GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

GPR/M/48
13 November 1992
Special Distribution

Committee on Government Procurement

MINUTES OF THE MEETING HELD ON 6 OCTOBER 1992

Chairman: Mr. D. Hayes (United Kingdom)

1. The following agenda was adopted:

A. ARTICLE IX:6(B) NEGOTIATIONS;

B. CONSIDERATION OF THE REPORT OF THE PANEL ON THE UNITED STATES PROCUREMENT OF A SONAR MAPPING SYSTEM (GPR.DS1/R);

C. 1989 STATISTICAL REVIEW (REF. GPR/57 AND ADDENDA);
1990 STATISTICAL REVIEW (REF. GPR/60 AND ADDENDA);

D. IMPLEMENTATION AND ADMINISTRATION OF THE AGREEMENT;
APPLICABILITY OF THE AGREEMENT TO SPAIN, GREECE AND PORTUGAL (GPR/65, GPR/69, GPR/69/CORR.1, GPR/63/ADD.3);

E. TWELFTH ANNUAL REVIEW OF THE IMPLEMENTATION AND OPERATION OF THE AGREEMENT; ADOPTION OF THE DRAFT 1992 REPORT TO THE CONTRACTING PARTIES;

F. OTHER BUSINESS.

A. ARTICLE IX:6(B) NEGOTIATIONS

2. Previous to this meeting, the Chairman had circulated the following statement containing his own personal assessment of the situation.

"1. In view of the formal Committee meeting on 6 October, I thought you might welcome my assessment of the present situation, together with an indication of issues that remain to be resolved.

2. Negotiations on revising the Government Procurement Agreement have been conducted in the Informal Working Group. This Group has met five times in 1992, on 16 January, 19-20 February, 24 March, 12 May and 26 June.

3. The Group agreed in January that there should be no wholesale re-opening of the draft revised Agreement circulated on 20 December 1991 (GPR/64), and that this text is considered to be the basis for finalisation.

4. Nevertheless, that text has subsequently been revised twice. First, on 10 March, to take account of minor changes or corrections suggested on 10 February. Second, to reflect terminology common to the Uruguay Round draft Final Act texts. This work has been of a similar nature to that in the Legal Drafting Group on the draft Final Act. The resulting text, circulated on 5 June, on my responsibility without prejudice for negotiators' positions, remains the current basis for our work.

5. A suggestion that there could be early implementation of certain of the improvements provisionally agreed, either on a full or trial basis, did not find favour.

6. A major element of the Group's work has been dispute settlement. The Group agreed that the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the MTO should apply to the Government Procurement Agreement, except in limited, specific instances. There was broad support for decision-taking by the Dispute Settlement Body, but with participation in such decisions restricted to the Parties to the Government Procurement Agreement. Also for the incorporation of the time limits proposed in the Understanding, but with a clause advocating that, where possible, panels should conclude their work within four months. There was no opposition to the inclusion of the provisions in the Understanding on an appeals mechanism or arbitration. On cross-sectoral retaliation, two schools of thought emerged. One school opposed the possibility of such action involving the Procurement Agreement, while the other would allow its use, as a "two-way street". It was recognised that the decisions required on this issue are essentially political rather than technical, though the continuing debate on remedies for implementing panel reports was also regarded as relevant. The Group has also held so-far inconclusive discussion on so-called "non-violation" complaints.

7. All participants [except three] have now submitted offers which follow the format envisaged in the revised Agreement. These offers were circulated on 14 August in the GPR/Spec series.

Next Steps

8. There remain several outstanding issues:

(i) most importantly, to resolve certain coverage related issues (challenge procedures, offsets, self-denial, privatisation and the scope of the Agreement);

(ii) to secure improvements in the level of the offers;

(iii) to address and resolve the questions relating to the offers set out by the GATT secretariat in their paper of 12 August;

(iv) to agree the solution to certain outstanding dispute-settlement related issues, in particular remedies;

(v) to confirm the changes suggested in the current working text and to address the remaining issues raised, e.g. Articles VI and XXIV; and

(vi) to agree the timing of entry into force, any transitional periods, and legal basis for implementing the new Agreement, together with the means for submitting and evaluating final offers."

