

GENERAL AGREEMENT ON

RESTRICTED

GPR/Spec/60

23 December 1988

TARIFFS AND TRADE

Committee on Government Procurement

MINUTES OF THE MEETING HELD
ON 7 OCTOBER 1988

Chairman: Mr. Anthony Dell (United Kingdom)

1. The following agenda was adopted:

	<u>Page</u>
A. Article IX:6(b) negotiations;	1
B. Implementation and administration of the Agreement;	4
C. Questions concerning statistics, including 1986 statistical review;	7
D. Questions concerning Article I:1(c);	12
E. Submission by Finland: Procurement of Antarctic Research Vessel with ice-breaking Capability by United States National Science Foundation;	15
F. Eighth annual review of the implementation and operation of the Agreement; adoption of the 1988 Report to the CONTRACTING PARTIES;	18
G. Other business:	18
(i) Updating of the Practical Guide;	18
(ii) Panel candidates for 1989;	18
(iii) Further meetings.	18

A. Article IX:6(b) negotiations

2. The Chairman gave the following progress report on his own responsibility:

"The Informal Working Group met on 24-25 May 1988. Without prejudice to further work in this area and to subsequent negotiating positions of individual delegations, it agreed on the following.

Code coverage would normally result from individual Parties' own cost/benefit analyses, including in particular whether the additional procurement opportunities justify the additional costs of implementation - overall and on an entity-by-entity basis - and negotiations aiming at a balance of rights and obligations (overall and, possibly, by sector). Delegations would have to take into account a wide variety of differing constitutional, administrative, political and legal situations and traditions, and differences in development, financial and trade needs.

In considering techniques and modalities of negotiations on broadening as well as other relevant issues to be addressed in the second stage of the work programme¹, a number of additional elements might be appropriate and might need to be taken into account in considering one or more of the groups listed below.

Group A: Central government entities, including those operating at regional and local levels.

Group B: Regional and local government entities:

- (a) over which the central government could ensure compliance with obligations under the Code;
- (b) over which the central government could not at present ensure compliance with obligations under the Code.

Group C: Other entities whose procurement policies are substantially controlled by, dependent on, or influenced by central, regional or local government:

- (a) over which the central government could ensure compliance with obligations under the Code and which are engaged in:
 - (i) non-competitive activities;
 - (ii) competitive activities;
- (b) over which the central government could not at present ensure compliance with obligations under the Code and which are engaged in:
 - (i) non-competitive activities;
 - (ii) competitive activities.

Group D: Other entities whose procurement policies are not substantially controlled by, dependent on, or influenced by, central, regional or local government, including cases where they are engaged in commercial activities.

Entities in Groups A, B and C may be the subject of negotiations on broadening.

Entities in Group D shall not be the subject of negotiations on broadening. The government should refrain from interference with transactions of these entities, including their procurement activities.

¹Bearing in mind that the provisions of Article III will apply to developing countries.

The Group met again on 7-8 July 1988 to continue work on service contracts. The basis for discussions was provided by replies to a questionnaire to indicate possible problem areas in applying the Code to such contracts. Amongst issues discussed were the application of national treatment, the right of establishment, and the movement of labour. The meeting permitted useful clarifications to be made in respect of such technical issues as the applicability of service contracts, to the current price threshold, the tendering and other procedures that are applicable to procurement of goods.

The Group met again on 4-6 October 1988 to discuss both broadening and service contracts.

In the area of broadening, the Group began the task of elaborating the appropriate approaches to expand the Code. The elements that are to be taken into account in this exercise are; inter alia:

- (i) techniques and modalities of negotiations;
- (ii) appropriateness of partial modifications or exemptions of Code provisions to accommodate a possible broadening; and
- (iii) a mechanism to evaluate and - if necessary - adapt coverage to a new situation such as privatization.

These elements were addressed with reference to the situation of each of the entity groupings (A-D) identified at the May 1988 meeting (see above). A number of "non-papers" were tabled to assist the Group in these considerations.

A number of factors were singled out as particularly important; these were (i) cost/benefit concerns; i.e. whether increased procurement opportunities justify additional costs of implementation; and (ii) the need for an overall balance of rights and obligations, also referred to as broad equivalence of concessions.

To assist the next stage of the exercise, the secretariat has been requested to carry out the task of preparing a synthesis document to identify convergences of views expressed in both the non-papers and by oral statements at the meeting.

In the area of service contracts, the Group reverted to some of the questions discussed before, notably the values of service procurements by governments, and in this context the question of refining the data both in respect of types of entities and types of services; problems concerning the calculation of contract values for threshold purposes; problems relating to technical specifications; and the question of goods content in service contracts. The Group agreed that further information should be presented, as well as clarifications of coverage in terms of entities and in terms of specific characteristics and nature of each type of service contracts.

