

GENERAL AGREEMENT ON

RESTRICTED

L/6593

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TARIFFS AND TRADE

Limited Distribution

REPORT (1989) OF THE COMMITTEE ON GOVERNMENT PROCUREMENT

1. This report outlines developments in the work of the Committee since the Committee's last report (L/6420 of 28 October 1988). It is submitted to the GATT CONTRACTING PARTIES, in pursuance of Article IX:5(a) of the Agreement. It represents at the same time the ninth annual review of the implementation and operation of the Agreement, 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. John Donaghy (Canada)
Vice-Chairman: Mr. Nils-Erik Schyberg (Sweden)

B. Meetings of the Committee

5. During the reporting period the Committee has held three meetings: on 16 March, 14 April and 6 October 1989. The notes by the Chairman are contained in L/6485, L/6493 and L/6592 respectively. The minutes are contained in GPR/M/32, 33 and 34¹. In the context of the Article IX:6(b) negotiations, the Informal Working Group on Negotiations met on 19-20 January, 13-15 March, 13-15 June and 4-5 October 1989.

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.

D. Article IX:6(b) negotiations

7. At the March and October meetings, the Committee took note of the progress reports, on the Chairman's own responsibility, on the work of the Informal Working Group on Negotiations. These are contained in Annex I to this note.

8. At the meeting in March 1989, the Committee noted that a suggestion had been made in the Informal Working Group that certain of its working papers be made available to observers upon their request; it also noted that there was no consensus on doing so. Concerning broadening of the Agreement, one observer cautioned against any possible extension of the conditional m.f.n. treatment of the Agreement impinging upon areas already covered by the General Agreement; in the area of service contracts, the Group should take full account of the more comprehensive discussions underway in the Uruguay Round.

9. At the October meeting one Party stated that it supported the objectives of these negotiations given that it already had a very open and competitive public tendering system. However, it saw little prospect of further benefiting from participation in the Agreement, unless its membership was widened. With negotiations aimed at a wider coverage of entities and the inclusion of services procurement, other contracting parties, in particular the developing countries, might be even less inclined to accede to it. An inordinate amount of manpower and other resources were also involved. Whilst this Party did not associate itself with the text on "Techniques and Modalities of Negotiations on Broadening" referred to by the Chairman, it would not prevent others from using it as guidelines to facilitate discussions. It would offer its own views in the process but reserved its position on the final package to emerge.

¹GPR/M/34 to be issued.

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

10. At the meeting of March 1989 the Committee noted that five Parties had submitted relevant information on regulations and procedures adopted in order to implement the Protocol. A number of delegations notified or stated that they would shortly notify rectifications or amendments pursuant to Article IX:5(a). In response to an enquiry about procurements of ice-breakers by a Code-covered entity, the Party in questions explained that the derogation clause had been invoked in the cases referred to. It also explained that the planned transferal of an entity from a Code-covered ministry to one which was not Code-covered, would in no way affect the Code-covered status of the entity concerned.

11. Title VII of the United States Trade and Competitiveness Act of 1988 was circulated at the March 1989 meeting and its emphasis and motivation explained. One underlying motive was a future reassessment of the United States' participation in the Agreement. A distinction had been made between Parties' Code-covered and non-Code-covered procurement, and a third category comprising procurement by non-Parties. Focus was primarily on encouraging Code-coverage of areas currently outside the scope of the Agreement, with the aim of increasing reciprocal, open and competitive procurement opportunities on a non-discriminatory basis. The current negotiations were viewed as a very important element in this context. Implementation of the Act would also focus on extending the principles of the Agreement to areas presently non-covered. Further guidelines and procedures would be published in the Federal Register, and interested parties, including governments, would have an opportunity to make comments.

12. A number of delegations made statements concerning this matter. Some expressed particular concerns at what they conceived as unilateral aspects of the Act and reserved their rights as Parties to revert to the legislation itself and its implementation, in the lights of the obligations under the Agreement. Some delegations referred in this connection to the need for timely notification of changes in the laws and regulations provided for in Article IX:4. Further clarification was sought on a number of points. Among these were, inter alia, the reference to "products or services (which) are acquired in significant amounts by the United States Government" for the purpose of identifying countries which "discriminate against United States products or services". Another question related to the compatibility of the "good-standing" provision with the dispute settlement rules and the provisions concerning balance of rights and obligations contained in Article VII:14 of the Agreement.

