

GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

GPR/M/49

25 May 1993

Special Distribution

Committee on Government Procurement

MINUTES OF THE MEETING HELD ON 29 MARCH 1993

Chairman: Mr. D. Hayes (United Kingdom)

1. The following agenda was adopted:

- A. ELECTION OF OFFICERS;
- B. STATE OF PLAY IN THE NEGOTIATIONS UNDER ARTICLE IX:6(b);
- C. IMPLEMENTATION AND ADMINISTRATION OF THE AGREEMENT:
 - ACCESSION OF ARUBA (REF. GPR/W/122/REV.1, DATED 4 MARCH 1993);
 - EC: REVISED ENTITY LIST FOR PORTUGAL (REF. GPR/W/117/REV.1 DATED 8 MARCH 1993);
 - SWEDEN: RECTIFICATION OF A PURELY FORMAL NATURE (REF. GPR/W/123 DATED 4 MARCH 1993);
- D. 1989 STATISTICAL REVIEW (REF. GPR/M/43 AND GPR/M/45, GPR/57 AND ADDENDA); 1990 STATISTICAL REVIEW (REF. GPR/M/48, GPR/60 AND ADDENDA);
- E. OTHER BUSINESS.

On the request of the European Communities the following points were added to the agenda under "Other Business":

- Paper of the European Communities on contract statistics on the "country of origin of the product"; and
- Report of the Panel on the Procurement of a Sonar Mapping System.

The delegation of Japan requested the addition of one item under "Other Business":

- Change by Japan in its entity list (GPR/W/124, dated 22 March 1993).

A. ELECTION OF OFFICERS

2. The Committee re-elected Mr. David Hayes (United Kingdom) as Chairman and elected Mr. H. Ernst (Switzerland) as Vice-Chairman.

B. STATE OF PLAY IN THE NEGOTIATIONS UNDER ARTICLE IX:6(b)

3. The Chairman informed the Committee of the efforts which he had undertaken earlier this year on his own responsibility with a view to helping the process forward. He recalled that the Informal Working Group at its session on 9 December 1992 had given broad support to a note dated 1 December 1992 which had set out the main outstanding issues in the text in the negotiations. This had not dealt so much with the so-called coverage-related issues, both as regards the text and the offers on entities, because those seemed to be largely a matter for a bilateral or a plurilateral process. In the middle of January he had invited all participants to engage in talks with the Secretariat and himself to determine the various views on the main outstanding issues in the negotiations and ways of resolving them, including on questions of coverage. After discussions with all those participants who had availed themselves of his offer, it had seemed sensible to prepare a paper on coverage-related issues which had been circulated on 9 March 1993. This paper suggested various ideas and possibilities as to how the negotiations might be taken forward. The Chairman stressed that the paper was not meant to be a basis for negotiation or a paper for discussion amongst participants, but simply one outlining his own thoughts as Chairman on how the negotiators might consider taking the negotiations forward. At the time of issuing the paper he had also made an offer to certain participants to assist them in their bilateral or plurilateral negotiations, whether as mediator or in any other capacity. He had reaffirmed his offer to them on 15 March and had informed all participants to the Informal Working Group of this offer the following day. He wanted to take this opportunity to reaffirm this offer once again to those participants or any other participant. It was open-ended and would remain so with a view to assisting the negotiating process in any way he could. He noted that this meeting of the Committee was taking place at the same time as bilateral discussions between certain major participants. He made it clear in this respect that this meeting was intended as the normal spring meeting of the Committee and that any parallelism between this meeting and other meetings which were going on was purely coincidental.

4. The Committee took note of the Chairman's report.

C. IMPLEMENTATION AND ADMINISTRATION OF THE AGREEMENT

- EC: revised entity list for Portugal

5. The Chairman recalled that, at the Committee meeting of 6 October 1992, Parties had agreed to an expedited procedure for applying the Agreement with respect to Portugal. Each Party was given ten days to object to the Portuguese entity list; if no objections were received,

Parties would have sixty days to apply the Agreement unless national implementing measures required additional time. The United States, by way of its communication dated 16 October 1992 and contained in document GPR/W/119, had notified the Committee that it was still examining the extent to which Portugal's coverage under the Agreement was affected by the fact that the Ministry of the Sea was not included in its entity list. For that reason, the United States had objected to the use of the expedited procedure at that time. The European Communities subsequently submitted a revised entity list for Portugal, (document GPR/W/117/Rev.1) on 8 March 1993, which contained the Ministry of the Sea.

