

GENERAL AGREEMENT ON

RESTRICTED

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TARIFFS AND TRADE

Special Distribution

Committee on Government Procurement

MINUTES OF THE MEETING HELD ON 18 OCTOBER 1991

Chairman: Mr. David Hayes (United Kingdom)

1. The following agenda was adopted:

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A. Article IX:6(b) negotiations

2. The Chairman gave the following report, on his own responsibility, on the meeting of the Informal Working Group on Negotiations which took place on 16 October 1991. On 17 October bilateral discussion were held.

"A further meeting of the Informal Working Group on Negotiations was held on 16 October 1991. The Group welcomed the participation of Korea in that meeting. The Group also considered a number of papers produced in collaboration between myself and the GATT secretariat concerning options for agreement as regards the framework text, a paper on services, a comparison of offers made and a paper comparing the dispute settlement provisions of the Agreement, with the draft Consolidated Text currently under discussion in the Institutions Group in the Uruguay Round. The Group also had before it a number of new proposals from one delegation. As a result of the discussion it was agreed that the Chair in collaboration with the secretariat would produce a number of new documents in the form of draft legal texts concerning issues like Bid Challenge and Self-Denial which would be based on the contributions by participants; delegations would have the opportunity to submit any drafting suggestions of their own by 28 October 1991, with a view to the distribution of draft legal texts on those issues by early November. The Group had agreed in a previous meeting that it would meet again in an informal session from the 19 to 22 November, which dates are hereby confirmed. I should also

like to leave open the possibility that we might have a further meeting of the informal group sometime in December but would like not to make a final judgement on that. I clearly hope that the Informal Working Group could make further good progress at its meeting in November. Bearing in mind the target dates that we have set ourselves, it might be productive to have a further meeting in December. I am personally aware of the linkage which is being made, or has been made although perhaps not by everybody, with the Uruguay Round negotiations and I think that is a fact we should take account of in the negotiating process. We could probably take a decision on the necessity of a meeting in December once we are clear on the progress we have made in November."

B. 1989 Statistical Review

3. The Chairman recalled that at the April 1991 Committee meeting, he had invited delegations to put forward questions on the 1989 statistics in writing by no later than the end of June of this year. This deadline had proven a little too optimistic since the 1989 statistics from the European Community and from the United States were received only in July and since Israel had not yet submitted its 1989 statistics. Questions from Canada regarding the statistics from Japan and Austria had been received by the secretariat. No other questions had been received thus far. The Chairman proposed that Israel submit its 1989 statistics as soon as possible with a view to concluding the review of the 1989 statistics possibly at the next Committee meeting. The delegate from Israel replied that he would transmit the message to his capital.

4. The Chairman furthermore proposed that the 1990 statistics be submitted as soon as possible, in line with what was decided at the April 1991 meeting. So far, the secretariat had received reports for 1990 from the Hong Kong and Swedish delegations only.

5. On the issue of the establishment of a uniform classification system for statistical reporting, the Chairman recalled that at the April meeting of this year, it had been decided to revert to this matter at a later stage when it would be more clear to what extent services would be covered as a result of the negotiations, since it would be sensible to adopt a statistical reporting system covering both products and services. The Committee agreed to revert to this matter at a later stage.

6. The representative of the European Communities observed that he had had occasion to comment in the past on the statistical reporting mechanism which is in place under the Code. He considered that a correct statistical monitoring of the performance of the Code was extremely important but had also commented in the past that his delegation considered that the quality of statistical reporting achieved was extremely poor. His delegation had come to the conclusion that the fundamental obstacle in the way of valid reporting was that the quality of information reported was critically dependant on the person who made the initial return. That was a common observation in all statistical systems and it was a commonplace of discussion in statistical circles where the problem always was how to give

an incentive to the furnishers of the statistics to make the effort to give true information. His delegation had studied the statistical return of the United States and had compared it with the information which could be derived from a careful study of the calls for tender and post-award notices which were published in the Commerce Business Daily. The United States/GATT return claimed or reported that over 7,000 contracts were awarded above the threshold in 1989. The European analysis of the Commerce Business Daily for the whole of 1989 showed that the number of calls for tender which were GATT covered and properly fell under the Code was of the order of 2,800. He asked if the United States delegation could explain the discrepancy. He continued that, in particular, if one studied the Agency-by-Agency return from the United States, it was very striking that there was a very large and variable gap between the number of calls for tender published by each Agency and the number of contracts apparently awarded by the Agency. This was most remarkable in the case of fourteen Agencies, which included the Executive Office of the President, the Department of the Interior, Department of State, Smithsonian Institute, National Science Foundation, United States Information Agency, Department of Labour and a number of others, who while apparently awarding contracts under the Code did not publish one single call for tender under the Code terms. He asked whether the United States delegation could explain how this situation had arisen?

