

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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Committee on Government Procurement

ADEQUACY AND EFFECTIVENESS OF THE AGREEMENT AND OBSTACLES TO ACCEPTANCE WHICH CONTRACTING PARTIES MAY HAVE FACED

Note by the Secretariat

1. The present note has been drawn up by the secretariat in response to a request by the Committee (GPR/M/15, paragraphs 88-89) in preparation for the special meeting called in response to the action taken by the CONTRACTING PARTIES at its 40th Session. The object of the meeting is "to examine ... the adequacy and effectiveness of the Agreement ... and the obstacles to acceptance which contracting parties may have faced" (L/5756).
2. This note draws on the report on these subjects which was adopted by the Committee in 1983 (L/5503) and other relevant documents of the Committee.
 - A. Background
3. The Agreement has twelve Parties. One of these has acceded after the Agreement came into force.
4. GATT contracting parties may accede to the Agreement "on terms to be agreed between that government and the Parties" (Article IX:1(b)).
5. The question of accession of further countries to the Agreement was a separate agenda item at all regular meetings in the period January 1981-April 1984.
6. In the Chairman's Note of July 1982 presenting the Committee's contribution to the GATT Ministerial Meeting "the Parties to the Agreement reiterate their hope that the largest possible number of contracting parties will accede to the Agreement on Government Procurement which has undoubtedly served and continues to serve the objectives of the GATT" (GPR/15).
7. Among statements by observers in the Committee it might be noted that in 1981 one delegation stated, inter alia, that "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 (its) view was that 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 it. It hoped, therefore, that the Signatories - particularly (its) trading partners - would look at its interest as a part of the whole negotiation package in the context of the Tokyo Round and would view (its) initial efforts favourably, considering that significant changes had taken place recently in (its) 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); the hope was expressed that "in the light of these changes the initiative taken by her Government in preparing an initial offer in the field of government procurement would be considered with understanding by the developed countries so that the talks initiated could proceed fruitfully" (GPR/M/4, paragraph 4). The same observer stated (in May 1983), inter alia, "that the Ministerial Declaration of 1982 called for the contracting parties to review the operation of the MTN Agreements and Arrangements, focussing on their adequacy and effectiveness and obstacles to their acceptance by interested parties ... Some time ago her delegation 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, (this delegation) had made efforts to improve the offer by including more entities and products. The consultations had been resumed with some developed country Parties but her delegation was disappointed to find that obstacles it had faced in the initial consultations remained. She suggested that in reviewing the operation of the Agreement the Committee might usefully address the adequacy of the Agreement in pursuing objectives set forth therein, as well as the reasons why after almost three years of existence only a few developing countries had so far accepted it. The (country in question) had, since its accession to the GATT, taken steps toward trade liberalization, introducing a tariff reform programme ... It was with a feeling of regret, therefore, that despite (these) efforts towards freer and non-discriminatory trade it found that in the area of government procurement different yardsticks were being applied to developing countries. In view of the outstanding difficulties, her delegation therefore now found itself further than before from accepting the Agreement" (GPR/M/8, paragraph 3).

B. The 1983 Report to the Contracting Parties

8. At its meeting of May 1983 the Committee agreed on the following report on this subject (L/5503, paragraphs 16-25):

"Adequacy and Effectiveness of the Agreement

The Parties consider that the Agreement, which establishes for the first time an agreed international framework of rights and obligations in the area of government procurement, is a significant first step to reducing protection to domestic products and suppliers, to reducing discrimination among foreign products and suppliers, to providing transparency and to establishing international procedures on consultations, surveillance and dispute settlement. They therefore consider that the Agreement has served and continues to serve the objectives of the GATT.

The Parties consider that the Agreement has on the whole worked satisfactorily although the commercial impact of the Agreement will materialize only gradually as entities become accustomed to the new procedures and as industries become familiarized with the opportunities it opens in a market which has traditionally been outside of international rules and frequently closed to competitive bidding. The Committee considers that the data exchange exercise has been very useful. It has nevertheless not considered it appropriate to draw substantive conclusions from data available to it so far.

At each of its meetings the Committee examines any questions that arise in connection with the implementation of the Agreement. The further negotiations which will start later this year in accordance with Article IX:6(b) will provide a further opportunity for the Committee to consider the adequacy and effectiveness of the Agreement.

Obstacles to accession to the Agreement

The Agreement contains a number of provisions aimed at facilitating the accession of developing countries.