13. In reply to such points it was explained, inter alia, that the reference to "significant amounts" indicated that the focus was on stimulating other governments to open their markets rather than on protectionism for its own sake. The Administration had been given some discretion in the Act. However, the Buy-American provisions would take effect following submission of a USTR report on foreign discrimination, to be prepared by 30 April 1990. The United States intentions had never been other than to uphold obligations under the Agreement and the Act was

consistent with United States obligations under the Agreement. Therefore, with respect to procurement covered by the Agreement, if a dispute could not be resolved bilaterally under the existing consultation provisions, invocation of the dispute settlement procedures would be required. Under the Agreement, this would be the normal course of action. Dispute settlement should not last more than a year.

14. At the October meeting one Party again expressed concern, in particular with respect to unilateral aspects of the legislation in the light of, inter alia, Article VII:14. Four other delegations associated themselves with this concern. The Party in question stated again that the provisions involved were fully consistent with its obligations under the Agreement. The Committee took note of these views and some additional comments made.

15. At the October 1989 meeting one Party stated that it continued to reserve its position with respect to questions concerning the transferral of some activities of one major entity in another Party to a company established under commercial law (ref 1988 report, L/6420, paragraph 23).

16. Also at this meeting one Party notified modifications of its entry in Annex I pursuant to Article IX:5(b). Another Party reserved its rights under the Agreement pending closer examination of the text which would be circulated. One Party which had proposed to transpose non-warlike materials lists in Annex I, from the CCCN to the Harmonized System nomenclature, subsequently submitted a formal rectification to this effect, pursuant to Article IX:5(a).

17. The Committee has been informed of a technical assistance seminar held for the benefit of exporters of one developing-country Party, concerning government procurement in another Party.

18. Information notified by individual Parties is enumerated in Annex II.

F. Review of 1986 and 1987 Statistics

19. The Committee concluded the review of 1986 statistics at the meeting in March 1989.

20. The Committee begun the review of 1987 statistical reports and concluded the examination of five of these. The review of the other seven reports will continue at the next meeting. Questions and replies circulated in writing before meetings facilitate the Committee's handling of the statistical exercise. It was noted that six Parties had submitted their 1988 statistics.

G. Uniform classification system for statistical purposes

21. Both at the March and the October meetings, the Committee continued the discussion of "a uniform classification system to be determined by the Committee" (ref. 1988 report, L/6420, paragraph 20). A number of delegations put forward suggestions and offered information and comments.

A suggestion was made that one possibility might be to base oneself on the United Nations Central Products Classification. It was agreed to come back at the next meeting to the classification question, including the possibility of increasing the number of product categories to be reported upon.

H. Definition of origin

22. The Committee has also continued the discussion of a uniform definition of origin as required in Article VI:10(b) and (c). Some Parties have provided information on origin rules used for implementing Code obligations and for statistical purposes. The Committee has noted that rules of origin are also being discussed in the Uruguay Round. The point has been made that these matters might be considered in the context of the Article IX:6(b) negotiations as well. The Committee will revert, at the next or a later meeting, to questions concerning definition of origin.

I. Third major review of Article III

23. In pursuance of Article III:14 the three-year major review of Article III was inscribed on the agenda of the October 1989 meeting. A number of statements were made in the course of this review. One Party, recalling that few developing countries had acceded to the Agreement in spite of provisions for special and differential treatment, noted that proposals tabled in the Uruguay Round had highlighted the problems of accession and had contained suggestions for examining the adequacy of the provisions of the Article. It suggested that Parties, in responding to entity offers from developing countries, pay greater attention to their development, financial and trade needs. Preliminary thoughts advanced by one delegation about "transitional membership" also merited further consideration but would require further elaboration. Consideration ought to be given to lower initial commitments combined with progressive liberalization over an extended period of time. One Party recalled and explained the preliminary suggestions it had tabled in the Negotiating Group on MTN Agreements and Arrangements, noting, inter alia, that this aimed at addressing the particular difficulties governments faced in establishing internal coordination for meeting Code requirements, and in establishing an appropriate information base.

24. A number of Parties including three observers supported or welcomed these views and ideas. Some Parties attached particular importance to the concept of transitional membership. One Party added that the Article IX:6(b) negotiations should take fully into account Article III, and consider the reasons why present developing country Parties had not benefited from membership. It noted the importance of Article III:1, 2 and 9-11; in particular the provision for technical assistance which should be utilized and be given a meaningful operation. In this connection, it commended another Party for having arranged a seminar in a developing country about market opportunities in government procurement. One observer drew particular attention to its own proposals in the Negotiating Group, (MTN.GNG/NG8/W/39), that special and differential treatment be incorporated into Article IX; that differences in procurement systems be taken into

account; that a commitment to a gradual expansion of entity lists be accepted; and that more flexibility be shown during accession negotiations.

