COMPARISON OF THE INTERNATIONAL INSTRUMENTS ON PUBLIC PROCUREMENT

March 2013

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NB: Paragraph 17 of this Paper contained a typo with respect to the adoption date by the European Commission of the three proposals of Procurement Directives. This typo has been rectified and corrected to read “December 2011” as of July 3, 2013.
Comparison of the International Instruments on Public Procurement

Introduction
This background paper has been prepared by the World Bank’s Legal Department as an input to the ongoing Procurement Policy Review. It is intended to provide background that would establish a baseline of common understanding and appreciation of the different international instruments that affect public procurement -- the WTO’s Government Procurement Agreement (GPA), the EU Procurement Directives, the UN Convention against Corruption (UNCAC), and the UNCITRAL Model Law. The Bank has a particular interest in understanding the main features of these instruments, how they influence the public procurement landscape and how they interact with the Bank’s own Procurement Guidelines and Consultant Guidelines. Such analysis is especially timely as the Bank rethinks its own procurement policies and procedures.

The Main Instruments
1. There are several international instruments¹ (“Instruments”) that may be relied on by governments as guidance with respect to the conduct of public procurement. These Instruments have contributed to the development of internationally accepted principles of public procurement. They demonstrate that public procurement is an effective tool and strategic part of public sector policy and systems, and an administrative function that can contribute to a higher objective. However, the various Instruments have different objectives – whether a fiduciary purpose, the promotion of international trade, the creation of a common market, the prevention of corruption, or other socio-economic policies. In particular, the value of procurement as a basic administrative function enabling public agencies to use allocated public funds to perform their mandate is not emphasized in these Instruments. In this respect, despite harmonization at the level of “principles,” there are no universally accepted international standards of public procurement. Countries apply in their procurement systems the standards that meet the principles in accordance with the respective Agreement/s² to which they have explicitly consented to be bound. Because these Agreements have different objectives, the adoption and incorporation of the principles into existing institutional and legal frameworks requires thoughtful policy consideration and legal analysis to avoid systemic internal inconsistencies and inefficiencies.

2. The main Instruments that are compared in this Note are the multilateral Instruments – the World Bank Procurement and Consultant Guidelines (“Guidelines”), the Government Procurement Agreement (“GPA”)³, the EU Procurement Directives (“EU Directives”), and the United Nations Convention against Corruption (“UNCAC”). The UNCITRAL Model Law on

¹ These “instruments” can be classified into “binding” and “non-binding” international instruments. For avoidance of doubt, the term “Agreement” will be used to refer to a legally binding international Instrument.
² See footnote 1.
³ Technically, the GPA is a “plurilateral” rather than a multi-lateral agreement of the World Trade Organization (“WTO”), regulating government procurement market of the WTO members that have chosen to become parties to it.
Public Procurement (“UNCITRAL Model Law”) is also included in this comparison, although it is not an Agreement with the equivalent legal status and effect of the Guidelines, GPA, EU Directives or UNCAC. Rather, the UNCITRAL Model Law is intended to serve as a model for states in the development of procurement legislation and practice, as well as to support the harmonization of procurement regulation. There are numerous other instruments, such as regional and bilateral trade or investment agreements, that also may impact on country procurement systems but that are excluded from this comparison.

3. The Instruments are compared in the following key areas: objectives, scope and applicability, principles, treatment of horizontal policies, conditions of participation, procurement methods, award criteria, and complaints systems.

4. Annex 1 shows the countries which are parties to or members of the Agreements.

5. **World Bank Guidelines.** The World Bank is a public international organization created by sovereign member states through Articles of Agreement that entered into force in December 1945. IBRD’s Articles of Agreement require that the World Bank “The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations,” and provide that the Borrower may withdraw the loan proceeds “only to meet expenditures made in connection with the operation as they are actually incurred.” IDA’s Articles of Agreement contemplate a similar requirement.

6. In response to this requirement, the World Bank has developed detailed procurement rules, the Procurement Guidelines and Consultant Guidelines, which are approved by its Board of Executive Directors representing all the World Bank’s shareholder/member countries. These Guidelines place the responsibility for project execution, and therefore the procurement of contracts financed by the World Bank, on the Borrower. Thus, the World Bank’s Guidelines are intended first and foremost to serve a fiduciary purpose, to ensure that the Loan proceeds are used for its intended purpose.

7. The World Bank Guidelines apply to all contracts for goods, works, and services financed in whole or in part from Bank loans, and are made applicable through the Loan

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4 The term “horizontal policies” used herein, is equivalent to “secondary policies” or “collateral policies” as commonly used in other jurisdictions.
5 “World Bank” refers to the International Bank for Reconstruction for Development (IBRD) and the International Development Association (IDA).
7 The borrower (“Borrower”) for purposes of the World Bank Guidelines includes recipients of loans, credits, grants or project preparation advances that execute World Bank projects.
9 The latest versions of these Guidelines are, respectively, the Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (January 2011), and Guidelines: Selection and Employment of Consultants under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (January 2011).
Agreement. A World Bank Loan Agreement is an "international agreement" with the status of a treaty and governed by international law. The General Conditions applicable to each Loan Agreement provide that the Loan Agreement takes precedence over national law and is insulated from the effect of changes in national law. Pursuant to the General Conditions, the rights and obligations of the Bank under such Loan Agreement shall be valid and enforceable in accordance with its terms, notwithstanding the law of the state or any political subdivision thereof to the contrary. This includes any inconsistent requirements in the Borrower's own national procurement law. The Loan Agreement provides remedies to the Bank if the Borrower fails to follow the procurement procedures as required in the Loan Agreement.

8. **GPA.** The Government Procurement Agreement (GPA) is a plurilateral agreement of the World Trade Organization ("WTO") regulating the government procurement market of those WTO members that have chosen to become Parties to it. The purpose of the GPA is to facilitate market access by suppliers from GPA member countries to contract opportunities in the covered public sector entities in other GPA member countries.

9. The GPA sets out high-level standards rather than detailed procurement rules and procedures. It reflects a lowest common denominator approach, or the minimum requirements to which the Parties should adhere and must give effect through legislative changes in their public procurement laws. As set forth in its fourth recital, "[t]he procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party."

10. As a binding legal instrument with respect to its Parties, the GPA provides for dispute settlement procedures to ensure that the rights and obligations established under the GPA through negotiations are enforced. Disputes may be brought by one Party against another through the WTO Dispute Settlement Body, when benefits accruing under the GPA are directly or indirectly nullified or impaired, or the attainment of any objective of the GPA is being impeded by another Party. In addition, the mechanisms for effective challenge required by the GPA may also be used by bidders to challenge the application of the procurement procedures with a GPA-covered procuring entity.

11. The GPA applies only to the procuring entities that each Party has included, relating respectively to central government entities, sub-central government entities and other entities such as utilities, and only for goods, services and construction services it has specified.

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10 IBRD General Conditions for Loans, dated March 12, 2012, Article VIII, Section 8.01; IDA General Conditions for Credits and Grants, dated July 31, 2010, Article VII, Section 7.01.
11 Canada, EU plus its 27 members States (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden and the United Kingdom), Hong Kong (China), Iceland, Israel, Japan, Korea, Liechtenstein, Aruba (the Netherlands), Norway, Republic of Armenia, Singapore, Switzerland, Chinese Taipei, United States.
12 Article XXII, GPA.
13 Ibid.
12. **EU Procurement Directives.** One of the main objectives set forth in the EC Treaty\(^\text{14}\) is the creation of a Community market. In this context, the EU has adopted several Directives with respect to public procurement. The EU Public Procurement Directives considered in this Note are: (i) Directive 2004/18/EC (the “Public Sector Directive”);\(^\text{15}\) (ii) Directive 2004/17/EC (the “Utilities Directive”);\(^\text{16}\) and (iii) Directive 89/665/EEC (the “Remedies Public Sector Directive”)\(^\text{17}\) and Directive 92/13/EEC (the “Remedies Utilities Directive”),\(^\text{18}\) both as amended by Directive 2007/66/EC\(^\text{19}\) (collectively, the “Remedies Directives”).

