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A REVIEW OF THE LEGAL ASPECTS OF JORDAN'S ACCESSION TO THE GOVERNMENT PROCUREMENT AGREEMENT

Final Report

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A REVIEW OF THE LEGAL ASPECTS OF JORDAN'S ACCESSION TO THE GOVERNMENT PROCUREMENT AGREEMENT

FINAL REPORT

SUSTAINABLE ACHIEVEMENT OF
BUSINESS EXPANSION AND QUALITY (SABEQ)

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AUTHOR: INTERNATIONAL BUSINESS LEGAL
ASSOCIATES (IBLAW)

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ABBREVIATIONS AND ACRONYMS

Draft GPR	Jordan Draft Government Procurement Regulation
GPA	Government Procurement Agreement
GP Committee	The Government Procurement Committee established under the GPA
IBLAW	International Business Legal Associates
SABEQ	Sustainable Achievement of Business Expansion and Quality – Jordan
The new text	The revised version of the GPA
The 1994 text	The GPA concluded in 1994 and which has been in force since 1996

EXECUTIVE SUMMARY

This Report examines two legal aspects of Jordan's accession to the GPA, namely: 1) whether the draft GPR is in harmony with the new text of the GPA, and 2) the legal requirements to ensure that the GPA will be constitutionally effective in Jordan upon accession. The first aspect is conducted against a comparison between the new text of the GPA and the 1994 text set out in section II.

Section III highlights the aspects of the draft GPR that are inconsistent with the new text, and explains the extent to which such inconsistency may affect the implementation of the GPA given the settled principle of the supremacy of international treaties. Section IV of this Report sums up the main implications of the new text for Jordan.

Finally, section V examines the constitutional requirements for ratifying the GPA, taking the view that ratification by the Parliament will be required for such a treaty. Reasons and justifications for this view are included.

I INTRODUCTION

I.1 BACKGROUND

The existing WTO Government Procurement Agreement (GPA) is a plurilateral agreement that has been signed by some of the members of the WTO in 1994 and came into force in 1 January 1996 (hereinafter “the 1994 text”). Upon joining the WTO, Jordan undertook to negotiate accession to the GPA. This commitment is recorded in the Party Working Report, which was referred to in the accession Protocol signed by the Government of Jordan and ratified by the Parliament.

In compliance with the above-mentioned commitment, the Government of Jordan started accession negotiations with the GPA members. While negotiations exceeded the anticipated time (one year upon accession to the WTO), serious and substantial steps towards accession have been, and continue to be, taken by the Government, including the drafting of a unified government procurement regulation with a view to satisfying the requirements of the GPA (hereinafter “the draft GPR”). Further, an initial entity offer has been submitted to the WTO GPA Committee and is subject to ongoing negotiations.

Pending these efforts, a new revised text of the GPA has been prepared by the existing GPA members. A draft of 8 December 2006 is published on the official WTO website. However, the draft seems to be subject to review and amendment. Thus, a version different than that of 8 December 2006 has been provided to IBLaw team by SABEQ, which version incorporates Articles I – XXI “as at 28 June 2007”. In this Report, we refer to the revised version of the 1994 text as “the new text”. We rely on the version provided by SABEQ. And unless otherwise indicated, it should be assumed that the two versions of the new text are essentially identical.

Crucial to the efforts of the Government of Jordan to accede to the GPA is to examine two aspects of the intended accession from a legal point of view: 1) whether the draft GPR¹ is in harmony with the new text, and 2) the legal requirements to ensure that the GPA will be constitutionally effective in Jordan upon accession. The purpose of this report is to examine and verify these aspects.

I.2 OBJECTIVES OF THIS REPORT

Since the draft GPR has been prepared on the basis of the 1994 text, the prime objective of this report is to examine whether the said draft is consistent with the new text. A Correlative objective will also be sought with respect to highlighting any possible implications for Jordan that can result from the new text and which were not there to be considered when Jordan submitted its initial entity offer and prepared its draft GPR.

¹ The English version of the draft GPR has been used for the purposes of this Report as instructed by the MIT.

A third objective – which does not depend on which version of the Agreement being acceded to – is to determine the legal requirements and procedures to ensure that the GPA will be constitutionally effective in Jordan, namely whether ratification by the Parliament of the Agreement is necessary.

I.3 ORGANIZATION OF THE REPORT

In order to achieve the objectives of this Report, it is necessary to conduct an analytical comparison between the 1994 text and the new text (section II below). Then, section III will examine the conformity of the draft GPR with the provisions of the new text. Section IV will highlight any possible special implications arising for Jordan from the new text. Finally, section V sets out the legal requirement and procedure to bring the GPA into force under the Jordanian Constitution.

II AN ANALYTICAL COMPARISON BETWEEN THE 1994 TEXT AND THE NEW TEXT

II.2 AN OVERVIEW

The new text differs from the 1994 text in several ways. It follows a new structure and aims to clarify general principles set out in the 1994 text. In doing so, the new text carries with it new specific obligations on the Parties

It can be said that the new text is clearer. It sets out definitions of its terms, and adopts a clear, logical order of articles. The underpinning principles of both texts are the same, namely, non-discrimination, reinforcing the liberalization of international trade, transparency and fighting corruption.

The main aims of the new text can be gathered from the new principles set out in its preamble compared to the preamble of the 1994 text.² Thus, one can draw together the following aims of the new text:

- a- To simplify the framework of the GPA by ensuring flexibility of the procedural commitments of the Parties. For instance, the new text attempts to relieve the Parties from certain reporting requirements.
- b- To take account of electronic means that can be used in the procurement process, and to encourage the use of such means.
- c- Clarify the general principles and obligations of the GPA by laying down detailed, specific obligations and requirements.

² The preamble of the new text was not fully reproduced in the copy provided by SABEQ, which refers to the version as at 28 June 2007. Therefore, the discussion above depends on the preamble of the text of 8 December 2006 as retrieved from the WTO website.

While the aims of the new text sound favorable to the Parties, one drawback of the aim mentioned in point c) above is that new members acceding to the GPA may find fewer aspects to negotiate about given the detailed specific obligations and requirements.

