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Multilateral Trade Negotiations

Group "Non-Tariff Measures"

Sub-Group "Government Procurement"

CHECKLIST OF POINTS SUMMARIZING VIEWS ON SPECIFIC ISSUES IN THE AREA OF GOVERNMENT PROCUREMENT

Note by the Secretariat

1. At its March meeting the Sub-Group "Government Procurement" requested the secretariat to prepare, for the next meeting of the Sub-Group, a checklist of points summarizing views on specific issues raised by individual delegations in the course of the discussion. The Sub-Group agreed that this material, as well as additional submissions which might be made by participants, and the existing background documentation, would form the basis for the detailed examination of major issues and approaches in the negotiations on government procurement at its next meeting (MTN/NTM/29, paragraphs 9-11).
2. The present note has been prepared by the secretariat in response to the Sub-Group's request for a checklist of points. It endeavours to reflect the main points made by delegations at the March meeting of the Sub-Group generally on a preliminary basis and without commitment. In this connexion, it may be recalled that delegations have been invited in GATT/AIR/1359 to submit in writing any additional comments, suggestions and proposals they would wish to have taken into account when seeking solutions to problems in the field of government procurement.
3. The note has been prepared on the secretariat's responsibility utilizing broadly the headings contained in document MTN/NTM/W/74 concerning a list of elements which might be taken up for examination in the Sub-Group. It may not be exhaustive of all the points presented.
 - A. OBJECTIVES AND PRINCIPLES
 - (i) General considerations
4. Emphasizing the importance of reaching an agreement in the area of government procurement, some delegations recalled:
 - the magnitude of trade involved;

- the potential for future growth of government procurement;
- the link between government procurement and other trade barriers and the need for effective action in as wide an area as possible if the objectives of the Tokyo Declaration are to be achieved;
- the need for the progressive and equitable liberalization of government procurement;
- the need for a reasonable balance of advantages for all participants in the negotiations on government procurement;
- the importance of differential and more favourable treatment for developing countries where this was feasible and appropriate.

5. Some delegations recalled the favourable experiences of their countries arising from regional co-operation in the field of government procurement. It was stated that this regional co-operation had produced results reaching beyond the membership of the organization concerned and had already made a contribution to the expansion of international trade. It had also demonstrated that an international agreement containing a global balance of rights and obligations was feasible.

(ii) Objectives

6. Some delegations stated that the objective of the work on government procurement should be to provide for:

- international competition;
- the application of commercial considerations in this area taking into account the aims and provisions of the Tokyo Declaration.

7. These objectives could, in the view of some delegations, be attained through an agreement containing, inter alia, provisions relating to:

- the principle of non-discrimination in respect of foreign products and suppliers;
- the assurance of transparency in terms of national policies, practices and procedures;
- differential and more favourable treatment for developing countries;
- surveillance;
- dispute settlement.

8. Some delegations noted that opportunities resulting from increased access to markets of developed countries on the basis of non-discrimination alone might not be sufficient to enable developing country suppliers to take advantage of trade possibilities in the area of government procurement.

9. With regard to the principle of non-discrimination it was stated by some delegations that this principle should apply:

- to the largest possible portion of goods and related services purchased by governments for their own use;
- not only with respect to foreign products and suppliers but equally between third country suppliers.

10. The balance of rights and obligations was mentioned by many delegations as a major objective for the negotiations in the Sub-Group. Some delegations stated that an important objective would be to achieve global reciprocity in the field of government procurement as between developed countries. With respect to developing countries, some delegations suggested that opportunities for increased access to markets of developed countries as well as of other developing countries and an increased share of developed countries' imports relating to government procurement was also an important objective.

11. A further objective mentioned by one delegation was the maintenance of a balance between the aims of a code and the efficiency of purchasing procedures as practised by individual countries. In this respect, it was noted by some delegations that the variety of methods used to favour domestic suppliers represented one of the major problems to be dealt with in negotiating an effective elimination of procurement restrictions.