13. The Public Sector Directive and the Utilities Directive *coordinate* the procedures for the award of procurement contracts in EU Member States above the set financial thresholds. This is in order to open up the Community market to competition and to avoid discrimination among economic operators from different Member States. These Directives set out a *minimum* common set of procedural rules, and – like all EU Directives -- they are mandatory on EU Member States, which have the obligation to transpose them into national law. Outside of this *minimum* common set of procedural rules, it is left to Member States to regulate other aspects of public procurement in respect of the fundamental principles of the EC Treaty, and in particular the principle of freedom of movement of goods, the principle of freedom of establishment, the principle of freedom to provide services, and the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

14. As mentioned above, the Public Sector Directive and the Utilities Directive apply only to contracts above set financial thresholds, which have not been excluded on the basis of the exceptions provided in the Directives, and which have as their object the supply of goods, the execution of works or the provision of services within the meaning of the Directives.\(^\text{20}\) Contracts below the set EU financial thresholds, however, are subject to the fundamental principles of the EC Treaty and the principles deriving therefrom referred above.

15. The Remedies Directives deal with complaints/review systems and some of the main features of these Directives are examined at a later stage in this Note. Enforcement of the EU Procurement Directives is ensured by national courts/review bodies but also by the European

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\(^{14}\) Treaty of Rome of 1957, as subsequently amended.

\(^{15}\) Directive 2004/18/EC of 31 March 2004 on the coordination of the procedures for the award of public works contracts, public supply contracts and public service contracts.

\(^{16}\) Directive 2004/17/EC of 31 March 2004, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

\(^{17}\) Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

\(^{18}\) Directive 92/13/EEC of 25 February 1992, coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.


Commission, which may start infringement proceedings before the European Court of Justice (ECJ) against EU Member States for infringement of the Directives.

16. The ECJ also plays an important role with respect to the interpretation of the EU Procurement Directives and has issued several judgments in this respect. These ECJ judgments, however, do not form part of the scope of this Note.

17. In the context of the overall program of modernization of public procurement in the EU, in December 2011, the European Commission adopted three proposals of Directives, i.e.: (i) a proposal on the revision of the Public Sector Directive, (ii) a proposal on the revision of the Utilities Directive, and (iii) a proposal on the adoption of a new Directive on the award of concessions contracts, which are now only partially regulated at the EU level. At the moment of writing, the new proposed Directives have not yet been adopted.

18. **UNCAC.** The United Nations Convention against Corruption (UNCAC) was adopted by the United Nations General Assembly by its Resolution 58/4 of October 31, 2003 and entered into force in December 14, 2005. It is legally binding on its contracting states, meaning those states which have consented to the Treaty either by ratification, accession or acceptance. As of October 19, 2012, UNCAC has 163 States Parties, and 140 signatories.

19. UNCAC has four main chapters dealing substantively with the themes of Prevention, Criminalization, Asset Recovery, and International Cooperation. Each chapter includes provisions which have different levels of obligations for contracting states: mandatory provisions, or those which a contracting state has an obligation to implement through legislative or other measures; optional requirements, or those which a contracting state has an obligation to consider; and optional measures, or those which contracting states may wish to consider.²¹

20. Article 63 of UNCAC requires the Conference of the States Parties²² to provide for a mechanism for the review of implementation of the Convention. The guiding principles and characteristics of the mechanism, process and other requirements are defined in the Terms of Reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption.²³ Participation in the review mechanism is voluntary. Briefly, the review mechanism, which is under the authority of the Conference of the States Parties, shall be, among other things, transparent, non-adversarial and non-punitive, and shall not serve as an instrument to intervene in the domestic affairs of other States. It is in essence, a “peer review” inter-governmental process which involves a self-assessment by the State Party under review, a desk review by experts from other States Parties, and finally, a dialogue among the State Party under review and the experts which will result in a country report and identification of areas of technical assistance to ensure effective implementation of the UNCAC. It is an information exchange and sharing process and shall take into account the levels of development of States

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²² A Conference of the States Parties to the Convention was established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation. Article 63 (1), UNCAC.
Parties, as well as the diversity of judicial, legal, political, economic and social systems and differences in legal traditions, which is consistent with a fundamental principle of UNCAC that States Parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and non-intervention in the domestic affairs of other States.\textsuperscript{24} Under the present review cycle, compliance with the chapter on preventive measures, which includes systems on public procurement, is not yet underway but will eventually take place when the review on the chapters on criminalization and international cooperation are completed. UNCAC applies to public procurement systems, but systems may take into account appropriate threshold values in their application to avoid overly complex procedures for small amounts.

21. \textbf{UNCITRAL Model Law.} The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly\textsuperscript{25} in 1966 with the mandate to “further the progressive harmonization and unification of the law of international trade” in recognition that the disparities in national laws governing international trade created obstacles to the flow of trade”\textsuperscript{26} The Commission is comprised of sixty UN member states.

22. The UNCITRAL approach to unification and harmonization of international trade is through various means, including the development of model trade laws. The UNCITRAL Model Law on Public Procurement (UNCITRAL Model Law) is one such model law. As a model law, the UNCITRAL Model Law is not mandatory for use; it is intended to serve as model for States for purposes of evaluation and modernization of procurement laws and practices, and establishment of procurement legislation where none currently exists, to support harmonization of procurement regulation internationally, and to promote international trade. States may choose to enact some or all parts of the Model Law, although in order to “increase the likelihood of achieving a satisfactory degree of unification and to provide certainty about the extent of unification, States are encouraged to make as few changes as possible when incorporating a model law into their legal system.”\textsuperscript{27}

23. The UNCITRAL Model Law covers “public procurement,” which is described as the acquisition of goods, construction or services by a “procuring entity.” In turn, the UNCITRAL Model Law provides options for enacting States to consider in drafting national legislation as to the meaning of “procuring entity.” Based on Article 1, the UNCITRAL Model Law is intended to cover all types of public procurement.

24. The objectives of these Instruments are self-evident from the Instruments themselves. How these objectives are met through the public procurement system of a member state should not diminish the basic purpose of public procurement itself, which is essentially to purchase the goods, works and services which a public agency needs to perform its mandate. That a public procurement system can have features or can be a mechanism which can help achieve a higher level objective beyond and through this basic procurement function creates challenges for policy makers in defining the role that such system can play in the overall country strategy. The different Instruments, for example, address international trade policy (GPA, UNCITRAL Model

\textsuperscript{24} Article 4(1), UNCAC.
\textsuperscript{25} UN Resolution 2205(XXI) of 17 December 1966.
\textsuperscript{26} See http://www.uncitral.org/uncitral/en/about/origin.html.
Law), creation of a common market (EU Directives), or anti-corruption policy (UNCAC), and a member country to the specific instrument would need to embed those features in its public procurement systems which can facilitate international trade or prevent corruption. However, the main purpose of the public procurement function is neither to promote international trade nor to prevent corruption, although it may be an effective mechanism to contribute to such higher-level policy objectives. For a public agency to perform its mandate at the agency level, it needs to be able to exercise the procurement function strategically while always ensuring that public funds are used for their intended purpose. In this regard, the statement of fiduciary purpose in the current World Bank Guidelines is aligned with the fundamental purpose of public procurement.

25. The different objectives affect how the principles of procurement are applied into the local legal framework. The Instruments are intended to either achieve coordination in country-level procurement rules (i.e., standards and procedures) among their Parties/Member States to facilitate international trade/cross-border trade (the GPA, EU Directives), or to strengthen governance and integrity in the public sector (UNCAC). The UNCITRAL Model Law was drafted with all such considerations in mind. While they all have for their purpose the harmonization or coordination of procurement rules in their respective members, harmonization or coordination for the purpose of facilitating trade is driven by the private sector to enable their participation in procurement markets to broaden their business opportunities. Harmonized or coordinated procurement rules in various procurement markets enhance these business opportunities, and ensure a degree of consistency, predictability, and transparency in the actions of public entities from whom they hope to obtain a contract to supply their goods or services. From the perspective of good governance and integrity, it is intended to satisfy the citizenry (i.e., taxpayers) that public funds are used to obtain the goods, works, and services so agencies of the state can deliver services in the public interest, and to provide the minimum standards on measures to prevent corruption in public procurement.