Special and differential treatment. Article III, relating to special and differential treatment, recognizes the development, financial and trade needs of developing countries and lays down that account shall be taken of these in the course of the negotiations on the lists of entities of developing countries (paragraph 3). Paragraph 4 of the Article permits developing countries to negotiate certain mutually acceptable exclusions from the rules on national treatment and non-discrimination with respect to certain entities or products that are included in their lists, having regard to the particular circumstances of each case. Paragraph 5 foresees that developing countries, after they have become Parties, may modify their lists of entities or request the Committee to grant exclusions from the rules on national treatment and non-discrimination. The Article goes on to provide for the provision of technical assistance to developing country Parties and for the establishment by developed country Parties of information centres to respond to requests from developing country Parties for relevant information. Finally, the Article provides for special treatment for least-developed countries.

The operation and effectiveness of the Agreement's provisions of special and differential treatment have been reviewed annually, as provided for in the Agreement, and have been found satisfactory. Every three years the Committee is required to carry out a major review of these provisions. The first such review will be initiated at the Committee's next meeting, to be held in November 1983, with a view to further facilitating the accession of more developing countries to the Agreement.

A number of other provisions in the Agreement, for example the notes to Article I:1 and Article V:14(h), also contain special provisions concerning developing countries.

Accession to the Agreement. At its initial meeting in January 1981 the Committee adopted procedures for accession of contracting parties (L/5101, Annex II) and at its meeting in February 1983 additional procedures were initiated in order to facilitate the accession of contracting parties in the interval between meetings (L/5466, Annex I). Since the entry into force of the Agreement, apart from Israel, two contracting parties have held consultations concerning their possible accession to the Agreement, but these have not yet led to their accession. It might also be recalled that, at the end of the Tokyo Round, negotiations on the entity lists of four additional contracting parties remained uncompleted and that these Governments have not pursued the matter in the Committee since the entry into force of the Agreement.

Participation of observers, circulation of documents. At its first meeting, the Committee adopted procedures, similar to those adopted by other Code Committees, for the participation of observers and the

circulation of documents (GPR/M/1, Annex 1 and paragraphs 6 and 12). The procedures for the participation of observers state that observers may participate in the discussions in the Committee but decisions shall be taken only by Signatories.

General. The obstacles to acceptance that may be perceived by non-Parties are, of course, basically a matter for these governments to pronounce on rather than for the Committee. The Committee hopes that contracting parties which have not yet accepted the Agreement will soon adhere to it. To this end, the Committee and its individual members remain ready to discuss further with interested parties any obstacles that they may feel exist to their acceptance of the Agreement".

C. Developments Since the 1983 Report

9. In the context of the third annual review in November 1983 the Committee conducted a major review of Article III, in pursuance of Article III:13 of the Agreement. In view of statements made by non-Parties in the Council, it was agreed that observers be invited in an appropriate way to explain to the Committee problems they might have encountered in acceding to the Agreement so that the Committee might be in a position to examine such problems with a view to ascertaining whether it could do something to make accession of interested observers easier (L/5578, paragraph 5). This invitation was extended by way of an airgram issued in January 1984 (GATT/AIR/1977) but no written communications were received in response.

10. The November 1983 meeting also opened the Article IX:6(b) negotiations. These are undertaken by the Parties to the Agreement in accordance with Article IX:6(b). The negotiations cover: (i) improvements of the Agreement; (ii) broadening of the Agreement; and are also (iii) exploring the possibility of applying the Agreement to service contracts.

11. Following a decision taken at the opening of the negotiations (L/5578, paragraph 3(e)), and in order to facilitate participation by non-Parties interested in seeking accession to the Agreement, the airgram mentioned in paragraph 9 above also invited governments not Parties to participate in the negotiations, it being pointed out that they would be considered participants when they had tabled an entity offer, which could be done at any point in time during the negotiations. At the meeting of February 1984, one Party stated as its understanding, and no contrary views were expressed, that the agreed procedures for participation of observers in the Article IX:6(b) negotiations implied that if an observer wished to become participant on the basis of an entity offer presented prior to the negotiations, it should notify the Committee to this effect. In doing so, the observer would undertake the same requirements as the Parties had undertaken in respect to the submission of information on entities and other aspects of the negotiations.

