

GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

GPR/Spec/59

26 April 1988

Committee on Government Procurement

DRAFT MINUTES OF THE MEETING

HELD ON 18 MARCH 1988

Chairman: Mr. Anthony Dell (United Kingdom)

1. The following agenda was adopted:

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A. Election of Officers

2. The Committee re-elected Mr. Anthony Dell (United Kingdom) as Chairman and elected Mr. Peter Cheung (Hong Kong) as Vice-Chairman.

B. Implementation and administration of the Agreement

(i) Changes in national laws and regulations following entry into force of the Protocol

3. The Chairman drew the Committee's attention to Article IX:4(b) and to the procedures which had been followed when the Agreement originally entered into force in 1981. He invited delegations to submit the complete texts of new laws, regulations and procedures, adopted in order to implement the Protocol Amending the Agreement on Government Procurement, to the secretariat, where they would be open for inspection.

4. Members responded as follows to the Chairman's invitation to give oral explanations:

- Canada: regulations had been changed to reflect implementation of the Protocol, amendments had entered into force on 14 February 1988;
- Austria: the amendments contained in the Protocol had been published on 14 February 1988 in the Federal Gazette as Law No. 38 of 1988;
- European Economic Community: the EC Decision adopted on the conclusion of the Protocol, had been published in the Official Journal on 9 December 1987, along with the Protocol. The Protocol was directly applicable in the member States and a notice to this effect, explaining the content and the consequences thereof, had been published in the Official Journal on 30 January 1988. The Protocol had come into effect on 14 February 1988;
- Sweden: new Swedish regulations including the Swedish equivalent of SDR 130,000, would enter into force on 23 March 1988. At the same time one entity on Sweden's list, the National Board of Education, was being replaced by the National Labour Market Board plus twenty-five regional labour market offices, as a result of a re-organization and decentralization. In order to comply with the obligations of the Agreement, the threshold prescribed to each of these regional offices had been calculated through dividing SDR 130,000 by twenty-six. This would be notified in due course;
- Switzerland: legislation had been amended and approved by Parliament in September 1987. The corresponding Decree had come into effect on 14 February 1988 (Receuil Officiel No. 2-371 of 1987). Instructions had been sent to all procurement services;
- Israel: following Cabinet decision, in order to implement the Protocol as of 14 February 1988, regulations had been sent in a circular to all Code-covered entities by the competent authority. The new threshold would be applied as of 1 April 1988, for a two-year period;

- Norway: the provisions of the Protocol, including the new threshold value, had been put into force on 14 February 1988, by way of regulation;
- Hong Kong: the Protocol including the new threshold had been in effect since 1 January 1988;
- United States: the provisions of the Protocol had entered into effect on 14 February 1988. Relevant information would be submitted in writing;
- Japan: all necessary measures had been taken and new procedures had become effective as of 14 February 1988.

(ii) Other questions concerning national implementation and administration of the Agreement

(a) Implementation and administration in the United States

5. The representative of the European Economic Community stated that the last couple of years had seen a proliferation of Buy America provisions notably in the period towards the end of 1987. The EEC wished to draw the attention of the Committee and more directly of the United States delegation, to the adverse effects of an increasing use of Buy America provisions. The Community had always warned against any possible extension of the Buy America Act or other restrictions by the Congress acting on its own initiative or on that of the Administration. It had repeatedly said that any such extension would have a negative impact on its ability and willingness to conclude negotiations referred to in Article IX:6 of the Agreement. Of particular concern was the fact that, among the new Buy America provisions which had been passed in 1987, several seemed to run directly contrary to the Agreement, in that they related to US entities and items which were covered by the Agreement. Examples were the Buy America provision on Department of Defense purchases of supercomputers and administrative vehicles, the ban on use of imported paper in printing US currency and passports, and of particular concern - the restriction imposed on purchase of foreign products in the facilities modernization programme of the Voice of America. The Community was examining these and other measures in detail and would take further action in the future should this be considered appropriate.