26. The legal systems of countries that adopt these Instruments may require deeper legal integration and structural changes to their public and private sector environments. Country legal systems and institutions may not be properly equipped to translate the principles into legal standards as prescribed in these Instruments, and may require broader reforms outside the scope of any reforms to procurement systems. When the government enters into a binding international agreement, it is also assumed that informed decisions have been made on the basis of the broader policy framework of the government on trade (in the case of international instruments on trade), public sector governance (in the case of international instruments on anti-corruption, bribery, transnational crime, mutual legal cooperation, etc.), labor, environment, and other considerations.

27. With respect to the UNCITRAL Model Law, its incorporation into country systems for any substantive subject matter of law should be part of a comprehensive reform approach which takes into account not only policy choices, but equally as important for legitimacy, the process of law reform (including stakeholder consultations), the necessity of well-functioning institutions, and resources to support the law’s effective implementation. Transplanting the Model Law in an institutional and legal vacuum as part of procurement law reform will not be sustainable or effective if not grounded in the local context. Moreover, the decision whether to regard the procurement function as part of the system of public expenditure management, trade, anti-
corruption, or all of the above, is a policy one that cannot be preempted by the transplant of a
model law on trade.

28. The World Bank, for its part, does not draft laws for its Borrowers, nor does it endorse
the transplant of “model laws” or legal systems, having learned from the failure of law reform
movements of the 1960s and 1970s. As stated by then World Bank General Counsel Ibrahim
Shihata in his widely disseminated Legal Memorandum on Governance, the “substance of rules
will, of course, reflect the policies of each government and should be based on its choices and
convictions. The Bank may assist in the design of policies related to its field of competence and
its mandate….the concern with the substance of the rules is appropriate as long as it based on
considerations of economy and efficiency.”

Principles of Public Procurement

29. A principle is defined in the Oxford Dictionary as “a fundamental quality or attribute
determining the nature of something; an essential characteristic or character; essence.” Widely
recognized principles of public procurement include economy and efficiency, transparency,
competition, and accountability.

30. Although the Instruments addressed in this Note have different objectives (i.e., fiduciary
purpose, coordination of procurement rules, promoting international or regional trade, preventing
corruption), each Instrument articulates all or some of these principles. These principles are to
be reflected in the member state’s public procurement legal framework depending on each
member state’s administrative and legal system. Application of these principles to the
institutional and legal framework will be constrained by the objective which the procurement
system is intended to achieve.

31. With the exception of the World Bank Guidelines, which are to be applied by the
Borrower’s implementing agency for a specific project under a Loan Agreement, the principles
to be applied in a country’s legal framework would apply to the country procurement system.
While there are common principles, however, the differences in approach and philosophy behind
the main Instruments affecting public procurement mean that the standards in these Instruments
may not be completely harmonized or coordinated. The distinction is not trivial; it creates
tensions at the highest policy-making level, since these Instruments, which have been widely
promoted and dominate other public policies, limit the policy space and impose restraints on the
ability of the government to optimize the strategic role of procurement for promoting other
socio-economic objectives. Thus, an Instrument with the objective of promoting access to
procurement markets for a member state’s private sector (bidders) would have a different
approach or focus from an Instrument that uses public procurement as a measure to prevent
corruption by both the public and private sector.

32. The application of the principles of public procurement as envisioned in the various
Instruments is not to enact a public procurement law as an international trade law or as an anti-

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28 “Learning from the Past”, Legal and Judicial Reform; Strategic Directions, World Bank Legal Vice Presidency (2002).
29 Legal and Judicial Reform; Strategic Directions, World Bank Legal Vice Presidency (2002).
corruption law, but to endow the procurement system with features or mechanisms which can help the member state meet its obligations to achieve the objectives under the different Instruments. It can be argued, however, that the basic function of public procurement, which is to enable a public agency to purchase the goods, works and services it needs using public funds for their intended purposes so it can perform its mandate, should not be diminished nor made overly complex or burdened by other policy considerations.

33. There are multiple stakeholders in a procurement system and the principles apply to all aspects of the procurement system – the establishment of key institutions, legally binding standards and procedural rules, administrative decision-makers and limits of discretion for said decision-makers, the means for bid protest/complaint/challenge, the arrangements for procurement operations at the procuring entity level; budgeting and procurement planning; rules of participation, e.g., eligibility and qualifications of bidders; the identification of procurement methods and the conditions for their use; a requirement for standard bidding documents and standard conditions of contract including on disputes; internal and external controls, and provisions relating to fraud and corruption, records and publication requirements.

34. **Economy and efficiency** as principles of public procurement relate to how the procurement function contributes to the best use of allocated resources by a public agency in the performance of its mandate. It refers not only to the methods and procedural rules which affect the procurement of a single contract, but also other aspects including: the broader administrative control mechanisms that affect the management of procurement function, the capacity of public officers responsible for procurement, the efficiency of markets which enable the public agency to purchase from the most competitive source, the need to procure the best quality of goods, works and services on terms and conditions reflecting a fair allocation of risks, and the need for contract and asset management.

35. **Economy and efficiency** applies not only to the methods and procedural rules, but also to how efficiently these procurement methods and rules can be used in the management of public resources. The cost involves not just the actual cost of the goods, works or services to be procured but the resources in administering the procurement function, and the cost and resources to the bidder to participate in the procurement. These system costs are ultimately borne by the public taxpayer or project financiers – whether from the public or private sources of finance. The approach to “cost” – whether as the “least cost” or “best value”, or “most advantageous,” depends on the overall public expenditure policy of a government, of which the procurement function is only one part. The budgeting, planning, implementing, maintenance and accountability for public expenditure will drive how “economy and efficiency” is translated and can be achieved through the procurement function, including in ways to evaluate bids and what factors to take into consideration. The main difference among the Instruments revolves around ways to assess value for money, including costs as well as benefits, the use of merit points and the evaluation of non-monetary costs and benefits, such as quality, reliability, post-sales service, and user friendliness.

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30 “Economy and efficiency”, although quoted together, may be regarded as two separate principles of “economy” and “efficiency.”
36. One of the main considerations guiding the World Bank’s procurement requirements is *economy and efficiency* in the implementation of the project, including the procurement of goods, works and services (non-consulting and consulting).\(^{31}\) This guiding principle was established as an absolute legal duty at the World Bank’s founding. The principle has its legal basis in the World Bank’s Articles of Agreement, which read: “The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.”\(^{32}\)

37. The World Bank Loan Agreement requires that the project finances the “reasonable cost” of goods, works or services. The World Bank Guidelines adopt a cost-minimization approach, given that the loan as a source of financing for a project becomes part of the Borrower’s external debt. Thus, “due attention to considerations of economy and efficiency” is a general consideration in the Procurement and Consultant Guidelines. Although the Bank has evolved to meet the financing needs of its Borrowers, this requirement, stemming from the World Bank’s Articles of Agreement, is referred to as the “fiduciary duty” which forms the legal and policy basis for the World Bank’s fiduciary framework.\(^{33}\) Thus, as a procurement principle having its legal basis in the World Bank’s founding charter, *economy and efficiency* may be considered as the *meta-principle* upon which all other principles articulated in the World Bank Guidelines are derived, and which differentiates the World Bank Guidelines from the other Instruments.

38. As a legal obligation applicable to both the Borrower’s implementation of a project and the procurement of goods, works and services, the principles of *economy and efficiency* are incorporated in the General Conditions, which require that the Borrower and the Project Implementing Agency (if not the same as the Borrower) shall use the proceeds of the Loan exclusively to finance the expenditures as payment for the reasonable cost of goods, works or services required for the Project, and procured, all in accordance with the provisions of the Legal Agreement.\(^{34}\) The IBRD and IDA General Conditions for Loans, the World Bank Procurement and Consultant Guidelines, and the Anti-Corruption Guidelines are all approved by the World Bank’s Board. Thus, these are legally binding obligations which go beyond procurement *per se*. The Loan Agreement requires that the project be executed with the appropriate administrative, technical, financial, economic, environmental and social standards and practices. There is neither requirement nor a prohibition against using a Borrower’s existing institutional arrangements for project implementation, though the fiduciary requirements of a Borrower would often be insufficient to meet the requirement of economy and efficiency in project implementation. The procurement-related aspects as provided in the World Bank Procurement and Consultant Guidelines, Anti-Corruption Guidelines and General Conditions are prescriptive in order to fill the gaps in any inconsistency between the World Bank’s requirements and a Borrower’s systems to enable compliance with the requirements in the Loan Agreement.

