

MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG8/W/18
1 December 1987

Special Distribution

Group of Negotiations on Goods (GATT)
Negotiating Group on MTN Agreements
and Arrangements

AGREEMENT ON GOVERNMENT PROCUREMENT
ASPECTS OF THE CODE PROPOSED FOR NEGOTIATION

Note by the Secretariat

1. At the meeting of the Group on 27 May 1987, the secretariat was requested to prepare factual background notes on those aspects of the MTN Agreements and Arrangements which had been raised in the discussions (MTN.GNG/NG8/2, paragraph 11). The present note provides background information on the issues identified by the delegation of India, in document MTN.GNG/NG8/W/9, Section (i) and by the Republic of Korea in an oral statement at the meeting of 5-6 November 1987 (MTN.GNG/NG8/4, paragraph 19).

2. For the issues identified, the note provides information on past discussions in the Committee on Government Procurement.

3. This information should not be regarded as exhaustive, nor is it intentionally selective. Rather, the intention is to provide sufficient information on earlier discussions of these issues, in the context in which they have been raised, and on any relevant developments including actions or decisions that might have followed from such previous consideration.

Item A. Special and differential treatment for developing countries in negotiations with respect to lists of entities to be covered by the provisions of the Agreement

Relevant provisions referred to in the Group: Article III

4. It has been suggested that an examination be made of the adequacy of the provisions relating to special and differential treatment, which should be suitably expanded with a view to securing the adherence to the Agreement of a larger number of developing countries. (See also paragraph 16)

5. The present note supplements information provided in Section I of document MTN.GNG/NG8/W/2: "Special and Differential Treatment for Developing Countries". The procedures referred to in paragraph 6 of that document are reproduced as Annexes 1 and 2 to this note.

6. The secretariat does not possess full information as to the reasons why the four developing countries referred to in the above-mentioned document, and which had tabled entity lists in the Tokyo Round, did not become Parties to the Agreement. The secretariat's understanding is that a number of participants considered the offers of three of these countries as inadequate, either in terms of market opportunities (two cases) or because the offer apparently related to a State-trading enterprise. One offer was tabled subject to a confirmation which did not follow. No country (except Israel which acceded to the Agreement after its entry into force) has availed itself of the formal procedures reproduced in the Annexes. To the secretariat's knowledge only two developing contracting parties have negotiated with Parties on the basis of concrete offers and after the Agreement came into force. Both cases arose during the first years of the Committee's work, and information is available in official GATT documents on only one of these.

7. The case in question dates back to July 1981 when one observer informed the Committee that "exploratory bilateral talks had been initiated with some ... signatory trading partners." (GPR/M/3, paragraph 4). Three Parties welcomed the initiative. One stated that it "hoped that the Parties ... would show reasonableness and understanding in these talks." (idem, paragraphs 5-7). In October of the same year, three Parties confirmed that they had entered into consultations (GPR/M/4, paragraphs 3, 5 and 7).

8. In February 1982 similar confirmation was given by a fourth Party (GPR/M/5, paragraph 6). Three Parties made a particular reference to the fact that the country in question was a developing country and a contracting party to the GATT. One of these expressed the hope that "Parties would provide favourable conditions for that country's adherence to the Agreement", another that "the developed country Parties would in their entity negotiations take into account the state of industrial development of the developing countries concerned as well as the provisions of Article III of the Agreement. In his view, the Committee was discussing a matter which would attract the attention of many countries as a test case." One Party "considered it of crucial importance that as many developing countries as possible become Parties. He therefore hoped that the industrialized countries would give favourable consideration to entity offers by developing countries." (idem, paragraphs 6-7 and 9). In December 1982 the country seeking accession explained that "pressing business had prevented it from carrying out consultations with some Parties. His authorities were undertaking the necessary technical preparations...". (GPR/M/6, paragraph 4)

9. In February 1983, the delegation concerned explained that it had "had informal consultations with a number of Parties recently. His authorities had been considering an improved offer which he believed should be sufficient to enable adherence to the Agreement. He would reply as soon as possible to certain questions concerning the government procurement régime in this country. At the same time, he looked forward to reactions to the offer from a number of Parties so that the consultations could be completed." (GPR/M/7, paragraph 11). Three Parties made particular

references to the developing country status of the country concerned. One stated "that developing countries had found it difficult to accede ... because of the demands made by the present Parties." (idem, paragraphs 6, 9 and 10).