7. Secondly, he noted that the United States return showed, on a simple arithmetic basis, an average contract value of SDR 1.9 million. This was a strikingly high value for an exercise where the threshold was SDR 130,000. It suggested that the average contract, not the highest contract, was fifteen times the threshold value. What was more curious was that the 2,800 calls for tender would imply, if the total value reported in the United States return was correct, an average value of calls for tender of practically SDR 5 million. He continued that some insight into this situation could be developed by examining the post-award notices that were to be found in the Commerce Business Daily. His delegation had taken all those post-award notices which were recorded under the heading of a GATT-covered agency and which related to products which were covered by the Code, i.e. not military products or service contracts or in some other way clearly excluded. The average value of those contracts appeared to be somewhat less than SDR 1.4 million. There seemed to be a substantial difference between the notices which recorded the average value of SDR 1.4 million, and the return which recorded an average value of 1.9 million. He wondered whether the United States delegation could assist in reconciling these figures?

8. Thirdly, the speaker touched upon the issue of the large size of the average contract value. It appeared to arise because there was a significant number of extremely large contracts being awarded. He inquired whether the United States delegation could provide information regarding a number of these very large contracts. He mentioned some of the more striking ones. There was a contract awarded on the 2 June 1989 to the American Cyanamide Corporation for Diphtheria and Tetanus vaccine whose value was US\$120 million and there were three other drug contracts, one for US\$86 million, one for US\$32 million, one for US\$12 million. There was

also a series of fascinating contracts awarded by the General Services Administration. Three of these contracts, for a total value of US\$330 million, were for paint remover. One of the curious insights was that the paint remover contracts had a greater value than the paint contracts which were only for US\$150 million. There were two of those.

9. In addition there were contracts listed under the heading of Microphotographic equipment, ranging in value between US\$11 and 26 million. There was a series of contracts for trucks and a series of large contracts for medical equipment. One under the general heading of Medical Equipment and Supplies went to Lumex Inc. for US\$360 million. There was also a remarkable series of contracts for the provision of fuel, practically all of it for the Department of Defence. The largest of these had a value of US\$325 million.

10. The European Community had a number of queries about these contracts: were these contracts Code covered? If they were then he would be grateful if the United States delegation could identify the relevant calls for tender published in the Commerce Business Daily. How many bids were received under each of these large contracts? If they were not Code covered, why not? He observed that pending detailed explanation to the contrary, his delegation had drawn the conclusion that the United States return must contain - and he appreciated that this was of course not a voluntary situation - substantial inaccuracies. The actual coverage of contracts as implied by the notices published in the Commerce Business Daily did not have the value of the order of US\$14 billion but something rather less than US\$4 billion. The gap was extremely large. He observed that even the latter figure was perhaps somewhat exaggerated if a number of the extraordinarily large contracts to which he had referred turned out not to be Code covered because that would reduce the average value which he had calculated for the contracts actually awarded. The EC spokesman concluded that the picture indicated by a preliminary perusal of the grand totals of national returns was a thoroughly misleading guide to the actual performance of parties under the Code. His delegation was very ready to collaborate with other Parties in a very detailed study of statistical systems. He remarked that the EC had engaged staff of its own to carry out a study within the Community with a view to finding a viable means of getting information that actually worked and gave accurate information. In the meantime, however, he had to conclude that these statistics were largely meaningless and did not provide a useful guide to performance under the Code.

11. The representative of the United States commented that she understood that the Community was going to provide in writing some details of questions it would like answered. She could not, of course, at this moment answer specific questions about specific contracts. However, with regard to the statistical reporting system in the United States, she explained that for both the publication and the reporting mechanism, procurement officials in the United States were required by law to publish not only Code contracts but all contracts. They were also required to report to a computerised data reporting system, and electronic capabilities to

accomplish that were available throughout the government. The Code obligations, in this case, came after the establishment of the United States' own reporting system. The United States reporting system was established in response to Congressional enquiries and Congressional monitoring of the way in which money was being spent to implement government programmes. There was a continuing oversight by certain government committees on the total government procurement process, including the reporting aspect. In fact, this information was publicly available for exactly that purpose. She explained that the way in which this worked was that a procurement official, as he was making the purchase, was not merely advertising an upcoming procurement - which might later be modified, withdrawn or cancelled - but in the actual moment of awarding the contract, when he would be completing his report, this report would be sent electronically to the computerised outfit responsible for this, so that what you were capturing was the actual awards that were being made. She recognised that there were legitimate concerns about statistical reporting systems. She was nonetheless confident that the system which she had just described, delivered a fairly accurate picture of what was happening in the United States.

12. She turned to the question raised by the EC concerning large value contracts. The United States had a very centralised procurement system. Agencies with responsibilities in certain procurement areas bought usually on behalf of all Agencies. For example, the General Services Administration would buy pencils, paper and computers for all Agencies. She recalled that the total government procurement at the Federal level in the United States was approximately US\$200 billion p.a. Contracts worth millions of dollars were certainly not unreasonable when placed through centralised agencies for the entire government. A similar situation occurred for medical supplies for Veterans Affairs hospitals. The Defence Department did buy fuel in extremely large quantities. In the United States system, centralised purchases were referred to as requirement contracts or schedule contracts or basic-ordering agreements, and frequently did result in very large value contracts.