\(^{31}\) Par. 1.2 (a), Procurement Guidelines; par. 1.4 (b), Consultant Guidelines.

\(^{32}\) IBRD Articles of Agreement, Article III, Section 5(b).


\(^{34}\) IBRD General Conditions, Article II, Section 2.05(a); IDA General Conditions, Article II, Section 2.05(a).
39. For the World Bank, the principle of “economy and efficiency” includes the implementation of the project which covers project execution arrangements including procurement arrangements, document requirements which allow the World Bank to supervise the project such as the procurement plan, procurement records, contracts, project monitoring, evaluation, financial management and audit policies and procedures, facilities and asset maintenance, which are all required under the Loan Agreement for investment lending. For Development Policy lending and Program for Results lending, the requirements for economy and efficiency are assessed on the basis, respectively, of the Borrower’s own country or program/sector fiduciary arrangements, including procurement.

40. Among the economy and efficiency benefits expected by the World Bank from open competition are cost savings, improved quality of works, goods and services, transparency in procedures, and reduced fraud and corruption. Open competition is considered by the World Bank as the basis for efficient public procurement, since it allows the Borrower to procure the goods, works and non-consulting services from the bidder who is substantially responsive to the bidding requirements at the lowest evaluated cost. However, the administrative costs to the Borrower, World Bank and bidders of conducting open competitive bidding -- preparing the technical specifications, advertising and publication, bid preparation, public bid opening, evaluation, responding to complaints, and review by the World Bank – should also be considered.

41. There are multiple stakeholders in the procurement function, and for the World Bank, “efficiency” also refers to efficiency of the market. Promoting wide competition regardless of nationality, and encouraging the Borrower’s domestic contracting and manufacturing industries, are main considerations guiding the World Bank’s procurement requirements. Another important factor to consider in assessing economy and efficiency in the project implementation and procurement of goods, works and services is the nature of Borrower implementing entities as primarily public agencies, and not commercial enterprises with a profit motive. These agencies do not further participate in the market by trading in their services, but deliver these services directly to the public.

42. With regard to the GPA, EU Directives, UNCAC, and UNCITRAL Model Law, these other Instruments do not concern themselves with the source of financing, and thus there is no emphasis on the fiduciary duty which drives the principle of “economy and efficiency” for the World Bank.

43. Accordingly, the GPA does not specifically mention “economy and efficiency” as one of its principles, at least not in the same fiduciary context as the World Bank. The objective of the GPA is to achieve “greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade.” The GPA is a market access agreement which obviously has different conceptual requirements for “economy and efficiency” from those applied under the World Bank Guidelines. In relation to procurement methods and procedures, however, considerations of “economy and efficiency” under the GPA are not necessarily incompatible with the World Bank requirements, and the GPA’s transparency-related procedural requirements are largely consistent with the requirements of the World Bank. As one

35 Par. 1.3, Procurement Guidelines.
of the available (although not the preferred) methods under the GPA, the use of open tendering procedures increases the likelihood of “economy and efficiency” in the same manner as contemplated under the World Bank Guidelines. However, the scope of applicability of the GPA is limited since it does not cover all public procurement in its member countries, but applies only to covered entities and sectors, and only at specified thresholds.

44. The UNCITRAL Model Law in its Preamble lists “maximizing economy and efficiency in procurement” as one of the objectives of the Model Law. This objective is further elaborated in the Draft Guide to the Enactment of the UNCITRAL Model Law on Public Procurement (“Draft Guide to UNCITRAL Model Law”). With respect to economy, the UNCITRAL Model Law allows procuring entities the flexibility to determine what constitutes “value for money in each procurement and how to conduct the procurement in a way that will achieve it.”

Regarding efficiency, the UNCITRAL Model Law “provides flexible procedures to ensure that the administrative time and costs of conducting each procurement are proportionate to the value of that procurement.”

45. Transparency is common to all Instruments, with only minor deviation on the procedural rules which are used to meet this principle: advertising requirements, publication of procurement-related regulations and documents, timeframes for submitting and opening bids, and objective bid evaluation criteria. Public bid opening, which is one of the main features of transparency required by the World Bank Procurement and Consultant Guidelines, is not specified under the GPA, EU Directives, nor UNCAC, which leave it to the member state to determine if this will be a requirement of its bidding procedures.

46. The GPA, as an agreement which only provides the minimum requirements, states that “a procuring entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders.”

Similarly, the GPA specifies that where there will be a public opening of tenders, the date, time and place for the opening and, where appropriate, the persons authorized to be present shall be stated in the Tender Documentation. Furthermore, an important aspect of transparency is the treatment of negotiations. In this respect, the World Bank Procurement Guidelines, with very limited exceptions, prohibit negotiations in the award of contract under the international competitive bidding (“ICB”) procurement method. Similarly, the EU Procurement Directives and the UNCITRAL Model Law limit negotiations to the negotiated methods of procurement provided for therein. The GPA does not regulate negotiations. UNCAC, which includes transparency among its principles, may be broadly interpreted to prohibit negotiations.

47. Transparency in the institutions affecting public procurement is not directly regulated by the Instruments except in the case of UNCAC. UNCAC addresses a member state’s anti-corruption framework, which includes institutions, procedures, and conduct of public officials and the private sector. UNCAC has the broadest scope to influence public sector institutions and systems, including on public procurement, from the perspective of anti-corruption.

36 Par. 4, Draft Guide to UNCITRAL Model Law.
37 Par. 8, Draft Guide to UNCITRAL Model Law.
38 GPA, Article XV.1.
39 GPA, Article XI (7) f.
48. The World Bank Guidelines do not include requirements with respect to institutions or the procurement arrangements at the agency level (i.e., how the public agency organizes the procurement function). However, the Loan Agreement requires that the project be executed under appropriate administrative, technical, financial, economic, environmental and social standards and practices, which may include covenants on procurement arrangements. The World Bank’s national competitive bidding (“NCB”) procurement method deals with effective and independent protest mechanisms. Otherwise, the GPA, EU Directives, and the UNCITRAL Model Law do not deal with institutions except with regard to those providing challenge/bid protest and review mechanisms.

49. **Competition** ensures that procuring entities are able to purchase the goods, works and services that best meet their needs from the market with the allocated funds for the specific purpose in order to perform their public mandate. From the procurement function point of view, competition means having a range of features such as open competitive methods, procurement planning, use of standards and technical specifications that promote competition, and wide dissemination of bidding opportunities. From the bidder’s point of view, this means another array of features such as public and accessible information on the procurement rules, information on bidding opportunities, transparent procurement procedures, confidentiality of business and proprietary information, access to procurement markets, non-discriminatory rules of participation (discussed separately below), equal opportunity to bid, the right to challenge and review a procurement decision, enforceable contracts, and a business environment that enables private sector competition.

50. As mentioned above, **competition** is a pillar principle of the World Bank, and the features identified in the preceding paragraph are mainstays of its Guidelines. **Competition** is expressed in the World Bank Guidelines in terms of giving eligible bidders from developed and developing countries the same information and equal opportunity to compete, with open competition being considered as the basis for efficient public procurement because it allows the Borrower to procure the goods, works and non-consulting services from the bidder who is substantially responsive to the bidding requirements at the lowest evaluated cost. However, creating the broader business environment which enables private sector competition is outside the scope of the World Bank Guidelines.

51. Under the Instruments on market access (GPA, and EU Directives and, to a certain extent, the UNCITRAL Model Law), **competition** means avoiding public procurement rules that afford protection to domestic suppliers or discriminate among foreign bidders, goods or services. **Non-discrimination** is a principle closely related to competition, which in the EU context derives from the EC Treaty and prohibits discrimination within the common market on the basis of nationality. With respect to the GPA, the principle of **equal treatment** means that among its members, bidders should have an equal opportunity to bid (also expressed in the World Bank Guidelines), and throughout the procurement process, all bidders would be treated in the same way. With regard to the EU Directives, this principle of equal treatment means that the same situations are treated in the same way and that different situations are not treated in the same way. With regard to the UNCITRAL Model Law, its objectives include: (i) “[f]ostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality, thereby promoting international trade,” and (ii) “[p]roviding for the fair, equal and
equitable treatment of all suppliers and contractors. Nonetheless, the UNCITRAL Model Law does contemplate the possibility that a procuring entity may limit participation in procurement proceedings on the basis of nationality, and also allows for the application of margins of preference for the benefit of domestic suppliers/contractors, domestically produced goods, or any other preference, as well as for the consideration of other socio-economic policies, in procurement proceedings. Finally, although UNCAC does not mention “non-discrimination,” which as a principle has its roots in trade agreements rather than anti-corruption agreements, the same may still be met through the establishment of rules based on verifiable “objective criteria” in procurement decision-making.