The following sections compare the two texts of the GPA with respect to the main themes of the Agreement as follows:

- Scope and Coverage
- General Principles
- Tender Procedures
- Transparency
- Challenges to the Decisions of a Procuring Entity
- Treatment of the Developing Countries
- Dispute Resolution

II.2 SCOPE AND COVERAGE

a) General Coverage

The new text elaborates on the scope of the Agreement both in positive and negative terms. Thus, Article II. 1 provides the general scope of application of the Agreement as in the 1994 text. That is, laws and regulations (referred to collectively as “measures” in the new text) regarding covered government procurement. Further, the new text explains that the Agreement applies whether the covered procurement is conducted by electronic means. Article II.2 of the new text explains the meaning and cases of covered procurements.

Moreover, Article II.3 clarifies the scope of the Agreement in negative terms by laying down the cases and circumstances that fall outside the ambit of the Agreement, unless a Party includes them in its annexes to Appendix I. Some of these excluded cases were scattered in the 1994 text and provided in concise terms, such as procurement related to international aid, which was excluded in “Notes”, attached to the text.

The new text requires the Parties, including acceding parties, to provide in a “positive list” the entities and services to be governed by the Agreement. (It is also being negotiated between the existing Parties whether there should be a positive list of the goods covered by the Agreement.) This is done through annexes to Appendix I of the GPA.

As will be explained in section II.7 below, the 1994 text afforded developing countries to negotiate exclusions and limitations as to national treatment regarding covered goods and services and to modify the scope of coverage under its annexes on grounds that were broader than those provided for in the new text.

b) General Exceptions to the GPA

Article III of the new text lays down purported “exceptions” to the GPA. These are largely the same as provided under Article XXIII of the 1994 text, namely, security, defense, public morals, etc.

We take note of the fact that, in its responses to the Jordan entity offer which explicitly excluded procurement related to public security and defense, the WTO GPA Committee questioned the need for a specific exception for public security and defense on the ground that Article III of the new text already provides for such an exception.

However, we take the view that Article III.1 of the new text (and indeed Article XXIII of the 1994 text) does not make an ‘absolute exception’ for procurement related to public security and defense. such, the said Article can be interpreted, not as excluding the matters in question, but as permitting derogation from the full implementation of the provisions of the GPA, e.g., not to abide by all information disclosure requirements.

Our view stems from the fact that Article III.2 provides for an exception for public morals and life etc., and allows ‘measures’ to implement this exception, whereas Article III.1 allows an action or the non-disclosure of information to protect essential security interests relating to procurement of arms or war materials or to procurement indispensable for national security and defense. It is clear that Article III.1 is much narrower than Article III.2, especially because “measures” referred to in the latter only include according to its definition in the Agreement laws, regulations, etc. And Article III.1 contains vague qualifications such as “essential” and “indispensable” which will have to be assessed when a Party decides to derogate from certain procedures under the GPA. Further, we find that a derogation under Article III.1 can be challenged by suppliers and Parties in accordance with challenging procedures and dispute resolution mechanisms adopted in the Agreement.

It is recommended therefore that the Government retains an explicit exception for public security and defense in its entity offer and not to rely on the text of Article III.1 of the new text (or XXIII of the 1994 text) if such an exception is deemed necessary.

Further, for reasons of lack of clarity in the new text with respect to the meaning and scope of the exception under Article III.2 and X.6 we recommend that the Notes in Jordan's entity offer should retain an explicit exception in this connection if such is deemed necessary.

c) Modification and Rectification of a Party's Coverage

After the Agreement comes into force for a Party, such Party can modify its annexes to Appendix I by transferring an entity from one annex to another, rectifying an annex, or withdrawing an entity from the annexes or make other modifications. This is all subject to notification to the Committee and to consideration by the same where objections to a proposed modification are made by other Parties.

While this power of modification is provided for in both versions of the GPA, the new text elaborates on the procedures of objections to a proposed modification, including time limits for notifying such objections. The new text also empowers the Committee to adopt arbitration procedures to deal with objections.

The outcome of the consideration of objections may be compensatory adjustments made by the modifying Party. Further, an objecting Party may withdraw substantially equivalent coverage. Such withdrawal is effective solely between the objecting Party and the modifying Party.

Finally, a modification should be supported by information and justification. As far as withdrawal of an entity is concerned, both versions require that such withdrawal be based on the elimination of government control or influence over the entity.

The rules relating to modification of annexes to Appendix I apply to all Parties, whether developed or developing countries.

II.3 GENERAL PRINCIPLES

The new text develops the principles embedded in the 1994 text. The new text articulates the requirements of non-discrimination and transparency (section II.5 below).

As far as the principle of 'national treatment' is concerned, the new text does not use the term 'national treatment' as the Agreement requires Parties to afford suppliers from each Party the most favorable treatment of national and foreign suppliers (Article IV.1). Like the 1994 text, the new text provides that non-discrimination does not apply to customs duties and the like (referred to as "measures not specific to procurement" in Article IV.7).

Likewise, the new text amends the principle relating to the adopted rules of origin by deleting the paragraph referring to Agreement on Rules of Origin annexed to the WTO Agreement.

The new text introduces two new headings for general principles. These are the principles relating to the conduct of procurement set out in Article IV.4 and the use of electronic means under Article IV.3.

The conduct of procurement should thus be in compliance with the GPA, avoid conflict of interest, and prevent corruption. Besides, the use of electronic means triggers the need for adequate standards and secure systems.

II.4 TENDER PROCEDURES

a- Methods of Tendering

The new text adopts the same methods of tendering as in the 1994 text, which are: open tendering, selective tendering, and limited tendering. The new text also retains the possibility of negotiation in the course of a procurement procedure.

Under Articles VII, VIII, and IX of the new text open tendering is viewed as the general rule. This is also the case under Article IX.1 of the 1994 text. If a procuring entity wants to use selective tendering, it shall state so in the procurement notice with certain information and criteria being included therein as prescribed by Article IX.4 and 5 of the new text.

Limited tendering may also be used in certain circumstances set out in Article XIII of the new text. These circumstances are largely the same as those contained in Article XV of the 1994 text. However, paragraph 1.g of Article XV relating to ‘new construction services consisting of the repetition of similar construction services ...’ is omitted from the new text.