3. The Committee took note of his assessment without comments.

B. CONSIDERATION OF THE REPORT OF THE PANEL ON THE UNITED STATES PROCUREMENT OF A SONAR MAPPING SYSTEM (GPR.DS1/R)

4. The Chairman recalled that discussion of this Panel Report had been on the Committee's agenda twice before but so far it had not been possible to adopt the Report. The spokesman for the European Communities expressed his concern over this delay, first as regards the outcome of the procurement in question and the position of the bidders whose interests were at stake; and secondly, because his delegation had noted that the rather extensive explanations given by the American authorities at the previous meetings tended to suggest that the practices, of which the Communities had complained and which were the subject of the Panel Report, were not confined to this unique case but were rather pervasive. That was hardly an argument that was likely to allay the anxieties of the Communities. His delegation therefore urged that the one delegation which had still to support the adoption of this Report should do so today, if possible. Secondly, it would like to request assurances that the interests of the particular bidders involved in the procurement, which were the reasons for the Communities' complaint in the first place, should be taken care of so that a fair and open procurement procedure could take place in accordance with the obligations of the Code.

5. The delegate from the United States argued that, unequivocally, the original drafters of the Government Procurement Code had not had in mind coverage of the type of procurement that was the subject of this dispute. They had considered a service contract to be a service contract and that is why, in the Code, there was a reference to future negotiations on services. This sort of contract and the situation that surrounded it were simply never discussed. It had not been the intent of any negotiator and certainly not his, that this kind of contract would be covered. Acceptance of the Report would expand the coverage of the Code by dispute settlement, which for his delegation was not acceptable. He acknowledged that the coverage of the Code should be expanded to the greatest extent possible, but this should be done through negotiations, not through dispute settlement procedures. To accept the Panel's interpretation would in fact constitute a major change in the operation of the Agreement. His delegation continued to reject the Panel Report, because it was incorrect, and hoped to clarify the issues raised in it in the context of the renegotiation of the Agreement. Any question of coverage should be dealt with in the Annexes to the Agreement; that was the place where

clarifications would be needed. His government had never had the intention of covering this sort of contract and it would clarify this in the course of the negotiations. For now his delegation opposed adoption of the Report and rejected its reasoning.

6. The delegate from Switzerland stated that his delegation supported the adoption of this Report. In particular, his country shared the view of the Panel that exceptions to the Code should be interpreted narrowly. It also agreed that a contract for the procurement of a product above threshold but accessory to the procurement of services should be covered by the Agreement. Any other interpretation would be incompatible with the purpose of the text. He acknowledged that there was a grey area because services as such were not included in the present Code. It was clearly up to the negotiators on government procurement to make progress as fast as possible at the multilateral level in order to come up with an unambiguous result, which would cover services as well.

7. The representative of Singapore stated that after careful consideration and deliberation her government supported the adoption of the Panel Report. In particular, her delegation agreed that exceptions should be interpreted narrowly. Her delegation was of the opinion that the procurement of this particular sonar mapping system fell within the scope of the Agreement.

8. The delegate of Sweden, speaking on behalf of the Nordic countries, noted that this was the third time that the United States had refused to accept the Panel Report, and reiterated their request that the United States should reconsider and accept the adoption. In more general terms, he noted that the dispute settlement system was at the core of the rule-based trading system, and that when rulings made by GATT panels were blocked for adoption, or if adopted but not implemented, the credibility of the system was weakened. His government believed that a strong, independent and effective dispute settlement system was needed. It should not be possible to block panel rulings indefinitely. The dispute system should be capable of handling not only general but also specific problems, and when needed should prescribe specific solutions in order to solve practical problems in international trade.

9. The spokesman of Hong Kong repeated his delegation's strong support of the adoption of the Report, and shared the frustration expressed by other delegations over the inability to do so. In response to the United States intervention, he pointed out that the Report stated explicitly that services per se were not covered by the present Agreement, but added that the form of a procurement should not be allowed to determine the coverage. The continued delay of the adoption of this Report created an ambiguity that would be harmful to the negotiations in the Informal Working Group. He agreed that the extended coverage of the Agreement was a matter for the negotiations; but failure to agree on the coverage of the existing Code did not augur well for successful completion of the negotiations. His delegation therefore urged very strongly that the United States should reconsider its position and abide by the conclusions of the Panel.