It was also agreed that the secretariat would carry out further work to assist the Group in its task but that, in recognition of the requests imposed on the secretariat in the area of broadening, this work would be deferred.

What has been referred to as "bid challenge system" could be an element of enforcement both in the area of broadening and services. Some have suggested that this would be an improvement to the Code. The Group was informed about how protest and dispute procedures in procurements operated in the United States, and about the draft EC directive commonly called the "Compliance Directive".

3. The Chairman added that this report was deliberately designed to be as detailed as possible with the objective of ensuring that the work in the Informal Working Group became known to participants in the Uruguay Round Negotiating Group on MTN Agreements and Arrangements.

B. Implementation and administration of the Agreement

4. The Chairman recalled that at the last meeting he had invited delegations to submit the texts of new laws, regulations and procedures adopted in order to implement the Protocol. Austria and Finland had done so; their legislations, in national languages, were available for inspection in the secretariat.

(i) United States

5. The representative of Switzerland referred to the Article VII:3 consultations requested by the EEC in February 1987, concerning the procurement of machine tools, and in which his delegation had announced its interest. Foreign suppliers of certain machine tools listed as civil materials under the Agreement continued to be discriminated against. These measures, which he thought were inconsistent with the Agreement, seemed to have been extended to Code-covered goods containing non-friction bearings and bearing components, through a decision by the Defense Acquisition Regulatory Council, in force as of 4 August 1988. He expressed concern and asked for clarifications.

6. The representative of the United States replied that DOD procurement of ball bearings, being primarily an FSC category 31 issue, fell outside the Agreement. The question about the use of ball bearings in other goods would be looked into; while this area was different from category 31, it was nevertheless not subject to the competitive procedures of the Agreement. Her delegation was available for consultation with the Swiss delegation either separately, or together with the EEC, on the general issue of machine tools. However, conclusions had not been reached on the current year's appropriations and authorization legislation in which the machine tool provision was contained.

7. Regarding Article IX:4, the representative of the United States then referred to the recently passed legislation (new Title VII of the Trade Bill). She recalled that the Trade Agreements Act of 1979 contained an

incentive for non-Parties to accede to the Agreement, in its requirement that United States Code-covered entities should not award contracts to suppliers from countries which had not opened their markets to Parties to the Agreement. Title VII of the Trade Bill significantly extended the same concept. The Bill was technically complicated and implementing regulations had not yet been worked out. However, United States' Government agencies would not be permitted to make procurements from countries whose governments maintained policies that were consistently and persistently discriminatory towards United States suppliers. An exception was made for Parties, but only for procurement covered by the Agreement, and on the condition that a Party was in "good standing" - a concept which had not been defined. A number of guidelines and factors were to be evaluated in determining whether consistent and persistent discrimination existed. In this connection great emphasis was placed on the open and competitive principle of the Agreement. For instance, the degree of single tendering, the dividing of contracts or other measures taken to avoid Code obligations or open and competitive procedures were specifically mentioned. After evaluation, the President would make a determination about whether or not to ban procurement. However, an element of discretion was provided for in this respect in accordance with the principle of reciprocity; a ban might thus be tailored to areas where discrimination seemed most significant or to have the most significant impact. Negotiations with the country concerned were to follow and only if these failed would sanctions - with discretion as mentioned - become mandatory. The evaluation on which the said determination was to be made would be based on a yearly analytical report, the first being due in 1989. The identification of discriminating countries and the ensuing process of negotiating (leading to agreement or to sanction) would take place as of April 1990. Consideration had also been given to countries with which there were Memoranda of Understanding, but a greater priority was now placed on trading interests which meant that the trade community would play an important rôle in this regard. The further details that had to be worked out would be reported to the Committee if it so wished, but they were not expected to be finalized by the next meeting. At present, no list of countries existed, nor was it known who was to initiate such a list. However, the administration was required to look at all countries. The law reinforced a concept that had been in place for a number of years and reflected the increased dissatisfaction with the functioning of the Agreement of a number of interested parties. She added that little mandated discrimination had existed in the award of services contracts in the United States. The new legislation also encompassed all such contracts.

8. Turning to other questions of implementation, the representative of the United States added that the National Gallery of Art - formerly part of the Smithsonian Institution, and the National Archives - formerly part of the GSA - had become independent institutions. The Panama Canal Company and Canal Zone Government was now entitled Panama Canal Commission. The Civil Aeronautics Board had been dissolved. These purely formal changes, which did not affect Code obligations or procurement levels would be notified under Article IX:5(a). A re-organization of the GSA had also taken place but only with respect to Region 9 which was excluded from the Agreement.