As for negotiation, a Party may permit entities to conduct negotiations under Article XII of the new text. Article XII is shorter than the corresponding Article XIV of the 1994 text, as few paragraphs of the latter are omitted from the new text. However, this does not constitute a substantive change because the omitted paragraphs can be deemed redundant as their provisions are covered in other articles (confidentiality, affording participants equal opportunities and treatment).

It should be mentioned that in line with its aim regarding the regulation of electronic means, the new text provides for some requirements of electronic auctions in Article XIV.

It follows from the above discussion that the draft GPR should be reviewed to ensure that it conforms with the requirements of electronic auctions and does not contravene the omission of awarding ‘new construction’ to a previously contracted supplier in respect of similar services. This will be revisited in section III of this Report.

b- Tender Documentation

In Article X, the new text deals with the technical specifications and the tender documentation that should be provided to the participants. Paragraphs 1-6 of Article X correspond to Article VI of the 1994 text. However, the following discrepancies between the two versions should be highlighted:

1. The new text allows exceptionally where appropriate that the technical specifications include design or descriptive characteristics provided that the procuring entity states – where appropriate – that it will consider equivalent tenders. The 1994 text, while requiring that technical specifications not be based on design and descriptive characteristics, where appropriate, does not lay the requirement of ‘equivalent tenders.’
2. The new text provides explicitly that an entity can apply technical specifications to promote the conservation of natural resources or to protect the environment. While both versions allow exceptional measure to be taken to protect the environment, the new text removes any concerns that such technical specifications would be regarded as restricting competition.
3. The new text is clearer and stronger in its attempt to prevent conflict of interests that can result from seeking advice in preparing or adopting technical specifications from a person that may have a commercial interest in the procurement. The underlined words in the previous sentence do not appear in the 1994 text, and the word in italics is replaced there by the word ‘a firm’.

Paragraphs 7-11 of Article X of the new text relating to tender documentation replaces Article XII of the 1994 text. Both versions have substantially similar contents, but the new text adds information as to the use of electronic means and electronic auctions. It should also be pointed out that the two versions indicate different lists of possible criteria for awarding the contract that should be included in the tender documentation. However, since both lists are not meant to be exclusive this difference is not a major one.

The new text reincorporates a stipulation to the effect that in determining the date for the delivery of goods or the supply of services, a procuring entity shall take into account such factors as the complexity of the procurement, the extent of subcontracting, transport, and other factors mentioned in paragraph 8 of Article X.

Article X.10 requires the procuring entity to provide tender documentation to participating and interested suppliers, and to reply to their inquiries, whereas the 1994 text refers only to participating suppliers.

Finally, the new text requires the procuring entity to transmit any and all modifications or amendments to, or reassurance of, the tender (prior to the award of a contract) to all participating suppliers and in the same manner as the original information was made available. This requirement is provided as a general rule under Article VIII.11 of the new text, whereas it was unnecessarily mentioned in the 1994 text in relation to modifications resulting from negotiation with the participants since a general rule to the same effect was provided in Article IX.10 thereof.

c- Notices

Both versions of the GPA contain three kinds of notices related to government procurement: a notice of intended procurement, a summary notice of intended procurement, and a notice of planned procurement. However, the two versions provide for some different rules regarding the content and medium of communication of such notices.

(1) Notice of intended procurement³

Each procuring entity, whether under Annex 1, 2, or 3 of Appendix I, is required to issue a notice of intended procurement. It is understood from Article VII that such a notice can be made in the language of the Party whether or not it is one of the WTO languages.

Unlike the 1994 text, the new text requires explicitly that a notice of intended procurement contain the criteria for selection of qualified suppliers and for awarding a contract.

With regard to the medium of communication, the new text lays down new specific requirement of making the notice available through an electronic medium, provided it is accessible free of charge where the procuring entity belongs to annex one of Appendix I. For entities in annexes 2 and 3, the new text encourages them to provide the notice free of charge through an electronic means but confines their immediate obligation to making it available through links in a gateway that is accessible free of charge.

It is also noteworthy that Article VII.2.i of the new text presumes that tenders and requests must be submitted in an official language of the Party of the procuring entity, but allows a procuring entity to set another language in the notice. The said presumption is not clear in the 1994 text.

(2) Summary notice

Both versions of the GPA are essentially identical when it comes to the requirements of the summary notice in terms of the content and language (must be a WTO language) of such notice. However, the new text is more specific as to the time of issuing a summary notice, which must be at the same time as the publication of the notice of intended procurement.

(3) Notice of planned procurement

³ The 1994 text refers to a notice of proposed procurement which can be used as an invitation to participate.

It can be said that the notice of planned procurement is intended to help ensure transparency and forecasting of future procurements. Further, such a notice can be subsequently used as a notice of intended procurement by entities falling under annexes 2 and 3 of Appendix I provided a statement to this effect is included in the notice.

The new text makes the publication of a notice of planned procurement a requirement of all procuring entities that shall be made every fiscal year. By contrast, the 1994 text is unclear whether this is an obligatory requirement for entities listed in annex 1 of Appendix I since the relevant paragraph always refer directly or indirectly to the entities covered in annexes 2 and 3.

d- Qualification and Selection of Suppliers

(1) Conditions for participation

The new text requires the conditions of participation to be published in the notice of intended procurement (Article VII.j), whereas the 1994 text makes a specific requirement that such conditions be publishes in adequate time (Article VIII.a).

The new text restates, and adds to, the rules governing the conditions of participation. Thus, conditions shall be limited to ensuring the financial and legal capacity and the technical abilities of suppliers. A proviso under Article VIII.2.a of the new text – with no corresponding provision in the 1994 text – prohibits imposing the condition that a supplier has previously been awarded a contract by a procuring entity of a given Party.

The assessment of the participants shall be according to the published conditions, and the financial capacity shall be evaluated on the basis of the business of the supplier worldwide. These are common rules in both versions of the GPA (Article VIII new text; Article VIII.b and XIII.4.c of the 1994 text.)

The new text clarifies and qualifies the grounds for excluding a supplier. A list of such grounds is provided in Article VIII.4 provided there is 'supporting evidence'.

(2) Registration systems and multi-use lists

The new text specifies conditions and requirement to be complied with by entities maintaining registration systems and multi-use lists of qualified suppliers. In the 1994 text, the same were respectively called qualification systems and permanent lists of qualified suppliers.

