

GENERAL AGREEMENT ON

RESTRICTED

L/6420

28 October 1988

TARIFFS AND TRADE

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REPORT (1988) OF THE COMMITTEE ON GOVERNMENT PROCUREMENT

1. This report outlines developments in the work of the Committee since the Committee's last report (L/6258 of 19 November 1987). It is submitted to the GATT CONTRACTING PARTIES, in pursuance of Article IX:6(a) of the Agreement. It represents at the same time the eighth annual review of the implementation and operation of the Agreement¹, referred to in the same provision.

A. Composition of the Committee

Members

2. On the date of this document, the following were members of the Committee: Austria, Canada, European Economic Community, Finland, Hong Kong, Israel, Japan, Norway, Singapore, Sweden, Switzerland and the United States.

Observers

3. The following thirty-two contracting parties have observer status: Argentina, Australia, Bangladesh, Brazil, Cameroon, Chile, Côte d'Ivoire, Cuba, Czechoslovakia, Dominican Republic, Egypt, Gabon, Hungary, India, Indonesia, Jamaica, Kenya, Korea, Malaysia, Malta, New Zealand, Nicaragua, Nigeria, Peru, Philippines, Romania, South Africa, Thailand, Trinidad and Tobago, Turkey, Zaïre and Zimbabwe. Two non-contracting parties, the People's Republic of China and Ecuador, are also observers. Two international organizations (IMF and UNCTAD) have attended the meetings of the Committee in an observer capacity.

Officers

4. Chairman: Mr. Anthony Dell (United Kingdom)
Vice-Chairman: Mr. Peter Cheung (Hong Kong).

¹The Seventh Annual Review is contained in GPR/42.

B. Meetings of the Committee

5. During the reporting period the Committee has held two meetings: on 18 March and 7 October 1988. The notes by the Chairman are contained in L/6323,¹ and L/6411 respectively. The minutes are contained in GPR/M/30 and 31.¹ In the context of the Article IX:6(b) negotiations, the Informal Working Group on Negotiations met on 16-17 March, 24-25 May, 7-8 July and 4-6 October 1988.

C. Decisions taken by the Committee

6. The Committee has taken no decisions on substance in respect of the implementation and operation of the Agreement during the review period. However, following previous decisions, and as indicated in the 1987 Report, the Protocol Amending the Agreement on Government Procurement entered into force on 14 February 1988.

D. Article IX:6(b) negotiations

7. At the March meeting, the Committee took note of the following report by the Chairman on the work of the Informal Working Group on Negotiations:

"The Informal Working Group on Negotiations met on 16-17 March 1988.

In the area of broadening of the Agreement, a useful discussion took place with the benefit of a number of submissions from certain delegations, towards the objective in the first stage of the work programme concerned with clarifying the possible spheres of application which the Agreement might appropriately cover. A number of delegations supplied lists of government and government-affiliated agencies or sub-agencies not presently covered by the Agreement.

A first discussion took place on what might constitute appropriate criteria and relevant considerations in order to determine the possible coverage of a broadened agreement. As a result of the discussions, a number of issues were identified which might be relevant to the future consideration by the Group in pursuance of the above-mentioned objective for the first stage. These issues will be discussed more fully at the next meeting, which will be held on 24-25 May 1988. Delegations which consider it useful may, if they so wish, provide procurement data which could assist the Group in its further considerations of potentials for broadening.

In the case of service contracts, a number of delegations supplied information on the procurement of services, in a format agreed at the previous meeting of the Group. These submissions were a

¹GPR/M/31 to be issued.

contribution to the examination of the nature and scope of service contracts, with a view to clarifying the applicability of the Agreement to such contracts, and to identifying potential problems. This exercise may continue at the meeting of 24-25 May 1988 and is expected to be the main purpose of a further meeting of the Informal Working Group on 7-8 July 1988, when it is hoped that more submissions will be available."

8. One observer raised the question of special and differential treatment for developing countries, noting, inter alia, that this matter and the question of how to attract further members, might perhaps be more appropriately dealt with in the Negotiating Group on MTN Agreements and Arrangements. The Chairman noted that the question of special and differential treatment was specifically recognized in the work programme but that work so far had been confined to technical issues rather than broad parameters.

9. The question of information to be provided to the Negotiating Group on MTN Agreements and Arrangements was on the agenda for the March meeting. The Committee took note of the following statement by the Chairman:

"On the basis of informal consultations which I have held, I believe that the members of the Committee consider it important to develop and maintain the lines of communication with the Negotiating Group on MTN Agreements and Arrangements. There was a feeling that my reports to this Committee on the activities of the Informal Working Group - available to the NGS by way of L/- documents and minutes - should be somewhat more elaborate and might include for instance the various stages reached in the work programme. This will of course depend on the scope of the discussion, which can vary from one meeting to another. On a separate point, there was general agreement that specific requests from the NGS will be dealt with on a case-by-case basis in a spirit of flexibility and co-operation. It was generally considered that such action would in no sense impede the work of the Informal Working Group. In this connection, I might add that discussions are often very informal and not always on the basis of formal instructions. The extent of detail in my report on any particular meeting will have to take this into account."