13. The United States delegate observed that this process of centralised procurement would often result in one advertisement for several contracts. She emphasised that there was no correlation between the number of advertisements and the contracts that resulted from them. There was no need for a separate advertisement for each contract. The requirement was that all upcoming procurement be advertised. She added that often there would be several advertisements, not solicitations perhaps, but advertisements about one Code-covered procurement. For example, when defining specifications in the event that it was necessary to make these specifications known in advance, pre-solicitation procedures were required and very often three notices would appear about the fact that suppliers were being invited to review the specifications before they would be put in final version. These would also be notified as code-covered procurements. So, the number of times that advertisements would appear in the Commerce Business Daily would not necessarily correspond to the number of contracts that resulted from the code. In examining other Parties' reports she had seen that this was also true in their cases. This was merely another way

of procuring but it did not affect the number of contracts and how many opportunities were created. She added that in a centralised system, such as the United States, the majority of procurements would exceed the Code's threshold.

14. The United States delegate expressed her concern about the discrepancies in the statistical reports. She was aware of the problems in statistical reporting and appreciated the fact that the EC had recently begun to put a great deal of effort into improving its statistics. She would be pleased to respond to specific questions from the EC but she firmly rejected the idea that the United States was not implementing its Code obligations and that the statistical system of the United States did not report accurately. She added that efforts to improve the statistical system were ongoing. She concluded that she would be very pleased to review the way in which statistical systems currently function, and what could be done to improve them. The United States was very concerned about the discrepancies between the number of opportunities provided by the United States in contrast with those which appeared to be provided for by the EC under this Code.

15. The delegate of the European Community observed that the point he had wanted to make was this: there had to be a link between the story being told by the statistical return and the story being told by the published calls for tender and post-tender awards. He noted that quite simply, at the moment these two sources were telling fundamentally different stories that did not stand together. The EC was not saying that this was only the situation in the United States. He recognised that it was a generic problem. The EC had only studied it in detail in the US. He recalled that even within the United States a report prepared for the Congress had pointed out that there was an innate tendency in the Federal Procurement System to over-report GATT coverage.

16. The spokeswoman of the United States commented that the United States' starting point for its publication was that everything was open unless otherwise stated in the note. There was no discrepancy about what was reported and what was published. When the delegate of the European Community referred to a report by the Congress, she supposed that he meant the report by the GAO, reporting on "over-reporting for GATT purposes". There was indeed a report done by GAO. Its conclusions were that the United States upon asking the Congress to pass implementing legislation for the Code had reported that the Code would open up a vast number of procurement opportunities in foreign Signatory markets valued at US\$20 billion. That report by the Administration to the Congress was made based on estimates given to the United States by foreign Signatories in the Tokyo Round Negotiations. It was certainly quite true that that had not been the result of this Code. Over-reporting had taken place, not of the United States statistics but of the total opportunities covered under the Code. They had not proven to be what was promised in the Tokyo Round. This was a very fundamental point for the United States.

17. The Chairman proposed the Committee take note of the statements made by the European Community and the United States and invited both delegations to submit their questions through the secretariat. The Committee would return to the question of reviewing how statistical systems function at its next meeting and in the meantime delegations were invited to make any specific proposals for the improvement of the current statistical reporting system.

C. Implementation and Administration of the Agreement

18. The Chairman gave an update on the two panel procedures currently underway under the Code. In the Sonar Mapping panel case between the European Community and the United States, the first substantive meeting with the Parties would take place on 30 October 1991. The composition of the panel in the Trondheim case between the United States and Norway as well as its Terms of Reference had been agreed. The first substantive meeting with the Parties would take place in the week of 2 December 1991.

19. The Chairman informed the Committee that the list of entities submitted by the European Community pursuant to Article IX:5 would be circulated shortly. Since this concerned a modification pursuant to Article IX:5(b), a Committee meeting would be convened on 22 November 1991 to discuss the entity list.

D. Eleventh annual review of the implementation and operation of the Agreement; adoption of the 1991 Report to the CONTRACTING PARTIES.

20. An initial draft of the 1991 Report to the CONTRACTING PARTIES was circulated to the Signatories. The Chairman proposed that this draft should be brought up-to-date to incorporate this and the next meeting and that a revised draft would be sent to delegations for comments and subsequent transmission to the CONTRACTING PARTIES. It was so agreed. Japan and Hong Kong commented that the section in the Report dealing with negotiations on Group C entities did not accurately reflect consensus in the Group and asked the Chair to revise that part of the text accordingly. It was so agreed.

E. Other business

21. The delegate from Sweden informed the Chairman that the former Chairman of this Committee, Mr. N.E. Schyberg, had expressed his interest and availability for future panel work under this Agreement. The Chairman noted that his name would be added to the informal list of available panelists.