The new text requires each Party to ensure that its procuring entities endeavor to harmonize their qualification procedures and their registration systems (Article IX.2).

Interested suppliers must be invited for inclusion in the multi-use list by issuing a notice to this effect. Such a notice must be published annually and made continuously available if published by electronic means. The content of the said notice is essentially the same under both versions of the GPA.

Under the new text, entities covered in annexes 2 and 3 of Appendix I may use a notice inviting for inclusion in multi-use lists as a notice of intended procurement provided they comply with the requirements stipulated in Article IX.12.

Further, the new text makes it clear and obligatory that a procuring entity shall promptly inform any supplier of its decision as to its request for participation or inclusion on the list. A supplier is also entitled to request and receive a written explanation of the reasons for an entity's decision to reject the supplier's request for participation or for inclusion on the list or to remove the supplier from a list. Such conditions were not specifically mentioned in the 1994 text.

e- Time Periods

Article XI of the new text incorporates criteria from the 1994 text for assessing the time afforded to suppliers to prepare for the tender. The new text adopts such minimum periods for submitting tenders or requests as essentially stipulated in the 1994 text. However, in selective tenders a minimum of 40-day period runs as of the date of issuing invitations to tender whether or not a multi-use list is used, whereas the period runs from the initial issuance of an invitation to tender if a list is used under the 1994 text.

The minimum periods can be reduced in certain circumstances mentioned in Article XI.4-8. These add and amend Article XI.3 of the 1994 text.

f- Treatment of Tenders and Awarding a Contract

All tenders must be treated according to procedures that guarantee fairness, impartiality, and the confidentiality of tenders (Article XV.1 of the new text). Like the 1994 text, the new text provides that a supplier shall not be penalized if his tender is received after the deadline if delay is due solely to mishandling on the part of the procuring entity. However, the new text omits the possibility that the procedures of a procuring entity may allow considering late tenders in exceptional circumstances.

All the suppliers must be afforded equal opportunities to correct unintentional errors in their tenders.

Except if a procuring entity decides not to award a contract on grounds of public interest, the entity shall award the contract to the supplier deemed to be capable (not fully capable as under Article XIII.4.b of the 1994 text) of fulfilling the terms of the contract.

Article XV.7 of the new text adds to the 1994 text that a procuring entity shall not cancel procurement or modify awarded contracts in a manner that circumvents the obligations under this Agreement. This new paragraph raises the following two concerns:

- (1) The prohibition of canceling procurement may well square with the possibility of not awarding a contract for public interest reasons. Thus, recourse to public interest does not bar challenges and disputes on the basis that discrimination and not genuine public interest reasons lie behind such decision.
- (2) As in other civil law countries, the Jordanian legal system recognizes the power of the public administrative authority to modify 'administrative contracts' in exceptional circumstances and on public interest grounds or if the contract itself provides for such power. Given that for most entities covered in Jordan's annexes procurement contracts can be classified as 'administrative contracts', Article XV.7 may be interpreted as restricting the powers of the public administration to modify such contracts.

II.5 TRANSPARENCY

a- Different Aspects of Transparency

Transparency is a major theme in government procurement and the two versions of the GPA; so much, so that the competent WTO Working Group is preparing a future agreement on transparency in government procurement.

While there are specific requirements of transparency under the new text (e.g., Article XVI), it should be emphasized that transparency is present in very many aspects of the implementation of the GPA. In addition, there is a general obligation on the Parties to provide information to suppliers and other Parties on the implementation of the Agreement. Therefore, this section cannot be an exclusive account of the requirements of transparency under the GPA.

However, we can highlight the main aspects of transparency in relation to different themes of the GPA as follows (these aspects may overlap with other sections of this Report):

1. Transparency as to the methods of procurement

As already mentioned, open tendering is the general rule under the two versions of the GPA, but entities are allowed in certain circumstances to use limited tendering and selective tendering. In order to ensure that these methods comply with the requirements of the Agreement, a procuring entity must prepare a report on each contract awarded through limited tendering (Article XIII.2 of the new text). If an entity intends to use selective tendering, it must state so in the notice of intended procurement.

2. Information about the national procurement system
Article VI of the new text requires each Party to promptly publish laws and relevant legal instruments in an officially designated electronic or paper medium that is widely disseminated and remains readily accessible to the public. Further, each Party shall provide an explanation of such instruments to any Party upon request. Appendix II shall include the medium of publication.
3. Information about procurement opportunities and qualifications
As mentioned above, a procuring entity shall issue different notices. Appendix III must specify the media in which such notices are published. Further, the qualifications and conditions of participation must be published in the relevant notices and tender documents. In addition, multi-use lists and invitations for inclusion thereon must be published as explained above.
4. Reviews, records, and reporting
The new text requires each procuring entity to organize and maintain for at least three years from the date of awarding a contract: records of the documentation of tendering and relevant reports as well as of data relating to the traceability of the conduct of covered procurement by electronic means (Article XVI.3).

Further, Article XVI.4 requires each procuring entity to conduct and report statistics on its covered procurement and contracts. The content of such reports varies depending on the kind of procuring entity (to which annex of Appendix I it belongs). As a measure to reduce administrative expenses, Article XVI.5 allows a procuring entity to publish the required statistics and reports on a web site instead of submitting reports to GP Committee, provided the address of the web site is notified to the Committee.

5. Decisions
A procuring entity is required to notify suppliers of the decisions affecting them (e.g., rejecting requests and tenders, disqualification or removal from lists). Further, a supplier is entitled to get explanations of such decisions. Procuring entities are also required to explain the grounds for awarding a contract to the successful supplier.

A procuring entity must also publish within 72 days after the award of each contract a notice in the media specified in Appendix III with certain actualities as per Article XVI.2.

However, Article XVII.2 and 3 lay down limitations on the duty to disclose information, relating to the protection of competition and respect for law enforcement, public interest, and the legitimate commercial interests of particular persons.

b- Observations on The Requirements of Transparency

Compared with the 1994 text, the above-mentioned aspects of transparency are essentially the same in both versions of the GPA. However, the statistics and reports required under the new text are not specifically required to contain information about the country of origin of the goods supplied.

Admittedly, transparency entails administrative expenses and requires dedicated labor. This is because the new text (and the 1994 text too) lay down specific requirements and not merely general principles.