52. With respect to **accountability**, the World Bank has the most detailed mechanisms established through the Loan Agreement and the Procurement and Consultant Guidelines to ensure accountable decision-making in procurement by the Borrower. This accountability framework arises from the delegation to the Borrower of the responsibility and decision-making for procurement. For its part, the World Bank as financier of the project assumes the financial risk for and the fiduciary obligation to its members/shareholders and investors, to ensure that loan proceeds are used by the Borrower for the intended purpose. From this point of view, the very essence of the World Bank Guidelines is to prescribe detailed procedures to limit the exercise or abuse of discretion by the Borrower in procurement decision-making. Thus, mechanisms for transparency in the procedural rules, open competition, conditions for use of non-competitive methods, neutral technical specifications, objective criteria, prior and post review by the World Bank, remedies of bidders to the World Bank, and remedies which can be exercised by the World Bank against Borrowers, are all mainstays of the World Bank Guidelines, as part of the World Bank-wide accountability framework which also includes complementary mechanisms in the Anti-Corruption Guidelines, Disbursement Guidelines, and Access to Information policy.

53. However, the **accountability** features required of a Borrower apply only to the implementing agency for a specific project. A Borrower may have its own accountability mechanisms as part of its administrative rules for public agencies, which affect the decision-making behavior of the agency. The World Bank Guidelines do not regulate these Borrower accountability mechanisms and internal administrative rules. The Guidelines require that Borrowers and bidders “observe the highest standards of ethics during the procurement and execution of Bank-financed contracts,” and define fraud and corruption practices for which bidders and contractors can be sanctioned, leading to ineligibility to be awarded a World Bank-financed contract or even to benefit from World Bank financing as a nominated sub-contractor, consultant, supplier, or service provider. These practices govern the behavior between the Borrower and the bidders, and among the bidders.

54. **Accountability** is enhanced by transparent procedures, avoidance of conflicts of interest, competitive procurement methods, neutral specifications, objective criteria and bid protest and review mechanisms, all of which are required under the GPA and, with the exception of conflict of interest provisions, the EU Procurement Directives. Like the accountability mechanisms

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40 Preamble, UNCITRAL Model Law.
41 Although the EU Procurement Directives do not contain specific conflict of interest provisions, it may be noted that the European Court of Justice (in the Fabricom case - C-21/03, (2005)ECR I-1559) has provided guidance with
under the Guidelines, these serve different purposes in achieving accountability – i.e., limiting discretion in decision-making by the public official, enhancing participation of bidders, improving the procurement process. However, unlike the World Bank Guidelines, these measures are limited in their application only to those countries that are GPA or EU members, and only to covered entities and procurements. The UNCITRAL Model Law also includes provisions addressing important accountability considerations.

55. By its nature as an anti-corruption agreement, UNCAC has the most far-reaching requirements in terms of accountability mechanisms, having as one of its main purposes the promotion of “integrity, accountability and proper management of public affairs and public property.” Accountability features are inherent in all aspects of UNCAC, particularly in preventive measures, criminalization of acts of corruption – and covers not only the public sector, with measures such as institutional and administrative arrangements and codes of conduct, but also measures affecting the private sector when dealing with the public sector and with each other. UNCAC includes both mandatory measures and optional measures, but in every case recognizes that “[e]ach State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law.” As with the GPA and EU Procurement Directives, UNCAC provides only the minimum standards, so states may apply more “strict or severe” measures for preventing or combating corruption.

**Treatment of Horizontal Policies**

56. The impact that an agency’s administrative act in purchasing for its needs may have beyond the performance of an agency’s mandate attests to the strategic role procurement policy can play in the broader environment. It also signals that the procurement policy should enable agencies to exercise the procurement function more strategically. Although one of the more controversial aspects of procurement policy, this potential to affect broader policy goals is recognized in all the Instruments. In one sense, the policies of promoting trade and preventing corruption, which are more broadly acknowledged than these other socio-economic considerations and perhaps more directly related to the market and public expenditure environment, are themselves ancillary to procurement rather than its principal raison d’être.

57. Socio-economic considerations may be addressed through qualifications or capability, technical specifications and requirements, evaluation criteria, and/or conditions of contract. The World Bank Procurement Guidelines contemplate such considerations through the use of standards, specifications and bid evaluation criteria. For example, operating costs, and safety and environmental benefits may be included among the factors in the bid evaluation, provided respect to the possibility of excluding firms on the basis of conflict of interest situations and related burden of proof.

42 Article 1(c), UNCAC.
43 Article 65(1), UNCAC.
44 Article 65 (2) UNCAC.
46 Par. 1.2 (c), Procurement Guidelines; par. 1.4 (d), Consultant Guidelines.
they can be expressed in monetary terms in the evaluation provisions in the bidding documents.\textsuperscript{47} Although there is no formal World Bank procurement policy on core labor standards,\textsuperscript{48} these standards were incorporated in the general conditions of contract of the MDB Harmonized version of the standard bidding documents for civil works, as part of the continuing harmonization agenda, and are also included in the SBDs for smaller works, which are widely used under NCB.

58. With respect to diversity and the development of local industries, the World Bank’s Guidelines allow the use of domestic preference in ICB; and are inclusive by not mandating joint ventures and associations, thus allowing bidders to form associations with NGOs, non-profits, and community-based service providers.

59. The use of domestic preferences is a feature of the World Bank Procurement Guidelines allowing Borrowers, through the procurement rules and procedures to be followed in the implementation of a project, to give effect to the World Bank’s interest in encouraging the development of domestic contracting and manufacturing industries in the borrowing country.\textsuperscript{49} A Background Paper on the Use and Impact of the Bank’s Policy of Domestic Preferences\textsuperscript{50} is among the papers prepared by the World Bank as part of the Operational Procurement Policy Review.

60. The UNCITRAL Model Law allows for the possibility that evaluation criteria may include a margin of preference for the benefit of domestic suppliers or contractors or for domestically produced goods, or any other preference, if authorized or required by procurement regulations or other provisions of State law. The margin of preference shall be calculated in accordance with procurement regulations.\textsuperscript{51}

61. The GPA and EU Directives rest on the two main principles of non-discrimination and equal treatment among members, and as such do not allow preferences, except (in the case of the GPA) for those negotiated by an acceding or implementing developing/least-developed country, which can include some transitory price preference programmes, or offsets.\textsuperscript{52} The EU Utilities Directive allows for the possibility to reject tenders where the proportion of the products originating in third countries (with which the Community has not concluded an agreement) exceeds 50% of the total value of the products constituting the tender.\textsuperscript{53}

62. The GPA requires that socio-economic considerations must be based on policies of the state which are addressed in legislation to avoid the arbitrary application of requirements related to such socio-economic factors, which may discriminate against bidders for whom access to markets have been negotiated. Specifically for the GPA and the EU Directives, which rest on the principles of \textit{non-discrimination and equal treatment}, socio-economic considerations cannot be used as barriers to restrict access to bidders of member states. The GPA, for example, states that,

\begin{itemize}
  \item \textsuperscript{47} Par. 2.52, Procurement Guidelines.
  \item \textsuperscript{48} Prohibition of forced or compulsory labor, prohibition of harmful child labor, workers organizations, and non-discrimination and equal opportunity.
  \item \textsuperscript{49} Pars. 2.55 – 2.56, and Appendix 2, Procurement Guidelines.
  \item \textsuperscript{50} Prepared by Myrna Alexander (Consultant) and Charles Fletcher, ( Junior Professional Associate), July 2012.
  \item \textsuperscript{51} Article 11(3)(b), UNCITRAL Model Law.
  \item \textsuperscript{52} Article V, GPA.
  \item \textsuperscript{53} Article 58, Utilities Directive.
\end{itemize}
“subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

(a) Necessary to protect public morals, order or safety;
(b) Necessary to protect human, animal or plant life or health;
(c) Necessary to protect intellectual property; or
(d) Relating to goods or services of persons with disabilities, philanthropic institutions or prison labor.”