10. At the meeting in May 1983 the delegation concerned stated, inter alia, "that some time ago ... had held bilateral negotiations with some developed country Parties on the basis of an initial offer of one entity. In response to some of these countries and motivated by a desire to contribute to the liberalization of trade and the establishment of international discipline in the conduct of government purchases ... had made efforts to improve the offer by including more entities and products. The consultations had been resumed with some developed country Parties but ... was disappointed to find that obstacles it had faced in the initial consultations remained." (GPR/M/8, paragraph 3). One Party stated that it "had noted with regret the disappointment expressed with respect to the way the process of negotiating access to the Agreement had progressed. It had always been his delegation's desire to move as quickly as possible to bring new countries into the Agreement, and it was particularly interested in seeing ... as member. His delegation intended to work closely and expeditiously with ... to try to overcome any obstacles to its accession." (GPR/M/8, paragraph 4). Another Party stated "that his delegation much appreciated the strenuous efforts of the government concerned to become Party to the Agreement. It was his sincere hope that ... would become Party as soon as possible, thus enhancing further the importance of the Agreement." (idem, paragraph 5).

11. Since May 1983 no further statements have been made concerning these particular negotiations.

12. It might be noted that in December 1982 one observer "informed the Committee that his delegation had communicated to Parties his Government's firm decision to accede to the Agreement." Pending an official offer, a list of public entities was tabled. "A further, official communication which would include figures on purchases made by the entities concerned would expectedly be submitted to the secretariat in the near future." "His delegation hoped that speedy negotiations would enable ... to accede at the earliest possible moment in 1983." (GPR/M/6, paragraph 5). Reverting to the matter in February 1983, the delegation stated that it had circulated an offer of entities. "A number of delegations had given comments and raised questions concerning the offer and on administrative procedures in his country. While he was not yet in possession of all details necessary for starting the negotiation process, he reaffirmed his Government's decision to accede to the Agreement. The interested Parties would be informed as soon as all requested information was available." (GPR/M/7, paragraph 7). This case has not been pursued further in the Committee, except that it was referred to at the special meeting on 2 May 1985 held to examine the adequacy and effectiveness of the Agreement and obstacles to acceptance that contracting parties might have faced (GPR/M/17, paragraph 3).

13. As mentioned in MTN.GNG/NG8/W/2, paragraph 7, references have been made directly or indirectly on a number of occasions to criteria used or

other considerations relevant to the negotiations on entity offers. Among these references are the following:

- "trade liberalization in this area was an unprecedented exercise in the GATT system ... a considerable degree of caution had been shown even by the industrialized nations in opening up this sector of their domestic requirements. It was essential, therefore, that in the case of developing countries, special incentives envisaged in the Agreement, must be provided to enable them to take on new responsibilities." (GPR/M/1, paragraph 9).
- "Although a cursory view of the lists of entities and items submitted by the Signatories to the Agreement indicated that only few and insignificant items were of interest at the moment ... acceptance of the Agreement would in the long run ensure participation in the government procurement processes of the Code's Signatories on items of potential interest to (the developing country mentioned above). It hoped, therefore, that the Signatories ... would look at its interest as a part of the whole negotiation package in the context of the Tokyo Round and would view the ... initial efforts favourably, considering that significant changes had taken place recently in the ... trade régime, including the liberalization of tariff and monetary policies, involving items of actual and particular interest to most developed countries." (GPR/M/3, paragraph 4, see also GPR/M/4, paragraph 4 and GPR/M/8, paragraph 3).
- "For a country, not least a developing country, which had not participated in the original negotiation based on offers and requests, the negotiation on accession was an unbalanced one. The country seeking accession had to negotiate its contributions and open up its system of government procurement, whereas the existing Parties did not increase the scope of their contribution under the Agreement. In addition, the quantitative and qualitative criteria used by Parties were not very clear. Several methods had been used, for instance the method of comparing the offer to the GNP which amounted to the calculation of one total figure. Such an evaluation was very difficult to carry out and he presumed that countries which were presently candidates for accession continued to ask themselves which criteria could be used in the negotiating process. The evaluation of the benefits of the Agreement for national administrations and industries was rendered difficult by the lack of knowledge about the real contributions others had made, a problem which appeared to exist even amongst the Parties; some of the latter had manpower resources far exceeding those ... could afford for analyzing commercial opportunities." (GPR/M/9, paragraph 9).
- "As developing countries represented a large number of the GATT contracting parties their accession would enforce the spirit of Article III:14, i.e. that the Agreement should genuinely aim at achieving maximum implementation of its provisions." (GPR/M/9, paragraph 18).