6. The representative of the United States replied that several delegations had criticized various Buy America provisions which allegedly negated benefits of other Parties. On the relative benefits enjoyed by the United States and other Parties under the Agreement, she recalled that when the Agreement had been drawn up in 1979, the United States had offered coverage totalling SDR \$7 billion (\$12.5 billion) versus SDR 16 billion (\$20.7 billion) offered by the other signatories. Telecommunications, power generating and transmission and transportation, three important sectors in the United States which had contributed positively to the

establishment of the Agreement, had not been included in its coverage. The promise of Article IX:6(b) negotiations to expand Code coverage had lessened the disappointment felt by these sectors. Despite the initial promise by other Parties of trade opportunities which would exceed the amount of coverage offered by the United States, the results had been disappointing from the United States point of view. In 1983, 1984 and 1985, total above-threshold coverage by all members - the amount of opportunities nominally open to foreign bids - had equalled SDR 22.3 billion, 25.4 billion and 23.9 billion respectively. For these respective years, United States above-threshold coverage had equalled SDR 16.7 billion, 20.4 billion and 18.8 billion, or 75, 80 and 79 per cent of total above-threshold coverage by the Parties to the Agreement. In 1983, 1984 and 1985, total above-threshold coverage by all Parties, minus single tendering contracts - which was the amount of opportunities actually open to foreign bids - had equalled SDR 18.2 billion, 20.0 billion and 20.8 billion, respectively, of which the United States had accounted for SDR 15.1 billion, 17.8 billion and 17.2 billion, or 83, 85 and 83 per cent of actual opportunities open to Parties to the Agreement. An Agreement in which one member provided such shares of total actual coverage could not be considered balanced. Her delegation recognized that certain sales figures were understated. However, it suspected that even with a complete analysis of actual United States sales to other members versus their sales to the United States, the result would show a large advantage for other signatories. Incomplete data on the national origin of products purchased by certain member States precluded a definitive answer.

7. Over the past year, the United States Congress had become increasingly frustrated by the large United States trade deficits. Buy America provisions reflected this frustration. Part of the impetus for these provisions came from the lack of Code coverage for telecommunications, power generating and transmitting, and transportation equipment. The lack of services coverage in the Agreement was also leading to the first major Buy America restrictions on services procurement. Despite the best efforts of the United States Executive branch to oppose Buy America provisions, especially those that might affect United States Government obligations under the Agreement, the Congress had tended lately to pass such provisions with ease. More bills were possible. Despite good intentions, the United States Executive branch would find it increasingly difficult to manage the situation.

8. Over the long term, the only way to defeat such provisions or to provide exceptions for Parties to the Agreement was to greatly expand its coverage. Since the initiation of Article IX:6(b) renegotiations in late 1983, four and a half years had passed with no expansion. There was still no clear idea of when, or even if, expansion of the Agreement would take place. Such a complete lack of results weakened the Executive branch argument when it opposed Buy America provisions. She wished to make it clear to those member countries which saw no need for urgency in these negotiations, that time was running out in the United States. The window of opportunity during which the United States Congress might keep open part

of the United States procurement market in return for the vague promise of greater access to foreign markets was closing fast. Continued lack of results in the renegotiation would lead to a further erosion through Buy America provisions of existing benefits enjoyed by other members under the Agreement. Without a large expansion in Code coverage in a reasonable time period, the Executive branch itself might begin to question whether the limited benefits that the United States enjoyed under the Agreement warranted the considerable obligations that membership entailed.

