GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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Committee on Government Procurement

MINUTES OF THE MEETING HELD ON 13 MAY 1992

Chairman: Mr. D. Hayes (United Kingdom)

1. The following agenda was adopted:

A. Consideration of the Report of the Panel on the United States Procurement of a Sonar Mapping System (GPR.DS1/R);

B. Consideration of the Report of the Panel on the Procurement of Toll Collection Equipment for the City of Trondheim (GPR.DS2/R);

C. Other Business.

2. The Chairman recalled that the present meeting was being held pursuant to paragraph 11 of Article VII of the Agreement on Government Procurement to consider two panel reports: the Report of the Panel on the Procurement by the United States of a Sonar Mapping System and the Report of the Panel on the Procurement by the Government of Norway of Toll Collection Equipment for the City of Trondheim. He reminded participants of the confidentiality of the two Reports until they were adopted by the Committee.

A. Consideration of the Report of the Panel on the United States Procurement of a Sonar Mapping System (GPR.DS1/R)

3. The Chairman recalled that at its meeting on 12 July 1991 the Committee, upon request by the European Communities, had established a panel to consider the matter of the procurement by the United States National Science Foundation of a sonar mapping system. The Chairman of the Panel, Ambassador Rossier, presented the Report to the Committee. He explained that the fact that the Report had not been submitted to the Parties within the prescribed time-frame was in part due to the suspension of the Panel's work for rather more than four weeks, at the request of the Parties, to allow exploration of the possibility of a bilateral solution.

4. The representative of the European Communities welcomed the Report of the Panel. He remarked on the Panel's first finding that, although the Communities had kept open the possibility that the procurement of the sonar mapping system could be regarded as a private acquisition, it agreed with the Panel's reasons for concluding that this was a case of government, and not private, procurement. He noted that under the second finding, the Panel had rejected the Communities' contention that procurement of the sonar mapping system was a direct product procurement by a covered entity -

the Panel had said that it was part of a service contract - but nevertheless had arrived at the positive conclusion that a covered entity - in this case the National Science Foundation (NSF) - could not alter its obligations with respect to product procurement under the Government Procurement Agreement by including such procurement in a so-called services contract per se with a non-government entity. The Communities agreed with the Panel that the anomalies resulting from allowing this would be more serious than accepting that the phrase which speaks of the exclusion of service contracts per se could be regarded as redundant. These anomalies were indeed so great that it was obvious that they should be unacceptable to the parties to the Agreement. The Communities therefore moved the adoption of the Panel Report and urged the Committee, and in particular the United States, to accept the recommendation of the Panel that it conduct this procurement consistently with its obligations under the Government Procurement Agreement. He stated that as far as the Communities knew there was still time for the United States to organise or re-organise the procurement in conformity with the Code and that there would be no obstacle in United States law to that.

5. The representative from the United States observed that the Panel's Report raised a number of fundamental issues that went to the very premises underlying the Code's coverage, to the heart of the balance which the Code attempted to strike between transparency and the efficient functioning of procurement systems, and the relationship between this Agreement and Article III of the GATT. He noted that, given the complexity and far-reaching nature of the issues raised by this Report, his Government was not in a position today to provide a definitive reaction to it.

6. In commenting on the Panel Report in detail, he noted first that the Panel had inaccurately reflected the United States interpretation of the term "but not service contracts per se" as meaning that a product procurement was outside the Code whenever it constituted less than 50 per cent of the overall value of the contract. He remarked that while it was his delegation's impression that quite a number of parties to the Code had been reading the language to mean just that, it was not the only possibility. He pointed out that the Panel Report on the Trondheim case, which would be discussed shortly, described another logical alternative, namely, to look to the principal purpose of the contract. He observed that under that approach, the uncertainty that had seemed to concern the Panel and the potential for manipulation of the numbers was substantially eliminated. This approach, in his view, was quite similar to the approach which was used in the December Chairman's text, at the proposal of the European Communities, to define construction service contracts. He recalled that given the fact that the Code did not define the term "service contract", the United States had applied a conservative test for Code-coverage that blended the two approaches: for a contract to be excluded from Code coverage under the United States regulations, its principal purpose had to be the procurement of a service and the products to be provided had to account for less than 50 per cent of the value of the contract. He had raised the language from the Trondheim case and the United States practice, not to claim that either approach was the only one possible under the Agreement, but rather to show that the consequence

perceived by the Panel of accepting the United States interpretation of the term service contracts per se", and which - in his delegation's view - strongly coloured the Panel's approach to this case, was not a necessary consequence but one of several possibilities.