(iii) Approaches to possible solutions

12. Some delegations made the following observations:

- an open approach with regard to the kind of solution to be sought;
- support in principle for the establishment of a code which would multi-laterally govern the field of government procurement;
- national legislation, rules and practices which give a preference or reserved purchases to domestic suppliers should be abolished or modified;
- there were a number of provisions in the GATT which were relevant to government procurement. The need for strengthening these provisions was also mentioned;

- the legal nature and structure of provisions to be negotiated and the relations between the objectives of an agreement on government procurement and the provisions of the General Agreement to be carefully examined at the appropriate time;
- while a large number of solutions might be conceivable, a useful basis was already available both as a result of work done earlier in the GATT Committee on Trade in Industrial Products and in particular the work done in the OECD on a draft instrument aiming at the establishment of a comprehensive set of rights and obligations;
- while it could be one of the documents to be taken into account by the Sub-Group, the OECD draft instrument should not be accorded any special priority or be considered as a starting point for deliberations in the Sub-Group. It would be difficult for developing countries, as importers, to undertake and subscribe to obligations of the kind contained in the OECD Draft Instrument;
- government procurement should be considered from a somewhat wider perspective than has been done in the past and as reflected in the OECD draft instrument. To provide greater opportunities for smaller countries, there should, inter alia, be no discrimination between third country suppliers;
- an agreement should consist of four key sets of provisions: (a) non-discrimination, the substance of which would be based on Article I of the General Agreement and certain paragraphs of Article III and possibly parts of Article XVII; (b) the nature and content of trade to be liberalized, including a threshold and a list of purchasing entities that would be covered by the code; (c) transparency aimed at ensuring that national purchasing policies are administered on a non-discriminatory basis and which might be elaborated having regard to paragraphs 15 to 34 of the OECD draft instrument and taking into account Articles VIII, IX and X of the General Agreement, and (d) surveillance and dispute settlement, where a good basis could be derived from long GATT experience as well as the discussions taking place and proposals being put forward in the multilateral trade negotiations;
- Article XVIII of the GATT was also relevant in so far as more favourable treatment for developing countries was concerned, because in most developing countries government procurement was being used as an instrument of government policy aimed at influencing and stimulating economic and industrial development, taking into account problems of employment, balance of payments, etc.

(iv) Differential and more favourable treatment for developing countries

13. Some delegations said that they were prepared to study, in a positive spirit, any concrete suggestions for differential treatment put forward by developing countries in the area of government procurement.

14. Some delegations suggested, inter alia, that:

- in conformity with paragraph 5 of the Tokyo Declaration, the contribution of developing countries should not be inconsistent with their development, financial and trade needs;
- there was need to see how greater participation by suppliers from developing countries in tenders called by governments or their agencies of developed and developing countries might be ensured. In this respect, a major problem could be the lack of knowledge and information about the precise procedural formalities which had to be conformed with in order to submit a bid. Access to documentation, sufficient time-limits for new and distant suppliers to tender, and technical assistance were all important questions that would need to be thoroughly examined;
- if all countries were willing to open their procurement systems, the trade of developing countries could also be expected to benefit as government procurement, on the basis of the best value per tax unit expended in this area, was in the interest of all countries, including those with scarce financial resources;
- special and differential treatment should be sought consistently with the general progress made. As the work proceeded towards the identification of problems in this area and in the elaboration of multilateral solutions, it would be important to take into account the needs of developing countries and to examine the concrete possibilities for extending differential treatment where feasible and appropriate.

15. Having regard to the objectives of economic development and balance-of-payments problems some other delegations suggested, inter alia, that while they subscribed to the principle of non-discrimination, provision should be made in any arrangement:

- for extending more favourable treatment in the markets of developed countries to bidders and products from developing countries;
- for developing countries to provide in their own markets more favourable treatment for their domestic suppliers, and suppliers from other developing countries so as to facilitate the expansion of their mutual trade.

16. It was further suggested by some delegations that if tied aid was replaced by that of untied or partially untied aid in relation to projects in the field of government purchasing, and this principle was written into any arrangement on government procurement, it would be of great help to developing countries, and would give impetus to the currently evolving idea that there should be an expansion of trade among them. In this respect, it was noted that tied aid had been a major factor in the creation of an environment in which developing countries were forced to act in a discriminatory fashion due to circumstances outside their control as evidenced by some of the notifications contained in document MTN/NTM/W/16.

17. Some delegations stated that certain of the problems faced by developing countries as exporters, stemmed from their lack of knowledge about the opportunities that existed in the area of international procurement, and from the operation of and competition from large multinational corporations. Both these drawbacks were exacerbated in respect of developing countries through their lack of the necessary human, financial and economic resources.

18. As indicated below, certain specific suggestions bearing on the possibilities for differential treatment for developing countries were also made in relation to a number of issues which may be subject to negotiation in the area of government procurement.

B. DEFINITIONS

19. Some delegations felt that the concept of government procurement required defining because of its impact on the field of possible application. It was also stated that definitions could play an important rôle in elaborating a solution and assessing its overall impact on the global balance of commitments.