9. The representative of Hong Kong stated that the explanations concerning the Trade Bill were interesting and had far-reaching implications for the work of the Committee. He wondered whether this oral information was the notification required under Article IX:4(b). One matter which caused concern was the reference to Parties in "good standing". Even if this concept was not defined, he wondered whether it could be in conformity with the obligation to extend national treatment to Parties to the Agreement. He reserved his delegation's rights pending a formal notification and the opportunity to examine the relevant provisions.

10. The representative of the European Economic Community welcomed the information and reserved his delegation's right to revert to the matter after having analysed the text of the law.

11. The representative of the United States replied that in respect of Parties, the first step under the "good standing" process was the Committee's own dispute settlement mechanism and therefore would depend upon an outcome in the Committee. She added that her delegation was ready to submit the text of the law to the secretariat.

12. The Chairman suggested that in order to assist consideration of the matter, details of the legislation should be made available to the secretariat. The US legislation might be placed on the agenda for the next meeting of the Committee, given the implications for its work as well as that of the Informal Working Group. The Committee so agreed.

(ii) European Economic Community

13. In reply to a question from the United States, the representative of the European Economic Community stated that implementation of the Protocol had taken place in two phases. By Council decision of 9 December 1987 the Protocol had become directly applicable in member States with effect from 14 February 1988; as of that date, the member States had to take the necessary measures to ensure this implementation. The Council Directive Directive 88/295 of March 1988, improving the EC internal régime on supplies, had formally incorporated the Protocol into Community Law. In reply to the United States, who wondered what additional steps member States had to take, if any, he added that they could implement the Protocol through administrative circulars or use other methods available to governments in some countries. However, formal implementation of the Protocol had to take place, at the latest, upon the entry into force of the March 1988 Directive. The text of this Directive would be made available to the secretariat.

14. He informed the Committee that Greece was about to prepare an entity list which would be presented to the GATT secretariat in due course.

(iii) Israel

15. The representative of Israel stated that notices of procurement were now published in the Jerusalem Post - a daily newspaper in the English language - instead of in the Official Gazette. This had been done in order

to ensure better compliance with publication requirements and would allow foreign suppliers easier access to information about future procurements. The change had been notified in GPR/47, and would become a new entry in Annex II of the Agreement unless objection were made within thirty days.

(iv) Canada

16. The representative of Canada stated that new Department of Supply and Services procedures would be introduced soon and would be notified. The procedures had been revised partly because of the Protocol and partly in connection with the establishment of a free-trade agreement with the United States.

(v) Austria

17. The Chairman noted that Austria had circulated an informal paper in which Austria's non-war-like materials list in Annex I to the Agreement had been transposed from the CCCN categories into the Harmonized System. It was for consideration whether this paper containing rectifications which concerned Code coverage, should be circulated as a formal document pursuant to Article IX:5(a) with a thirty-day limit for comments. The representative of Austria stated that the paper was a draft. He added that it would seem normal to undertake such a transposition because other agreements had also been transposed into the Harmonized System, e.g. the Agreement on Trade in Civil Aircraft.

(vi) General matters

18. The representative of the United States stated that since the coming into effect of the Protocol an analysis had been made concerning compliance with bid deadlines. There seemed to be persistent use of short deadlines. In the new United States legislation, this was one of the factors which required bilateral discussions with the countries concerned.

C. Questions concerning statistics, including 1986 statistical review

(i) 1986 statistical review

19. The Chairman thanked the delegation of Israel for the report which has been received and Japan, Sweden and the United States whose questions to individual Parties had been circulated to all members, through the secretariat. He also thanked Hong Kong for having provided written replies through the secretariat, prior to the meeting. Replies by Finland, Japan, Norway, Singapore and Sweden were being circulated. This procedure made the review more meaningful for third Parties and might also save time in the Committee for matters that required follow-up explanations.

(a) United States statistics (GPR/38/Add.2)

20. The representative of the United States stated that she had replied directly to delegations which had put questions. These could be repeated orally or made in writing after the meeting. The Chairman suggested that the latter approach be followed.

(b) Statistics of Singapore, Sweden, Finland, Norway and Japan (GPR/38; and Add.3-5 and Add.7)

21. The representatives of these Parties referred to the written answers which were, or had been circulated.

(c) Canada's statistics (GPR/38/Add.8)

22. The representative of Canada had received two questions from the United States at the meeting, both concerning declines in amounts of procurement. Pending a full answer, he noted that one factor involved was energy prices.

(d) Statistics of the European Economic Community (GPR/38/Add.10)

23. The representative of the EEC stated that a number of questions from the United States had just been received; answers would be given at the next meeting.

(e) Austria's statistics (GPR/38/Add.9)

24. The representative of the United States noted that as in the case of some other countries, her delegation had recently submitted three questions and did not expect full replies at this meeting. The representative of Austria stated that his country had many decentralized entities and that this explained some of the figures. Austria's legislation did not authorize entities to split contracts in order to avoid obligations.

