

GENERAL AGREEMENT ON TARIFFS AND TRADE

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Committee on Government Procurement

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OBSERVATIONS CONCERNING LEASING UNDER THE AGREEMENT ON GOVERNMENT PROCUREMENT

Communication from the Delegation of Finland

The following communication, dated 5 November 1981, has been received from the delegation of Finland.

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1. The use of leasing by procurement entities covered by the Agreement in Finland is very limited. Practically the only cases where leasing has been used are large computer systems and copying machines. Since the latter cases have invariably fallen below the threshold value, the only cases where leasing practices could affect the enforcement of the Agreement are those where large computer systems are procured. When such contracts have been made, they have always been pure leasing contracts without commitment to purchase.
 2. The discussions in the Committee have revealed that this question is a more complicated one than was originally expected. There are several forms of leasing and some of those forms seem clearly to fall within the Agreement whereas some seem to fall outside its scope. Between these forms there seem to be forms of leasing for which it is difficult to decide whether they are covered or not.
 3. The suggestion put forward in the Committee that the transfer of ownership should be the criteria against which decision should be made seems logical. Consequently, a pure leasing contract would clearly fall outside the Agreement. Leasing with an option to buy would have to be treated similarly, because at the moment when the award of the contract is made by the entity, it is obviously not known whether the option to buy will be used or not. On the other hand, hire purchase contracts fall clearly within the scope of the Agreement (in fact it could be argued that a hire purchase contract is not leasing at all). As far as leasing with a commitment to buy is concerned, that practice, if it ever has been used, amounts to a hire purchase arrangement, and is therefore covered by the Agreement.
 4. When this matter is discussed, it should, however, be pointed out that it is not enough to categorize different leasing practices and to decide some of them to fall inside, some outside the Agreement. In a concrete procurement operation the entity may decide to lease and invite tenders accordingly. It may, however, get a

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tender to buy which proves to be so advantageous that it wants to accept that tender. Another case is when the entity has decided to purchase and has proceeded according to the procedures of the Agreement, but has received an advantageous tender to lease, and wants to accept that tender. The same situation may arise when the entity has invited tenders either to purchase or to lease, whichever is more advantageous in the light of tenders to be received.

The critical question seems to be: is it the end-result of the procurement operation that should decide whether the procurement is covered by the Agreement or should it be the original decision by the entity either to lease or to purchase? While both approaches may have their advantages, it would, however, seem that the end-result should be the decisive factor, and that procurement which leads to the purchase of goods should be regarded as falling within the scope of the Agreement. If the entity has originally opted for leasing, but in the end decides to purchase, it has obviously not published a notice, and it should not be punished for that. In such a case all subsequent stages of the procurement operation should be conducted according to the Agreement. However, the Committee should study all possibilities to avoid misuse of leasing practices in the light and scope of the Agreement. In this context general guidelines are needed in order to minimize the possibilities of circumventing the obligations of the Agreement through the use of leasing.