10. The delegate of the European Communities expressed regret at the views expressed by the United States delegation. These arguments had been fully rehearsed before the Panel and at two previous Committee meetings. The United States was in a minority of one. The United States spokesman had said that the coverage of the Agreement should not be extended by dispute settlement; the EC's concern was that the coverage of the Agreement should not be diminished by non-application of existing obligations. He reiterated his request for information as to the procedure to be adopted for the carrying through of this procurement and as to whether the bidder who was at the origin of the complaint could expect to get non-discriminatory access to the award of the contract.

11. The delegate of the United States responded that he was not aware of the state of the award of that contract but noted that the purchasing agency had been informed of the result of the Panel.

12. The Chairman concluded that the Committee would take note of the statements made; second, that the Committee noted that it was unable on this occasion to adopt the Panel Report in question; third, that if those mainly concerned agreed, he would offer his good offices to them to put forward some ideas which he hoped would lead to a resolution of this matter. If those ideas proved acceptable he would return to this matter in an early meeting of this Committee.

13. The Committee so agreed.

C. 1989 STATISTICAL REVIEW (REF. GPR/57 AND ADDENDA)
1990 STATISTICAL REVIEW (REF. GPR/60 AND ADDENDA)

1989 statistical review

14. The Chairman recalled that the 1989 statistics had been discussed at the meetings of the Committee on 18 October 1991 and 27 March of this year. At the October meeting, the European Communities had submitted a number of detailed questions to the delegation of the United States regarding its 1989 statistics, to which the United States delegate had responded in great detail at the meeting of 27 March 1992.

15. The delegate from the European Communities expressed his delegation's gratitude to the United States delegation for the replies to his questions; they came under three broad headings, to which he responded in general terms. Firstly, he argued that the United States had evidently misconstrued both the Communities' reasoning in its earlier questions and its method. The original question was based on the view that in a procurement system that publicly and systematically discriminated against foreign bidders and products, markets could only be considered to be open if bidders were informed accordingly. That was why, in the award of contracts covered by the procurement Code, the United States authorities had agreed to append Note 12 to their calls for tender so that bidders, who normally would assume that they had no chance because of the inherent nature of the system, could be assured that in these cases the Buy American

Act and other provisions, which could make their bid futile, would not be used against them. Based on a detailed examination of published information in the Commerce Business Daily (CBD), the Communities had invited the United States authorities to reconcile the information given to potential bidders with information contained in its 1989 statistical return. This was a request for reconciliation of two sets of apparently contradictory information. The European Communities agreed that in the United States, as elsewhere, a single call for tender could give rise to more than one contract. However, the contention that this explained the difference between GATT-covered calls for tender, published in the CBD and the statistical return, did not appear to be borne out by analysis of post-award notices, also published in the CBD, which was the source from which he drew the inferences on average contract value. Secondly, the United States delegation had replied to the Communities' request that it identify the calls for tender for 171 contracts which were reported in the United States statistical return as having been awarded by fourteen Code-covered agencies for which his delegation had been unable to find any advertisement in the CBD. The answer was hardly reassuring. It amounted, in effect, to saying that the procurement for these covered agencies had been carried out by a different agency. His delegation had not been told which agency nor whether they had published the notices in the CBD nor whether the agency which carried out the procurement was Code-covered. That was hardly a positive signal to foreign bidders. For a number of specified very large contracts his delegation had noted that the American authorities had been unable to confirm that bidders had been made aware that the contracts were open to Code-party bidders and not subject to the normal procurement procedures in the United States. Indeed, the United States answer showed that of the two grouped award procedures for aviation fuel, which together had a value of 2.3 billion dollars, one was not clearly specified as being Code-covered. The tenor of the replies confirmed the Communities' concern that the statistics, while no doubt adequately representing the intentions of the purchasing entities, were not a true representation of the opportunities actually open to foreign bidders, in the sense that bidders only had an opportunity if they were given the necessary information to tell them that the market was indeed open. In particular, his delegation could not accept that the statement that all responsible sources could bid constituted a sufficient guarantee. In normal circumstances, he understood this term to mean that all responsible sources, including foreigners, could bid but contracts would be subject to the Buy American Act, the small business exemption and other discriminatory conditions which habitually existed. In other words, there was no procurement opportunity actually being offered. The EC delegate cited some recent examples by way of illustration from the CBD to show his point: on 9 March this year there was a call for tenders on lubricating oil for aircraft turbo-shafts. This specified that what was required was Mobil Oil - Mobil Jet-2 Exxon Corporation. The call for tender said that this was Code-covered. It mentioned Note 12. It said, however, that specifications were not available and could not be furnished by the government but that all responsible sources could submit an offer. Presumably, this meant all responsible sources which provided Mobil Aviation fuel could submit an offer but that was limited comfort to those who did not belong to the Mobil Corporation. The EC spokesman drew the