7. Considering the Report of the Panel in detail, he noted that it offered two sweeping opinions that needed to be scrutinised both individually and in tandem. The first was that the Code applied to product sub-contracts of service contracts. The second was that with respect to sub-contracting, "the purchase by service contractors of products they needed in order to be able to render the services contracted for would not normally be government procurement". In his delegation's view, it would seem that the Panel's findings simultaneously expanded the Code's coverage to procurements that were not intended to be covered and at the same time created a significant loophole from coverage. He found that acceptance of the Panel's findings could well lead to putting the many informal means of discrimination that governments have at their disposal beyond the effective reach of the Agreement. He observed furthermore that these findings would create an administrative nightmare for the procurement official who attempted in good faith to meet his or her government's Code obligations.

8. Commenting on the part of the Report that dealt with the interpretation of "... but not service contracts per se", he quoted Article I:1(a) of the Code as saying that it applied to any procurement of products. It then went on to say "This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se". The United States spokesman remarked that the issue at hand was the interpretation of the term "but not service contracts per se". In his delegation's view this term meant that service contracts in their entirety were not covered by the Code, whilst the Panel had taken the opposite view. He found it impossible to reconcile the Panel's conclusion with the plain language of the Code. If, as the Panel had recognised, the sonar mapping system was being procured as part of a service contract, the inescapable conclusion had to be that its procurement was not covered by the Code. He argued that the United States view on this was supported by a number of points in the language of the Code. First of all, in Article I:1(a) itself, the phrase "but not service contracts per se" would serve no purpose if it were not intended to exclude service contracts in their entirety. According to the first sentence of this provision the Agreement applied to the procurement of products. Therefore, in his view, the last phrase would be superfluous if all it meant was that the Code did not apply to the procurement of the service portion of service contracts. He pointed out that, where the Code said that products were covered, it said that service contracts were not. He wondered why, if the drafters of the Code had meant to exclude only the service portion of services contracts, they had departed from a parallel construction? Article V also gave some indication of the intent of the drafters in that all transparency and procedural obligations were drafted in terms of prime contracts with no guidance provided whatsoever with respect to sub-contracts. He noted in passing that on this last point, the Panel seemed to implicitly accept the European Communities' view that the Code's full substantive and procedural

obligations applied to these Code-covered service sub-contracts. He observed that in the Panel's view the term "service contracts per se" was simply an extension of the thought that services incidental to the supply of a product were covered. This did not explain the redundancy of the term or the use of the words "service contract". Moreover, if one looked at the genesis of this language in the first draft of the Agreement considered during the Tokyo Round (MTN/NTM/W/81) it was clear that the Panel's reading of the sense of these words was wrong. He recalled the language of this draft:

> "This instrument applies to government purchases of goods and not to services contracts. It nevertheless applies to services which are incidental to the supply of goods and as such included in the price thereof, it being understood that the part of the price representing services should not exceed that of supplies."

9. In this light, it was clear to his delegation that the language on incidental services was necessitated by the fact that service contracts had, in the first instance, been excluded in their entirety. He noted that his delegation had not discussed this earlier document before the Panel because it had not anticipated the line of reasoning it had followed. Moreover, the Panel had seemed swayed by the view that the United States interpretation of these words would result in a situation where a preponderant value rule would apply creating possibilities for manipulation and creating uncertainty for procurement officials. He remarked that he did not see this as a necessary consequence of the United States reasoning.