20. Among views expressed by some delegations were the following:

- with regard to the definition of government procurement the provisions of Article III:8(a) of the General Agreement should suffice;
- government procurement should be defined as procurement of products by a procurement entity or entities for its or their own use and not with a view to commercial resale or with a view to use in the production of goods for commercial sale;
- definitions should be kept as simple as possible. Some delegations said that complicated definitions tended to increase the number of disputes of interpretation;

- while Article III:8(a) could be taken as a basis, a number of problems remained to be dealt with including, inter alia, the fact that the end use of a product purchased by a central government unit was not always easy to check, that some purchases might be made by entities not directly controlled by governments, etc.
- although it might be desirable at a later date to expand government procurement solutions to cover a wider field of transactions, an initial solution should be limited to purchases for use by government entities.

C. COVERAGE

(i) Procurement entities

21. Some delegations stated that with regard to the degree of government control, budgetary independence, etc., the position of procurement entities (centralized, decentralized, para-governmental, public companies, public utilities) could vary significantly between countries depending on a number of factors such as differences in constitutional or administrative structures, administrative organization, etc. Some delegations believed that these differences posed difficult questions which would require careful examination having in mind the objective of an overall balance of commitments.

22. Among other points made were the following:

- procurement entities included in any arrangement should cover as wide an area as possible;
- an important task would be to find an equilibrium between obligations of central and federal governments;
- the scope of procurement entities to which obligations would apply should be limited to those entities whose procurement operations were under the direct control of the central government; public corporations and the like would not fall within this category;
- the aim should be to find a balanced solution based on a negotiated list of entities. This should not imply, however, a quantitative balance but would mean that member countries enjoyed equal benefits. A clause on "best endeavours" could be appropriate where authorities outside government control were concerned;

- in the context of negotiations to determine which entities were to be covered, broad exclusions of public entities which were considered major potential buyers would not be favoured. The coverage should be as comprehensive as possible with regard to entities whose purchasing practices fell under the direct or indirect control of central governments. The operations of quasi-government entities whose purchasing policies often favoured domestic suppliers would also need to be considered, in order to eliminate trade distortion to the maximum extent possible.

(ii) The value threshold

(a) The function of the threshold

23. With regard to the function of the threshold it was suggested by some delegations that:

- at least two different kinds of threshold were conceivable: (i) one which would exempt contracts below the threshold from the scope of the agreement and (ii) the other which would exempt contracts below the threshold from the procedural rules;
- it was difficult to see how the objective of non-discrimination could apply below the threshold value if no procedures were available for ensuring the application of non-discrimination;
- the question of whether to adhere to the non-discrimination principle also below the threshold was closely related to the formulation of an escape clause;
- effects of the threshold could vary according to the scope and coverage of procurement entities and the differences in procurement practices among countries.

(b) The magnitude of the threshold

24. In relation to the size of the threshold some delegations made the following suggestions:

- under a high threshold there was a risk that an important percentage of trade would be excluded and the threshold should therefore be set as low as was administratively feasible. A value of US\$50,000 was indicated by way of example;
- a relatively high value threshold was preferred in order to limit the application of the procedural rules in cases of minor economic value;

- since developing countries could often be interested in tenders of low value, the application of the lowest value threshold, which was administratively feasible, would not only be more in accord with their supply potential, but also preserve for them the benefits of transparency, which the imposition of a high value would deny them;
- if it were not possible to have a low value threshold of general application, developing countries would need differential treatment to the extent that the value threshold applicable to them should be lower in comparison to that applicable to developed countries.

D. NON-DISCRIMINATION

(i) Existing discriminatory provisions

25. It was suggested by some delegations that existing discriminatory provisions in the field of government procurement should be eliminated:

- because the principle of non-discrimination with respect to foreign products was the key principle in a possible multilateral instrument on government procurement;
- because the achievement of global reciprocity was a major objective.

26. Some delegations also suggested that:

- each signatory country should have flexibility in adopting procurement procedures consistently with its domestic situation while respecting the principle of non-discrimination;
- the current situation was characterized by two main approaches - one system providing for open procurement but often with clearly stated percentage preferences for domestic suppliers and the other applying a more subtle method of discrimination through such practices as lack of advance notice of purchases, onerous conditions for foreign suppliers seeking to qualify as bidders, refusal to entertain foreign supplier complaints or even respond to those complaints and the operation of procurement systems in a highly invisible fashion so that it was nearly impossible to determine what was going on in day-to-day operations. Any proposed solution in the area of government procurement should take account of these two primary methods of restrictive procurement now in existence;
- deviations from non-discrimination should provide for more favourable treatment for developing countries.