(f) Israel's statistics (GPR/38/Add.11)

25. The representative of Israel made the correction that the Israeli Port Authority had made purchases amounting to SDR 250,000 from Norway. He noted that the 1986 report was an improvement on the 1985 report, since all entities were now included.

(g) General points

26. The representative of the United States suggested that the review be concluded but that further questions or answers could be made under "Implementation and administration" at the next meeting. The Chairman said that circulation of questions and answers was a step forward in transparency but should not detract from the important task of examining the statistics. This could be a time-consuming exercise but remained one of the Committee's main monitoring opportunities. Final consideration of the 1986 statistics would take place after delegations had had time to examine the written replies.

27. The Chairman reminded delegations that according to procedures agreed upon in June 1984 (GPR/M/Spec/10, paragraph 15), the 1985 Reports would become derestricted on 16 October 1988, as one year would have passed since the conclusion of the review of 1985 statistics. Delegations were also reminded that the 1987 Reports should have been submitted by 30 September 1988. He thanked the delegations of Austria, Hong Kong, Norway, Singapore and the United States, which had met this deadline.

(ii) Other questions concerning statistics

(a) "A uniform classification system to be determined by the Committee"

28. The Chairman recalled that this matter had been taken up by the Nordic countries in October 1987 (GPR/W/83). A secretariat note had been circulated in GPR/W/88, giving the situation after the entry into force of the Protocol, and explaining the background and history of the classification issues over the years in the Committee, including classification questions other than purely statistical. He recalled that according to Article VI:10(b) there should be "a uniform classification system to be determined by the Committee". The new language of Article VI:10(c), which had not been referred to by members in the previous discussion, required statistics to be broken down "... by category of product". He had assumed, at the last meeting, "that all Parties would make" (this and other) "information available as of the 1987 Report." However, upon reflection he thought Parties would have to use the current product classifications for Article VI:10(b) reports until the Committee had determined the uniform system. With respect to Article VI:10(c) reports on single tendering, the new requirement on product breakdowns could be interpreted to mean that reports submitted after 14 February 1988 should report according to the current product classifications, until such time as a uniform system was introduced. However, since the statistics submitted in 1988 concerned procurement in 1987, certain implementation problems might occur. He presumed that this was also the case with the new requirements that Article VI:10(a) and (c) reports be broken down by entities and the new sub-paragraph (d) which required figures on contracts awarded under derogations.

29. The representative of the United States stated that the use of the Harmonized System seemed to coincide with the objectives that had been discussed during the improvements exercise and wondered what level of detail other delegations had in mind. The representative of Canada associated himself with this question.

30. The representative of Austria stated that his delegation's draft transposition of CCCN categories into the Harmonized System (see paragraph 17) might also be used for Article VI:10(b) purposes. He had been able to transpose the twenty-six product categories from the CCCN to the new nomenclature and was ready to share the results with the Committee.

31. The representative of Sweden, on behalf of Finland and Norway, suggested that the existing twenty-six categories be maintained and simply converted into numbers of the Harmonized System.

32. The representative of the European Economic Community stated that further co-ordination was needed within the Community before he could present suggestions and positions.

33. The representative of Japan could accept the adoption of a classification based on the Harmonized System. However, this might require more specialized knowledge and impose further administrative burdens upon procurement officers. This should be borne in mind in the future work of the Committee.

34. The representative of the United States recalled that the only question at stake was how to report for statistical purposes; Parties were not obliged to use the same categorizations in their actual procurements. This question was also quite different from the question of country of origin.

35. The representative of Canada, having expressed concern about different types of classifications for different purposes, welcomed clarification and added that Canada was in favour of a relatively small number of categories. He noted that the Harmonized System at two-digit level amounted to twenty-one sections. The challenge of the transposition exercise should not be underestimated.

36. The representative of Israel also thought that practical problems should be taken into account. A too detailed system could be difficult to implement because entities did not possess much knowledge about matters such as the Harmonized System. He suggested, as a first step towards uniformity, to modify or perhaps add to the twenty-six categories utilized by Parties other than the EEC.

37. The representative of Hong Kong did not believe that the Harmonized System should pose too many problems if the number of categories was not too large and details not too numerous. He suggested that the proponents concretize the proposal on this point.

38. The representative of Sweden stressed that the Nordic proposal was purely practical. The Harmonized System now existed and imports would be classified according to it; there was therefore no reason to maintain the CCCN references. A decision should be taken soon.

39. The representative of the United States recalled that the purpose of the improvements proposal had been to increase the number of categories. She suggested that each delegation give thought to whether or not it was possible to use the Harmonized System at the 2-digit or the 4-digit level for the purposes of reporting statistics to the Committee. The preliminary conclusion of her delegation was that it would be difficult to go beyond the 4-digit level.