25. The Committee agreed to continue the third major review of Article III at its next meeting.

J. Consultations and Dispute Settlement

26. At the meeting in March 1989 the Committee continued its investigation of the matter raised by one Party at the meeting of October 1988 concerning the acquisition or lease of an Antarctic research vessel with ice-breaking capability by a Code-covered entity in another Party (ref. 1988 report, L/6420, paragraph 22). The Party bringing the case exercised the right it had reserved to request the establishment of a panel under Article VII:7. Some delegations suggested that more discussion would be useful.

27. This matter was pursued at an extraordinary meeting held for this purpose on 14 April 1989. In the light of bilateral consultations held in the interval and noting that conciliation was an important element in disputes between governments, the Party bring the case did not request that a panel be established at this meeting, but reserved its right in this regard, pending the result of further bilateral discussions. The other Party confirmed the positive spirit in the bilateral consultations and hoped a mutually satisfactory solution would be reached. Other members expressed the same wish. The Committee encouraged a continuation of efforts towards a positive settlement of the matter, and noted the possibility that the request for a panel might be pursued at a future meeting.

28. At the meeting in October one Party expressed serious concern about the handling of a particular procurement in another Party. The matter had been the subject of Article VII:3 consultations in September 1989. Article VII:4 consultations had been requested, would be held in the near future and might have to be reverted to in the Committee at a later stage. The other Party confirmed that consultations involving technical expertise would be held in the near future following the request which had been received very recently: it expressed the hope that these would eliminate the need for the Committee to pursue the matter.

K. Other matters

29. The Chairman has kept the Committee informed of the relevant developments in the Negotiating Group on MTN Agreements and Arrangements (NG8) and of the Trade Negotiations Committee.

30. Four Parties nominated Panel candidates for 1989.

31. The revised Practical Guide was issued in February 1989. Further amendments in country chapters can be made at any time and some corrections received already will be circulated as soon as possible.

32. The Chairman has invited all Parties to notify their 1990-1991 thresholds in national currencies according to the agreed procedures.

ANNEX IREPORTS REFERRED TO IN PARAGRAPH 7(i) Substance of report given at the meeting of 16 March 1989

The main purpose of the meeting in January 1989 was to continue discussion of the question concerning broadening of the Agreement, and in particular to elaborate the appropriate approaches to expand the Agreement. As requested, prior to the meeting, the secretariat had prepared a background document attempting to identify convergences of views expressed in the Group on this issue.

A number of additional suggestions was made by delegations on the basis of which the secretariat was able to prepare a revised draft on techniques and modalities of negotiations on broadening. Apart from an introductory section, it deals with each of the four categories of entities and the various elements for consideration in this regard, which were enumerated in my report to the Committee at the last meeting (ref. L/6420, Annex I; GPR/M/31, paragraph 2). This draft was discussed in detail at the meeting held on 13-15 March, following which a new text on techniques and modalities of negotiations on broadening was agreed, subject to reserves by three delegations. This is intended to provide guidance for the next stage of the work on broadening. It is quite clear from the text that it does not prejudice the position of any delegation on any aspect of the future work. The whole text will be made available at such time as the reserves are lifted. In that way it might be made available to observers as well as to the Negotiating Group on MTN Agreements and Arrangements.

The Informal Working Group also discussed future work and had the benefit of proposals made by the EEC and Japan. It was agreed to continue the discussions with a view to formulating a work programme at the next meeting.

The subject of service contracts was discussed at the March meeting. The secretariat had, as requested, summarized additional information received from delegations and had examined the question of the applicability of existing Code language if service contracts were to be covered. A short paper containing initial comments was presented for further consideration by the Group. A short but generally inconclusive debate ensued. Delegations were then invited to prepare some comments or proposals in writing, taking as a basis, if they so chose, the secretariat's initial comments mentioned above. The question of whether or not indicative lists of types of service procurements would or would not be useful was left open. At its next meeting the Group is expected to take stock of work done so far, in order to structure the future development of the discussion in this area.

(ii) Substance of report given at the meeting of 6 October 1989

As mentioned in the report at the last meeting, a text entitled "Techniques and Modalities of Negotiations on Broadening" has been elaborated by the Group and I am in a position to state that this text is now available. It will take too much time to read it all, and I therefore suggest that it be annexed to the minutes of the meeting as being part of my report.

Work undertaken at the June and October meetings has been based on these techniques and modalities, which cover the main issues involved in the work on broadening.

In the area of broadening, the Group met in June to discuss further work on the basis of proposals made by the EEC and Japan. Further suggestions were made at that meeting by Japan and the United States. Both in June and in October, the Group focused on substance rather than on a further drafting of texts concerning future work.