6. The representative of the European Communities explained that the revised list submitted by the European Communities took account of the points which had been made by a number of delegations at the previous meeting. He drew the attention of the other participants to the modifications introduced in the Portuguese list. Under the Ministry of Public Works, Transport and Communications, the Portuguese Post and Telecom Organisation had been added. In addition, the Ministry of the Sea and the Ministry of Health which had been omitted by oversight had also been added. He hoped that, with the approval of this list, Portugal would have fulfilled its obligations so as to become a fully active covered member of the Agreement, following the normal procedures and the normal deadline for application.

7. The representative of the United States stated that in her delegation's view the revised entity list for Portugal appeared to be sufficient for the purposes of according rights to Portugal under the Code. Nevertheless, Washington requested two small points of clarification. Was the Ministry of Parliamentary and Youth Affairs offered as part of the Prime Minister's Office? - And secondly, had the entity functioning as the Portuguese Mint or Bureau of Engraving been offered as part of the Portuguese entity list? She confirmed that the United States could now agree to the expedited procedure as proposed. The representative of the European Communities responded that, to the best of his delegation's knowledge, the Ministry of Parliamentary and Youth Affairs was indeed covered. He needed more time to answer the second question. He hoped that this matter would not hold up the extension of the rights of the Code to Portugal. The Chairman invited the two delegations concerned to pursue this matter bilaterally and noted that the United States had made it clear that it would not hold up the expedited procedure as proposed.

8. The Committee agreed to apply the expedited procedure with respect to the extension of the rights and obligations of the Agreement on Government Procurement to Portugal. This meant that each Party was given ten days from 29 March 1993 to object to the Portuguese entity list (12 April 1993); if no objections were received, Parties would have sixty days to apply the Agreement, unless national implementing measures required additional time.

- Accession of Aruba

9. The representative of the Kingdom of the Netherlands, with respect to Aruba, outlined the interests of Aruba in joining the Agreement on Government Procurement. He recalled that Aruba's application to accede had been circulated in document GPR/W/122/Rev.1 of 4 March 1993, which described the status of Aruba as one of the constituent parts of the Kingdom of the Netherlands. The Government of Aruba was interested in accession to the Agreement for two reasons; the first was a reason of principle and the second a reason of pragmatism. As a matter of principle, the Government of Aruba attached great importance to a secure and predictable world trading system. As a small island economy it depended to a large extent on the international economy and on secure trade relations, which incidentally was also the reason why Aruba was participating in the Uruguay Round. He recalled in that respect that the Kingdom of the Netherlands with respect to Aruba had submitted a draft offer in the Services negotiations last year. Although accession to the Code on Government Procurement was optional in the present GATT system and the revised Code, which was presently under negotiation, would remain a facultative Agreement in terms of accession, Aruba was nevertheless committed to join the present Agreement and possibly, when negotiations resulted in a new Code, Aruba would also be interested in acceding to the new Agreement. Secondly there were pragmatic reasons. Membership of the Code would bring certain economic advantages. As a small economy heavily dependent on services such as tourism and financial services, Aruba was constantly trying to broaden its economic basis and to diversify its economy. Attracting foreign investment aiming at export markets played a central part in this strategy. Aruba, as an overseas country and territory of a member state of the European Communities, in this case the Kingdom of the Netherlands, enjoyed preferential trade relations with the European Communities. However, Aruba was of course also looking to other markets in its own region and beyond. Recently, Aruba's oil refinery, which had been in the past an important part of its economy but which had been mothballed in 1985, had been reopened. For that reason Aruba was very interested in export markets for its refined oil products. Government contracts were of course an interesting segment on that market especially in the region. Certain governments required that in order for companies to qualify for government contracts, the country of origin of the exporter had to be a Party to the Agreement on Government Procurement. Aruba's offer of listed entities, contained in the Annex to the document, represented all the relevant government departments in Aruba. In conclusion, the representative of the Kingdom of the Netherlands offered to give any further clarifications on the offer or to answer any questions with regard to the application of Aruba for accession, either at this meeting or in a bilateral context later on.

10. The representative of the United States welcomed Aruba's interest in exploring Code membership and stated that her authorities were currently reviewing its application and would come back with a further response or a list of questions at a later date. The representative of the European Communities welcomed Aruba's application for accession, and was pleased that it concerned an island which had a special relationship with one of the member states of the European Communities. The Communities considered

this application a positive development in the context of broadening the membership of the Agreement on Government Procurement to which the European Communities attached considerable importance. He expected that delegates would seek bilateral contact with the representative of Aruba with a view to obtaining clarifications of the offered entity list. The representative of Japan welcomed Aruba's application. An open and free trading system would benefit the development of the world economy and the application was a step in that direction. He noted that his government favoured the creation of a less biased and less discriminatory trading system and it was also from this perspective that his delegation welcomed Aruba's request for accession.