12. No observer has so far sought to become participant in the negotiations.

13. When opening the negotiations the Committee took note of a statement made by one Party (GPR/M/9, paragraph 18), to the effect, inter alia, "that Article IX:6(b) required that the negotiations be undertaken, having due regard to Article III of the Agreement ... after three years of operation

of the Agreement, it had only succeeded in attracting three developing countries to accede. This was an immediate cause of concern to all the Parties, and raised questions as to the totality of the GATT system ... the Committee should utilize the opportunity provided by the negotiations to give serious consideration to the problems faced by developing countries in joining the Agreement, with a view to finding ways and means of expanding their participation. 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". Another Party fully supported these comments "regarding the inadequate participation of developing countries" and "urged the Committee to take advantage of this opportunity to explore ways of making it easier for developing countries to accede to the Agreement" (idem, paragraph 19). One Party expressed, in general terms, "the hope that the negotiations would be successful and contribute to making the GATT system more effective" (idem, paragraph 17). Another Party also looked forward "to hopefully enlarge the scope of participation under it" (idem, paragraph 20).

14. The one Party which has acceded to the Agreement since its entry into force expressed some opinions at this meeting, based on experience on how the provisions of the Agreement affect those seeking accession (GPR/M/9, paragraph 9). This Party stated, inter alia, that "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 (the Party concerned) could afford for analyzing commercial opportunities".

15. While no written communications were received in response to the Committee's invitation to non-Parties to explain problems encountered in acceding to the Agreement, one observer stated at the February 1984 meeting "that a commonly held criticism of the Committees set up under the MTN Agreements was their limited membership. This was particularly true for the Committee on Government Procurement which had only three developing country members. In the view of his delegation the principle of special and differential treatment for developing countries envisaged in the Agreement had not been adhered to. This had prevented developing countries from becoming Parties, despite their best intentions. He felt that the Parties, notably the major ones, had not shown the necessary flexibility in accepting the entity offers of developing countries. In addition, the activities of the Committee ought to be made more transparent; information concerning purchases by Code-covered entities would, in particular, be extremely useful in evaluating the benefits accruing from membership" (GPR/M/10, paragraph 3).

16. At the November 1984 meeting, one observer "recalled that his delegation had previously expressed concern in respect of difficulties and obstacles confronting developing countries interested in adhering to the Agreement. Having in particular underscored the need for implementation of the provisions on special and differential treatment it was encouraged by the suggestion that Parties should show necessary flexibility in accepting entity offers of developing countries and the suggestion that qualitative and quantitative criteria used by Parties be clarified. This might, if agreed upon, lead aspiring developing countries to take another look at the desirability of pursuing membership" (GPR/M/14, paragraph 4).

17. In the context of the Article IX:6(b) negotiations a number of proposals have been made for improvements of the Agreement. (These are listed in GPR/W/56/Rev.3 and Add.1). Observers from developing countries have identified, in particular, two matters as being of special interest to them. These are questions relating to transparency and the application of the principle of special and differential treatment for developing countries in negotiations for accession.

18. With respect to transparency, a number of actions have been taken. All developed country Parties have set up information centres in accordance with Article III:10 and have procedures in place for technical assistance to developing country Parties (Article III:8 and 9). The "Practical Guide to the Agreement on Government Procurement" published in March 1985, contains information which is hopefully also of value to interested non-signatory contracting parties. In accordance with the agreed procedures the Committee is to oversee the conduct of the negotiations in the presence of observers. The main problem identified has been related to statistics. The reviews of the 1981 and 1982 statistics were carried out in restricted meetings of the Committee. Summaries of 1981 and 1982 statistics were made available to other contracting parties (GPR/W/38 and GPR/W/57). However, at the Committee's meeting on 20 June 1984 the Chairman announced that, in the future, statistics would be circulated as ordinary GPR documents (and thus be available to observers), that statistical reviews would be conducted in regular Committee meetings, and that the statistics would be derestricted one year after the conclusion of the annual review. The 1983 statistics have been circulated in the GPR/24/- series and have been examined at meetings of the Committee held in the presence of observers.

19. With respect to the application of the principle of special and differential treatment, "in particular it has been suggested that Parties should show the necessary flexibility in accepting the entity offers of developing countries and that the quantitative and qualitative criteria used by Parties might be clarified". Reference has been made in this connection to Article III:3 (first sentence), which stipulates 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 1¹ 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 this Agreement" (GPR/W/56/Rev.3, item 19). This matter continues to receive the Committee's attention.

¹ Paragraph 1 of Article III.