63. The GPA and EU Directives allow for specific reference to environmental -- and in the case of the EU Directives, social -- considerations in technical specifications, evaluation criteria, and contract conditions. The EU Directives also recognize reserved procurement/contracts, allowing member states to reserve the right to participate in contract award procedures to sheltered workshops or to provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are disabled persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions. Reserved procurement is not allowed under the World Bank Guidelines.

64. The UNCITRAL Model Law contemplates that enacting States may wish to address socio-economic policies in a procurement law, but does not specify such policies. Rather, the UNCITRAL Model Law allows enacting States to define those policies in national legislation based on Article 2(o), under which “Socio-economic policies” are defined as “environmental, social, economic and other policies of [the] State authorized or required by the procurement regulations or other provisions of law of [the] State to be taken into account by the procuring entity in the procurement proceedings,” with a notation that an enacting State may expand such list by providing its own illustrative list of such policies. Implementation of socio-economic policy also may be a condition for use of single-source procurement under Article 30(5) of the UNCITRAL Model Law.

**Conditions for Participation of Bidders**

65. Based on the particular objective it aims to achieve, each Instrument sets forth a set of conditions under which a procuring entity may determine the eligibility of a supplier/contractor to participate in procurement and the legitimate grounds to exclude suppliers/contractors from participation in such bid. All of the Instruments specify that criteria for qualification of bidders shall be limited only to those criteria essential to ensure that a supplier/contractor has the legal

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54 Article III. 2, GPA.
55 Article X.6, GPA; Article 23, Public Sector Directive and Article 34, Utilities Directive.
56 Article X.9, GPA; Recital 46 and Article 53, Public Sector Directive, and Article 55, Utilities Directive.
58 Article 19, Public Sector Directive; and Article 28, Utilities Directive.
and financial capabilities and technical and professional abilities to undertake the relevant procurement.\footnote{With respect to the EU Directives, the Utility Directive – in contrast to the Public Sector Directive - does not set out an exhaustive list of criteria for qualitative selection and it allows for more flexibility with respect to their choice. See Article 54, Utilities Directive.} All require that the qualification criteria should be disclosed in the tender notice and specified in the bidding documents. The Instruments provide for the assessment of the qualifications of the tenderer or candidate either prior to or after the submission of bids. In this regard, the World Bank Procurement Guidelines and the UNCITRAL Model Law both contemplate the potential use of prequalification proceedings preceding the bid submission stage. When no prequalification takes place, both Instruments contemplate use of a “post-qualification” process, using the same criteria that would normally apply in prequalification. The EU Directives (Public Sector Directive) provide instead for procurement methods, i.e. restricted procedure, competitive dialogue and negotiated procedure with publication of a contract notice, which are all characterized by a separate prequalification stage.\footnote{It is to be noted that, by contrast with the Public Sector Directive, the Utilities Directive does not provide for competitive dialogue among the procurement methods allowed under the Directive.}

66. With regard to conditions of participation based on \textit{nationality} of the bidder, the World Bank does not exclude bidders on the basis of nationality, except if the Borrower, by law or official regulation, prohibits commercial relations with a country; or if, by an act of compliance with a UN Security Council decision, the Borrower prohibits the import of goods from or payments to a particular country, firm or person.\footnote{Par. 1.10 (a), Procurement Guidelines; par. 1.13 (a), Consultant Guidelines.} Since the World Bank is an inter-governmental organization that provides development financing (loans, credits or grants) to its member countries, the principal considerations guiding the World Bank’s procurement requirements (i.e., economy and efficiency, equal opportunity of all eligible bidders, development of domestic industry, and transparency in the procurement process) are intended so a Borrower, in procuring goods, works and services using loan proceeds, may obtain the most advantageous bid and avoid incurring more external debt. Thus, conditions of participation under the World Bank Guidelines are intended to enable the widest sourcing options for the Borrower, limited only by conditions affecting the firm’s capability to fulfill the contract in question,\footnote{Par. 1.8, Procurement Guidelines; par. 1.11, Consultant Guidelines.} and situations involving conflicts of interest.\footnote{Pars. 1.8, 1.9., Procurement Guidelines; pars. 1.11, 1.12, Consultant Guidelines.}

67. Each Instrument specifies all or some grounds for exclusion, which include conviction by final judgment for participation in criminal organizations, fraud and corruption, and money laundering; professional misconduct; serious crimes; misrepresentation; nonexistence of bankruptcy proceedings; and failure to pay taxes.

68. Exclusion from participation under the World Bank Guidelines is narrowly and strictly applied. Grounds for exclusion consist of: (i) prohibition of commercial relations by country law or UN Security Council resolutions; (ii) participation of State-Owned Entities (“SOEs”) that do not meet the requirements for legal and financial autonomy, operation under commercial law and independence from the procuring entity; and (iii) inclusion in the World Bank’s debarment or suspension list in accordance with the fraud and corruption sections of the Procurement
Guidelines or the Anti-corruption Guidelines. In general, the World Bank Guidelines do not recognize exclusion outside the scope of the World Bank’s sanctions system. Exceptionally, in the case of NCB, the World Bank may agree, if requested by the Borrower, to include in the bidding documents a clause rendering ineligible a firm or individual of the Borrower’s country that is under a sanction of debarment for fraud and corruption by a judicial authority of the Borrower’s country.

69. There are exclusions in the conditions of participation in the GPA and EU Directives which are more extensive than those contained in the World Bank Guidelines. For example, the GPA envisages persistent deficiencies or failure to perform prior contracts as a ground for exclusion. Similarly, with respect to the personal situation of economic operators, the EU Directives (Public Sector Directive) specify two types of grounds for exclusions, namely: (i) mandatory grounds; and (ii) optional grounds. While in the first instance, the failure to satisfy the grounds for participation shall lead to automatic exclusion of a bidder or candidate in all cases, in the second, it is left to the discretion of the contracting authority whether or not to apply such criteria in a specific procurement process.  

70. Procurement under Bank-financed projects is excluded from the scope of the GPA and EU Procurement Directives, and member countries applying the World Bank Guidelines under a Bank financed project cannot apply any of the exclusions under the GPA or EU Procurement Directives to the Bank-financed contract. In this regard, a Borrower applying the World Bank Guidelines is better positioned to support the participation in its contracts of firms from all eligible countries, especially developing countries who are increasingly part of such aspects of production or distribution.

71. Supplier’s Lists. Among the Instruments, the GPA and the EU Directives (the Utilities Directive) envisage the possibility of establishing qualification systems/lists of qualified suppliers. In operating such systems, contracting authorities are required to ensure openness and accessibility at all times by qualified suppliers/contractors, and use of objective criteria and rules of qualification, and to avoid introducing obstacles to participation by suppliers/contractors.

72. Fraud and Corruption. It is commonly noted that all the Instruments specify measures to safeguard the integrity of the procurement process, and they all include engagement in fraud and corruption as a cause for bid rejection or disqualification from the procurement process. Particularly in the case of UNCAC, the integrity of the procurement process is the main purpose of the Instrument, requiring the Parties to take the necessary measures, both legislative and administrative, to prevent and punish corruption.

73. Similarly, all the other Instruments (World Bank Procurement and Consultant Guidelines, EU Directives, GPA and the UNCITRAL Model Law) include provisions to address fraud and corruption. In particular, the World Bank Guidelines reflect the World Bank’s policy requiring all the parties to observe the highest standards of ethics. In pursuance of this policy, the Bank defines fraud and corruption and expands the scope to include collusion, coercion and obstruction (the latter is a distinct feature of the World Bank’s sanctions system). When found to have engaged in one of these practices, a bidder/supplier/contractor will be rejected from the

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64 Article 45, Public Sector Directive.
procurement process and may be included in the list of debarred firms for a defined period of time.

74. The UNCITRAL Model Law also provides for exclusion from participation in procurement proceedings on the grounds of inducements, unfair competitive advantage or conflict of interest. The UNCITRAL Model Law also includes among the listed qualification criteria that suppliers/contractors have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a specified period of time, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.