40. The Chairman concluded that this item be reverted to at the next meeting with the express intention of taking decisions. He invited delegations to consider the United States suggestion and to submit any specific proposals to the secretariat in good time.

(b) A uniform definition of origin

41. The Chairman recalled previous discussion (GPR/M/30, paragraph 32). After consultations with some Parties concerned, the secretariat had made available an informal note, dated 20 September 1988, on problems raised in the Committee over the years. He added that, since the new sub-paragraphs (b) and (c) of Article VI:10 both required reports according to "country of origin of the product" and since these requirements had come into force in February 1988, strictly legally speaking it would seem that

reports submitted in 1988 ought to follow the new rules. However, there might be implementation difficulties, at least with respect to the 1987 statistics.

42. The representative of the United States stated that the rule of origin was a key to using the statistics for their intended purpose, i.e. for monitoring implementation of obligations. In her view, if the rule of origin for statistical reports was different from the rule used to implement a country's obligations, one could not effectively monitor such implementation. She suggested that Parties explain in writing the rules of origin they used (i) for implementing obligations; and (ii) for statistical reports.

43. The representative of the European Economic Community stated that the Commission had drawn the attention of member States to this matter as well as to the political importance of improved statistics, given the fact that the present definition underestimated imports into the EEC. If the EEC were to report on the basis of the product origin, this would mean a major change in its system of data collection. A common position might therefore be difficult to achieve in the near future. In reply to the Chairman, he confirmed that a submission as suggested by the United States would cause no problem.

44. The representative of Canada stated that, at present, suppliers were not requested to provide information on the origin of the goods they sold, but rather on their own location. In her country, therefore, rules of origin were not used to implement obligations. It would be difficult to give 1988 statistics in the format suggested in the revised Agreement.

45. The representative of Sweden, on behalf also of Finland and Norway, stated that this question had been of great importance over many years. Because of the different methods used, it had not been possible to use the statistics in a fruitful way. As the revised Agreement had solved this problem, the only question was whether the EEC still had problems in complying with the new requirement. The representative of the European Economic Community confirmed that this problem remained.

46. The representative of Hong Kong stated that suppliers to his Government had to quote the country of origin of the product. A "miscellaneous" category was sometimes used. He would try to clarify this in writing.

47. The Chairman suggested that the Committee agree to the fact finding suggestion in paragraph 42 above. The item would be inscribed on the agenda of the next meeting. It was so agreed.

(c) Secretariat analysis of statistics

48. The Chairman recalled the Nordic proposal (GPR/W/83, paragraph 3), containing twelve elements which had not yet been discussed in detail. He drew attention to the fact that a number of questions concerning statistics had been taken up in the Negotiating Group on MTN Agreements and

Arrangements (NG8) at its June meeting (ref: MTN.GNG/NG8/7, paragraphs 24 and 31). He also noted that, according to the secretariat, all the suggested "analyses" could be done as the necessary statistics were, or should become available. The only exceptions related to the number of contracts and statistics on derogations. It was also unclear what was meant by "analysis of trends".

49. The representative of the United States wondered whether the proposal was intended as an amendment to the Agreement or a one-time action. The representative of Sweden, on behalf also of Finland and Norway, replied that the idea was to have reports from the secretariat that could facilitate an analysis of national figures. They were ready to pursue the proposal as an improvement of the Agreement, if that was considered to be the best way to proceed.

50. The representative of the United States thought the quality of an analysis would depend to a very great extent on the outcome of the rules of origin examination. The figures were not always comparable and to proceed as if they were, without important qualifications, was not advisable. She preferred to discuss this matter in greater detail once the rule of origin question had been settled. The representatives of Hong Kong and of the European Economic Community supported this view. The representative of Sweden, on behalf also of Finland and Norway, did not object.

51. The Chairman stated that the proposal would be reverted to when the previous question had been clarified.

(d) Circulation of summarized statistics

52. The Chairman recalled that summaries circulated for 1981 and 1982 had given a 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 undated figures could be circulated, and if so, whether they could be made available both to observers and to the NG8.

53. The representative of the United States stated that she did not favour a type of transparency which gave misleading information. Also, if the idea was to advertise the benefits of the Agreement, she was not sure that sales figures were appropriate as the Agreement did not guarantee sales but only sales opportunities. More discussion on this point might be necessary. The representative of the European Economic Community supported this view.

54. The Chairman stated that this meant that summarized statistics could not, therefore, be circulated.

D. Questions concerning Article I:1(c)

55. The Chairman drew attention to the submission by Japan in GPR/W/87 relating to the transfer of some of NTT's activities to a company established under the commercial law.

