

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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COMMITTEE ON GOVERNMENT PROCUREMENT

MEETING OF 7 OCTOBER 1988

Note by the Chairman

1. The Committee met on 7 October 1988.
2. The Chairman gave a report, on his own responsibility, on developments in the Article IX:6(b) negotiations (see Annex I).
3. The meeting provided the usual opportunity to take up questions concerning implementation and administration of the Agreement by the Parties. The Chairman recalled that he had invited delegations to submit the texts of new laws, regulations and procedures adopted in order to implement the Protocol. Two Parties had done so; one did so at the meeting. One Party sought clarification on new defence procurement regulations in another Party involving discrimination against foreign suppliers of certain machine tools covered by the Agreement. The Party concerned agreed to look into this matter. It added that previous questions in the Committee had dealt with non-Code covered machine tools. Some appropriation and authorization legislation that might become relevant had not been completed yet.
4. The Committee received an oral report on recent legislation passed in one Party. It was recalled, in this connection, that earlier legislation had contained requirements intended to be an incentive to governments which had not opened their markets to do so. The new law extended significantly the same concept, in that governments which maintained policies that were consistently discriminatory towards this country's suppliers would be banned from its government procurements. An exception had been made for Code-covered procurement on condition that Parties were in a "good standing" (but this term had not yet been clearly defined by regulations). Outside the scope of the Agreement, Parties and non-Parties were given the same treatment. Special consideration had been given, however, to countries with which this Party had Memoranda of Understanding, but the new law placed more emphasis on the trading interests in concluding these. A number of detailed guidelines and factors would be evaluated and taken into consideration, for example, the degree of single tendering, dividing of contracts or other measures to avoid Code obligations. The determination of discrimination would be based on a yearly analysis, the first of which was due in April 1990. According to the principle of reciprocity, a ban would be tailored to areas where discrimination was most significant or

appeared to have the most significant impact. Negotiations with the government concerned were envisaged as a next step. If such negotiations failed, sanctions were mandated although the form these could take would be subject to some discretion. A number of further details had to be established and implementing regulations would be worked out over the next months. There was presently no categorization or list of countries and no decision had been taken as to who would establish such a list. The new law reflected increasing dissatisfaction with the way the Agreement worked in practice. The Party added that, in the past, little mandated discrimination had applied to service contracts in government procurement; the new law, however, also encompassed such contracts.

5. One Party recalled the notification requirements under Article IX:4(b), given the far-reaching implications of the law mentioned. It wondered in this connection whether the concept of Parties in "good standing" was in conformity with Article II. In response, it was explained that the Committee's dispute settlement provisions would first have to be utilized.

6. The Committee agreed with a suggestion by the Chairman that a progress report be given at the next meeting, as a separate agenda item, and that the new legislation be made available to the Committee.

7. One Party explained that the Protocol had become directly applicable in the countries concerned as of 14 February 1988; this had been further formalized in a directive of March 1988 which was followed up by administrative circulars or government enactments, depending on the individual case. The directive would be made available.

8. One delegation noted that the publication used for notices of procurement in its country had been changed. This was likely to improve its implementation. Another delegation added, in respect of implementation in general, that recent analysis seemed to indicate a number of cases of persistently short bid deadlines, which caused concerns.

9. The Committee reverted to a number of questions concerning statistics:

(i) in the 1986 statistical review, questions and replies had been or were circulated. Some additional explanations were given during the meeting. A suggestion was made that any outstanding points could also be taken up under the item of Implementation and Administration of the Agreement. The Committee agreed, however, to continue the review of 1986 statistics at the next meeting;

(ii) the question of a "uniform classification system, to be determined by the Committee" was discussed in detail. A number of suggestions were made and explanations of technical and practical problems were given. It was agreed that delegations look further into the possibility of agreeing on classifications based on the 2-digit, or possibly 4-digit level of the Harmonized System. The matter would be reverted to at the next meeting;

(iii) the question of a uniform application of definition of origin was also reverted to. One delegation considered uniformity in this respect to be a key element in the monitoring of obligations. It was agreed that members explain, if possible in writing, what rules of origin were used for (i) the implementation of Code obligations and (ii) the statistical reports. One Party noted that a new reporting basis would be a major change in its present system of data collection. This delegation, as well as another delegation which was in a similar situation were examining the problems involved.

(iv) the Committee agreed that in order, inter alia, to ensure meaningful comparisons of statistics of different Parties, a proposed secretariat analysis of statistics and circulation of summarized statistics be deferred until the questions mentioned above had been settled.

10. On the Committee's agenda was also a submission by one Party relating to the transferal of some of its major entity's activities to a company established under the commercial law. This Party had requested that, since it was not clear how such a case should be dealt with in the light of the Agreement, the Committee make a thorough examination of the matter. It explained in detail the background and the present situation of the case, which had to do with telecommunication procurement and questions currently being pursued in the Informal Working Group. Two Parties reserved their rights under Article IX:5(b) of the Agreement. The matter will be reverted to at the next meeting.