11. The Committee welcomed Aruba's application for accession and took note of the offer by the representative of the Kingdom of the Netherlands with respect to Aruba to engage in bilateral consultations with interested delegations.

- Sweden: rectification of a purely formal nature

12. The Chairman recalled that the delegation of Sweden had notified the Committee in its communication dated 4 March 1993 and contained in document GPR/W/123 that one of its listed entities had ceased to exist and its functions had been transferred to another Code-covered entity. This rectification had been notified under paragraph (a) of Article IX:5 as a rectification of a purely formal nature which did not require any discussion in the Committee. The delegate from Sweden took the opportunity to give the Committee some background information on this change. He assured the Committee that the transfer of functions of the National Road Safety Office to an all-encompassing organisation, the National Road Administration, did not in any way prejudice procurement behaviour, since all activities of the former had been transferred to the latter.

13. The Committee took note of the notification.

D. STATISTICAL REVIEW

- Review of the 1989 and 1990 statistics

14. The Chairman proposed that the Committee conclude the statistical reviews both for 1989 and 1990. The representative of Canada stated that, in view of the fact that the complete statistics for 1989 and 1990 had only been submitted a few days ago, his authorities would need some time to study them. He was therefore not in a position to agree to the conclusion of the respective reviews at this Committee meeting. The representative of the European Communities recalled that his delegation had on a previous occasion submitted detailed questions to the delegation of the United States with respect to its 1990 statistics. The principal question concerned the net decline in total procurement above and below threshold of 6 per cent. His delegation had also noted some drops in overall procurement by several agencies for specific product categories. The European Communities had requested the United States authorities to provide an explanation and his delegation was looking forward to receiving such information.

15. The Committee concluded that more time was needed for the reviews and decided to revert to this matter at its next meeting.
16. As a separate point, the Chairman encouraged delegations who had not yet done so to submit their statistics for 1991.

E. Other Business

- Paper of the European Communities on contract statistics on the "country of origin of the product"

17. The representative of the European Communities recalled that his delegation had stressed on more than one occasion that it was extraordinarily difficult to obtain meaningful statistics which accurately reflected the extent of commercial opportunities offered under the Agreement on Government Procurement. The note his delegation was presenting at this meeting (subsequently distributed as document GPR/W/125) was intended to be a technical contribution to the discussion of the ways in which government procurement statistical reporting could be developed and improved. Introducing the note, he explained that the Commission had experimentally drawn a random sample of contract award notices from the Official Journal with a view to establishing how far there had been foreign penetration of the contracts concerned. The sample covered seventy-seven contracts covered by the Agreement on Government Procurement awarded by EC entities with a total value of ECU 80.9 million. The Commission had applied a rigorous methodology in order to ensure reliability of the figures.

18. Three different indicators could be used to assess the level of market opening: firstly, the address of the winning supplier; secondly, national ownership of the winning supplier; and thirdly, the actual origin of the products contained in the bid. This last information was traditionally very difficult to obtain, but the Commission was confident that in this sample the figures were correct. The European Communities had hitherto used the address of the winning supplier in its reporting to the GATT. In all probability, such a method gave a very restrictive view of the foreign penetration of the EC market. A Community address could be that of the agent of a foreign supplier and concern the supply of foreign goods. By using this method one was in fact not measuring market opening but the organisation of business in respect of distributorships and local agents. The two other indicators, ownership of the firm and origin of the product, gave a much more positive picture of the level of market opening. Ownership of the firm was a relatively straightforward indicator reflecting the pole to which profits would likely converge. Two conclusions could be drawn from the note. Firstly, the use of the address of the winning supplier as an indicator gave a much more pessimistic picture of the level of market opening than the returns on the basis of ownership of the firm or the origin of the product. Secondly, the paper demonstrated the fallibility of the current statistics and made clear that no simplistic conclusion concerning the relative degree of openness and market opportunities under the present Agreement could be drawn from such statistics.

19. The Chairman noted that delegations would need time to study this note and that the Committee could revert to the matter at a later date.