- "Article III:3, first sentence stated that 'with a view to ensuring that developing countries are able to adhere to this Agreement on terms consistent with their development, financial and trade needs, the objectives listed in paragraph 1 above shall be duly taken into account in the course of the negotiations with respect to the lists of entities of developing countries to be covered by the provisions of the Agreement'." (GPR/M/17, paragraph 3).

14. In addition, the general view that more flexibility was needed in accepting entity offers from developing countries has been referred to on a number of occasions (see, e.g. GPR/M/1, paragraph 9, GPR/M/10, paragraph 3, GPR/M/14, paragraph 4 and GPR/M/17, paragraph 3).

15. Document MTN.GNG/NG8/W/2 contains further information on discussions in the Committee and in the Working Group on MTN Agreements and Arrangements relating to entity negotiations (Ref. in particular paragraphs 8, 9 and 11).

Item B. Accession of contracting parties

Relevant provisions referred to by participants in the Group: Article IX, paragraphs 1(b) and 9

16. It has been suggested that appropriate changes be made in Article IX:1(b) concerning consent of all Parties to terms of accession, and in the procedures adopted by the Committee concerning accession. It has also been suggested orally that the objective of Article III be incorporated in Article IX:1(b). It has been noted that Parties have the possibility of invoking non-application in accordance with Article IX:9.

17. As mentioned above, the procedures adopted are reproduced in Annexes 1 and 2 to this note. The second of these was intended to facilitate accession in the period between meetings (GPR/M/7, paragraph 4).

18. Since its inception, the Committee has not discussed Article IX:1(b). Nor has it discussed Article IX:9 concerning non-application.

19. It might be noted that other than what is provided in the procedures mentioned above there are no rules on how the Committee should take decisions. From the beginning the Committee has worked on a consensus basis.

Item C. Tendering procedures such as short response deadlines or restrictive pre-qualification requirements; technical specifications

20. These issues were mentioned orally at the fourth meeting of the Group (MTN.GNG/NG8/4, paragraph 19). Particular provisions of the Agreement were not referred to.

21. The Committee reviews the implementation and administration of the Agreement on a regular basis. In the course of this exercise questions

concerning bid deadlines, pre-qualification procedures and technical specifications have been raised several times. These subjects have also been referred to in the annual statistical reviews. During the initial phase of the Article IX:6(b) negotiations, some of these questions were considered sufficiently important for some delegations to put forward proposals for improvements of the text of the Agreement.

Amendments finally agreed upon have been incorporated in the Protocol Amending the Agreement on Government Procurement, which was adopted on 21 November 1986 and which will enter into force on 14 February 1988.¹

(i) Pre-qualification requirements

22. The following amendments to the text of the Agreement relating to the issue have been adopted and incorporated in the Protocol:

Addition of new Article III:10:

"10. Technical assistance referred to in paragraphs 8 and 9 above would include translation of qualification documentation and tenders made by suppliers of developing country Parties from a GATT language designated by the entity, unless developed country Parties deem translation as burdensome, and, in that case, explanation shall be given to developing country Parties upon their request addressed either to the developed country Parties or to their entities."

- Addition of new sentence at the beginning of the existing provision of Article V:2(b):

"any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question."