10. Furthermore, the Panel's findings would create an equal if not greater opportunity for manipulation as well as an extremely high degree of uncertainty for procurement officials. His delegation was under the strong impression that the Panel's interpretation on this point did not follow "the living interpretation" of the Code - meaning the manner in which parties implementing the Code had read and implemented this language in their day-to-day activities. Other than perhaps when governments had found a need to contract for the service of product procurement itself, what his delegation called an agency arrangement, it had not been aware of any Code signatories treating service sub-contracts as Code-covered. Similarly, in reviewing the implementing measures of other parties, his delegation had never run across anything by way of guidance to procurement officials that they should treat all or certain sub-contracts as Code-covered. He noted that, were the Panel's interpretation of this language correct, his delegation would find it rather remarkable that a number of practices that were quite open and well-known had gone unchallenged over these many years. He was not suggesting that failure to exercise Code rights somehow compromised these rights. Rather, this lack of dispute settlement activity might shed some light on what parties thought they had or had not accepted as rights and obligations under the Code. His delegation had wondered many years ago why one of the European Communities' larger member states had never made a Code-covered purchase of computers. It had discovered that this member state followed a practice of entering into computer service contracts. The contractor would be required to buy the computers and to service and operate them. He observed that, as much as his Government had

wished otherwise, it had been its view that the contractors' purchases of computers had been beyond the reach of the Code since these purchases were sub-contracts of service contracts. The United States representative observed that in looking at the European Communities' implementation of its procurement Directives his Government had found a certain schizophrenia. He recalled that up until sometime around 1989, no visible effort by the European Communities to apply its supplies Directives to services sub-contracts had been undertaken. At that point the Commission of the European Communities had taken one of the member states to the European Court of Justice in a circumvention dispute and had won a ruling that said that certain service sub-contracts were covered by the Directive. According to his delegation's understanding, it was basically this ruling of the Court of Justice which the European Communities had asked the Panel to adopt, although it was the United States impression that what the Panel had come up with was somewhat different. Looking ahead, however, he noted that in the European Communities' common position on its upcoming services Directive, it was shifting to yet another approach to determine what was covered by which Directive. As his delegation understood it, the rule that the European Communities would use was a predominant value test - basically the 50 per cent rule that the Panel had found did not apply here. He observed that in the early years of the Code, its members had spent most of their time examining each other's implementation of the Code in detail. He recalled that a broad range of issues had been brought up bilaterally, plurilaterally and multilaterally. Some points of contention, such as the European Communities' practice on VAT and the threshold, went to various stages of dispute settlement; others led to re-negotiation of Code language, as was the case with leasing. In still other cases, parties had decided not to pursue issues further. Nevertheless, not one party had raised even one question concerning service sub-contracting. He argued that the practices in this area were so well-known and the stakes sufficiently high that it would have been hard to imagine that if other parties generally had shared the Panel's interpretation, they would have remained silent. He continued that throughout the negotiations to expand and improve the coverage of the Agreement, negotiators had consistently argued that one of the important reasons for expanding the Code to cover services was the significant amount of products involved in providing such services, a view, which, in his delegation's opinion, was generally shared. He concluded that collectively, these observations had led his delegation to believe that the Panel's interpretation of the term "but not service contracts per se" was not in keeping with the living interpretation of the Code.

11. The United States spokesman then turned to the second substantive conclusion of the Panel's Report - that "the purchase by service contractors of products they need in order to be able to render the services contracted for would not normally be government procurement". He noted that in his view the Panel, having concluded that service sub-contracts were Code-covered, then turned around and said that most of these sub-contracts were not Code-covered because they were not government procurement. He remarked that the United States concern here was not that the Panel had found the sub-contract in question to be government procurement, because the United States had always thought this to be

