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MTN/NTM/W/61
18 October 1976

Special Distribution

GENERAL AGREEMENT ON TARIFFS AND TRADE

Multilateral Trade Negotiations

Group "Non-Tariff Measures"

Original: English/ French

WORK OF THE OECD ON GOVERNMENT PURCHASING

Note received from the OECD

This note, drafted in reply to the request from the GATT secretariat, expands and complements the information transmitted in June 1975, on work in the OECD on government purchasing.

1. As indicated in the original note, the work had a two-fold purpose, the first being to improve knowledge of regulations, procedures and practices in member countries in a field of major economic and commercial importance, whose dissemination would facilitate international competition for government contracts. The main effort now, however, is being put into in-depth discussion with a view to elaborating a draft instrument on the basis of which signatory countries would eliminate discrimination in this field and ensure that suppliers and products of other signatories are given treatment equivalent to national treatment in the procurement process.

2. An OECD publication updating[1] and supplementing the brochure "Government purchasing, regulations and procedures" came out a short while ago. The chapter headings, being the aspects regarded as having an important bearing on international competition, now include a new one - as compared with the 1966 edition - with the title "Procedures for hearing and reviewing complaints", summarizing the information collected for the purposes of the discussions concerning a draft instrument.

3. In the main this note deals with the work done in connexion with a multilateral instrument. Much of the text of this instrument has been drafted. However, there are a number of issues which have been explored in detail but on which agreement has not yet been possible. Even so, the discussions have helped to draw a fairly complete picture of the issues involved in producing such an instrument, and the links between them. The object of this note is to explain the directions along which work has proceeded in the OECD discussions.

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[1] This edition generally refers to the situation as at December 1975.

4. The work toward a solution in the OECD has been able to draw on the extensive experience and systems of the OECD member countries with full understanding of the need to find a solution compatible with the needs of countries with less developed procurement systems and economies. This work in the OECD has been directed towards establishment of a set of detailed rights and obligations likely to ensure the widest possible coverage of the procurement field on a reciprocal basis among the countries concerned. As has already been pointed out, this work was undertaken on an exploratory basis and does not imply any commitment on the part of governments regarding the type of solution that would finally be adopted.

5. The principal questions are grouped under four headings

I. Abolition of discriminatory provisions or preferential treatment;
II. Market accessibility and transparency;
III. Surveillance and settlement of disputes;
IV. Field of application.

I. Abolition of discriminatory provisions or preferential treatment

6. The essential condition for the attainment of the objective of an international instrument on government purchasing is that all national provisions giving rise to discriminatory treatment or preferences in favour of national suppliers and products be abolished to the extent that they are inconsistent with the provisions of the instrument. This should be complemented by appropriate steps to call the attention of public purchasing entities to the instrument and to ensure that their rules, procedures and practices conform to the provisions of the instrument.

II. Market accessibility and transparency

7. To achieve non-discrimination in government purchasing policy, procedures and practices, the elimination of discriminatory legislative, regulatory or administrative provisions inconsistent with the instrument is necessary but not enough. It needs to be supplemented by certain objective guarantees (whose number and scope have to be established) designed to ensure that suppliers and products of the other signatory countries effectively receive non-discriminatory treatment in the purchasing process. It is considered these guarantees will be found in provisions ensuring fair conditions of access and participation to all interested suppliers and availability of relevant information on contemplated purchases as well as purchases made.

8. Market transparency works in two ways: it aims at enlarging the field of competition for potential contracts and it permits a watch to be kept, at different degrees and levels, on the way in which contracts are awarded and undertakings complied with. This transparency can be secured by providing information in various ways. It may be general - relating to a set of contracts - or separate for each contract and it may be "ex ante and/or ex post", i.e. supplied before or after the award, the content and scale of dissemination being a function of its usefulness in each case.

