trade and improving the international framework for the conduct of world trade. It is based on the principles of non-discrimination on the basis of nationality; transparency; open and effective competition; accountability and due process; and reciprocity with respect to the rights and obligations undertaken by the parties under the Agreement. However, of the well over 100 members of the World Trade Organization, GPA has attracted only 28 signatories so far, including the European Community and its 15 member countries as well as 3 members of the European Economic Area.[26]

33. In view of the limited membership of GPA, three activities have been launched in WTO to develop multilateral WTO rules on government procurement. First, the parties to GPA have agreed to launch an early review of GPA with a view to simplifying and improving it so as to make it more accessible to non-parties.

Secondly, the parties to GATS have launched negotiations on government procurement with a view to extending the disciplines of GATS to government procurement of services. Thirdly, pursuant to the Singapore Ministerial Declaration, adopted at the first World Trade Organization Ministerial Conference, negotiations have been launched on developing elements for a multilateral agreement on transparency in government procurement. While the mandate of the first two exercises extends to non-discrimination and transparency, the mandate of the third exercise is limited to aspects of transparency.

34. In regard to work on transparency, despite intensive negotiations over a period of four years, significant differences remained between the members of the Working Group on Transparency in Government Procurement leading up to the fourth World Trade Organization Ministerial Conference, held at Doha in 2001, and beyond. Some members argue that the negotiating mandate under the Singapore Declaration does not extend to carrying out negotiations on an agreement on transparency in government procurement and that the Group should confine its activities to the study phase of its mandate with a view to reaching a common understanding on the various elements of transparency. Furthermore, there is still a wide divergence of views on matters ranging from the scope and coverage of the future agreement to procurement methods and the requirements of domestic review procedures.

35. The Declaration of the World Trade Organization Ministerial Conference at Doha sought to address these formal and material issues. The declaration provides that negotiations will take place after the fifth Ministerial Conference, in 2003, on the basis of a decision to be taken, by explicit consensus, at that Conference on modalities of negotiations. Both adequate technical assistance and support for capacity-building will be provided during the negotiations and after their conclusion. On the scope of the negotiations, the Doha Declaration re-emphasizes that the negotiations will be limited to the aspects relating to transparency and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers.

Notes

[1] *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), para. 100.

[2] Ibid., *Forty-ninth Session, Supplement No. 17* (A/49/17), annex I.

[3] In the period covered by this report the European Community alone concluded bilateral agreements on government procurement with the following 13 countries: Bulgaria, Czech Republic, Estonia, Hungary, Israel, Latvia, Lithuania, Mexico, Poland, Republic of Korea, Romania, Slovakia and Slovenia. For details see, for instance, the "Report on negotiations regarding access to third country public procurement markets in the fields covered by directive 93/38", available at http://simap.eu.int, under "rules and guidelines".

[4] These provisions of the Treaty of Rome are contained in article 28 on the free movement of goods, article 43 on the right of establishment, article 49 on the freedom to provide services, article 56 on the freedom to move capital, and article 81 et seq. on the rules on competition.

[5] See, for instance, the UNIX case, in which the European Court of Justice held that the use of the term "UNIX" in a tender notice was contrary to the provision of the Treaty of Rome on the free movement of goods in the Community, since the flow of imports in intra-Community trade may be impeded by reserving the contract exclusively to suppliers intending to use the system specifically indicated (Case C-359/93, *Commission of the European Communities v Kingdom of*

the Netherlands, [1995] *European Court Reports*, p. I-157).

[6] See, for instance, Directive 93/36 of 14 June 1993 (the Public Supplies Directive), [1993] O.J. L199/1, recital 9 to the preamble.

[7] Directive 92/50 of 18 June 1992 (the Public Services Directive), [1992] O.J. L209/1; Directive 93/36 of 14 June 1993 (the Public Supplies Directive), [1993] O.J. L199/1; and Directive 93/37 of 14 June 1993 (the Public Works Directive), [1993] O.J. L199/54.

[8] Directive 89/665 of 21 December 1989 (the Public Remedies Directive), [1989] O.J. L395/33, as amended by Directive 92/50 of 18 June 1992 (the Public Services Directive), [1992] O.J. L209/1.

[9] These activities are:

(a) Provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water; or

(ii) electricity; or

(iii) gas or heat; or the supply of drinking water, electricity, gas or heat to such networks;

(b) The exploitation of a geographical area for the purpose of:

(i) exploring for or extracting oil, gas, coal or other solid fuels; or

(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

(c) The operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

(d) The provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

[10] Directive 93/38 of 24 June 1993 (the Utilities Directive), [1993] O.J. L199/84.