9. Parties to the Agreement had a historic opportunity to increase greatly world trade in the government procurement sector, which remained largely closed. Among members of the Agreement alone, procurement purchases at all government levels probably exceeded one trillion dollars annually, versus actual Agreement coverage of roughly SDR 20 billion. A major expansion of the Agreement was not only desirable, but also necessary if delegations were to receive approval for such a deal in respective capitals. A marginal expansion of the Agreement would not be enough to overcome growing Buy America sentiment and would likely generate sufficient political opposition from dissatisfied sectors to preclude legislative approval. Only a major expansion cutting across many sectors would build the political consensus needed for final approval. Liberalization of procurement would probably result in more trade than in any other area now under discussion in the Uruguay Round. Continued delays in the renegotiation exercise would not increase trade opportunities or protect members' rights under the Agreement. A more likely result was a continued shrinking of the limited opportunities that now existed. She added that this statement was offered in friendship, not as an excuse. Her delegation was concerned about the future of the Committee and her Government's participation in it and urged all Parties to understand the need for urgency and to apply maximum effort to successfully conclude the renegotiation exercise.

10. Turning to particular points raised, she offered bilateral consultations with any Party wishing to go into more detail. Concerning the supercomputer issue, she was not aware that there were supercomputer manufacturers in the EEC. Moreover, for purchases of such equipment by the Department of Defense there was always a case-by-case review of national security considerations. In the area of printing paper, she noted that passports were printed in-house by a Government organ and that this area was not covered by the Agreement. The distinctive paper required for the printing of currency had already been the subject of a national security review before the legislation had been passed. On administrative vehicles, there were certain areas for legitimate concern which her Administration was looking into. The Voice of America issue was also of great concern to the US Administration which was examining what it could do. Concerning Buy America provisions in non-Code covered areas, one that had not passed was a comprehensive piece of legislation that, in general, would prohibit the US Government procuring from any country that did not offer open, reciprocal opportunities to the United States. Code Signatories, non-Code-covered procurement from Code Signatories, and procurement from other countries were referred to in this respect.

11. The representative of Sweden, on behalf of the Nordic countries Parties to the Agreement, expressed serious concern about the proliferation of Buy-America provisions; these concerns had not been weakened by the statement made.

12. The representative of Hong Kong agreed that progress in the Article IX:6(b) negotiations had been slow; his delegation was willing to work intensively and positively towards progress. He nevertheless wondered whether it was helpful for negotiations to take place against the background of legislative threat. As he saw it, balance should be in terms of rights and obligations, in accordance with ability and development. There seemed to be an underlying message that in the absence of achievement in the Committee, the United States would go ahead with Code-inconsistent legislation. This was, of course, not acceptable. The Committee was administering the Agreement and the first and foremost consideration should be how to make this Agreement work.

13. The representative of Switzerland stated that the questions raised by the EEC were also of interest to his delegation, which would closely follow developments.

14. The representative of Japan expressed serious concern with regard to the US commitment to the Agreement and also to the on-going legislative work in the United States. He shared the view of Hong Kong in respect of balance of rights and obligations; this concept was mentioned in the Agreement and also in the General Agreement. Negotiations on broadening and service contracts were undertaken with a view to achieving a higher level of such rights and obligations. His delegation was committed to making maximum efforts towards achievements as early as possible.

15. He posed questions concerning the Omnibus Continuing Resolution by Congress, enacted on 22 December 1987, Section 8122 of which required that none of the funds available to the Department of Defense were available for obligations or expenditure to procure, either directly or indirectly, any goods or services from the Toshiba Corporation or any of its subsidiaries. Section 109A stipulated that none of the funds appropriated for 1988 might be obliged or expended to enter into any contract for the construction, alteration or repair of any public building or public work in the United States or any territory or possession of the United States with any contractor or sub-contractor of a foreign country or any supplier of products of a foreign country during any period in which such foreign country was listed by the USTR. Japan was named in this list and should any restrictions be placed on supplies of products, a problem of inconsistency with the Agreement could occur. Japan reserved its rights on these two questions.

16. The representative of the United States replied that the latter provision applied only to construction contracts which were definitely not covered by the United States under the Agreement. She was surprised that the first matter had been raised; it had been widely publicised and had clearly had threatening implications for national security concerns of the

United States and other Parties. Similar action from a US firm would not have been tolerated. Every Party had the right to take steps against any kind of conduct that threatened national security.