9. A case-by-case ex ante publicity regarding the intention to purchase (this applying for contracts of a certain value) would be essential for maximum access to government contracts. This publicity would not make any basic change in the freedom of choice of buying entities as regards the procedures applied, since they could either allow all suppliers interested to bid ("open" procedures) or choose those that would be allowed to participate ("selective" procedures). This would ensure that all suppliers specifically interested in an envisaged contract could be informed, put their names forward and follow developments with regard to that particular contract. Publication would be supplemented by the provision of precise information to bidders on the characteristics of the products required, the conditions in which suppliers could take part and the criteria on which their bids would be assessed.

10. As regards ex post information, this type of information could serve several purposes. It would enable the various aspects of the award of contracts to be followed thereby contributing to the overall transparency. Such information would be of interest in the first place to suppliers who wanted to obtain information or explanation relating to the award of specific contracts for which they had been rejected. The question of what information should be made available has not yet been answered. On the one hand, the concern is that information should be sufficient to ensure the transparency of transactions and the integrity of the operation of the agreement. On the other hand, the concern is that the information provided shall be that which the procuring agency deems possible to disclose, keeping in mind the need to safeguard competition. In the second place this information would be useful both at the bilateral level between governments and in connexion with the supervisory machinery provided for in the instrument. This information could be made available by various means, among them statistical systems which could be established by all the countries participating in order to gather aggregate information on government purchasing and/or on transaction by transaction basis.

11. As indicated, market transparency would need to be supplemented by guarantees regarding accessibility for effective participation by suppliers and products of other signatories. Here the objective is to avoid any discrimination in the form of the technical characteristics of a product, qualifying conditions for suppliers and the guarantees and proofs they have to provide of their technical and economic capacity and financial solvency, the conditions for access to the "suppliers" list that the purchasing entity may use, grounds for exclusion, etc. Where only a limited number of suppliers is allowed to tender, under the selective procedure, it is important that equitable criteria should be applied as regards competition between national and other suppliers. Other aspects of non-discriminatory treatment relate to the time-limits applied at the various procedural stages, supplementary information, procedures for receiving and opening tenders, and selection methods (the criteria used, as has already been pointed out, need to be known to suppliers in advance). Undertakings would be general in nature or relate to specific obligations, as necessary.

12. In some cases, publicity and inviting tenders from a number of suppliers in predetermined conditions would not be justified or practical, e.g. if the purchase has to be made in serious emergency situations or in cases where it is clearly established that only one supplier can provide the product. It therefore seemed necessary to agree that in some cases it would not be possible to apply the procedures designed to ensure, objectively, the transparency and accessibility of markets. The question of how to limit the effective use made of such a provision is not yet solved. It should apply only in limited cases. Systematic information would be needed in order to monitor this.

III. Surveillance and settlement of disputes

13. The provisions applicable to purchasing entities and suppliers which should enable the undertakings to operate satisfactorily on their own, need to be supplemented, at government level, firstly by general surveillance machinery and secondly by a system enabling them to settle such difficulties as might arise between them and, in the final resort, to ensure compliance with the obligations. It is felt that a committee of representatives of signatory governments to the instrument should perform a leading rôle in this connexion.

14. The regular surveillance provisions do not present any special problems as to their substance. They are based on the availability of relevant information, on notification of changes in regulations and practices in the signatory countries and on periodical reviews to be made by the committee of signatory governments etc. One of the keystones of this surveillance could well be the study of regular statistics.

15. The machinery for settling disputes at international level is an essential feature of an instrument intended to be of a binding nature and involving important national insterests. This subject is currently examined by the governments.

16. In view of the various filters envisaged in the ordinary operation of the instrument, most difficulties should normally be solved before reaching multilateral level. In effect, a supplier could first contact the purchasing entity and would have access to the complaint procedures in the purchasing country. If he then approached his own government to take up his case, that government could, after due consideration, have recourse to bilateral consultations. It would only be in the case of serious difficulties, or which could not be resolved by bilateral consultations that a signatory government would make use of the multilateral settlement machinery.

17. The nature of these difficulties could vary: they might include problems of interpretation or application of the instrument; alleged discrimination or specific difficulties in a particular contract area; or even they might have complicated technical aspects in individual cases. Dealing with difficulties would therefore mean calling on various types of expertise. However, the solutions found - even though the difficulties might initially involve only two countries - could in fact very often be of interest to all the countries signatories to the instrument.