obvious, but rather, by implication, that the Panel's findings would define substantial areas of government procurement as private procurement. Looking beyond the instant case, his delegation found it impossible to advise procurement officials, on the basis of this Report, how to determine when a sub-contract was Code-covered. The Panel, having said that it was not going to define the term "government procurement", then seemed to do so. The characteristics that the Panel had described were (1) payment by government; (2) governmental use of or benefit from the product; (3) government possession; and (4) government control over the obtaining of the product. While his Government could understand the logic behind the first two, the logic of the second two eluded it. On government possession, the Panel itself had noted that the Agreement covered procurement by means of leasing. Therefore, his delegation failed to see the distinction between this point and the second point which mentioned government use. More importantly, he did not see any basis for the Panel's fourth criterion and saw it as an invitation for parties to circumvent the Code through using informal rather than formal means of control over procurement. He recalled that the Panel stated that it derived the concept of controlling interest from the wording "by the entities" in Article I:1(a). His delegation strongly disagreed with this interpretation and found it regrettable that, since it appeared neither in any of their briefs nor in any of the European Communities nor was it used during oral argument, there had been no opportunity to discuss this interpretation with the Panel. In his view, the purpose of the words was to state that the coverage of the Code was limited to those entities in each party's entities list. His delegation saw no basis to read into these words some additional meaning such as "controlling influence". He found such a test unworkable and it ignored the basic fact that it was the government's being the customer that made government procurement special. It was for this reason that parties had been unable to write a much simpler Agreement on Government Procurement, simply stating that the exception contained in Article III:8(a) of the GATT would not apply among the signatories. Yet, when one looked at all the indices for controlling influence, one found that they all turned on obvious and open possibilities for government involvement in the sub-contractor selection process. Such an approach was open to serious abuse and could have the perverse effect of picking up sub-contracts because they had clauses that, in trade terms, were benign while missing sub-contracts where the party in question had essentially dictated that a sub-contract would go to a domestic supplier. He recalled that service contracts were not Code-covered and, therefore, parties were under no obligation to advertise contracts, specify in a transparent manner the selection criteria, or to limit their use of sole source procurement. In the worst of cases, a party could negotiate a sole source contract with a service provider and in the process tell it to use domestic products wherever they would be available. In that case, no other party could possibly have known this was happening. The service provider would have had no incentive to reveal this information as it would not have wished to prejudice its privileged position with the government agency and could build any additional cost into its contract. On a more subtle scale, the government could direct an important sub-contract to domestic firms by asking firms to identify their intended sub-contractors in their bids and then giving preference to those bids that were using domestic

sub-contractors. On a yet more subtle scale, a government could direct an important sub-contract to a domestic firm by awarding the prime contract to a firm that had a strong business tie to the company that produced the product in question. In his view, while some might argue that what fell through the cracks of the Code would be picked up by GATT Article III, he wondered if anyone in the Committee believed that they could make an Article III-based case for the latter two cases? He wondered whether contracting parties could successfully argue that the fact that (a) the government had asked for information on intended sub-contractors and (b) awarded the contract to a contractor that happened to plan to use domestic contractors constituted a breach of Article III? His delegation had serious doubts. He also seriously doubted whether sole sourcing a services contract to a firm that had strong business ties to a firm that produced a product to be sub-contracted could be interpreted as denial of national treatment under the GATT. In his delegation's view, there was always the potential for a government agency to exercise some degree of control over sub-contracting by virtue of the fact that the government was the customer. This control could be latent or applied, it could be obvious or hidden. But the potential was always there. He observed that the Code had been designed to deal with both formal and informal means of discrimination. Therefore, in his view, a definition of government procurement, in the sub-contracting sense, that ignored these informal means was in fundamental conflict with the basis of the Code.

12. Turning to other points in the Panel's findings that puzzled his delegation, he mentioned the Panel's logical observation that a government procurement involved payment by government. But then in assessing the particulars of this case the Panel seemed to attach particular importance to the fact that this was a cost-plus contract. The Report stated "due to the contractually-prescribed reimbursement of ASA's costs by the NSF, the purchase money for the system remained government money". He wondered whether these words meant that had the contract not been a cost-plus type contract and had the contractor simply received a lump sum amount, this would have been considered a private procurement. He failed to see the logic in such a distinction. He did not agree with the Panel's reasoning that a cost-reimbursement-type contract provided a greater degree of government control than a fixed-price contract. On the contrary, in fixed-price contracts governments could control exactly what they paid and exactly what they received in return. The same could not be said for cost-plus contracts. The Panel had based its findings on certain "indicia" of government control that in his view did not in fact exist. He called into question the statement in paragraph 4.12 of the Report that "ASA (the prime contractor) would have no commercial interest in the transaction in the sense of a profit motive or a commercial risk". In his delegation's opinion, under the terms of the contract, which it had provided to the Panel, this statement was wrong. He recalled that the contract between the NSF and ASA was a Cost-Plus-Award-Fee type contract. These contracts were used when the nature of the procurement would have made it impossible for a potential bidder to make a fixed price bid. He observed that as a general matter, and particularly in a period of austerity, governments were loath to award a simple cost-plus-fee contract as such a contract would contain no incentive for the contractor to seek best value for money. That was the