(b) Implementation and administration in the European Economic Community

17. Concerning Greece, Portugal and Spain, the representative of the European Economic Community stated that the Commission had received reports on progress underway in the preparation of the appropriate lists for two of these member States. In the third case, the question was one of confirmation and adoption. The work was progressing steadily and would hopefully be brought to a conclusion in the near future.

C. Questions concerning statistics, including 1986 statistical review

(i) 1986 statistical review

18. The Chairman noted that compliance with the requirements to provide annual statistics was becoming less and less satisfactory. Nine Parties had been able to circulate their 1981, 1982, 1983 and 1984 statistics in the respective following year. Only six Parties had been able to do so with 1985 and 1986 statistics. In earlier years, questions and replies had often been circulated to other delegations through the secretariat prior to each meeting. This practice had also fallen into disuse. However, on this point, he thanked the delegation of Japan which had circulated questions, prior to this meeting, relating to two other Parties, Switzerland and the United States.¹ He also noted that the United States' delegation had addressed written questions to Finland, Hong Kong, Japan, Norway, Singapore and Sweden, and that the delegation of Sweden had addressed written questions to the United States.²

19. The European Economic Community and the United States reserved their rights to formulate additional questions.

20. The representative of Israel explained that a number of technical and resource problems had caused delays in the preparation of the 1986 report.

21. In a preliminary answer, the representative of the United States referred to the changing value of the dollar and lower fuel prices as an important reason for decreased above-threshold procurement in 1986. The representative of Norway, in a partial reply, explained that procurement by three universities appeared to have been for administrative needs below the threshold. The fourth university was new and had therefore made some larger purchases.

¹ Circulated to all Parties on 15 March 1988.

² Circulated to all Parties on 21 March 1988.

22. The Committee agreed to revert to questions and replies at the next meeting. Delegations which had further questions were invited to supply these to the secretariat for circulation to all Parties prior to the next meeting.

(ii) Other questions concerning statistics

23. The Chairman took up the proposals by the Nordic countries (GPR/W/83), as follows:

- (a) The new requirement that reports under Article VI:10(b) are to be submitted "according to a uniform classification system to be determined by the Committee" (ref: GPR/M/28, paragraphs 40-42; GPR/M/26, paragraph 28).

24. The representatives of Austria and Switzerland agreed with the suggestion that statistics on procurement of goods be based on the Harmonized System. This would, according to the representative of Switzerland, require discussion of the extension of the current number of categories.

25. The representative of the United States also thought the idea was interesting; a common system with a more extensive breakdown than at present would be very useful in the negotiations. Therefore, work on this should begin soon.

26. The representative of Israel agreed that improved categorizations could be useful but was not sure whether entities would be able to comply with too detailed breakdowns. He suggested a survey of categorizations presently used by procuring entities and, later, a discussion of a new system which might possibly be based on the Harmonized System or any other system which was not too cumbersome and would not increase the workload and delay further the submission of annual reports.

27. The representative of Canada noted that the current Canadian system was applied in the context of other international obligations and that the introduction of two sets of categorizations would increase costs. Nevertheless, it would be useful to have a uniform reporting system and the matter required further discussion.

28. The representative of Sweden, on behalf of the Nordic Parties, stated that it was perhaps not possible to use the Harmonized System in every detail. He was not in a position to propose a precise number of categories, and added that a new common system should be formulated so as to make comparisons with previous statistics possible.

29. The Committee agreed that the secretariat be asked to prepare, for the next meeting, a background paper that would draw attention to various considerations raised.

(b) The question of a uniform definition of origin

30. The Chairman stated that the new Article VI:10(b) required Article IV:10(b) reports to be "broken down by ... country of origin of the product".

31. The representative of the United States thought that the Nordic initiative was interesting. She suggested, as a first step, to review the origin criteria used by each Party for the purpose of reporting statistics and the origin criteria used when making procurements under the Agreement.