11. Inscribed on the agenda at the request of one Party, were also questions concerning the procurement of a research vessel by a Code-covered entity in another Party, on which Article VII:4 consultations had been requested. The Party bringing the case made a detailed statement setting out its views; it considered that the case was one of principle, and of interpretation of the Agreement. The other Party made a detailed response; this Party did not consider the Agreement to be applicable to the case. Two delegations stated that the matter was followed with interest and that they hoped that further bilateral consultations would lead to a satisfactory solution. The Committee took note of the statements made.

12. Reverting to the updating of the Practical Guide to the Agreement, the Committee decided that final comments to a secretariat draft be provided by 1 December 1988. The Chairman recalled, in this connection, that a number of apparently purely formal changes by a number of Parties concerning Annex I to the Agreement had not been notified under Article IX:5(a). Two Parties indicated that notifications would follow.

13. The Committee agreed on the procedures to be followed for finalization of its report to the CONTRACTING PARTIES to take account of work undertaken at the present meeting.

14. The Informal Working Group will meet on 17, 19 and 20 January 1989. The Informal Working Group and the Committee will meet in the week of 20 March 1989.

ANNEX I

The Informal Working Group met on 24-25 May 1988. Without prejudice to further work in this area and to subsequent negotiating positions of individual delegations, it agreed on the following.

Code coverage would normally result from individual Parties' own cost/benefit analyses, including in particular whether the additional procurement opportunities justify the additional costs of implementation - overall and on an entity-by-entity basis - and negotiations aiming at a balance of rights and obligations (overall and, possibly, by sector). Delegations would have to take into account a wide variety of differing constitutional, administrative, political and legal situations and traditions, and differences in development, financial and trade needs.

In considering techniques and modalities of negotiations on broadening as well as other relevant issues to be addressed in the second stage of the work programme, a number of additional elements might be appropriate and might need to be taken into account in considering one or more of the groups listed below.

Group A: Central government entities, including those operating at regional and local levels.

Group B: Regional and local government entities:

- (a) over which the central government could ensure compliance with obligations under the Code;
- (b) over which the central government could not at present ensure compliance with obligations under the Code.

Group C: Other entities whose procurement policies are substantially controlled by, dependent on, or influenced by central, regional or local government:

- (a) over which the central government could ensure compliance with obligations under the Code and which are engaged in:
 - (i) non-competitive activities;
 - (ii) competitive activities;
- (b) over which the central government could not at present ensure compliance with obligations under the Code and which are engaged in:
 - (i) non-competitive activities;
 - (ii) competitive activities.

* Bearing in mind that the provisions of Article III will apply to developing countries.

Group D: Other entities whose procurement policies are not substantially controlled by, dependent on, or influenced by, central, regional or local government, including cases where they are engaged in commercial activities.

Entities in Groups A, B and C may be the subject of negotiations on broadening.

Entities in Group D shall not be the subject of negotiations on broadening. The government should refrain from interference with transactions of these entities, including their procurement activities.

The Group met again on 7-8 July 1988 to continue work on service contracts. The basis for discussions was provided by replies to a questionnaire to indicate possible problem areas in applying the Code to such contracts. Amongst issues discussed were the application of national treatment, the right of establishment, and the movement of labour. The meeting permitted useful clarifications to be made in respect of such technical issues as the applicability of service contracts, to the current price threshold, the tendering and other procedures that are applicable to procurement of goods.

The Group met again on 4-6 October 1988 to discuss both broadening and service contracts.

In the area of broadening, the Group began the task of elaborating the appropriate approaches to expand the Code. The elements that are to be taken into account in this exercise are; inter alia:

- (i) techniques and modalities of negotiations;
- (ii) appropriateness of partial modifications or exemptions of Code provisions to accommodate a possible broadening; and
- (iii) a mechanism to evaluate and - if necessary - adapt coverage to a new situation such as privatization.

These elements were addressed with reference to the situation of each of the entity groupings (A-D) identified at the May 1988 meeting (see above). A number of "non-papers" were tabled to assist the Group in these considerations.

A number of factors were singled out as particularly important; these were (i) cost/benefit concerns; i.e. whether increased procurement opportunities justify additional costs of implementation; and (ii) the need for an overall balance of rights and obligations, also referred to as broad equivalence of concessions.

To assist the next stage of the exercise, the secretariat has been requested to carry out the task of preparing a synthesis document to identify convergences of views expressed in both the non-papers and by oral statements at the meeting.

In the area of service contracts the Group reverted to some of the questions discussed before, notably the values of service procurements by

governments, and in this context the question of refining the data both in respect of types of entities and types of services; problems concerning the calculation of contract values for threshold purposes; problems relating to technical specifications; and the question of goods content in service contracts. The Group agreed that further information should be presented, as well as clarifications of coverage in terms of entities and in terms of specific characteristics and nature of each type of service contracts. It was also agreed that the secretariat would carry out further work to assist the Group in its task but that, in recognition of the requests imposed on the secretariat in the area of broadening, this work would be deferred.

What has been referred to as "bid challenge system" could be an element of enforcement both in the area of broadening and services. Some have suggested that this would be an improvement to the Code. The Group was informed about how protest and dispute procedures in procurements operated in the United States, and about the draft EC directive commonly called the "Compliance Directive".