reason why the word "award" appeared in the term Cost-Plus-Award-Fee contract. Award fee was specifically described in Section H.4.A of the contract as "an incentive or inducement to improve the quality and efficiency of the work to be performed under this contract at a reasonable cost and adherence to annual programme plan and budget estimates". Looking further at the contract, Section H.4.B.1.E stated that one of the factors that would be used to determine whether the contractor received an award fee, and if so how much, was the extent to which the contractor achieved "effective cost control". Given these facts, he was puzzled as to how the Panel could have come to the conclusion that the prime contractor in this case had had no profit motive or commercial risk in the sub-contract. He quoted the Panel in paragraph 4.9 as saying that "The amount of the purchase was ... specially determined by the government ..." and observed that, while it was true that there was a statutory ceiling on the amount of funds that could be expended on the system, it could hardly be said that this set the purchase price. Rather, the statute set a ceiling on the expenditure, which was not surprising given that this was a cost-plus contract. Given those award provisions in the contract, the prime contractor had had every reason to try to obtain best value for money.

13. The United States representative was concerned that the Panel's findings could lead to the creation of a rather large loophole in the Code. His delegation had always viewed sub-contracts of product contracts as government procurement, and therefore had assumed that placing a "Buy American" restriction on a sub-contract to a Code-covered contract would be a violation of the Code. He noted, however, that one of the many possible interpretations of the Panel's findings was that so long as arm's length from actual sub-contractor selection was maintained and cost-plus contracts were avoided, his Government would be free to place a "Buy American" restriction on such sub-contracts from the standpoint of the Code. He accepted that some might argue that such a measure would be picked up by Article III of the GATT. However, his delegation seriously doubted that a GATT Panel could be convinced that such a measure did not fall under the exception for "laws, regulations or requirements governing the procurement of products purchased for governmental purposes." He thought that, were a GATT panel to make such a finding it would certainly come as quite a shock to those contracting parties that maintained, or had maintained, certain types of offset requirements. He welcomed the views of others on the interpretation of this portion of the Panel's findings.

14. The United States spokesman maintained that, when reading the two findings together at a practical level, procurement officials would have little guidance as to which sub-contracts were Code-covered and which were not. Despite the Panel's concern that the United States interpretation of the term "service contact <u>per se</u>" might lead to uncertainty on the part of procurement officials, the Panel's findings, if anything, would create even more uncertainty. For those sub-contracts that were Code-covered, it would most likely be necessary for procurement officials to split them off from their prime contracts and compete them separately in order to ensure that all obligations were met. Given the time it took to perform certain types of service contacts, fluctuations in price and differences in the way prime contractors chose to structure their sub-contracting, he did not think that

it would always be possible to know what specific sub-contracts were going to be let, much less be above the threshold, at the time that a prime contract was awarded. He concluded that it might therefore be necessary quite some time after a prime contract was let, to retrieve a portion of the contract, so that it could be competed in a Code-consistent fashion. The prospect of having to divide contracts to create Code-covered procurement would go far beyond what was intended in the drafting of the Code, and would be seriously at odds with the efficient and effective operation of procurement systems. Such inefficiencies would add enormously to the cost of procurement and seriously diminish the level of service that procurement officials could provide. These findings seemed at odds with the balance struck in the Code between procedural transparency and the efficiency of procurement processes. He invited the members of the Committee to think of the potential situation under the proposed revision to the Code where construction would have a threshold of SDR 4.5 million. He wondered whether, under the Panel's findings, parties would be expected to apply the proposed SDR 4.5 million threshold to prime contracts while applying the lower product threshold to all or some product subcontracts and if so, what would be the status of the single-tendering exceptions that were designated specifically for construction contracts. He furthermore invited parties to consider the fact that service contracts would also be covered by the new Code, probably with the same threshold as for products and that service sub-contracts to construction contracts would also appear to be governed by the logic of the Panel's findings. He concluded that, in his view, therefore, depending on how one read the Panel's Report and/or structured one's construction procurements, either just about everything done under these contracts above the product/service threshold would have to follow Code procedures, or would not be considered government procurement at all.