56. The representative of Japan first explained the background of the transfer, pointing out that the Japanese telecommunications market consisted of two types of business. The Type I segment had its own telecommunications circuit facilities, while the Type II business leased them from a Type I common carrier to provide Value Added Network (VAN) and other services. The Type I market had been liberalized in 1985 by terminating the NTT monopoly and a certain number of firms had entered it. Nevertheless, NTT remained predominant in this market. The Type II market had also been opened by the deregulation in 1985, to foreign participation, and to date approximately 600 foreign and domestic companies had entered it. In the field of the data communications, NTT's Data Communications Sector, a division of NTT and a Type I carrier, had been in competition with Type II carriers. A question which had arisen from the point of view of competition policy, was how to prevent possible abuse by the Type I carrier of its position to lease telecommunications circuit facilities to Type II carriers. The report submitted by the Telecommunications Council in March 1988 had recommended separation of the Data Communications Sector because this would, while assuring fair competition, contribute to the development of data communications in general and serve the interest of users. Under these circumstances, NTT had transferred its data communications services to the newly-established NTT Data Communications Systems Company (DCS) on 1 July 1988.

57. This company had taken over all businesses concerning data communications except for NTT's in-company system. Its major type of service was to construct data communications systems in accordance with customers' needs. These services essentially included (i) purchasing hardware like mainframes and terminal equipment from manufacturers (because DCS did not manufacture hardware itself); (ii) producing or procuring necessary business software; (iii) constructing and integrating systems; and (iv) delivering systems to customers. These services were in hard competition not only with other Type II carriers (VAN service providers, etc.), but also with computer makers, computer dealers, software houses, and system houses. Thus, customers of data communications services could purchase or lease hardware and software from DCS or from other Type II carriers. They were also free to purchase, lease or rent directly from manufacturers, dealers or software houses. A customer's choice of product manufacturer was completely dependent on his own discretion. Accordingly, the data communications market in Japan being very competitive, DCS was naturally forced to base its procurement and other activities strictly on the competitive principle and the market mechanism.

58. The procurements of NTT Data Communications Sector (related to its customer service businesses) which had been transferred to DCS, could be roughly divided into three categories: (i) company-use products; (ii) re-sale products; and (iii) customized products, representing about 5 per cent, 30 per cent and 65 per cent respectively, of its total procurements in the past three fiscal years (1985-1987). Almost all re-sale products procured by DCS were data terminal equipment, covered by the Agreement. Almost all customized service products were information-processing equipment, which was excluded from the Agreement by virtue of the note to the Japanese entity list in Annex I. The procurement

statistics were (in billion Y) for the years 1985-1987: procurement by NTT - 87.3, 87.9 and 100.8; procurement by Data Communications Sector - 12.5, 18 and 20.5. Thus, in 1987, about 20 per cent of procurement had been made by the latter. Because the new company was a private company established under the Commercial Law, the Government did not hold supervisory authority over its procurement procedures, nor did it have any means to control or influence its procurement policies. The Japanese Government thus considered it impossible to make DCS subject to governmental arrangements. The company was expected to procure products of high quality at reasonable cost in order to survive competition as a private and independent company.

59. The Government of Japan did not have such supervisory authority over DCS as it had over NTT, the latter being a public corporation established under the Nippon Telegraph and Telephone Company Law, which specified the degree of governmental authority. In compliance with a policy of assuring fair competition in the data communications market, it had been made clear at the time of the transfer that (a) in order to ensure the independence of transactions: (i) NTT would provide its network facilities to users on an equal and non-discriminatory basis without giving any favourable treatment to DCS; (ii) the transactions between NTT and DCS (such as utilization of offices and R&D results, and placing and receiving of orders of hardware, construction and maintenance) would be conducted under the same conditions as those existing between NTT and other companies; (iii) NTT and DCS would not engage in joint procurement activities; and (b) in order to prevent cross-subsidization: (i) financial accounts of NTT and DCS would be completely separated; and (ii) the personnel exchange between NTT and DCS would be minimized. Concerning stocks, his Government understood that NTT and DCS were preparing to list DCS stock at the Tokyo and other Japanese stock exchanges, whose listing eligibility criteria would require DCS to diversify its shareholders. Although NTT held 100 per cent of its shares, the Japanese Government's understanding was that NTT would be decreasing its investment ratio in DCS in the years to come. The listing eligibility criteria normally required about five years until a newly-established company would be listed at a stock exchange, and according to NTT and DCS, the future listing schedule would be examined with due heed to DCS's business performance and market conditions during this period. After the listing of DCS at the stock exchanges, both domestic and foreign investors could purchase its stock.