The new text attempts to mitigate such expenses by allowing electronic publications in notified official web sites. Yet, it should be remembered that Parties and suppliers are entitled to request different kinds of information and explanations in writing.

Therefore, the solutions adopted by the new text to reduce expenses relating to transparency may not yield substantial relieves for the procuring entities.

II.6 CHALLENGES TO THE DECISIONS OF A PROCURING ENTITY

Both versions provide that each Party shall ensure that there is a challenging procedure made generally available. The requirements of such a procedure are well understood as aiming to ensure due process.

However, the new text adds two specific requirements: first, hearings can be in public upon a request of the complainant; and secondly a complaint can be considered initially by a body other than a judicial or independent administrative authority subject to challenge before an independent judicial or administrative authority.

II.7 TREATMENT OF THE DEVELOPING COUNTRIES

While the new text aims, like the 1994 text, to accord developing countries differential treatment, it seems to us that the new text actually omits some aspects of preferential treatment and options that are available under the 1994 text.

For instance, Article V.1 of the 1994 text sets out specific objectives of and justifications for a favorable treatment of the developing countries, such as safeguarding their balance-of-payments, promoting domestic industries and supporting industrial units that are dependent on government procurement. By contrast, Article V.1 of the new text makes only a general reference to 'the development, financial and trade needs' of developing countries.

Further, Article V.2 of the 1994 text requires each Party to facilitate increased imports from developing countries, whereas Article V.2 of the new text provides that each Party shall accord goods and services and suppliers of a developing country the treatment of the most favored nation subject to terms negotiated with such developing country. Thus, the 1994 text is stronger as to this requirement of favorable treatment since it could be interpreted as permitting 'positive discrimination' in favor of the developing countries.

Moreover, Article V.4 of the 1994 text permits a developing country to negotiate mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products, or services that are included in its coverage list. There is no equivalent of the said provision in the new text.

Another weakness in the new text is that developing countries are subject to the conditions for modifying their coverage, which are mentioned above (II.2.c). By contrast, Article V.5 of the 1994 text allows a developing country to modify its coverage on more grounds relating to its development, financial, and trade needs. A developing country may also request the Committee to grant exclusions after the agreement comes into force.

Yet another weakness in the new text is that it incorporates a timid, general provision as to the role of the Parties in offering technical assistance and capacity building to a developing country. This is in contrast to the obligation of each developed Party under the 1994 text to provide technical assistance to a developing country upon request of the latter. Such assistance must be provided on a non-discrimination basis and take different forms specified by way of example in Article V.8-10 of the 1994 text.

In addition, unlike the 1994 text, the new text does not contain a requirement that developed Parties shall establish an information center to respond to inquiries from the developing countries. Nor does the new text contain a special provision to ensure even more favorable treatment to the least developed countries or to offer assistance to potential tenderers from least developed countries.

However, the new text provides certain rules to ensure a differential treatment of the developing countries. Thus, subject to the agreement of the Parties, a developing country may adopt and maintain a number of specific transitional measures (offsets, price preference, phased-in addition of entities or sectors, and a threshold higher than its permanent threshold). Similarly, a developing country may be granted an implementation period.

A transitional or an implementation period may be extended by the Committee upon request from the concerned developing country. However, the new text does not prescribe certain procedures for such request and determination of the Committee, leaving such procedures, including voting on decisions, to be determined by the Committee itself.

Like the 1994 text, the new text requires the Committee to review the operation and effectiveness of Article V on the treatment of developing countries. It remains a matter of interpretation what modifications – if at all- the Committee can introduce under through the exercise of this power.

Finally, subject to further negotiations of the new text:

- The new text may require transitional and implementation periods and measures to be listed in a new seventh annex of Appendix I.
- The new text requires compliance with the conditions that may be set by the Committee regarding the application of any price preference granted by a developing country to suppliers from another developing country pursuant to an agreement between such countries. (The last two points appear in the version provided by SABEQ but not in the version of 8 December 2006.)

II.8 DISPUTE RESOLUTION

Both versions of the GPA require that disputes between Parties be settled through consultations and, failing such, by the Dispute Settlement Board according to the Understanding on Rules and Procedures Governing the Settlement of Disputes.

However, the new text omits details on specific procedures and the composition of panels by the Dispute Board. As such, the new text does not modify the above-mentioned Understanding.

It should be pointed out that a Party may complain not only from a breach of the Agreement but also from any measure whether or not it conflicts with the Agreement if the complaining Party argues that it impedes the Agreement. However, Article XXII.15 (of the new text as at 8 December 2006) requires the Committee to review the applicability of Article XX.2.b, which allows complaints from measures not conflicting with the Agreement. (We reserve further comments on Article XXII of the new text since it is under continuing negotiations and has been omitted from the version provided by SABEQ.)

III EXAMINING THE CONFORMITY OF THE DRAFT GPR WITH THE NEW TEXT

III.1 AN OVERVIEW

The GPA contains different kinds of provisions. Some provisions lay down general principles, whereas others prescribe specific requirements, procedures, or criteria. Therefore, the assessment of the conformity of the draft GPR with the new text requires:

- Verifying that those specific requirements and procedures provided by the new text are included in the GPR; and
- Ensuring that no provision in the GPR is in conflict with the new text.

In examining the draft GPR, however, we take into account that it is intended to be a unified regulation for all government entities and public procurements. As such, it would contain rules relating to uncovered procurements. ***Therefore, it should be emphasized that not every non-conforming provision will necessarily have to be removed or amended. Rather, it should be remembered that upon the entry into force of the GPA, the provisions of the Agreement would supersede any rule to the contrary contained in national legislation so long as the case falls within the scope of the Agreement.***

Nevertheless, national rules, which conflict with the GPA, will have to be amended if they breach a general principle of the Agreement and the Agreement does not contain relevant specific rules that can be directly applied by courts.

Accordingly, the following subsections examine the conformity of the draft GPR in terms of the two aspects mentioned above.