In the area of regional and local government entities, participants recognized the magnitude and importance of procurement involved, and the potential for increased mutual benefits within the limits of an agreed perception of balance. In at least some Parties, such procurement represents more than 50 per cent of total public procurement. The Group has elaborated further on questions related to issues such as administrative burden, the threshold, jurisdiction and the question of ensurance of compliance. It is progressively getting a better understanding of types of procurement and overall values, the legislative or regulating bases for sub-central procurement, conditions attached to central government funding, and the kind of rules or solutions that might be envisaged.

The Group has also noted a need for additional data with respect to Group A entities, presently not Code-covered.

With respect to other entities whose procurement policies are substantially controlled by, dependent on, or influenced by, central, regional or local government, work continues towards elaborating an operational concept. At the October meeting the Nordic countries and the United States presented further ideas concerning this Group. The discussion at both the last two meetings has reiterated a number of different considerations which individual delegations wish to see stressed. There is no agreed approach to further work in this area in the Informal Working Group. However, delegations have been encouraged to come prepared to give relevant information based on their own experience. Issues relating to privatization and nationalization have been discussed in relation to this Group, in the light of the need for a mutually agreed balance of rights and obligations currently dealt with in Article IX:5(b).

Three delegations have submitted information and suggestions about surveillance, monitoring and control, including what has been referred to as a "bid protest mechanism". This has to be discussed further since some delegations have questioned the usefulness and cost of new requirements in this regard; others have sought further clarifications from other participants. A number of delegations see rules in this area as an important element of confidence building for the business world.

The Group has also heard statements and questions about the possible improvement of the Agreement, notably in respect of origin rules, and in respect of possible transitional membership of the Agreement. These matters are expected to be reverted to.

In the area of service contracts, some delegations have explained rules, practices and activities in their respective countries. The United States has proposed a work programme since the last meeting of the Committee. The exchange of views, comments, questions and replies has been inconclusive but some delegations have indicated general support, stating that they favour progress in this area in the Group. The view has also been expressed that priority should be given to broadening over service contracts. The Group recognizes that the work of the GNS is of direct relevance to its own activities.

ANNEX II

Notifications to the Committee

Apart from statistics, information referred to in paragraphs 21 and 22 above, and information of a practical nature contained in the revised Practical Guide, the following was notified to the Committee during the review period:

AUSTRIA

- rectification to the entity list in Annex I; and to the list of supplies and equipment procured by the Federal Ministry of Defence (following introduction of the Harmonized System Nomenclature);
- manual or practical guideline entitled "Arbeitsbehelf Ubereinkommen Uber das öffentliche Beschaffungswesen", BGBl. No. 452/1981, i.d.F.d. BGBl. No. 38/1988 concerning the revised text of the Agreement.

CANADA

- copy of the official order form for the new Department of Supply and Services publication, "Government Business Opportunities", which is now the publication referred to in Annex II of the Agreement;
- information about adjusted procedures of the Department of Supply and Services;
- rectifications to the entity list, submitted in pursuance of Article IX:5(a) (ref. GPR/50); which became effective as of 3 May 1989;
- the publication "The Canadian Public Sector Market/Le marché du secteur public canadien".

EUROPEAN ECONOMIC COMMUNITY

- Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the co-ordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC;
- amended proposal for Council Directive (COM(88)733 final) on the co-ordination of the laws, regulations and administrative provisions relating to the application of Community rules on procedures for the award of public supply and public works contracts.

FINLAND

- amendment of the Decision (no. 1071/1979) of the Ministry of Trade and Industry concerning the application of the Decree on General Terms of Government Procurement for Finland (1989). These amendments, which took effect as of 1 September 1989, clarify procedures for negotiated and direct procurement. The main changes relate, however, to the harmonization of the Finnish government procurement provisions with the principles of the Nordic trade law of 1987.

ISRAEL

- rectification to the entity list, submitted in pursuance of Article IX:5(a) (ref GPR/52) which became effective as of 3 May 1989.

JAPAN

- Cabinet Order and the Ministry of Finance Ordinance which have partially amended the Cabinet Order and the Ministerial Ordinance stipulating special procedures applied to the Government procurement of goods;

SWEDEN

- the complete text of the Ordinance concerning implementation of the GATT Agreement on Government Procurement (SFS 1988:101).

SWITZERLAND

- rectifications to the entity list, submitted in pursuance of Article IX:5(a) (ref. GRP/48) which became effective as of 16 February 1989.

UNITED STATES

- rectifications to the entity list, submitted in pursuance of Article IX:5(a) (ref. GRP/51) which became effective as of 3 May 1989.
- Title VII: Buy American Act of 1988, contained in the Omnibus Trade and Competitiveness Act of 1988.