60. The representative of Japan reiterated that a case like this was not anticipated by the Agreement. This was the reason why his Government had asked the Committee to examine it, taking due account of the following two elements: (i) the general consensus that had been reached in the Informal Working Group that entities whose procurement policies are not controlled by, dependent on, or influenced by, the government shall not be made subject to the Agreement but that the government should refrain from interference in their transactions, including their procurement activities; and (ii) the fact that Japan had already subjected all central government entities to the Agreement; it was therefore not in a position to subject further entities to it unless the negotiations on broadening under Article IX:6(b) were successful.

61. The representative of the European Economic Community stated that the problem presented was closely linked to the discussions on privatization in the Informal Working Group. His delegation considered that until final results had been reached, Japan had to respect present rules and therefore had to offer compensation for withdrawing NTT's Data Communications Sector. While appreciating further details, and pending further study, he reserved his delegation's right to ask for such compensation.

62. The representative of the United States, while appreciating the Japanese statement and the transparency provided, disagreed with the assumption that the Agreement was unclear with respect to a Party's obligations. The matter was complex and some detailed questions had to be clarified, however, at this juncture, she reserved her delegation's rights.

63. The Committee took note of the statements made and agreed to revert to the matter at the next meeting.

E. Submission by Finland: Procurement of Antarctic Research Vessel with ice-breaking Capability by US National Science Foundation

64. The Chairman drew attention to document GPR/W/89 submitted by the delegation of Finland.

65. The representative of the United States noted that the request for consultations concerned a contract which had been envisaged and which raised the issue as to whether or not it was Code-covered. In addition, the case touched on a number of interesting technical issues such as services, "protest systems" and questions of balance. Given the preliminary stage of the discussion, she did not think it necessary to go into detail but noted that the procurement in question had been cancelled and that in her delegation's opinion, it was not Code-covered. The fact that other Parties were nevertheless aware of it touched on questions dealt with in the Informal Working Group. She was ready to consult and report in whatever fashion was considered desirable.

66. The representative of Finland recalled that his delegation had requested consultations under Article VII:4. The National Science Foundation (NSF) was a leading US Government authority on scientific research, being responsible for, among other things, research activities in the Antarctic. Due to the very harsh natural environment, the fulfilment of these activities required special qualities and technology, not only with regard to scientific instruments, etc. but also with respect to the vessels used for transportation and other support activities in the area. Therefore, in 1987 the NSF had begun to actively develop a project to acquire a research vessel with ice-breaking capability. After the project had been preliminarily accepted, the NSF had organized a tender competition in the autumn of 1987, concerning the construction and operation of such a vessel. According to his information, the bidding had been organized on a worldwide basis, including the participation of seventy companies. The Finnish shipbuilding industry, which was the leading supplier in the world of vessels with ice-breaking capability, had participated in the tender, and remained firmly interested in supplying the vessel in question.

67. The planned procurement method had been a lease with an option to buy. Funds had been provided in the Department of Housing and Urban Development - Independent Agencies Appropriations Act (No. 100-404) 1989 for 1989-90. The US Congress, in adopting this Act on 19 August 1988, had included therein an amendment comprising the following "Buy American"-provision: "that no funds in this Act shall be used to acquire or lease a research vessel with ice-breaking capability built by a shipyard located in a foreign country if such a vessel of United States origin can be obtained at a cost of no more than 50 per centum above that of the least expensive technically acceptable foreign vessel bid." Article I:1(a) of the Agreement, as amended, had enlarged its application from 14 February 1988 to "any law, regulation, procedure and practice regarding any procurement of products, through such methods as purchase or as lease, rental or hire-purchase, with or without an option to buy, by the entities subject to this Agreement. This includes also the services incidental to the supply of products, if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se." The NSF was covered by the Agreement and therefore the "Buy American"-provision mentioned seemed to be in conflict with obligations undertaken by the United States Government.

68. In consultations held, the United States authorities had informed his authorities that the NSF would not procure the vessel during the fiscal year 1988-89, since the "Buy American"-provision would make the procurement too expensive and would require a new tender competition. Accordingly, the funds for the procurement had been withdrawn from the budget. Therefore, the issue remained as one of principle only. The claim that the procurement was not Code-covered was not valid, in the opinion of his delegation. The NSF was clearly the decision-maker concerning all aspects of the procurement in question. Not only did it decide the type of the procurement, but also the type and qualities of the vessel, and all other matters including the final supplier. Therefore, the ITT-Antarctic Services Company was not independent at all, it only fulfilled the tasks given to it by the NSF, acting as a middleman without any decision-making power. If his delegation were to accept the kind of implementation that the United States was proposing, the implication would be that obligations could be circumvented by simply placing a middleman between a Code-covered entity and the final supplier under a lease or rental contract. It would thus seem very easy, for example, in the procurement of larger computer systems, to claim that such contracts were not covered by the Agreement, the share of support activities in the price of computers being considerably larger than, for instance, the operational costs of an ice-breaker which were minimal compared with the purchase price. He recalled that on 1 January 1981, the USTR had issued a "determination regarding acceptance of an application of the Agreement on Government Procurement", waiving for all covered purchases from Parties to the Agreement, inter alia, the Buy American Act, and special rules concerning the Department of Defence. The USTR had subsequently stated that all relevant regulations had been revised to take Code obligations into account. The amendment made by the United States Congress to the Independent Agencies Appropriations Act seemed to represent a reversal of the United States' position. The "Buy American"-provision in question

would also seem to be contrary to the United States' approach in the Committee, where it had been one of the strongest advocates of enlargement of coverage and strengthening of disciplines.

