

GENERAL AGREEMENT ON

RESTRICTED

TARIFFS AND TRADE

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REPORT (1990) OF THE COMMITTEE ON GOVERNMENT PROCUREMENT

1. This report outlines developments in the work of the Committee in the period between its last report (L/6593 of 27 November 1989), and until its meeting of 5 October 1990. 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 tenth 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, Czech and Slovak Republic, Dominican Republic, Egypt, Gabon, Hungary, India, Indonesia, Jamaica, Kenya, Republic of Korea, Malaysia, Malta, New Zealand, Nicaragua, Nigeria, Peru, Philippines, Romania, South Africa, Thailand, Trinidad and Tobago, Turkey, Zaire 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. Nils-Erik Schyberg (Sweden)
Vice-Chairman: Mr. Akitaka Saiki (Japan)

B. Meetings of the Committee

5. During the reporting period the Committee has held four meetings: on 19 January, 9 March, 29 June and 5 October 1990. The notes by the Chairman are contained in L/6645, L/6663, and L/6699 respectively, the note on the last meeting being incorporated into this report. The minutes are contained in GPR/M/35, 36, 37, and 38.¹ In the context of the Article IX:6(b) negotiations, the Informal Working Group on Negotiations met on 18-19 January, 7-8 March, 26-28 June, 1-4 and 22-26 October 1990. It will meet again in the weeks beginning 12 and 19 November 1990.

¹GPR/M/38 to be issued.

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 January, March, June 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.

8. At the Informal Working Group's meeting on 18-19 January 1990, the view emerged that there was a window of opportunity for major results in the Article IX:6(b) negotiations to be achieved in parallel with the final negotiating phase of the Uruguay Round. In this connection, it was noted that this phase was to be concluded at a Ministerial meeting in Brussels between 3-7 December 1990.

9. The Informal Working Group held a further meeting on 7-8 March and its participants also engaged in informal consultations on certain issues on 5 March 1990. The discussions mainly focused on the possible coverage for, and the possible régime to be applied to, the so-called "Group C" entities, i.e. entities which are not central, regional or local government entities, but whose procurement policies are controlled by, dependent on, or influenced by, such governments. In this connection, the Group was informed of the content of and background for the EEC's so-called "Utilities Directive", concerning the sectors of transport, energy, telecommunications and water management. The Group recognized the significance of these developments and exchanged views on their importance and relevance for its further work. There were also discussions of a "non-paper" which another delegation presented in respect of "Group C". While it was generally felt that any solution for this Group had ultimately to be found in a "package" of results, views differed on what the notion of an overall, balanced, context should comprise. Views also diverged on how a possible coverage and possible rules for "Group C" entities could be developed, given the scope of the present Code. In this regard, discussions referred to both obligations on the governments themselves and procedural rules for the entities. Progress in this area depended on the ability and willingness to continue the discussions and to engage negotiations in an innovative spirit.

10. In respect of regional and local government entities (referred to as "Group B"), useful procurement data were provided orally by a number of delegations. Useful additional information of procurements made by non-Code covered central government entities ("Group A") was also provided.

11. A checklist of issues for discussion in the area of service contracts had been identified by the secretariat prior to the meeting. However, the discussion was deferred.

12. The Group continued its discussion of surveillance, monitoring and control and what had been referred to as a possible "bid protest system" which many delegations viewed as an important part of an improved Code,

pointing to its value in enhancing the Code's credibility within the business community. However, views differed on the need for making amendments to the Code on this point. A concrete proposal tabled by one delegation at the October 1989 meeting remained on the table.

13. In the course of its activities, the Group also heard a number of observations with regard to Code rules on eligibility criteria and origin determinations. One delegation suggested further work in this field, taking duly into account work done elsewhere in the GATT.

14. The question of a transitional membership for non-Parties was given increased attention. The Group appreciated the opportunity to discuss with interested non-Parties suggestions made in this regard, as well as other suggestions for facilitating accession to the Code, tabled in the Uruguay Round Negotiating Group on MTN Agreements and Arrangements.

15. In preparation for the next Informal Working Group meeting, delegations were invited to prepare additional information relative to "Group A" entities not currently covered by the Code, including indications as to procurement volumes, main products purchased and indications as to their legal nature. In respect of "Group B" entities, they would endeavour to complete, in writing, a questionnaire circulated two meetings earlier. As for "Group C", they would bring forward indications as to entities for which they would wish to obtain information comparable to that envisaged for "Group A" entities. In addition, delegations were invited to come forward with additional original thinking as to coverage and régime for "Group C", taking into account what would be necessary to achieve success in the negotiations. Finally, they were invited to submit for consideration proposals for textual amendments using legal drafting language, for instance in areas such as transitional membership, eligibility requirements, etc.