- Addition of the following sentence after the present sentence of Article V:2(b):

"The financial commercial and technical capacity of a supplier shall be judged both on the basis of that supplier's global business activity as well as its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations;"

- Addition of the following words (underlined here), in Article V:2(d):

"entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are included in the lists within a reasonably short time."

¹The "negotiating history" relating to these amendments is contained in document GPR/W/56 and Revs.1-5.

- Addition of new Article V:2(f):

"(f) the Parties shall ensure that

(i) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for different procedures;

(ii) efforts be made to minimize differences in qualification procedures between entities;"

(ii) Technical specifications

23. The following amendment relating to technical specifications has been adopted and incorporated in the Protocol:

- Addition of new Article IV:4:

"4. Procurement entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement."

(iii) Time-limits

24. The following amendments relating to time-limits have been adopted and incorporated in the Protocol:

- Article V:9(b) (to become Article V:10(b)), has been redrafted as follows: (new language underlined):

"Consistent with the entity's own reasonable needs, any delivery date shall take into account such factors as the complexity of the proposed procurement, the extent of sub-contracting anticipated, and the realistic time required for production, de-stocking and transport of goods from the points of supply."²

- In Article V:10(a), (b) and (c) the minimum period for receipt of tenders has been increased from thirty to forty days (Article V:10 has become Article V:11).

- In Article V:10(b) (to become Article V:11(b)), first sentence, the minimum period for submitting an application to be invited to tender (in selective procedures not involving the use of a permanent list of qualified suppliers), has been reduced from thirty to twenty-five days.

²Original language: "the normal time required for the transport of goods from the different points of supply."

- Article V:10(d)³ (to become Article V:11(d)), (dealing with exceptions) has been redrafted as follows:

"(d) The periods referred to in (a), (b) and (c) above may be reduced in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 5 of this Article. In this case, the period for the receipts of tenders shall in no case be less than twenty-five days. The second or subsequent publication should include a reference to permit the identification of the first publication."

- Addition of new Article V:11(e)³

"(e) The periods referred to in (a), (b), (c) and (d) above may be reduced where a state of urgency duly substantiated by the entity renders impracticable the periods in question but shall in no case be less than ten days from the date of the publication referred to in paragraph 4 of this Article."

- Addition of new Article V:11(f)

"(f) The Parties shall ensure that their entities shall take due account of publication delays when setting the final date for receipt of tenders or of applications to be invited to tender."

Item D. Statistics

Relevant provision referred to: Article VI:9

25. It was suggested orally at the fourth meeting that Article VI:9 be amended, with the aim of improving statistics through more detailed breakdowns in product categories, statistical analyses and improved means of comparing statistical presentations. It was noted that lack of accuracy, consistency and uniformity of statistics made it difficult to assess benefits accruing from accession (MTN.GNG(NG8/4, paragraph 19).

26. Questions concerning statistics have been raised over the years (Ref. MTN.GNG/NG8/W/2, paragraph 10). Statistical problems were also discussed in the Article IX:6(b) negotiations. The amendments to the text of the

³Original language to be compared to new Article V:11(d) and (e):
"(d) The periods referred to in (a), (b) and (c) above may be reduced either where a state of urgency duly substantiated by the entity renders impracticable the periods in question or in the case of the second or subsequent publications dealing with contracts of a recurring nature within the meaning of paragraph 4 of this Article."

Agreement relating to statistics which have been adopted and incorporated in the Protocol, introduce changes in the following respects:

- Article VI:9(a) (to become Article VI:10(a)) relating to statistics on estimated value of contracts awarded, both above and below the threshold value); such statistics shall henceforth be "on a global basis and broken down by entities".
- Article VI:9(b) (to become Article VI:10(b)) (concerning reports on above-threshold procurement, has been amended as follows (new language underlined):

"(b) statistics on number and total value of contracts awarded above the threshold value, broken down by entities, categories of products according to a uniform classification system to be determined by the Committee, and country of origin of the product;"⁴
- Article VI:9(c) (to become Article VI:10(c)) (concerning reports on single tendering) has been amended as follows (new language underlined):

"(c) statistics, broken down by entity, and by category of product, on the number and total value of contracts awarded under each of the cases of Article V, paragraph 16 showing country of origin of the product;"
- Addition of new Article VI:10(d):

"(d) statistics, broken down by entities, on the number and total value of contracts awarded under derogations to the Agreement contained in Annex I."