[11] Directive 92/13 of 25 February 1992 (the Utilities Remedies Directive), [1992] O.J. L76/14.

[12] The rationale for regulating procurements of utility companies in a separate legal instrument was twofold. First, in some European Community member States, procuring entities operating in the utilities sector were governed by public law, in others by private law. For this reason, a different basis for coverage than by reference to their legal status, as under the public sector rules, was required to ensure a fair balance in the application of procurement rules in these sectors. Secondly, unlike the essentially administrative organizations governed by the public sector rules, procuring entities operating in the utilities sector typically had economic or industrial purposes. The obligations imposed upon utilities therefore had to be more flexible than the public sector rules in order to permit the procuring entities concerned to manage their procurement activities effectively in the light of their particular commercial circumstances. See recitals 8 et seq. to the preamble of Directive 93/38 of 24 June 1993 (the Utilities Directive), [1993] O.J. L199/84.

[13] Directive 97/52 of 13 October 1997 (the Public Alignment Directive), [1997] O.J. L328/1; and Directive 98/4 of 16 February 1998 (the Utilities Alignment Directive), [1998] O.J. L101/1.

[14] See, for instance, Directive 93/38, recitals 1, 11 and 12 to the preamble.

[15] *Public Procurement in the European Union: Exploring the Way Forward*, Green Paper (27 November 1996, COM(96) 583 final).

[16] *Public Procurement in the European Union*, Commission Communication (11 March 1998, COM(98) 143 final).

[17] *Proposal for a Directive of the European Parliament and of the Council on the coordination of*

the procedures for the award of public supply contracts, public service contracts and public works contracts (10 May 2000, COM(2000) 275 final); and *Proposal for a Directive of the European Parliament and of the Council on coordinating the procurement procedures of procuring entities operating in the water, energy and transport sectors* (10 May 2000, COM(2000) 276 final).

[18] *Amended proposal for a Directive of the European Parliament and of the Council on the coordination of the procedures for the award of public supply contracts, public service contracts and public works contracts* (6 May 2002, COM(2002) 236 final); and *Amended proposal for a Directive of the European Parliament and of the Council on coordinating the procurement procedures of procuring entities operating in the water, energy and transport sectors* (6 May 2002, COM(2002) 236 final).

[19] Article 251, Treaty establishing the European Community.

[20] With respect to the public sector, the Commission accepted, either entirely or in part, 63 of the 103 amendments adopted by the European Parliament. All amendments adopted by the European Parliament can be found in document A5-0378/2001 at http://eurparl.eu.int. With respect to the utilities sector rules, the Commission accepted, either in their entirety or in part, and with reformulations where appropriate, 47 of the 83 amendments adopted by the European Parliament. All amendments adopted by the European Parliament can be found in document A5-0379/2001 at http://eurparl.eu.int.

[21] See, for instance, the conclusions of the sixth meeting of the European Union-MERCOSUR biregional negotiations committee, at http://europa.eu.int.

[22] In general terms, the national treatment obligation provides for non-discrimination in favour of domestic industries in stipulating that World Trade Organization (WTO) members shall afford the same treatment to goods, services and suppliers of other WTO members as that afforded to the goods, services and firms of domestic origin. The most-favoured-nation obligation, on the other hand, requires non-discrimination between "foreign" WTO members in stipulating that any preferential treatment given to products, services or suppliers of one WTO member must also be given to the suppliers and "like" products or services of any other.

[23] In general terms, the rules on transparency put members under an obligation to publish their general measures on trade with a view to making them readily available to other WTO members and to domestic as well as foreign operators in the respective markets.

[24] See WTO Agreement, article II, paragraph 2. Multilateral WTO Agreements are agreements that form part of the so-called "single undertaking" of the Uruguay Round. Signatories are required to assume the rights and obligations arising from these agreements as a condition for becoming members of WTO. In contrast to previous GATT practice ("GATT à la carte") WTO members cannot opt out of individual agreements of the "single undertaking" as the rights and obligations flowing from those agreements are binding upon all WTO members.

[25] See WTO Agreement, article II, paragraph 3. Plurilateral WTO Agreements are agreements that do not form part of the single undertaking. Rather, they operate as agreements "on top" of the single undertaking and thus create obligations or rights only for those WTO members that have opted in.

[26] At the time of writing (March 2003), the following were parties to GPA: Austria, Belgium, Canada, Denmark, European Community, Finland, France, Germany, Greece, Hong Kong Special Administrative Region of China, Iceland, Ireland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Republic of Korea, Singapore, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America. According to the WTO homepage at the time of writing, a number of countries were negotiating accession to GPA.