- Report of the Panel on the Procurement of a Sonar Mapping System

20. The representative of the European Communities recalled that this item had so far been on the agenda three times but that it had not been possible to secure adoption of the Report, because the delegation of the United States had not yet given its approval to the Panel Report. GATT rules could only be fully effective if rulings made by GATT panels were accepted. Adoption of this report would do much to strengthen suppliers' interest in the effectiveness of the Agreement on Government Procurement and would increase the credibility of the dispute settlement mechanism. The European Communities therefore hoped that the United States could confirm today that it no longer blocked adoption of this Report. He also asked the United States delegation whether it could reassure his delegation that the United States Government had taken steps to ensure that the discriminatory measures about which the Communities had complained had not been applied in this specific case and that the particular bidder involved had had the opportunity to participate in a fair and open procurement procedure in line with the requirements of the Code. The representative of the United States regretted that her delegation needed to continue to oppose the adoption of this Panel Report. Nothing had occurred since the previous meeting to change her delegation's position. The United States maintained that the Panel's findings were inconsistent with the clear language of the Code and contradicted the intent of the original negotiators of the Code. Her delegation was however willing to continue negotiations with a view to expanding coverage of the Code to service contracts but could not accept such an expansion through dispute settlement procedures. The representative of Canada said that his delegation could not accept a view that a panel decision, especially one upheld by a large consensus, which was seen as giving an interpretation of the Code, be made the object of negotiations in terms of its adoption.

21. The Committee agreed to revert to this item at its next meeting.

- Change by Japan in its entity list

22. The representative of Japan referred to document GPR/W/124 entitled "Japan: Change in Entity List", which the Group had before it. According to its paragraphs 1.1 and 1.2, two private companies had been spun off from the original NTT entity, itself part of the Japanese entity list, on 1 July and 1 December 1992 respectively and both were now established as private companies in accordance with the Japanese Commercial Law. They were acting in a competitive environment and were under the constraints of competitive markets. The Japanese communication was only intended to inform the members of this Committee of these developments. They did not change the fact that NTT itself was covered, and very effectively covered, under the Code. He added that these two private companies, "NTT Mobile" and "NTT Facilities", had informed the Japanese Government of their intention to voluntarily continue to carry out procurements in a transparent and non-discriminatory manner, as reflected in the final paragraph in the Japanese communication.

23. The representative of the European Communities requested the delegation of Japan to provide a clarification of the concept of privatised commercial entities, in particular whether this meant that the two entities concerned had been placed under private law or whether their shareholdings had been sold to the private sector. Depending on the reply, his delegation saw two ways forward. In the case that they were still publicly controlled - in terms of ownership or otherwise - the Communities would not support withdrawal from the list of covered entities. If, on the other hand, the two entities had become genuinely private, his authorities would envisage that the loss of the two entities should be compensated. However, even in this event, his delegation would be unable to agree to such a procedure today, also in view of the very recent transmission of the note. The representative of Canada was interested to know whether the control over these entities was in the hands of private shareholders or if there was a percentage held by government authorities and, if so, what percentage? He furthermore enquired as to whether the government authorities legally or in any other way still had access to the Board of Directors of these entities under their statutes. In view of the late submission of the Japanese communication he reserved the right to ask further questions and to draw conclusions from the information furnished by the Japanese delegation at a later date. The representative of the United States shared the Communities' and Canadian need to come back to this issue at a later date, given the recent submission of the communication.

24. The representative of Japan said that there were basically two points which had been raised. One concerned the issue of ownership and the other the issue of control. With regard to the issue of ownership he said that NTT, the mother entity, was itself still basically in government hands. The two entities, "NTT Mobile" and "NTT Facilities" respectively were entirely owned by the mother company at this present stage. However, the plan, as he understood it, was to sell the shares of these two companies progressively to private investors over the course of several years. On the issue of control, he said that the notification made it clear that the relevant law was the Japanese Commercial Law. On the issue of compensation, he said that his country's communication served a transparency purpose only and that there was no doubt in his delegation's mind that NTT, as the original entity, was covered under the Code. Therefore he did not see the link with the issue of compensation.

25. The representative of the European Communities asked whether he had correctly understood the Japanese intervention to mean that nothing had changed as regards Code coverage in relation to these two entities. The representative of Japan responded that paragraphs 1.1 and 1.2 of the communication referred to two companies being established by NTT to "take over the relevant activities which had been formerly conducted by NTT". There was clearly a difference of framework. He also drew attention to paragraph 3 of the Japanese communication which indicated that these companies, while not being directly subject to Code coverage, had submitted that they would voluntarily continue to make procurements in a transparent and non-discriminatory manner. Having heard the Japanese clarification, the representative of the European Communities responded that his delegation concluded that Japan appeared to have changed its Code coverage.

26. The Committee noted the Chairman's proposal that delegations pursue the matter bilaterally, noted that several delegations had reserved their rights to come back to the question at a later stage and agreed to revert to this issue at a following meeting upon request of one or more delegations.

- Next meeting of the Committee

27. The Chairman said that the date of the next meeting of the Committee would be determined in consultation with the delegations.