15. The United States spokesman recalled that his delegation was still examining the Panel's conclusions and that a number of points in the Report, which went beyond the instant case, caused the United States serious concern. While some might argue that panel findings had no meaning beyond the case in dispute, his delegation found such reasoning short-sighted and disingenuous, because future panels would rely upon the reasoning of previous panels on similar subject matter unless they viewed the previous findings to be seriously flawed. He stated that there was no doubt in his delegation's mind that adoption of this Report would lead to further disputes of the same sort. He added that, having participated in many meetings of the GATT Council and Code Committees, he understood that there was a healthy scepticism when a party facing an adverse panel report asked the relevant body to take a critical look at the report. He was also aware that there was a strong bias in the GATT, which he thought was for the most part healthy, to accept panel reports first and deal with any resulting consequences later. He nevertheless stressed the point that this Report had far-reaching implications for all members of the Committee and that therefore, before the Committee headed down the road which these findings suggested, it needed to be sure that it was the right one. The United States would welcome views from other parties on the substance of the Report which would contribute to their internal deliberations. He welcomed, in particular, the views of other parties both as regards the

United States perception of actual practices vis-à-vis subcontracts and as regards members' perceptions of what the Panel's views meant in creating a demarcation between public and private procurement.

16. The European Communities representative observed that the United States arguments put forward during this meeting were a repetition of those already extensively discussed before the Panel. He would refrain from rehearsing the reasons which led the European Communities to reject these arguments at the Panel meetings. However he wanted to comment on two points made by the United States. The European Communities refuted the suggestion that it would be impracticable to follow the recommendations of the Panel. On the contrary, the Communities argued that nothing could be simpler. The situation at hand was a very simple one: a Code-covered entity was in the process of conducting a procurement of a product, which was subjected to a Buy-American provision, and which had every appearance of being a discriminatory measure. He recalled that the line of defence the United States had taken was to say that this was not a product but a service, which, in his view, was a complicated proposition. The Panel had concluded that the procurement was what it appeared to be on the face of it: procurement of a product, which was a simple, straightforward and sensible conclusion. To maintain that this was not practical or could not be implemented was difficult to understand. Secondly, he refuted the United States contention that the fact that this particular practice had never been contested before was proof of its Code compatibility. It would be the same as saying that the police should not pursue undiscovered crime. Lastly, he found no justification for the United States argument that the Panel Report would automatically require all subcontracts awarded by service providers to be covered by the Code. He referred to paragraph 4.22 of the Report, which stated that the procurement at hand was a product procurement and therefore any considerations as to whether the bricks for inclusion in a building would be covered were simply not raised. He appealed to the Committee to look at the Report, the facts of the case and the recommendations as a simple and practicable ensemble. The Communities' view was that the Report should be adopted at an early date and that appropriate action should be taken. In that respect, he recalled that the Code in Article VII:11 provided that the Committee should take appropriate action normally within thirty days of the receipt of the Report. He was anxious to see that this provision was adhered to as far as possible.

17. The United States representative responded that it was in the interest of all the members of the Committee - most of whom had not of course been present at the Panel hearings - who were asked to adopt the Panel Report and accept its implications, to be given information which they could use in evaluating these consequences. Secondly, he reiterated that the United States did not believe that the failure to exercise a GATT right in any way compromised such a right. However, in this instance, the absence of complaints to date could be viewed as indicative of how parties interpreted the Agreement. Noting the EC's analogy to an undiscovered crime, he reiterated that in this instance we were dealing with well-known practices. He added that this was simply one of the factors he had raised, to indicate how Code members had always read the Agreement. He took strong exception to the European Communities' contention that the United States claimed the

sonar mapping system to be a service. This was clearly not the case. In any case, that was not the issue. The issue was: do subcontracts for the procurement of goods, as part of a service contract, come under the Code? He noted that it was not the contention of the United States that the Panel Report would necessarily extend the Agreement to all subcontracts. The problem he noted was that it was not clear as to which subcontracts, according to the Panel's findings, were covered by the Code: what was private and what was public?