69. The representative of the United States stated that she had not expected bilateral consultations to be held in the Committee. The contract had been designed a long time in advance of any "Buy American"-proposal. It had been a services contract for research, requiring the research provider to acquire data to be obtained by the operation of a vessel in Antarctica. The prime contractor - the researcher - had looked for a sub-contractor who could operate such a vessel. This sub-contractor had in turn solicited a lease, or a lease with an option to buy, of an ice-breaker. The issue was therefore about a sub-contract of a sub-contract of a services contract. It was only because of US transparency that this service contract had been published. Prior to any proposal for a "Buy American"-provision, two of the numerous firms involved had been US firms which had been excluded at an early stage on technical grounds. These had protested but some matters, among them sub-contract awards, could be dealt with by the General Accounting Office only in the very limited circumstances when such awards were made by, or for, the Government. After careful study, the GAO had decided that the case had merely to do with the elimination of domestic suppliers found not to be acting as agents of the Government. This, being independent of the consideration of foreign or domestic sources, adequately justified her delegation's view that the case was not covered by the Agreement. Authorization bills and appropriation legislation in combination defined procurement restrictions on an agency. The final language for the current one-year period was not as quoted by Finland; the prohibition concerned procurement under a services contract. Pending the lapse of the temporary restriction after one year, the Government had cancelled the contract in question and funds had been withdrawn. The case was therefore one of principle only.

70. The representative of Finland stated that the GAO was the investigatory arm of Congress and had given and could no doubt give many interpretations on legislation passed. He looked forward to consultations in this matter of principle, no practical case being involved.

71. The representative of the United States added that when this issue had been raised, she had spent much time trying to resolve a problem before it affected what she had then viewed as a procurement in which Finland was interested. The reason for this was that Finland had supported efforts to expand the Agreement to services. She had made much progress in discussions both with industry and Congress members but when it had been discovered that services contracts were not Code-covered, her arguments had been dismissed. Her delegation had consistently pushed for coverage of service contracts and had made the point in the Informal Working Group that many goods were procured under such contracts. This case was an example. If services contracts had been covered, the Act referred to might not have contained the language quoted.

72. The representative of Sweden, also speaking on behalf of Norway, stated that they were following this matter with interest and hoped that the process initiated would lead to a mutually satisfactory solution for the Parties involved.

73. The Committee took note of the statements made.

F. Eighth Annual Review of the Implementation and Operation of the Agreement; adoption of the 1988 Report to the CONTRACTING PARTIES

74. The Chairman drew attention to the fact that for reasons of economy the two secretariat drafts had been merged. He suggested adoption, on the understanding that the text be updated to reflect the present meeting and with a period for comments before the final version was circulated as an official document. The Committee so agreed.

G. Other Business

(i) Updating of the Practical Guide

75. The Chairman noted that on 26 September 1988, members had received a draft English/French/Spanish version of the revised introduction, and draft English versions of the revised country chapters. French and Spanish translations had been made available to countries concerned at the meeting. He invited delegations to check carefully the content of the revised pages and thanked the delegations of Austria and Finland which had already made their comments.

76. The Committee decided that comments should be made by 1 December 1988, after which the secretariat could produce and distribute the revised Guide.

77. The Chairman added that the secretariat had called his attention to a number of cases where countries' entity lists had apparently undergone changes, presumably of a purely formal nature, e.g. new names of Ministries. Such changes should be notified under Article IX:5(a).

78. The representative of Canada stated that the long time-lapse between updates of the Guide might undermine its usefulness and that the loose-leaf format permitted more frequent updating to be done. The Chairman said that updating depended mainly on timely contributions from delegations.

(ii) Panel candidates for 1989

79. The Chairman invited Parties to nominate or renominate candidates for 1989. Hong Kong, Israel and Sweden had responded in 1988.

(iii) Dates of further meetings

80. The Committee noted that the Informal Working Group had agreed to meet on 17, 19 and 20 January 1989 when it would address the question of broadening of the Agreement. The Informal Working Group will meet again on 13-15 March 1989 followed by a Committee meeting on 16 March 1989.