III.2 WHETHER THE DRAFT GPR CONTAINS THE SPECIFIC REQUIREMENTS OF THE NEW TEXT

a) General Principles

The draft GPR is based on the same principles and bases of coverage as the new text. Thus, the definition of procurement under Article 2 coincides with Article II.2.(a) and (b) of the new text. Further, the principles of transparency, ensuring equality between bidders (non-discrimination against participants) and fair competition are also recognized by the draft GPR by virtue of Article 3 thereof; the same principles are reflected in several provisions of the draft, e.g., those relating to the treatment of tenders.

It should be recognized that the draft GPR is in itself consistent with the principle of the new text regarding the unification of national legislation on procurement and the adoption of standard rules for all procuring entities.

The valuation of procurement under Article 25 of the draft GPR is consistent with the rules pertaining to valuation in the new text.

b) Use of Electronic Means

While the new text accommodates and encourages the use of electronic means subject to general principles of security and authenticity, the draft GPR recognizes that electronic means may be used, but leaves the matter to be regulated through subsequent instructions to be issued by a Higher Commission of Government Procurement under Article 254 of the regulation. The draft GPR, however, sets out the general principles that such instructions should follow.

c) Notices

Article 18 of the draft GPR requires the procuring entities to prepare and publish planned procurement. Article 26 of the regulation requires certain features of planned procurement to be published in the first month of the fiscal year. This serves as the notice of planned procurement under Article VII.4 of the new text. However, since the draft GPR allows the plan of future procurement to be for more than one year, it would be appropriate to set rules regarding the time of publishing and republishing such plans. In any event, however, the existing rules on planned procurement would not constitute per se a breach of the new text, since the latter encourages, and does not require, entities to publish such notices.

Likewise, Article 88 of the draft GPR meets the requirements of the notice of intended procurement. The content of such notice under Article VII.2 of the new text is more elaborate and some elements are mentioned in the regulation, such as any options, the estimates relating to recurring contracts. However, Article 89 of the regulation is a minimum and the missing elements are required in the tender documents in general.

However, it is unclear whether the tender documentation can be offered free of charge in respect of procurement by entities mentioned in Annex 1 to Appendix I. Further, the draft GPR requires procuring entities to publish a summary of planned procurement but does not require publishing a summary of the notice of intended procurement (call for tender). Such summary notice is required under Article VII.3 of the new text.

d) Tender Documents

The draft GPR sets minimum tender documents and the contents thereof. The relevant provisions are in line with the new text. In particular, the regulation requires specifications to be function-based, excluding descriptive, design characteristics or reference to trademarks and the like. If the tender documents contain descriptive features and trademarks or patents, the phrase "or functionally in performance" must be inserted.

e) Prequalification

The regulation requires prequalification of participants to be used in international tenders. The procedures for prequalification meet the requirements of the new text in terms of transparency and non-discrimination (Articles 37, 41-59). The regulation recognizes the right of participants to obtain information about the prequalification process and the decisions of qualification and disqualification.

However, with respect to the permissible bases for disqualification under Article 55 of the draft GPR, it is noted that paragraph (b) of the said Article is broader than the corresponding Article VIII.4.c of the new text. The latter allows disqualification on grounds of 'significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts', whereas the former

refers to 'violation of any of its [the participant's] contractual obligations of any procurement transaction within or outside the Kingdom'.

f) Classification of Suppliers

Article 38 of the draft GPR adopts a form of classification of suppliers which constitutes a 'registration system' under the new text. The regulation makes the classification list annual and permits applications for inclusion on it at any time except the last two months of the year.

It should be pointed out that paragraphs 9 and 10 of Article IX of the new text require that: requests for inclusion shall be admissible at any time, and that where the list is annual, a notice of inclusion shall be permanently published on the web site indicated in Appendix III. These requirements are not addressed in the regulation.

g) Treatment of Tenders

While the draft GPR meets essentially the requirements of non-discrimination and transparency in the treatment of tenders, the following points should be reconsidered:

1. The regulation does not provide for not penalizing a supplier for the late submission of its bid if delay was solely caused by mishandling on the part of the procuring entity. As such, Article 106.g of the regulation is stricter than Article XV.2 of the new text.
2. Similarly, Article 107 of the regulation allows accepting modifications and corrections of a bid, but unlike Article XV.3 of the new text it does not explicitly require the procuring entity to afford the same opportunity to all participants.
3. Article 139.b of the regulation allows a procuring entity to withhold reasons for rejecting a bid. This is in conflict with the right of a participant to request information under Articles XVI and XVII of the new text.
4. Also, Article 168.2 of the regulation prohibits the disclosure of information relating to the evaluation of bids and the comparison between bids. But a procuring entity is required to provide an unsuccessful bidder with such information under Article XVI.1 of the new text.

h) Challenging the Decisions of a Procuring Entity

The draft GPR provides for means of challenging decisions relating to the procurement procedures. However, while the new text requires that the minimum time limit to submit a challenge shall not be less than 10 days (Article XVIII.3), the regulations sets out a time limit of 7 days for challenges under Article 272, 5 days under Article 273.2, and 4 days for objections to decisions of disqualification under Article 56.

The means of challenge provided for in the regulation are of administrative nature. The procedures are left for subsequent instructions. It should be realized that some procuring entities might not be subject to the jurisdiction of the High Court of Justice. It is the decision of the Minister or the committee to be established by the Commission, which can be challenged before the said court.

Article 271.b of the regulation immunizes decisions of canceling procurement or rejecting all bids against challenges. Such an exception is inconsistent with the GPA.

i) Records and Reporting

The draft GPR requires that information, decisions, and documents relating to each procurement to be recorded. Each procuring entity is required to submit certain reports and statistical reports to the Commission. As one function of the Commission is to follow up with international treaties, it should be assumed that the Commission will take necessary steps to ensure that required reports and data is published and reported to the GP Committee under the GPA, including publishing required data, notices, and reports through paper and/or electronic media specified in Appendix III.

III.3 WHETHER THE DRAFT GPR CONTAINS PROVISIONS CONFLICTING WITH THE NEW TEXT

a) The Supremacy of GPA

As mentioned above, the draft GPR is a unified legislation that applies to all government procurement. As such, it governs procurements that fall outside the scope of the GPA. Therefore, it is not surprising that there are provisions which do not take the GPA into account. A good example of this is Article 87.b of the regulation.