75. With regard to fraud and corruption, the EU Directives do not define “fraud” or “corruption” but instead make reference to other acts of EU legislation. Similarly, the GPA requires that the procurement proceedings are conducted in a manner so to avoid corrupt practices, making reference to the applicable international instruments, such as UNCAC, for the definitions of improper actions.

76. **Conflict of Interest.** With the exception of EU Directives, all of the Instruments include provisions on conflict of interest. Most notably, the World Bank Guidelines require that suppliers/contractors shall not have a conflict of interest. Furthermore, they define the main situations that may cause a conflict of interest and provide that conflict of interest shall result in the rejection of the supplier/contractor (including in those cases where the conflict is susceptible to mitigation but is not mitigated). In the same vein, the UNCITRAL Model Law envisages conflict of interest or unfair competitive advantage as cause for rejection of a supplier/contractor. Distinct from the other Instruments, it further introduces the requirement for a code of conduct for procuring entity staff.

77. Similarly, the GPA and the UNCAC require the members/parties to take the necessary steps to establish appropriate procurement systems, based on transparency and objective criteria so as to avoid conflict of interest.

**Procurement Methods and Use of Electronic Means**

78. Generally, all of the Instruments offer a menu of permissible procurement methods, which are to be used under and as per the conditions specified in each text. These methods include, among others, open tendering, restricted tendering, negotiated tendering (with and without prior call for competition), two-stage bidding, competitive dialogue, limited tendering, international competitive bidding, limited international bidding, and direct contracting.

79. Although the methods have distinct names and detailed procedures under each system, they also show strong similarities. For example, two-stage bidding under the World Bank Procurement Guidelines arguably may be considered to be analogous to competitive dialogue in the Public Sector Directive and two-stage bidding under the UNCITRAL Model Law. Similarly, direct contracting under the World Bank Procurement Guidelines is akin to the negotiated procedure without prior call for competition under the EU Directives, limited bidding under the
GPA, and single-source procurement under the UNCITRAL Model Law. Conversely, there are methods that do not have a corollary in other systems, which may be attributable to the nature and purpose of each Instrument. For example, the NCB method is only found in the World Bank Procurement Guidelines. And even though the World Bank Procurement Guidelines list NCB under procurement methods, in reality NCB procurement defers to a Borrower’s own procurement procedures. More precisely, the procedure to be used is the Borrower’s most competitive procurement method, which is applied with certain modifications prescribed by the World Bank so as to ensure broad consistency with the general requirements and considerations of the World Bank Procurement Guidelines. The practical effect of using such method is the use of a Borrower’s open tendering-type procurement method with the prescribed World Bank modifications.

In contrast with the other Instruments which set out specific conditions for use of permissible procurement methods, the GPA more broadly requires only that procurement be conducted in an impartial and fair manner, consistent with the Agreement, using methods such as open tendering, selective tendering and limited tendering. These methods are so broadly defined in the GPA that most of the distinct methods contemplated under other Instruments could be accommodated within the scope of GPA. The rationale for this GPA approach may arise from the GPA preamble text regarding flexibility of procedural commitments to accommodate the specific circumstances of each party to the GPA, which arguably is a step towards a principles-based rather than rule-based system. UNCAC does not prescribe any specific methods; it requires only that “each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption, including the establishment, in advance…of …tendering rules, and their publication.”

Open Competition. As previously noted, competition is an important principle across the Instruments. From a strict procurement perspective, the principle of open competition includes a range of features including the presence of open competitive methods, procurement planning and prior notice of procurement information, use of standards and technical specifications that promote competition, and wide dissemination of opportunities to bid. This Note has focused particularly on the use of “open competition” as the preferred or default method of procurement. Accordingly, the EU Directives (Public Sector Directive), the UNCITRAL Model Law, and the World Bank Procurement Guidelines each specify a preferred or default method(s), respectively, Open Tendering and Restricted Tendering (putting both methods at par and leaving the choice to the contracting authority), Open Tendering, and International Competitive Bidding (“ICB”), with alternative methods to be used only as otherwise provided for under each respective Instrument. In contrast, the GPA and UNCAC do not specify a preferred method of procurement.

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66 Article 9(1) b, UNCAC.

67 In the case of the Utilities Directive, contracting authorities are free to choose among the open procedure, restricted procedure and negotiated procedure with prior publication of a contract notice.
82. **Framework Agreements ("FAs").** The use of FAs has increasingly become an important procurement method (or as otherwise known under the EU Directives, “procurement technique”) in many systems around the world. In this respect, the EU Directives, the UNCITRAL Model Law and the World Bank Procurement Guidelines all include provisions on FAs. Although FAs are not expressly contemplated under the GPA, given the GPA’s broad definition of procurement methods, the use of FAs arguably could be accommodated within the scope of the methods identified in the GPA. It is generally noted among the Instruments that FAs may be concluded with one or more suppliers. The various Instruments generally contemplate FA durations of no more than 3 to 5 years. With the exception of the World Bank Guidelines, which permit use of FAs only for goods/works/non-consulting services, the Instruments permit use of FAs for all types of procurement, including advisory or consulting services. There also are some differences, mainly on procedural aspects of FA procurement, among the Instruments.

83. **Use of Electronic Means.** All of the Instruments encourage the use of electronic means in the conduct of public procurement, and emphasize that the means chosen should be readily available and shall not restrict access to the procurement proceedings. Furthermore, most of the Instruments (the EU Directives, GPA and UNCITRAL Model Law) set out specific requirements for the use of electronic means in the conduct of procurement proceedings, including without limitation, the need for measures to secure the authenticity, integrity and confidentiality of information. Additionally, the Instruments require that the types of technology and software to be used shall be of a kind generally available and interoperable with other generally available information technology systems and software. With the exception of the World Bank Procurement Guidelines and UNCAC, the Instruments contemplate specific procedures for procurement through auctions using electronic means -- termed electronic auctions under the GPA and EU Directives, and electronic reverse auctions under the UNCITRAL Model Law.

**Evaluation Criteria/Basis for Award**

84. UNCAC does not prescribe details but merely provides that its State Parties shall establish procurement systems and tendering rules including selection and award criteria on the basis of the principles of transparency, competition and objective criteria in decision making. All of the other Instruments, namely, the GPA, EU Directives, UNCITRAL Model Law and the World Bank Guidelines, include specific provisions on evaluation criteria and the basis for determining the successful tenderer and thus for contract award. Such considerations differ, however, among the Instruments.

85. All the Instruments\(^68\) provide that bidding documents for a particular procurement shall specify the relevant criteria in addition to price to be considered in bid evaluation, as well as the manner in which they will be applied for purposes of determining the successful tenderer. Similar to the EU Directives and UNCITRAL Model Law, the World Bank Procurement Guidelines envisage the possible use of non-price criteria that include, among others, payment

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\(^68\) To reiterate, UNCAC does not prescribe how this is defined in the tendering rules, but requires that such selection and evaluation criteria are based on the principles or transparency, competition and objective criteria in the decision-making. Article 9 (1) b.
schedule, delivery time, operating costs, efficiency and compatibility of equipment, availability of after sale services and spare parts, etc.  

86. However, the World Bank Procurement Guidelines differ from the other Instruments by requiring that the evaluation criteria shall be, to the extent practicable, expressed in monetary terms in the evaluation provisions of the bidding documents. Exceptionally, the Procurement Guidelines allow deviations from this requirement in cases when the specifications cannot be precisely defined or factors other than price cannot always be expressed in monetary terms, such as may occur in connection with the procurement of complex information technology and textbooks.  

87. With regard to the basis for award, the World Bank Procurement Guidelines contemplate that contract award to be made to the bidder who meets the appropriate standards of capability and resources, and whose bid has been determined to be substantially responsive to the bidding documents, and to offer the lowest evaluated cost -- in other words, the qualified bidder submitting the “lowest evaluated substantially responsive bid.”  

88. By contrast, the GPA, EU Directives and UNCITRAL Model Law each contemplate two main bases upon which contract award may be made, namely: (i) the lowest price, when price is the only award criterion; and (ii) the most (economically) advantageous tender, when price is considered in combination with other criteria specified in the applicable bidding documents. Where criteria in addition to price are used, the EU Directives and the UNCITRAL Model Law (under most procurement methods) specify that the evaluation criteria should be assigned, in the applicable bidding documents, specific relative weights to be used in the evaluation of tenders. Also, the EU Directives specify that said evaluation criteria shall be linked to the subject-matter of the contract in question.  