conclusion that there were fundamental problems in statistical reporting for all delegations, including the EC. It was extraordinarily difficult to obtain meaningful statistics which actually reflected the extent of contracting opportunities offered under the Agreement. The EC was not at all satisfied with its own reporting in this respect, nor with reporting by others. Internally, the EC had already launched a major programme to try to develop statistical indicators which adequately reflected the commercial opportunities actually made available to would-be suppliers. He offered to make the results of this work available to members of the Agreement and to see how development would go forward. He concluded that it was extremely misleading to build substantial conclusions regarding the balance of application of the Code on the existing system of statistical reporting.

16. The representative of the United States responded that there was no need whatsoever to defend United States statistics. The US had more coverage, indeed, three or four times more coverage than the EC. Statistics showed that the opportunities afforded in the United States government procurement market far exceeded those offered by the other parties to this Agreement. The United States government had worked eighteen years to produce a transparent computerised system of data collection for the statistics which his country provided to this Committee. It was not 100 per cent correct, but close to it. The US had never been convinced that the Commission of the EC had a reliable system of data collection. In some of the member states there appeared to be no collection system at all; this called into question the published figures. In any event, if they had a system, it was not transparent. The coverage in the United States was clear. Exceptions existed which had been negotiated and which appeared in the entity list attached to the Agreement. His delegation had tried to be helpful in answering questions. It did not seem to work. Questions were being asked by Signatories which themselves had no reliable data collection system. The United States statistical report (GPR/60/Add.6) showed that more contracts were awarded to foreign firms by the United States government than by any other Signatory to the Agreement. If the present unbalanced situation could not be corrected in the course of the renegotiation of the Agreement, his government would take a serious look at its participation in this Agreement.

17. The Committee took note of the statements made.

1990 statistical review

18. The representative of the European Communities circulated a number of specific questions, in particular addressed to the United States delegation. In explaining the gist of the questions, he observed that comparing the development of the reported statistics since 1985 for the three largest parties to the Agreement, Japan, the United States and the EC, the figures for Japan and the European Communities reflected a significant increase, while those for the United States showed a decline. For Japan, over the period 1985-90, the total reported coverage of contract-procurement above and below threshold had increased by 55 per cent. The increase in above-threshold procurement was rather larger - 69 per cent. For the EC the figures over the same period reflected a

76 per cent increase in total procurement reported and 104 per cent increase in above-threshold procurement. This reflected not only inflation and growth but also improved reporting. For the United States, on the other hand, there had been a net decline in total procurement above and below the threshold of 8 per cent. Although the real value of the threshold had declined steadily throughout the period, the decline in above-threshold procurement reported by the United States was 30 per cent. This development appeared contrary to normal expectations. This was exemplified by the development over the last year. The EC requested the US to explain this trend. In connection with that his delegation had a number of specific questions which would be circulated to the Signatories in writing.

19. The Chairman proposed that the Committee take note of the statements made and that the secretariat circulate the EC questionnaire. He urged delegations who had not yet done so to submit their statistical reporting for 1989 and 1990.

20. The Committee so agreed.

D. IMPLEMENTATION AND ADMINISTRATION OF THE AGREEMENT; APPLICABILITY OF THE AGREEMENT TO SPAIN, GREECE AND PORTUGAL (GPR/65, GPR/69, GPR/69/CORR.1, GPR/63/ADD.3)

(i) Spain and Greece

21. The Chairman recalled that, as regards Spain, following the Committee's decision on 13 May 1992 regarding the list of entities for Spain which had been submitted by the EC, the Agreement on Government Procurement was considered to apply between each Party and Spain as from sixty days from 23 May 1992 or, in cases where national legislation implementing that decision had not been enacted by that date, as soon as such enactment had taken place. As regards Greece, the Committee, at its meeting of 26 June 1992, had decided that the list of entities for Greece, which had been submitted by the European Commission in document GPR/63/Add.2, was considered to apply between each Party and Greece as from 5 September 1992 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. The representative of the European Communities confirmed that both Spain and Greece had fulfilled their obligations so as to become fully active covered members of the Agreement in the EC.