10. At the October 1988 meeting, the Chairman gave a progress report, on his own responsibility, on further work undertaken. The text is reproduced in Annex I to this Report.

E. National legislation (Article IX:4): implementation and administration

11. At the March 1988 meeting, the Committee heard statements by the Parties explaining changes made in national laws and regulations in order to implement the Protocol Amending the Agreement on Government Procurement. The Chairman invited the Parties to submit the texts of the new laws, regulations and procedures to the secretariat where these would be open for inspection. By the October 1988 meeting, three Parties had submitted texts. One Party explained a new directive and follow-up measures.

12. The Committee examined national implementation and administration of the Agreement at both meetings. A number of issues were raised concerning government procurement policy, including draft legislation in one Party, which was subsequently adopted.

13. At the March 1988 meeting, some Parties expressed concern with the possible extension of buy-national legislation in one Party which among other things, would have a negative impact on their ability and willingness to conclude the Article IX:6(b) negotiations. Some of these stressed that the balance of the Agreement should be seen in terms of balance of rights and obligations rather than in terms of actual benefits and that some measures had been taken contrary to the Agreement. The Party in question referred, inter alia, to a lack of balance in Code coverage offered by various Parties, and a lack of Code coverage for telecommunications, power generating and transmitting equipment, transportation equipment and services. A major expansion of the Agreement across sectors was not only desirable, but necessary, in order to counter the pressure for Code-inconsistent measures. This Party thought that continued delays in the renegotiation exercise would not increase trade opportunities nor protect members' rights under the Agreement.

14. At the October 1988 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 yet been completed. One Party stated that, in respect of implementation in general, recent analysis seemed to indicate a number of cases of persistently short bid deadlines, which caused concerns.

15. The Committee received an oral report on recent legislation passed in one Party. In this connection, it was recalled 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 significantly extended the same concept, in that governments which maintained policies that were consistently discriminatory towards this country's suppliers would be banned from its Government's procurements. An exception had been made for Code-covered procurement on condition that Parties were in "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 employed 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. It was added that, in the past, little mandated discrimination had applied to service contracts in government procurement; the new law, however, also encompassed such contracts.

16. One Party recalled the notification requirements under Article IX:4(b), given the far-reaching implications which it thought the law had. In this connection, it wondered 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. 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.

17. Concerning Greece, Portugal and Spain, the Committee was informed in March 1988, of progress under way in the preparation of the appropriate lists for two of these EC member States; in the third case, the question was one of confirmation and adoption. At the October 1988 meeting, information was given on progress with respect to an entity list of one of these countries.

18. Information received from individual Parties is enumerated in Annex II.

F. Questions concerning statistics, including review of 1986 statistics

19. The review of 1986 statistical reports took place at both meetings and will continue at the next meeting. The following were among matters raised or referred to: the shares of procurements above and below the threshold in terms of overall numbers, values, and of particular entities or particular products; the ratio of above-threshold purchases involving "similar recurring contracts"; the use of different types of single tendering, overall, by particular entities or for certain equipment; procurement from abroad, overall, by entities, by supplying countries and by product categories; the number of tenders received from other Parties; multi-year contracts, and their lengths, in general or in the case of certain products; fluctuations or cyclical patterns in purchasing activities; the rôle which fuel procurement, including the price of fuel, played in some overall figures; the rôle of exchange rate fluctuations on overall figures; the possible reliance by some entities on service contracts; absence or delays of reports. The Committee also noted that the 1985 statistics had become derestricted in October 1988.

20. The Committee continued, at both meetings, the discussion of proposals for improvements of government procurement statistics and further analysis thereof. The question of "a uniform classification system to be determined by the Committee" (new Article VI:10(b)) 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. The question of a uniform application of definition of origin was also taken up. 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 require a major change in its present system of data collection. This delegation, as well as another delegation which was in a similar situation, was examining the problems involved. The Committee agreed that, in order to ensure, inter alia, 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.

21. In March 1988, the Chairman recalled the new requirements of Article VI:10, assuming that these would be implemented as of the 1987 reports. At the October meeting, he noted the absence of common product description and said that in some respects implementation problems would perhaps be difficult to avoid in the reports on 1987 procurements.