32. The Chairman suggested that this matter be reverted to at the next meeting and that the secretariat might consult interested delegations, as necessary, on the question of a uniform application of the definition of country of origin. It was so agreed.

(c) The question of a secretariat analysis of statistics

33. The Chairman suggested that this part of the Nordic proposal also be referred to the next meeting. It was so agreed.

(d) Date of submission and content of 1987 statistics

34. The Chairman recalled the new requirements that global statistics and single tendering figures (Article VI:10(a) and (c)) were to be broken down by entities and that single tendering figures were, in addition, to be broken down by product category and by country of origin. He assumed that all Parties would make this information available as of the 1987 reports. No statements were made and the Chairman stated that this was an agreed assumption.

35. The Chairman further suggested that 1987 reports be submitted by 30 September 1988. This was agreed.

(e) Circulation of summarized statistics

36. The Chairman recalled that summaries circulated for 1981 and 1982 had given total estimated value of all contracts and total above-threshold contracts for each Party, the latter split on domestic and foreign origin. He wondered whether there was any reason why one-page summary tables along these lines could not be circulated as GPR/- documents.

37. The Committee agreed to revert to this question at the next meeting.

D. Article IX:6(b) negotiations

38. The Chairman gave the following progress report:

"The Informal Working Group on Negotiations met on 16-17 March 1988.

In the area of broadening of the Agreement, a useful discussion took place with the benefit of a number of submissions from certain

delegations, towards the objective in the first stage of the work programme concerned with clarifying the possible spheres of application which the Agreement might appropriately cover. A number of delegations supplied lists of government and government-affiliated agencies or sub-agencies not presently covered by the Agreement.

A first discussion took place on what might constitute appropriate criteria and relevant considerations in order to determine the possible coverage of a broadened agreement. As a result of the discussions, a number of issues were identified which might be relevant to the future consideration by the Group in pursuance of the above-mentioned objective for the first stage. These issues will be discussed more fully at the next meeting, which will be held on 24-25 May 1988. Delegations which consider it useful may, if they so wish, provide procurement data which could assist the Group in its further considerations of potentials for broadening.

In the case of service contracts, a number of delegations supplied information on the procurement of services, in a format agreed at the previous meeting of the Group. These submissions were a contribution to the examination of the nature and scope of service contracts, with a view to clarifying the applicability of the Agreement to such contracts, and to identifying potential problems. This exercise may continue at the meeting of 24-25 May 1988 and is expected to be the main purpose of a further meeting of the Informal Working Group on 7-8 July 1988, when it is hoped that more submissions will be available."

39. The observer for India noted the view expressed at a previous meeting, that broadening of the Agreement could also be achieved through broader participation. He wondered whether this had been given further consideration in the Informal Working Group. He also wondered whether the Group took full account of the provisions for special and differential treatment contained in Article III.

40. The Chairman replied that it seemed to him that the particular concept of broadening mentioned was something that members of the Informal Working Group no doubt had in mind. He thought that most members would envisage the notion of broader participation in the Agreement as being an excellent objective. However, he thought the work of the Group thus far had tended to concentrate rather more on technical issues concerned with definitional matters rather than on broad parameters. He would therefore characterize the discussion as not having really dealt with broader participation. Particular aspects of special and differential treatment had not been discussed, for much the same reason. However, the notion of special and differential treatment had been specifically recognized in the work programme of the Group.

41. The observer for India added that his delegation continued to be interested in the work of the Committee and the Informal Working Group.

Whilst it might be quite appropriate that technical aspects be taken up at this stage, the two aspects he had raised should also be considered at the appropriate occasion. These issues might perhaps more appropriately be dealt with in the wider context of the Negotiating Group on MTN Agreements and Arrangements (NG8), where his delegation had made proposals in this regard. At its next meeting the NG8 would focus, inter alia, on the Agreement on Government Procurement. He continued to have the general concern that while India was familiar with the present Agreement and had followed work so far, developments might place the Agreement further out of reach of developing countries which had expressed interest in becoming Parties to it.