89. With regard to consulting services, the World Bank Consultant Guidelines include specific methods for the selection of consultants. These methods provide a basis for award in keeping with the title ascribed to each method, for example, price and quality (Quality and Cost-based Selection, or QCBS), quality only (Quality Based Selection, or QBS), lowest cost amongst the technically responsive proposals (Least Cost Selection), and highest ranked technical proposal within the specified budget (Fixed Budget). In terms of the evaluation criteria to be applied, the World Bank Consultant Guidelines identify the consultant’s specific experience, the quality of the methodology proposed, qualifications of the key experts proposed, the transfer of knowledge, and the extent of participation of nationals among key experts in the performance of the assignment. The selected criteria and the respective weight shall be determined based on the nature and complexity of the specific assignment and shall be disclosed in the Request for Proposal (“RFP”). The other Instruments do not provide for distinct methods and/or contract award criteria for the category of consulting services. However, while the UNCITRAL Model Law itself does not provide specific methods for the procurement of consulting services, the Draft Guide to UNCITRAL Model Law does note that multilateral development banks historically have included methods with features of request-for-proposals without negotiation.

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69 The UNCITRAL Model Law, for example, provides an illustrative list of other possible criteria that may be used depending on the nature of a particular procurement.

70 Par. 2.52 fn. 54, Procurement Guidelines.
Complaints Review Mechanism

90. All of the Instruments require the establishment of an effective and independent complaints review mechanism as a tool to meet the transparency and accountability requirements guiding the Instruments and public procurement systems in general. In this regard, depending on its specific purpose and applicability, each Instrument sets forth the fundamental principles guiding a complaint review mechanism.

91. More specifically, the GPA requires each party to provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure. As the GPA reflects a lowest common denominator approach to which the Parties should adhere, with the exception of a few high-level requirements explained below, it does not lay out detailed rules and procedures. Similarly, the Remedies Directives “are designed to help ensure that the procurement that is not carried out fairly and transparently will be remedied through review procedures,”71 and to coordinate national review systems by imposing some common standards intended to ensure availability of rapid and effective means of redress. To that end, EU Member States are required to ensure the implementation of these Directives by effective, available and transparent mechanism. The UNCITRAL Model Law and UNCAC similarly promote the need for an effective review/challenge system. The World Bank, on the other hand, has developed a special arrangement for the review of complaints. In contrast to the other Instruments, the review of complaints related to World Bank-financed contracts is of a special nature, stemming from the fact that its Borrowers are responsible for the conduct of procurement. Therefore, complaints should be administered by the procuring entities in charge for the procurement. Only when the complaining parties are not satisfied with the Borrower’s response, they can address their complaints to the World Bank. However, the role of the World Bank in this review is in no way a substitute for an independent body, as it should be considered strictly within the context of the fiduciary function, deriving from the World Bank’s Articles of Agreement. In placing the responsibility for the complaints review on Borrowers, the World Bank, through its Procurement Guidelines, requires them to have in place an effective and independent complaints review mechanism.

92. It should be noted that the decision to design and establish a domestic complaint review system, perhaps more than for any other aspect of public procurement, is closely related to the constitutional, legal, administrative and judicial traditions of the Party/Member State seeking to establish such a system. Probably for that reason, the compared Instruments do not provide detailed requirements/arrangements in this respect, leaving flexibility to the Party/Member State. Nevertheless, the Instruments set forth in broad terms some of the basic elements that would contribute to an effective complaints review mechanism. Based on international good practice, the following general categories represent the minimal elements to be considered in establishing

a complaints review mechanism. However, these categories are not exhaustive nor are they presented in any order of priority. 72

93. **Standing.** The Instruments vary in specifying the parties that are eligible to file a complaint. In the case of the Remedies Directives, such standing is given to any “person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.” 73 The GPA permits “a supplier who has or has had an interest” to submit a complaint. It would appear, *prima facie*, that the GPA is more restrictive in the range of parties allowed filing a complaint. However, various commentators 74 have argued that the GPA provides for a broader scope of eligible parties, i.e., subcontractor, suppliers, etc. and that it is up to a GPA Party to expand the right to parties other than the main contractors in its domestic procurement legislation. With respect to the World Bank Guidelines, bidders who submitted a bid before bid submission deadline shall be eligible to submit a complaint. The consistent interpretation of the World Bank Guidelines has been that the first tier contractors only, i.e. those who submit the bid, are eligible to file a complaint. Similarly, the UNCITRAL Model Law extends the eligibility to file a complaint to “a supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity.” 75

94. **Forum for review.** The forum for review, including determining where to locate it and whether to establish a tiered review system, is an important consideration in establishing an effective complaints review system. In this respect, there are differences among the Instruments. More specifically, the GPA contains a specific requirement that the Party should establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities. The current wording of the GPA provides great latitude to a Party in complying with this requirement. Similarly, the UNCITRAL Model Law presents review by the procuring entity as an option that can be considered, but does not make it a mandatory first step in the challenge process. Depending on the legal and administrative context of the enacting State, the UNCITRAL Model Law offers three alternatives, namely: (i) as an optional first level of review, application for reconsideration by the procuring entity if a contract has not yet been awarded; (ii) application for review by the independent body designated to conduct such review; and (iii) application for review or appeal to a competent court. The Remedies Directives, on the other hand, include a provision on the possibility to demand the complaining party to first seek redress before a contracting authority. Furthermore, the Remedies Directives specify that whenever the bodies responsible for review are not judicial in character, certain requirements are to be met, including that the decisions shall be subject to judicial review or review by another body which is a court or tribunal within the meaning of the EC Treaty and independent of both the contracting authority and review body. As explained above, the World Bank Guidelines require in all cases (unless the complaint relates to allegation for fraud and corruption by the

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72 Because there is no uniformity in terminology among the various Instruments -- “challenge” (GPA and UNCITRAL Model Law), “complaint” (World Bank Guidelines), “review” (Remedies Directives) -- the term “complaint” is used here for ease of reference.
75 Article 64, UNCITRAL Model Law.
Borrower) that the complaint is addressed and reviewed at the procuring entity level. The Bank will only review a complaint when the complaining party is not satisfied with Borrower’s response.

95. **Interim relief.** In this respect, the GPA and the Remedies Directives require the Parties/Member States, to provide for interim measures to preserve the rights of the complaining party. Such measures include automatic suspension of the procurement proceedings at the time of filing of complaints. In the same vein, the World Bank Guidelines envisage that the Bank’s review will not be completed until the complaint is fully examined and considered. Thus, it is anticipated that no contract shall be signed without the Borrower having fully addressing the complaint. Similarly, the UNCITRAL Model Law contemplates a general prohibition on the entry into force of a contract while a complaint is being reviewed. The UNCITRAL Model Law also provides interim measures to preserve the rights of the complaining party, including the ability of reviewing entities to suspend the procurement proceedings upon the filing of a complaint. Additionally, both the UNCITRAL Model Law and the Remedies Directives provide for the imposition of a standstill period during which a procuring entity cannot accept the successful submission and disappointed parties can file complaints.

96. **Remedies.** The GPA requires that each Party shall maintain procedures that provide for corrective action or compensation for the loss or damage suffered, when the review body has determined that there has been a breach or failure of the agreement. Under the Remedies Directives, the remedies available to the review body include setting aside of the decisions taken unlawfully, awarding of damages and ineffectiveness of concluded contracts. Similarly, the UNCITRAL Model Law offers a listing of potential remedies that may be taken by the independent review body, including, among others: overturning a decision of the procuring entity, ordering the termination of procurement proceedings, and requiring the payment of compensation. With regard to procuring entity-level complaint review, the UNCITRAL Model Law provides that a procuring entity may overturn, correct, vary or uphold any decision or action taken in the procurement proceedings to which the complaint relates. The World Bank Guidelines do not have specific provisions with respect to the remedies in case of a complaint found to be grounded, except that the World Bank may require the Borrower to take the necessary steps to comply with the Guidelines, otherwise it would be subject to misprocurement and the remedies in the Loan Agreement such as cancellation or suspension of the loan. Other remedies are available under the World Bank’s Anti-Corruption Guidelines, if the complaint is grounded in a case of fraud or corruption.