G. Consultations under Article VII:4

22. At the request of one Party, questions were also inscribed on the agenda of the October meeting 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 being 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.

H. Other matters

(i) Questions concerning Article I:1(c)

23. On the Committee's October 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. Since it was not clear how such a case should be dealt with in the light of the Agreement, this Party

had requested that the Committee make a thorough examination of the matter. It explained in detail the background and the present situation of the case, which concerned 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.

(ii) 1988-89 threshold expressed in national currencies

24. As required, thresholds were notified by all Parties (see Annex III).

(iii) Panelists

25. Panel candidates were nominated by three Parties for the period under review.

(iv) Request for Committee documentation

26. In March 1988, the Committee agreed to provide documentation to an international organization in response to a request.

(v) Updating of the Practical Guide to the Agreement

27. The Committee agreed, in March 1988, to update the Practical Guide. The secretariat has prepared a first draft, for comments by delegations and appropriate inputs by them, with respect to their own country chapters, by 1 December 1988. The Chairman has 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.

(vi) Further meetings

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

ANNEX I

Statement by the Chairman, on his own responsibility,
at the meeting of 7 October 1988

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;

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

(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.

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".

ANNEX II

National actions notified to the Committee

AUSTRIA

"Bundesgesetzblatt für die Republik Österreich", No. 38/88, contains the Protocol Amending the Agreement on Government Procurement ("Änderungsprotokoll zum Überinkommen über das öffentliche Beschaffungswesen").

Rectifications of a purely formal nature and minor amendments relating to a number of entries in Austria's entity list in Annex I of the Agreement were notified in GPR/44 and came into force on 26 June 1988, as certified by the Director-General of the GATT.

FINLAND

The official laws bringing into effect the Protocol Amending the Agreement on Government Procurement is contained in Suomen säädöskokoelman/Finlands författningssamlings no. 120/88.

ISRAEL

As of 1 May 1988, notices of proposed procurements covered by the Agreement are published in the daily English-language Jerusalem Post.

SWEDEN

Sweden has modified its entity list in Annex I of the Agreement by replacing the National Board of Education with the National Labour Market Board and its 25 regional labour market offices, the so-called AMU Group (ref: GPR/43 and Add.1). The modification came into force on 26 May 1988, as certified by the Director-General of the GATT.

A rectification of a purely formal nature was made in GPR/46, notifying that on 1 July 1988, the Swedish Coastguard was given the status of an independent administration in relation to the National Board of Customs and that it had therefore been added to the Swedish list of entities covered by the Agreement.

SWITZERLAND

Concerning the implementation of the Protocol Amending the Agreement on Government Procurement, the corresponding Decree came into effect on 14 February 1988 (Receuil Officiel No. 2-371 of 1987).

UNITED STATES

The United States has notified Federal Register, Volume 53, No. 23 of 4 February 1988, containing notice on entry into force of the Protocol; and Federal Register, Volume 53, No. 139 of 20 July 1988, containing implementing rules and regulations.

ANNEX III

Establishment in national currencies of the threshold
(SDRs 130,000) for the purpose of public notices

According to new procedures agreed upon in November 1986, thresholds expressed in national currencies are, as of 1988, to be fixed on a two-year basis (calendar years, except for Israel, Japan and Singapore, where the fiscal year (1 April-31 March) is used).

The 1988-89 thresholds are as follows:

<u>AUSTRIA</u>	-	<u>S 2,280,889</u>
<u>CANADA</u>	-	<u>Can\$213,000</u>
<u>EUROPEAN ECONOMIC COMMUNITY</u>	-	<u>ECU 130,000</u>

Currency amount for one ECU:

Corresponding threshold:
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Belgium	-	BFr/Lfr 43,3452
Denmark	-	Dkr 7,86926
Germany, F.R.	-	Dm 2,07479
France	-	FF 6,90031
Netherlands	-	Fl 2,33945
Ireland	-	£ Irl 0,773632
Italy	-	Lit 1482,32
United Kingdom	-	£ 0,710192

<u>FINLAND</u>	-	<u>FIM 760,000</u>
<u>HONG KONG</u>	-	<u>HK\$ 1,228,000</u>
<u>ISRAEL</u>	-	<u>US\$156,000¹</u>
<u>JAPAN</u>	-	<u>YEN 24,000,000¹</u>
<u>NORWAY</u>	-	<u>NOK 1,130,000</u>
<u>SINGAPORE</u>	-	<u>S\$ 343,000¹</u>
<u>SWEDEN</u>	-	<u>SEK 1,076,524</u>
<u>SWITZERLAND</u>	-	<u>SwF 265,000</u>
<u>UNITED STATES</u>	-	<u>US\$156,000</u>

¹1 April 1988-31 March 1990.