Generally speaking, a conflict between the regulation and the GPA will be resolved by administrative and judicial authorities in favor of the latter. This is because an international treaty prevails over national legislation in case of contradiction. And this is a settled principle followed by the courts.⁴ Indeed, the regulation itself emphasizes that international treaties shall be applied where they contradict the provisions of the regulation (e.g., Articles 5 and 87.a).

However, the recognition of the supremacy of an international treaty may not be in itself a remedy where the requirements of the treaty cannot be implemented without there being a compatible national legislation to prescribe relevant procedures. For instance, time limits for submitting a challenge under the GPA can be directly applied despite the non-conforming provisions of the regulation. By contrast, the requirements of due process of determining a challenge which are set out in the new text (and the 1994 text) cannot be met without compatible procedural provisions. As

⁴ Ct. Cass. Civ. 1824/2005, 25 Oct. 2005; 1477/2005, 7 Sep. 2005.

mentioned above, the regulation leaves the detailed procedures to be prescribed by further instructions.

b) The Relevance of the Entity Offer

Because of the principle of the supremacy of international treaties, certain provisions of the regulation which are intended to supersede the GPA must be included in the relevant annexes and general notes in the entity offer submitted by the government of Jordan. These provisions are:

- The exceptions under Article 4;
- The offsets aiming at strengthening SMEs, such as price preference and apportioning of large procurements and other measures under Article 263;5
- The possibility of stipulating domestic content under Article 228.v.
- For certainty purposes, direct execution under Article 171 of the regulation.

c) Methods of Tendering

The new text incorporates the same three methods of tendering contained in the 1994 text, namely: open tendering, selective tendering and limited tendering. The draft GPR defines four methods: general tendering, limited tendering, purchase from a single source, and a two-stage tender. Obviously, a general tender is the equivalent to an open tender. In addition, it is our understanding that a limited tender and a purchase from a single source fall within the concept of limited tender under the GPA, and that a two-stage tender corresponds to a selective tender. Therefore, despite the apparent discrepancy between the concepts of the regulation and the GPA, we find the regulation to be compatible on the possible methods of tendering.

The regulation defines local and international tenders. Article 87.b of the regulation makes local tenders to be the general rule. However, Article 87.a and the principle of the supremacy of international treaties reverse the rule in respect of procurements covered by the GPA.

d) Cases of Limited Tendering

Article 66.8 of the regulation allows resort to limited tendering in respect of additional services and works that are similar to a previously awarded contract. However, the new text omits this justification for limited tendering which is available under the 1994 text. Again, Article 66.8 would be set aside in respect of procurement uncovered by the GPA by virtue of the supremacy of international treaties, even if it is retained in the regulation to apply to uncovered procurement.

e) Technical Specifications

⁵ A detailed examination of the legal aspects of possible measures regarding SMEs is deferred until a forthcoming study on a special SME program for Jordan is accomplished.

The draft GPR requires the specifications of procured items (goods, works, and services) to satisfy at least Jordanian standards (Article 21.f). In contrast to this, both versions of the GPA require that, as a general rule, international standards shall be followed where such standards exist; otherwise national standards, technical regulations or building codes may apply (Article X.2.b of the new text).

It follows that the requirements of technical specifications under the regulation may not be identical to those provided for in the GPA.

f) The Cost of Tender Documents

The draft GPR assumes that participants will pay for the tender documents. However, the GPA requires that entities listed in annex 1 of Appendix I make such documents available free of charge through a Web site. The regulation should provide that tender documents may be provided free of charge if the procuring entity or an international treaty so requires.

IV POSSIBLE IMPLICATIONS OF THE NEW TEXT FOR JORDAN

This section sums up the implications for Jordan that may result as a consequence of the adoption of the new text. It should be mentioned that such implications bear on matters of policy and factors that may be considered in accession negotiations and do not have direct influence on the content of the draft regulation.

1. The treatment of developing countries is based on narrower grounds in the new text.
2. The power of a country to modify its annexes to Appendix I (e.g., by removing an entity from a list) will be limited under the new text.
3. The possibility of obtaining an extension of transition or implementation periods is contingent on the procedures and voting requirements that will be set by the GP Committee in the future. No specific relevant criteria are mentioned in the new text.
4. The Agreements with Arab and foreign governments referred to in Article 5.b of the draft GPR may be restricted since mutual price preferences under them will be subject to the conditions of the GP Committee.
5. Some provisions of the draft regulation would be better amended as explained in the previous section of this Report.
6. The exceptions suggested in the entity offer with respect to security and defense should be explicitly retained since the GPA can be interpreted as permitting derogation from certain requirements but not an exclusion of a sector altogether.
7. The potential administrative expenses resulting from the implementation of the Agreement, especially with regard to transparency requirements, appear to be the same as may ensue from the 1994 text, although electronic means can substitute paper reporting for limited purposes.
8. Parties are considering adding an annex to Appendix I in respect of goods. If this is agreed, a positive list of covered goods will need to be prepared.

V THE CONSTITUTIONAL REQUIREMENTS TO RENDER THE GPA ENFORCEABLE IN THE JORDANIAN LEGAL SYSTEM

V.1 THE RELEVANT RULES IN GENERAL

The Jordanian Constitution of 1952 laid down the powers and requirements for making and joining international treaties. Section 33 of the Constitution – as amended in 1958 – provides that:

- ‘1. The King declares war, concludes peace, and makes conventions and treaties.
2. The conventions and treaties, which entail committing the treasury to any expenses or affect the public or private rights of Jordanians shall not be effective unless approved by the National Assembly [the parliament]. In any event, the conditions of any convention or treaty may not be contrary to the declared conditions.’

It follows that there are two categories of international treaties. The first category includes the treaties which do not result in public expenses from the treasury or in affecting the rights of Jordanians; such treaties become effective by virtue of a Royal Decree or Assent without recourse to the Parliament.

The second categories of treaties, which give rise to public expenses or affect the rights of Jordanians, have to be approved by the Parliament.

Where an international treaty is duly approved by the King or the Parliament as the case may be, Jordanian courts have been consistent in ruling that the treaty supersedes any enacted law that is inconsistent therewith regardless of the date of the coming into force of such law. Jordanian courts take this position in the absence of any constitutional provision that explicitly upholds or contravenes the principle of the ‘supremacy of international law’.⁶

V.2 THE ISSUES

Under international law, a treaty becomes effective between the Parties in accordance with the requirements stipulated in the treaty itself. This in the case of the GPA is the laps of thirty days as of the depositing the accession instrument with the Director-General of the WTO. However, the effectiveness of a treaty as a matter of international law does not make it directly enforceable in the legal system of a Party (at least as far as Jordan is concerned). Therefore, the issue of the enforceability of an international treaty in Jordan is a matter of national law.