(ii) Procurement techniques

27. The following suggestions were made by some delegations:

- purchasing procedures should not be too detailed or administratively cumbersome;
- a set of common guidelines should be formulated covering the various tendering procedures; however, purchasing procedures should be made as simple as possible so as not to constitute an impediment to developing countries;
- efforts should be made to increase the use of open procedures, and to liberalize practices used when keeping lists of suppliers under selective tendering. Reasons for the use of negotiated procurement should be examined.

28. The question of private contracts or "single tender" was taken up in some interventions:

- the practice of placing contracts with a single source without competition should be limited to conditions of extreme urgency or in buying unique products which could only be obtained from a sole source, possibly in cases where patent rights were held by that firm. There was no reason to use direct purchases, for example in the case of follow-up orders for the sake of standardization, when the question of "urgency" was not relevant;
- single tender should be permitted not only in emergency situations or when it was evident that there was only a sole producer of a certain product, but also for example when a purchase involved products of a research and development project and when there was no bidder which met the specifications under open or selective tender;
- while some delegations were for the moment not in a position to express views on situations where negotiated procurement (marché de gré à gré) might be acceptable, they felt that a limitative list of such situations could be considered.

29. It was suggested by one delegation that under open procedures - normally entailing the use of sealed bids offering standardized products with the award being based on price - there should be public opening of bids and the disclosure of names of bidders and prices to assure impartial treatment. One delegation suggested that a set of common guidelines should be developed with regard to the system of filing and opening of bids.

30. The view was also expressed by some delegations that the open tender system should be used to the maximum possible extent, as continued widespread application of the present system of selective tendering was likely to adversely affect the advantages to be derived from a multilateral arrangement. Certain purchasing procedures might, more than others, militate against the objectives of ensuring transparency and non-discrimination and might impose constraints which would be felt more by developing countries than by developed countries.

(iii) Timing

31. In commenting on the time interval required between the calling for bids and the closing of tenders, some delegations made the following points:

- provision should be made for an adequate lead time for foreign and distant suppliers to prepare and submit bids before the closing date;
- the legitimate needs both of distant suppliers and procurement entities needed to be taken into account when determining time-limits;
- certain structural difficulties encountered by developing countries should also be borne in mind in relation to the time interval between the calling for bids and the closing of tenders;
- it was of particular importance to avoid discrimination not only with respect to foreign suppliers but also between third country suppliers in connexion with time-limits for the preparation and submission of bids.

(iv) Conditions of participation

32. It was suggested by some delegations that the principle of non-discrimination should apply with regard to participation conditions in order to avoid the introduction of elements of discrimination either through the criteria and conditions attached to participation in tenders or through the criteria attached to the products in question. The point was made that rules for participation should not jeopardize administrative effectiveness. Attention was also drawn to the importance of avoiding provisions regarding participation conditions which could discriminate between third country suppliers.

33. Among the more detailed comments were the following:

- no undue or discriminatory requirements should be placed on foreign suppliers becoming qualified suppliers;
- a set of common guidelines should be developed with regard to questions concerning tender deposits, charges and guarantees, etc.;

- provisions or guidelines were desirable to prevent discrimination through the way in which technical characteristics or product specifications were prescribed;
- developed countries should not utilize regulations relating to transportation, insurance, storage, etc. so as to adversely affect developing country interests and opportunities in the field of government procurement;
- all tenders which met specified and published requirements should be considered for award;
- all criteria for the evaluation of bids should appear in invitations to bid. The evaluation of bids should be based only on announced criteria.

34. It was suggested by some delegations that foreign suppliers should not be faced with a language impediment which might inhibit their effective participation in international procurement.

(v) Ex-ante information

35. With regard to ex-ante information, some delegations made the following points:

- that adequate information should be made available when giving notice of intent to purchase;
- that the purchasing entity should supply information on what it intended to buy in a publication of wide circulation and that a provision should be included which would entitle interested suppliers to make enquiries concerning any aspect of a particular procurement and be assured a prompt response to such enquiries;
- that the establishment of precise procedures with regard to ex-ante information was important and was related to the question of timing.

(vi) Ex-post information and publicity

36. The main points raised under this heading by some delegations were the following:

- in order to ensure transparency in the operation of procurement systems some form of ex-post publicity would be required whereby bidders should have access to the name of the supplier receiving the award and the value of the contract, etc.;

- to determine whether full and fair consideration had been given to a bid, the objective should be to permit bidders access to information and criteria used during the evaluation process. In this connexion, it was suggested that such disclosures would actually promote competition and that the fear of possibilities for price collusion in subsequent bidding was unfounded. Some ex-post information would also be desirable for surveillance and dispute settlement purposes;
- ex-post facto information should only be required where indispensable for surveillance and dispute settlement purposes;
- while the exact content of ex-post information required examination, in practical terms a transparent system which provided for ex-ante information, time-limits, participation conditions, etc., could obviate the necessity for ex-post information;
- the existing practices of individual countries should be respected and the practice, if followed, of inviting all bidders as witnesses at the opening of bids might be sufficient to secure transparency;
- reservations were expressed with regard to the need for publishing information concerning "single tenders".