42. The Committee took note of the statements.

E. Information to the Negotiating Group on MTN Agreements and Arrangements

43. The Chairman recalled that he had undertaken to hold consultations on this matter. He went on to make the following statement:

"On the basis of informal consultations which I have held, I believe that the members of the Committee consider it important to maintain and develop the lines of communication with the Negotiating Group on MTN Agreements and Arrangements. There was a feeling that my reports to this Committee on the activities of the Informal Working Group - available to the NG8 by way of L/- documents and minutes - should be somewhat more elaborate and might include, for instance, the various stages reached in the work programme. This will, of course, depend on the scope of the discussion, which can vary from one meeting to another. On a separate point, there was general agreement that specific requests from the NG8 will be dealt with on a case-by-case basis in a spirit of flexibility and co-operation. It was generally considered that such action would in no sense impede the work of the Informal Working Group. In this connection, I might add that discussions are often very informal and not always on the basis of formal instructions. The extent of detail in my report on any particular meeting will have to take this into account."

F. Updating of the Practical Guide

44. The Chairman noted that the secretariat had received a number of enquiries from subscribers to the Practical Guide concerning the first updating. One way of simplifying an update could be to ask the secretariat to prepare a draft covering entities' procurements, based on 1984-1986 statistics. The Parties would have an opportunity to revise the draft thereafter. Some practical data might also have to be changed. On these points, the Parties themselves would have to do the work.

45. The representative of Japan sought information on the extent to which the Guide was used. The Chairman suggested that the secretariat provide information on this point.

46. The Chairman suggested that the secretariat be requested to prepare drafts by the beginning of July 1988 for comments by delegations and for additional inputs with respect to their own country chapters, by the end of September 1988. Thereafter, the secretariat would provide each Party with an advance copy of the revised Guide, with a relatively short deadline for final comments.

47. The Committee so agreed.

G. Request for Committee documents

48. The Chairman reverted to the request by the UN Commission on International Trade Law to receive appropriate documentation relating to the Committee's work on a regular basis. He suggested that UNCITRAL be given all annual review documents issued in the GPR/- series since 1981. These gave an overall view of all activities, including the operation of the Agreement, without going into technical details that might not be of interest.

49. The Committee so agreed.

H. Other business

(i) 1988 - 1989 thresholds in national currencies

50. The Chairman recalled the Decision of November 1986 (GPR/M/24/Annex V) and noted that ten Parties had notified thresholds.

51. The representative of Hong Kong stated that the threshold defined obligations and were now valid for a period of two years. Some Parties appeared to have used a one-year basis for their calculations and some had used an unspecified period. The Committee should rectify the situation. His delegation was ready, therefore, to take such action as the Committee might agree upon.

52. The representative of Austria stated that his delegation was also ready to re-notify its threshold.

53. The representative of the United States noted that some Parties had arrived at thresholds lower than required. She suggested that each Party should meet the required threshold.

54. The Chairman suggested that Austria and Hong Kong be invited to submit re-calculated thresholds in national currencies. Small discrepancies in respect of some other Parties were generally reckoned to have resulted from rounding-up exercises carried out for reasons of administrative convenience.

55. The Committee so agreed.

(ii) Panel candidates for 1988

56. The Chairman noted that Hong Kong, Israel and Sweden had responded to the invitation to nominate new, or confirm previous, panel candidates. He invited other Parties to do the same.

(iii) Further meetings

57. The Chairman recalled that the Informal Working Group on Negotiations had agreed to meet on 24-25 May and 7-8 July 1988. He suggested that the Committee itself meet in the week of 3 October 1988, combined with a further meeting of the Informal Working Group.

58. After a short discussion concerning the timing of a further meeting of the Informal Working Group to be held either later in 1988 or in January 1989, he concluded that both the Committee and the Informal Working Group would, tentatively, meet in the week of 3 October 1988. He would consult informally on the dates to be fixed.

59. The Committee so agreed.