16. The Informal Working Group held its next meeting on 26-28 June 1990 and discussed all elements which could constitute a possible overall agreement.

17. In a further meeting held on 1-3 August 1990, one Party presented its requests and offers in the Article IX:6(b) negotiations. This included suggestions for improvements to the text of the Agreement, inter alia, to cater to the coverage of services. A very useful exchange of views and clarifications took place following the tabling of that proposal.

18. The discussion also continued of certain specific issues which had been on the table for some time, such as the possible introduction of criteria for how goods and suppliers become eligible for Code benefits; a suggestion to strengthen the rules on the use of offsets and similar conditions; suggestions on how to treat situations of privatizations and nationalizations; and the introduction of a bid challenge mechanism into the Code, and different aspects of including services into the Code. Some Parties also provided further information, including statistical data, on their procuring entities.

19. At the end of the August meeting the Chairman proposed procedures for interested delegations as a practical means to advance the negotiations. Delegations which needed some time for reflection confirmed, by the agreed date of 20 August, that they could also comply with the proposed procedures. The procedures are attached to this report as Annex I.

20. At the meetings of 1-4 October offers and requests from six more Parties were introduced and commented upon in the Informal Working Group and two further delegations indicated that they would circulate offers and requests. The discussions covered all main elements which could constitute a possible overall agreement, including the treatment of different types of procuring entities, different categories of services, the threshold, and - apart from points mentioned above - amendments to the text of the Agreement which might be needed to cater for the eventual results of the negotiations. The Group also discussed a suggestion - originally tabled in the Uruguay Round - to introduce a transparency and predictability procedure. The Chairman stated that from now on the negotiations would proceed on the basis of concrete offers and requests from participants, and concrete textual proposals for any changes in the Agreement that might be needed. In the course of the meeting, a number of bilateral and plurilateral discussions took place outside meetings of the Informal Working Group. The Chairman added that it was necessary that bilateral work be intensified.

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

21. At the March meeting, Austria informed the Committee that in the autumn of 1989 the Austrian Council of Ministers had adopted new internal guidelines for the application of the Agreement. These were designed to help the Code-covered entities fulfil their obligations with regard to the new Protocol amending the Agreement. They did not contain any new compulsory provisions but were merely of an explanatory nature.

22. At the October meeting one Party invited another Party to provide information regarding the manner in which the procurement of a solar mapping system for the maintenance and operation of facilities in Antarctica was carried out by one of its Code-covered entities. The Party reserved its rights to come back to this matter at a later date.

23. Written information notified by individual Parties is listed in Annex II to this report.

F. Accession of further countries to the Agreement

24. At the March meeting the observer from the Republic of Korea announced his Government's intention to seek accession to the Agreement as soon as possible. A large number of parties welcomed this announcement and expressed their willingness to work together with this delegation towards this end.

25. At the June meeting, the observer from the Republic of Korea stated that his Government had presented its initial offer list of entities to the Director-General on 25 June 1990, composed of thirty-five central administration agencies, the Korean Telecommunication Authority, and the Korean National Housing Corporation. On the basis of 1989 figures, the total amount of the prospective concession, excluding the amount of procurement in the exceptions clause, was estimated to be US\$572 million. His delegation was prepared to hold consultations with Parties on the terms of accession and believed that the reason why there were so few developing country signatories was that the threshold for accession was too high for many of them. Parties welcomed the Korean submission of its list of entities and reserved their rights to comment on it at a later time. At the October meeting, the observer from Korea stated that his delegation was continuing bilateral consultations on its initial offer list and looked forward to completing this process in a timely fashion. His delegation attached importance to a wider coverage of entities and to the other issues being discussed in the Informal Working Group under the Article IX:6(b) negotiations and believed that such issues were directly and indirectly influencing the countries that were seeking full membership to the Agreement.