18. The delegate of Sweden observed that even though fully aware of the Code provisions regarding the time-frames, his delegation thought that the unusual case of discussion of two panel reports at the same meeting warranted special consideration. Turning to the Panel Report on Sonar Mapping his delegation could, after a preliminary reading, share the Panel's conclusions, but would prefer some extra time to study the Report.

19. The Committee adopted the following conclusions: it had taken note of the provisions of Article VII:11 that the Committee should take action in relation to a Panel Report, normally within thirty days of receipt of the Report, unless that time limit was extended by the Committee. The Committee had considered the adoption of the Panel Report. One Party, however, had made it clear that it was not in a position to adopt that Report at the present meeting; other participants had also made it clear that they would like more time.

20. The Committee therefore decided to extend the thirty-day time limit as provided for under Article VII:11 to a date in the latter part of June; the precise date for this meeting would be decided after consultations.

B. Consideration of the Report of the Panel on the Procurement of Toll Collection Equipment for the City of Trondheim (GPR.DS2/R)

21. The Chairman recalled that at its meeting of 23 September 1991 the Committee, upon request by the United States, had established a Panel to consider the matter of the procurement by the Government of Norway of a toll collection system for the city of Trondheim. The Chairman of the Panel, Mr. Peter Williams, presented the Report to the Committee.

22. The representative of the United States welcomed the Report of the Panel and found it well reasoned. He expressed some concern that this case had not yielded any meaningful remedy to a problem his country was now facing for a second time. He wondered though whether the flaws were in the Panel's action or in the documents it had before it to interpret. In that light he thought that adoption of the Report was appropriate and expressed the hope that the Committee could adopt it today.

23. The delegate of Norway took note of the conclusions and recommendations made by the Panel. In commenting on the Report, in particular its paragraph 4.6, where the basic difference between the United States and Norway on their interpretation of Article V, sub-paragraph 16(e) was set out, he noted that the Norwegian interpretation of that

subparagraph was different from the one adopted by the United States and by the Panel. The Norwegian authorities had acted in good faith in their handling of the Trondheim toll ring project and were convinced that they were complying with Norway's obligations under the Agreement. His delegation had been surprised and disappointed by the Panel's conclusions and its interpretation of the Agreement.

24. Touching briefly upon some of the detailed points of the Report, the Norwegian spokesman pointed to paragraph 4.1, where the Panel stated that the central point of difference between Norway and the United States was whether Norway, in single tendering the procurement of parts of the equipment for the toll ring, had met the requirements of Article V:16(e). Sub-paragraph (e) of Article V:16 outlined the conditions under which the procuring entity could use single tendering to purchase prototypes for a first product in connection with, inter alia, research and development contracts. The Panel had concluded that the phrase "contract for research ... or original development" in the Agreement had to be understood to refer to a contract for the purpose of the procurement by the procuring entity of the results of research or original development, that is, knowledge. The Panel had furthermore concluded that Norway had not demonstrated that this was the case and had found that Norway had not met the conditions of Article V:16(e) of the Agreement. Norway's interpretation of the Agreement was - in brief - that single tendering of prototypes was justifiable under Article V:16(e) because the prototypes, and therefore the testing and use in connection with research and development contracts, fell outside the Agreement's coverage. The Panel's interpretation of Article V:16(e) was, in Norway's opinion, restrictive. It was not apparent from the wording of Article V:16(e) nor of other provisions in the Agreement that the principal purpose of a research and development contract had to be the procurement of knowledge. Although the Panel's reasons for arriving at such a restrictive interpretation were undoubtedly laudable, its conclusions also had practical and economic consequences which members of the Committee might want to consider carefully. He concluded however that, provided that the recommendations made by the Panel had the support of the members of the Committee, Norway would not oppose adoption of the Report at this meeting.

25. The delegate from Canada supported the United States request for adoption of the Report. He found the clarification provided on the interpretation of Article V:16(e) useful and agreed that any exception to a general rule required a narrow interpretation. The Canadian delegation also had some questions concerning remedies but acknowledged that these would probably be better discussed in a rule-making context than in this meeting.

26. The representative of Norway observed that, if parties regarded the Agreement as needing additional rectification mechanisms, a broad and substantive discussion of the matter would be required in the general context of the negotiations on revision of the Agreement.