Subsequent discussions in the Committee

27. Questions concerning statistics have been discussed after these amendments were agreed upon. At the meeting of 12 February 1987, one Party noted, inter alia that "The statistics were important in monitoring the implementation of the Agreement and also in comparing reciprocity, because merely having adopted regulations did not constitute compliance with the Agreement. In order to analyse sales opportunities and possible hidden discrimination one might subtract single tendering and large product categories, such as fuels, which might be less open to true competition from all Parties." (GPR/M/25, paragraph 41). Among points made at the meeting on 20 May 1987 were the following: "The introduction of the Harmonized System would provide a new basis for improved statistics as would also the new Article VI:10(b). Comparability of statistical data

⁴Original language: "and either nationality or winning tenderer or country of origin of the product, according to a recognized trade or other appropriate classification system."

from all Parties was a key issue which should be dealt with on a priority basis." (GPR/M/26, paragraph 27); one Party noted a proposal "to enlarge the list of product categories to 100." (idem, paragraph 28).

28. At the meeting of 16 October 1987 some delegations tabled written proposals for a follow-up of, inter alia, the new provisions in the Protocol (GPR/W/83).

29. The implementation of the requirements concerning annual statistics in Article VI:9 of the Agreement (i.e. the original text) is governed by the Committee's decision at its first meeting (GPR/M/1, paragraphs 36-38 and Annex III). It is provided, inter alia, that "the European Economic Community will report according to the nationality of the winning tenderer; the other Parties will report on the basis of the origin of the product." Concerning reports under Article VI:9(b) "Parties to the Agreement (other than the European Economic Community) will report statistics under Article VI:9(b) according to twenty-six product categories. The European Economic Community will report according to the NIPRO system at 2 digit level."

⁷When this paper was prepared the minutes of this meeting were not yet available. The Committee agreed that at its next meeting it will revert to these and other suggestions which were made orally.

ANNEX 1

ACCESSION OF CONTRACTING PARTIES TO THE AGREEMENT

(Decision adopted on 15 January 1981)

1. A contracting party interested in accession according to Article IX:1(b) would communicate its interest to the Director-General, submitting relevant information, including an offer by way of a list of entities having regard to the relevant provisions of the Agreement, in particular Article I and, where appropriate, Article III.
2. The communication would be circulated to Parties to the Agreement.
3. The contracting party interested in accession would hold consultations with the Parties on the terms for its accession to the Agreement.
4. Upon completion of the consultations and a decision by the Committee agreeing to the terms of accession including the list of entities, the acceding contracting party would deposit with the Director-General to the CONTRACTING PARTIES to the GATT an instrument of accession which states the terms so agreed. The text of the acceding contracting party's list of entities in English, French and Spanish would be annexed to the Agreement.

ANNEX 2

ACCESSION OF CONTRACTING PARTIES TO THE AGREEMENT
(Decision adopted on 24 February 1983)

In pursuance of the Committee's decision at its first meeting concerning accession of contracting parties to the Agreement (L/5101), Annex II; GPR/M/1, Annex II), the Committee agreed at its meeting held on 24 February 1983, that a country interested in acceding to the Agreement on Government Procurement might avail itself of the following procedure if it so desired:

- (i) An acceding country, once its consultations with the Parties are completed, will submit to the Director-General the terms agreed, including its list of entities to be included in Annex I of the Agreement;
- (ii) The secretariat will circulate this communication to the Parties, inviting them to confirm in writing within thirty days, whether they accept the terms of accession as set out; and
- (iii) Once all the members of the Committee have given their consent, the Committee will be considered to have taken the decision called for in the procedures adopted at the Committee's first meeting, and the acceding contracting party would be free to deposit its instrument of accession with the Director-General.