G. Review of 1987 and 1988 statistics

26. At the March meeting, the Committee noted that a number of questions and replies concerning individual statistical reports for 1987 had been circulated to all members. Further written questions and answers were announced and some other clarifications were made. It was agreed to conclude the 1987 statistical review but any questions could be reverted to under "other business" at the next meeting. It was noted that the 1987 reports would become derestricted one year from the date of the meeting and that the 1986 statistical reports would become derestricted on 16 March 1990. The Chairman reminded delegations that the Committee had agreed to set 30 September 1989 as a deadline for submissions of 1988 statistics, but that only eight Parties had circulated their 1988 figures by that date. The Chairman urged the remaining parties to submit their 1988 reports as soon as possible.

27. At the June meeting the Committee took note of written answers from the United States to questions from Canada and Japan regarding the 1987 statistical review and noted that 1988 statistics had been received from all Parties. One Party circulated questions and noted that additional questions would be forthcoming. It was decided to revert to this item at the next meeting.

28. At the October meeting it was agreed to conclude the 1988 statistical review for all but two Parties and to revert to the reviews which would take place at the next meeting of the Committee.

H. Uniform classification system for statistical purposes

29. The Committee continued discussion of "a uniform classification system for statistical purposes" both at the March and June meetings. A number of statements were made at the March meeting and it was agreed to invite

Parties to circulate proposals giving product descriptions and references to corresponding Harmonized System numbers. At the June meeting, one Party presented a paper relating to a uniform classification system for statistical purposes which concluded that the Harmonized System was not a practical alternative to the present system. This Party's expert examination of the Customs Cooperation Council Nomenclature, the Standard International Trade Classification, and the UN Central Products Classification, had determined that the latter was the best alternative for the purposes of the Committee. Another Party agreed with this view, adding that it was presently developing its own version of the CPC. Both believed that the CPC could only feasibly be utilized at the two-digit level but reserved their final views on this question. Another delegation believed that the thirty-nine categories of the CPC at the two-digit level were not a significant improvement over the present system while the 291 categories at the three-digit level were excessive. It suggested that the Committee devise an alternative by dividing areas of particular interest to the Committee into more detailed categories. Parties agreed to revert to this subject at the first meeting in 1991 when the secretariat would be able to compile a uniform report of the proposals which had been made.

I. Third major review of Article III

30. At the March and June meetings, the Committee continued its third major review of Article III. In this connection, a number of references were made to proposals, relating to accession of further countries, that had been presented in the Committee, as well as in the Negotiating Group on MTN Agreements and Arrangements. At the June meeting, one Party briefly reviewed developments in the Negotiating Group, noting that one proposal presented in this Group did not explain how to facilitate accession of developing countries beyond providing transparency and that serious consideration should therefore be given to another proposal dealing with procedures for accession. The sponsor of the former proposal stated that by giving non-Parties better knowledge of their own procurement systems, they would be able to make more appropriate requests under the special and differential treatment provisions of the Agreement. The sponsor of the latter proposal also requested that this be given more serious consideration, particularly since it believed that the terms of accession to the Agreement on Government Procurement were more onerous than those of the General Agreement. Another Party disagreed on this point and recalled that this issue had been thoroughly discussed at an informal meeting under the auspices of the Negotiating Group.

J. Consultations and Dispute Settlement

31. The Committee met on 19 January to consider the recourse to Article VII:6 by one Party with respect to procurement of electronic toll collection equipment in another Party. The complaining Party explained the details of the case it brought. In its opinion, a political intervention had prevented the due award to its supplier of a contract which fell under the rules of the Agreement. It noted, among other things, that since the contract in question had been awarded, a commercial opportunity had been

lost and that follow-up problems were also involved. Although it preferred to move quickly towards a stage of legal determination it was prepared to continue bilateral consultations and accepted the good offices of the Committee. The other Party explained that replies were under preparation in response to numerous and complex questions which had been raised in the bilateral discussions, which continued in accordance with the provisions of the Agreement. It considered that it was difficult to discuss the substance of the matter in the Committee until the other Party had had time to study the full response. It held the view that the Agreement had been followed in the matter, in particular Article II, and that a supplier of the other country had not received treatment less favourable than local and other foreign suppliers. The Committee encouraged continuation of efforts towards finding a solution.

32. At the meeting in March, the complaining Party requested the establishment of a Panel in this matter (reference L/6645). Following a request for continued bilateral discussions by the other Party concerned, the Committee encouraged further bilateral talks in order to exhaust the possibilities of finding a mutually satisfactory solution. The Party bringing the case reserved its right to call a special meeting upon lapse of the three-month period stipulated in Article VII:7.