27. The representative of the European Communities observed that on first sight his delegation found the Report of the Panel reasonable and practicable. He stated that the Communities were in the process of

verifying that the results of the Panel Report were reflected in the internal European Communities' procedures and practices and would therefore support the request of the Swedish delegation for more time to consider it.

28. The delegate of Sweden observed that since in the case of the Trondheim Panel, Norway had made it clear that it did not stand in the way of adoption of the Report, the Swedish delegation did not wish to press for more time in this case.

29. The Chairman, having heard the various interventions, proposed that the Committee adopt this Panel Report as contained in document GPR.DS2/R. In doing so, the Committee requested Norway to take the measures necessary to ensure that the entities listed in the Norwegian Annex to the Agreement on Government Procurement conduct procurement in accordance with the above findings.

The Committee so decided.

30. The delegate of the United States pointed out that the two Panel Reports had revealed a potentially serious flaw in the dispute settlement provisions of the Agreement in its lack of effective remedies where contracts had already been awarded inconsistently with the Agreement. He suggested that this issue warranted discussion in the Informal Working Group. The Chairman recalled the previous day's discussion in the Informal Working Group, where it had been decided that the secretariat, together with the Chairman, would draft a paper on this issue to be discussed, along with other issues relating to dispute settlement, at a further meeting of the Informal Working Group, to be held back to back with a formal meeting of the Committee, probably towards the end of June.

C. Other Business

(a) Communication, dated 27 April 1992, from the delegation of Switzerland pursuant to Article IX:5(a) concerning Liechtenstein

31. The Chairman recalled that Switzerland, in a communication dated 27 April 1992, had informed the Committee pursuant to Article IX:5(a) that it had added "the Government of Liechtenstein" to its entity list. The delegate from the United States wondered whether the proper procedure had been followed. He stressed that his delegation had no problems with the substance of the matter. However, he did not think that the procedure of Article IX:5(a), which governed minor rectifications in a member's entity list, was the appropriate one. Rather, paragraph (b) of that Article, governing modifications to an entity list, or alternatively, the provisions of Article IX:1, governing accession of a new Government to the Code, seemed to be more appropriate. The United States had not hitherto considered Liechtenstein a party to the Agreement and hoped that it had not erred in its Code responsibilities vis-à-vis Liechtenstein. He sought the views of Switzerland on this and requested legal guidance from the secretariat.

32. The representative of Switzerland explained that since 1924 Switzerland and Liechtenstein had been bound by a Customs Union. By virtue of this Customs Union, the territory of Liechtenstein had become an integral part of the Swiss Customs territory. The Swiss Protocol of Accession to the GATT stipulated that the rights and obligations accepted by Switzerland in its Protocol of Accession were also applicable to Liechtenstein. On the basis of this Protocol, the rights and obligations of the Agreement on Government Procurement as well as those of other Codes were also applicable to Liechtenstein ever since the Tokyo Round Codes entered into force. With the Swiss amendment to its entity list to the Agreement on Government Procurement, this Agreement became in fact also operational for Liechtenstein. Switzerland did not ask for any compensation from other Code members for the extension of its list. The delegate of Canada supported the United States request for a legal opinion from the secretariat on this question. The Chairman agreed that this would be useful and it was agreed that the secretariat would prepare such an opinion.

(b) European Communities: entity list for Spain

33. The delegate from the European Communities recalled that his delegation had submitted earlier to this Committee a modification to its entity list, consisting of three elements, as contained in documents GPR/63 and Addenda, including entity lists for Spain and for Greece. A number of questions regarding these lists had been received and he had provided oral replies pending responses in written form, which would be done as soon as possible. However, he was able to provide at this meeting written answers to a number of questions from the United States regarding the entity list for Spain. He also submitted a list of Spanish entities which corrected the list originally circulated in document GPR/63/Add.1 of 10 January 1992. The Committee decided that this list would be considered approved ten days from the present meeting, unless objections by parties had been received by the secretariat before that date, and secondly that in the absence of such objections, the Agreement on Government Procurement would apply between each party and Spain as from sixty days after the date of approval of that list, or, in cases where the relevant national legislation implementing this decision had not been enacted by that date, as soon as such enactment had taken place (document GPR/W/112 refers).