18. A number of such considerations led to the following lines of thought. Firstly, in view of the interests and responsibilities of the signatory governments in the field covered by the instrument it would seem necessary to recognize their sovereignty (via the Committee of Representatives of such governments) for the settlement of disputes. Secondly, for assuming the responsibilities involved in the ordinary course of running the system there would have to be fair and efficient operational machinery covering the various situations that might present themselves. The nature of this machinery and of the precise relationship with the committee of signatory governments has yet to be worked out. There are several possibilities: conciliation, procedures akin to arbitration, review by a standing restricted organ of the committee of representatives of signatory governments, etc.

19. Another question is that of the action to which the settlement of disputes could lead. In this connexion, an appeal at international level differs in context from the case of a supplier taking his complaint before the national courts of the country of the purchasing entity. The international appeal would take place after the event and the decision awarding the contract could not be reversed. The question that arises is whether apart from recommendations and moral pressure and the undertakings that the signatory governments might give, more direct coercive action (countervailing measures for example) would constitute an additional guarantee.

IV. The instrument's field of application

20. Another series of questions still being considered relates to the exact field of application that the instrument would have at the outset and the flexibility that it might be permissible to exercise in its application.

21. The market accessibility objective set by the signatory countries, and the administrative burden implied, goes logically hand in hand with their expectation of satisfactory trading advantages for suppliers in each of them. One of the questions in this connexion is that the economic importance and nature of the purchasing entities coming directly under the authority of national governments and controlled by them in their purchasing activities (and for which the governments could therefore enter into the obligations specified in the instrument) vary from one country to the next. Among other things, the situation varies for some major branches of the economy; in some countries these come under the government, whereas in others they belong to the private sector. For those entities in the public sector but not directly under governmental control, governments could enter into an undertaking to "use their best endeavours" ("user de tous moyens dont ils disposent") to ensure that such entities comply with the non-discrimination principle and heed the provisions of the instrument wherever possible. Even so, the effectiveness of such a clause may vary from one case to another.

22. Another question is to what extent the obligations should cover all contracts or apply only above a certain threshold, contracts of lower value being excluded. One of the aspects of the question is bound up with the fact that very detailed provisions to ensure market accessibility and transparency seem to be fully justified, from the administrative angle, only for contracts above a certain value. Conversely, in the absence of any provisions of this kind it would be difficult to monitor compliance with the undertakings.

23. As was mentioned in the previous note, an instrument on government purchasing would include limited exceptions for contracts that from the outset and on a permanent basis, would remain outside its field of application (an agreed exception, for example, concerns the purchasing of arms, ammunition and war materials or procurement indispensible for national defense purposes). One possible approach would be to attempt to restrict the scope of such exceptions by giving precise interpretations.

24. A question arises as to whether a safeguard clause or derogation clauses should be provided to enable a signatory government temporarily to suspend the application of its obligations for one or several contracts or a group of contracts falling, in principle, within the field of application of the instrument. There could be various situations of this kind; a country might wish to maintain existing arrangements which it regards as essential, whether they be in effective use or not,

or else it may feel that it is necessary to be prepared for situations which may arise after subscribing to the obligations. Needless to say, derogations, or the possible use of a safeguard clause, between countries accepting the instrument on a basis of reciprocity would have to be subject to strict limitations on their duration and scope and to close supervision.

25. Under the "derogations" procedure - i.e. clauses setting out in advance the grounds on which obligations may be suspended - the acceptance of certain grounds for the discriminatory utilization of government purchasing might involve a snowball effect leading to recognition of a set of practices that could well rob the obligations of their significance. If there were to be a "safeguard clause" with future situations in mind, the problem should be solved by means of conditions laid down in the clause and of the terms for its practical implementation, i.e. the procedures for invoking it and for surveillance, which would be binding on governments.

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26. Work has so far centred round the issues set out above relating to the substance itself and the quilibrium of the obligations for countries applying such an instrument. A number of major questions relating more especially to the conditions under which the instrument could be implemented (participation, enforcement, accession, withdrawal, etc.) have not yet been put into the form of specific proposals.