22. The Chairman proposed that the Committee take note of that information concerning the status of the Agreement as regards Spain and Greece and to note that the Agreement was now considered to apply as between Signatories of this Agreement and those two countries.

23. The Committee so agreed.

(ii) Portugal

24. The Chairman recalled that on 22 June 1992, the EC had submitted a list of Portuguese entities with the request that this list be discussed with a view to the rights and obligations of the Agreement becoming applicable to Portugal. The representative of the United States requested the EC to clarify why the entity list for Portugal submitted by the EC on 26 June did not include the Ministry of Parliamentary and Youth Affairs and the Ministry of Maritime Affairs. Did these Ministries still exist and if so why were they not included on the list? Secondly, he requested confirmation from the Communities that both Portugal and Greece had a statistical system for data collection on government purchases which would coincide with the requirements of this Committee.

25. The representative of the European Communities replied that the Ministry of Parliamentary and Youth Affairs no longer existed. Its functions had been taken over by another covered entity. The Ministry of Maritime Affairs was in the course of a reorganisation during which its functions were expected to be very substantially reduced and it had not been offered for coverage by the EC. With regard to the reporting obligations, the countries in question would be in a position to report in accordance with the requirements of the Agreement.

26. Concerning the list of entities for Portugal, the representative of Canada asked whether the Ministry of the Sea and the Maritime Affairs Ministry were one and the same? He noted the absence of the Ministry of Health. He also observed that the list did not include what would be called Crown Companies in Canada, such as PTT, for example. Was there any reason for these being excluded?

27. The representative of the Communities confirmed that, to the best of his delegation's knowledge, the Ministry of the Sea and the Ministry of Maritime Affairs were one and the same. He added that the Ministry of Health was covered but had been omitted by oversight. Its constituent bodies would be added to the list. As regards the third question, he did not recall that other delegations had been exhaustive in their coverage of their Crown corporations. In this case, the Portuguese PTT had not been offered. The Communities had made a general offer in the context of negotiations for the enlargement of the Agreement concerning the coverage of such entities.

28. The Chairman proposed that the Committee follow the same procedure as it had used concerning the application of the Agreement to Spain and Greece, namely that the list of entities for Portugal, as set out by the EC on 26 June 1992 and as amended following the statements made by the Communities in this meeting, would be considered approved ten days from the date of this Committee meeting, unless objections by Parties were received by the GATT secretariat before that date. In the absence of such objections the Agreement would be considered to apply between each Party and Portugal as from sixty days after the date of approval of the list of entities for Portugal 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.

29. The Committee so agreed.

E. TWELFTH ANNUAL REVIEW OF THE IMPLEMENTATION AND OPERATION OF THE AGREEMENT; ADOPTION OF THE DRAFT 1992 REPORT TO THE CONTRACTING PARTIES

30. The Chairman recalled that the meeting of the CONTRACTING PARTIES would not take place until December and it was not possible that the Committee would meet again before that date. The secretariat had nevertheless drawn up a first draft of a report to the CONTRACTING PARTIES which had been sent to all delegations. He invited participants to offer any comments to the secretariat, on the basis that if there were a further meeting of this Committee before the CONTRACTING PARTIES meeting amendments would in any case be needed.

31. The representative of Hong Kong observed that the draft report revealed that the Agreement had twelve Signatories but thirty-three Observers. This was demonstrative of the interest of many contracting parties of the GATT in the Agreement, but was maybe also a reflection of the difficulties they faced in becoming a full member. As delegations were now engaged in a broadening exercise, they should not lose sight of this rather important aspect of broadening, i.e. the broadening of membership. In the negotiations delegations had spent due time in the discussion on coverage and improved disciplines. He pointed out however that in doing so disciplines should not become more restrictive or more difficult for those who were intending to join but may need more time to adjust. One of the objectives of the Code was greater liberalisation and expansion of world trade and improving the international framework for the conduct of world trade in respect of government procurement. Widening of membership should not be lost sight of.

32. The representative of Singapore agreed that the obligations which ensued from this Agreement ought not to be so onerous as to discourage other contracting parties from joining it. The representative of Israel supported these statements.

33. The Committee took note of the statements made by Hong Kong, Israel and Singapore.