⁶ Ct. Cass. Civ. 1824/2005, 25 Oct. 2005; 1477/2005, 7 Sep. 2005; 71/2005, 23 Feb 2005; 4309/2003, 22 April 2003; 3965/2003, 29 Feb 2004.

Therefore, it is necessary to determine under which category of treaties the GPA lies for the purposes of section 33.2 of the Constitution.

Then, assuming the GPA falls within the category of treaties that require the approval of the Parliament, and whereas the Parliament has enacted a law ratifying the WTO Agreement along with Jordan's accession Protocol which provided for the commitment of the Government to start negotiations to join the GPA, a question arises as to whether the aforementioned law already satisfies section 33.2 of the Constitution.

V.3 WHETHER ACCESSION TO THE GPA REQUIRES THE APPROVAL OF THE PARLIAMENT

For the purposes of section, 33 of the Constitution set out above; it should be determined whether accession to the GPA gives rise to public expenses or affects the rights of Jordanians.

As to public expenses, the GPA gives rise to possible savings since it aims at reducing tender costs in order to achieve value for money. However, the GPA involves administrative commitments of reporting, conducting statistical studies, submittals to the WTO GP Committee, etc. Further, more foreign supply can affect the country's balance-of-payments. As such, it can be said that the GPA entails commitments to public expenses.

Further, the GPA can be regarded as affecting the rights of Jordanians in different ways:

- a. The GPA aims at removing all offsets that otherwise protect domestic suppliers. This will detract from the protection afforded to engineers and construction contractors under their respective laws.
- b. The GPA affects the right to development in that it changes the role of government procurement as a means of economic development. Thus, it will not be always possible to utilize government procurement as a macroeconomic tool to stimulate the economy in times of recession, and the country will not maximize the benefits of government spending as the case could be were such spending directed to local companies. Although the right of development is not explicitly provided for in the Constitution, it derives from some Constitutional provisions relating to 'upgrading the economy' and the right to life.
- c. Moreover, smaller domestic supply may result in higher unemployment.

It is true that the above-mentioned implications of the GPA for the rights of Jordanians are contingent, and that there are counter benefits of the Agreement, but section 33.2 of the Constitution admittedly does not require a treaty to be actually harmful to the rights of Jordanians. Rather, it merely requires a treaty to affect such rights in order for it to be subject to the approval of the Parliament.

To conclude, the GPA falls within the category of treaties that are subject to the approval of the Parliament under section 33.2 of the Constitution.

V.4 WHETHER THE RATIFICATION OF THE WTO AGREEMENT AND ACCESSION PROTOCOL CONSTITUTES AN AUTOMATIC APPROVAL OF THE GPA

The Party Working Report relating to Jordan's accession to the WTO contained a commitment of the Government of Jordan to start negotiations to accede to the GPA. The relevant section of the Party Working Report states that: 'The representative of Jordan confirmed that, upon accession to the WTO, Jordan would initiate negotiations for membership in the Agreement on Government Procurement by tabling an entity offer. He also confirmed that, if the results of the negotiations were satisfactory to the interests of Jordan and the other members of the Agreement, Jordan would complete negotiations for membership in the Agreement within a year of accession. The Working Party took note of these commitments.'

This commitment was incorporated by reference in the Accession Protocol, which has been ratified by the Parliament along with the WTO Agreement.

However, we take the view that the GPA is nevertheless subject to a separate, subsequent approval. This view rests on the following grounds:

- a) The proper interpretation of the 'approval of the Parliament' under section 33.2 is that an approval is subsequent to the making of a treaty. This is consistent with the role of the Parliament in general. Further, the same wording is used in other sections of the Constitution, such as the approval by the King of regulations issued by the cabinet, which always takes place after a Regulation is prepared;
- b) Further, it can be said that a customary constitutional rule has emerged to the effect that the approval of the Parliament means ratification by law. Such customary rule derives from the positive practice of the Government and the Parliament in ratifying treaties by laws and from a negative position of the courts which denied the enforceability of treaties not ratified by the Parliament (in some cases specifically requiring ratification by a law).⁷ This reinforces the view that the required approval is subsequent to the making of the treaty. Indeed, the Government endorsed this understanding by ratifying one treaty even by a provisional law;⁸
- c) The commitment of the Government as mentioned in the Party Working Report and in the Accession Protocol relates to starting negotiations and

⁷ Ct. Cass. Crim. 1312/2005, 8 Nov. 2005; 755/2006, 17 July 2006; 82/1999, 14 April 1999; 758/1998, 30 Nov. 1998; 281/1997, 23 June 1997; Ct. Cass. Civ. 260/1999, 31 Aug. 1999; 24/1957; 98/1956.

⁸ The Trade Agreement between Jordan and Syria of 1975, ratified by the provisional law 5/1976 published in the Official Gazette 17 Dec 1975.

not to joining the GPA. And this is an ordinary function of the Government which does not require the approval of the Parliament;

- d) The GPA is a treaty on its own. It is not compulsory on WTO members and subject to independent depositing requirements. In other words, it is not an implementation of the WTO Agreement.
- e) The GPA consists of two parts: general conditions and provisions, and special conditions relating to each Part's annexes. At the time of the ratification of the WTO Agreement, such annexes were not there to be considered. Hence, the ratification of the WTO Agreement cannot be taken as a prior approval of the GPA;
- f) Even if the ratification of the WTO Agreement and the Accession Protocol could be interpreted as a prior approval of the GPA, such interpretation runs contrary to the interpretation of section 33.2 of the Constitution as established through the interpretation of the relevant text and through the constitutional customary practices.

To conclude, the GPA is subject to a separate approval of the Parliament through a special law.

Sustainable Achievement of Business Expansion and Quality
Salem Center, Sequleyah Street
Al Rabieh, Amman
Phone: +962 6 550 3050
Fax: +962 6 550 3069
Web address: <http://www.sabeq-jordan.org>