E. EXCEPTIONS

37. The question of exceptions was referred to by a number of delegations:

- a careful examination of the scope of application of the particular concept of security exceptions was needed;
- no exceptions should be permitted except for national security purposes;
- there was an evident need for independence when purchasing essential goods of military importance or goods deemed indispensable for national defence or other strategic purposes;
- exceptions or waivers should be provided when necessary to take care of the needs of developing countries;
- instead of basing exceptions on a list of products it would be preferable to do so on the basis of certain specific circumstances, e.g. security, development and financial needs.

F. DEROGATIONS AND/OR ESCAPE CLAUSE

38. The following points were mentioned by some delegations during the discussions:

- the aim of government purchasing should be to obtain the best value for public funds spent and not to pursue various socio-economic objectives, e.g. the protection of infant industries, etc. Exceptions and derogations taken together could undermine the whole purpose of negotiating rules of government procurement;
- the only valid basis for resorting to derogations and/or escape clause procedures could be provided by requirements of national security;
- it would perhaps be unrealistic to expect a final solution without any derogations and/or an escape clause;
- an escape clause was desirable and should be formulated in a way that would make a list of specific derogations unnecessary;
- unlike security exceptions, any derogations should be temporary, taking into account the importance of the problems at hand; if a safeguard clause were to be established, any safeguard action thereunder should be temporary and exceptional and subject to international surveillance, etc.;
- the view was also expressed by one delegation that these questions should be examined at a later stage in relation to other major elements of any arrangement, such as the principle of non-discrimination and transparency.

G. PUBLICATION OF GOVERNMENT PROCUREMENT REGULATIONS

39. A number of delegations felt that considerations of non-discrimination, transparency, surveillance and dispute settlement in practice called for the periodic compilation, publication and circulation of laws and regulations, including any modifications which might be made to them, by the appropriate body; notification procedures might be adopted in this respect. Some delegations also referred to the importance of technical assistance to developing countries in this context.

H. REPORTING, REVIEW AND COMPLAINT PROCEDURES, ETC.

(i) Surveillance

40. A number of delegations stated that effective surveillance machinery was important to the question of administering an arrangement in the field of government procurement, more particularly since discrimination was currently often the rule in this area and taking into account that a solution would extend beyond the present text of the General Agreement.

41. Some delegations suggested that:

- surveillance should be examined in relation to other major elements of any arrangement;
- the relationship of surveillance in this area to a more general surveillance system which might be established under the GATT would need examination at the appropriate time;
- it would be more appropriate to examine the issue at a later stage of the negotiations.

42. It was also suggested that as surveillance implied the need to establish a supervisory body, the functions of such a body might include, inter alia, (a) serving as a clearing house to receive and disseminate notifications of changes in procurement rules; (b) providing guidelines for the collection and publication of data on contract awards based on an agreed format; (c) conducting periodic reviews and considering possibilities for amending or adding to an agreement.

(ii) Dispute settlement

43. In addressing themselves to dispute settlement, some delegations raised the following points:

- it seemed appropriate to examine this issue at a later stage in the negotiations;
- the basis already existed for moving expeditiously to drafting provisions for dispute settlement;
- it was to be hoped and expected that most complaints and disputes would be satisfactorily dealt with at the national level, or through bilateral consultations or discussions;
- it was important that both parties to a dispute should be represented in a dispute settlement body, which would preferably be of an ad hoc nature rather than a standing group of experts;
- there was need for a body which could, inter alia, interpret the arrangement if disputes were not settled below the multilateral level. Without prejudice to the form of machinery which might be adopted, the question of interpretation of the arrangement should not be left to the parties concerned nor to a panel but should be reserved to a body representative of membership of the arrangement;

- if a surveillance body were to be constituted, its terms of reference should enable it to dispose of complaints and cases expeditiously, since developing countries could ill afford long periods of dispute settlement.

I. OTHER ELEMENTS

44. Some delegations proposed that two additional elements (which had already been included in the Draft Standards Code) should be taken up for consideration, namely, the provision of technical assistance and the establishment of enquiry or information points, both of which could be of considerable importance to developing countries in the field of government procurement.