33. After a mutually satisfactory solution had been found, the complaint was withdrawn by 26 April 1990.

K. Other matters

34. The Chairman has kept the Committee regularly informed of the relevant developments in the Negotiating Group on MTN Agreements and Arrangements (NG8) and of the Trade Negotiations Committee. At the October meeting the Chairman informed the Committee that the document MTN.GNG/NG8/W/83/Add.2 had been forwarded to the GNG by the NG8 on 23 July 1990 for its meeting. When the NG8 had met on 17 September, its Chairman had stated that it was his understanding that no progress had been made at an informal meeting held on 1 August 1990 and that attendance had been very small. It had been decided not to continue discussions in this area in the NG8 context.

35. Two Parties nominated Panel candidates for 1990.

36. All Parties have notified their 1990-1991 thresholds in national currencies according to the agreed procedures.

ANNEX I

PROCEDURES FOR FURTHER ARTICLE IX:6(B) NEGOTIATIONS

(A) BROADENING OF THE AGREEMENT TO FURTHER PROCUREMENT ENTITIES

1. Interested Parties are invited to table, by 24 September 1990 if possible, offers for the inclusion of further procurement entities in Annex I to the Agreement. In addition to lists of procurement entities the offers should contain:

- where available, information on the value of procurement above SDR 130,000 during a recent period and the products procured, both on an indicative basis;
- any conditions on which the offer is based, including modifications to the text of the Agreement, or derogations required (e.g. by way of notes in Annex I) which would be required for coverage of regional and local government entities and entities other than central, regional and local governments whose procurement policies are substantially controlled by, dependent on, or influenced by, central, regional or local governments.

2. Interested Parties are also invited to submit requests to their trading partners for the inclusion of procurement entities in Annex I to the Agreement.

(B) POSSIBLE EXPANSION OF THE COVERAGE OF THE AGREEMENT TO INCLUDE SERVICE CONTRACTS

3. Interested Parties are invited to table offers for the inclusion of service contracts into the Agreement by 24 September 1990, if possible.

4. Such offers, which would be without prejudice to delegations' positions in the GNS Negotiations, should contain:

- where available, information on the value of typical service contracts awarded above SDR 130,000 by entities presently Code-covered, and entities offered for inclusion under (A) above, during a recent period, on an indicative basis;
- any conditions on which the offer is based, including modifications to the text of the Agreement, or derogations (e.g. by way of notes in Annex I) which would be required for the offer to be maintained.

5. Interested Parties are also invited to submit requests to their trading partners for the inclusion of service contracts in the Agreement.

(C) IMPROVEMENTS IN THE AGREEMENT

6. Apart from improvements proposed as conditions for offers referred to in paragraphs 1 and 4 above, interested Parties may submit additional proposals for other improvements in the text of the Agreement, not later than 24 September 1990.

* * *

7. In the forthcoming period every effort should be made by Parties to provide one another, upon request, with information regarding procurement in their respective countries including indications as to the legal nature of entities, the legislative/regulatory bases for their procurement, their procurement volumes, and main products and services procured, to the extent that such details are available.

8. In the process of the exchange of offers and requests between the Parties, a copy of each offer and request should be lodged with the GATT secretariat for confidential circulation to the other Parties.

9. The tabling of offers will be followed by intensive negotiations between the Parties. The negotiations will take place on the basis of mutual reciprocity having regard to the provisions of Article III relating to developing countries.

ANNEX II

Notifications by Parties Relating to Their Own
Implementation and Administration of the Agreement

Apart from statistical information presented orally in the Committee, and certain information provided in the context of Article IX:6(b) negotiations, the following was notified during the review period.

AUSTRIA

- See paragraph 21 of report.

EUROPEAN ECONOMIC COMMUNITY

- EC "Council Directive of 21 December 1989 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts" (89/665/EEC, published in EC's Official Journal L395 on 30 December 1989).
- "Proposal for a Council Directive Coordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors" (COM(90) 297 final, published in the EC Official Journal C216 on 31 August 1990).

SWEDEN

- Modification of entity list notified in GPR/58; effective as of 11 October 1990.

UNITED STATES

- Modification of entity list effective as of 29 June 1990 (ref GPR/56 and Corr.1; Let/1687);
- copy of the relevant pages of Federal Registry/Vol.54, No 230 of 1 December 1989, containing "Request for Comments Concerning Foreign Government Discrimination in Procurement".