

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

GPR/M/Spec/2
14 February 1983

Special Distribution

Committee on Government Procurement

MINUTES OF THE MEETING HELD ON 15 DECEMBER 1982

Chairman: Mr. H. van Houtte

1. The Committee on Government Procurement met on 15 December 1982. The participation in the meeting was limited to the Parties.

2. The agenda was adopted as follows:

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A. <u>Recourse to the dispute settlement procedures under Article VII:6 of the Agreement by the United States</u>	

3. The representative of the United States recalled that ever since the Agreement's entry into force his delegation had been concerned about the European Community's treatment of the VAT when establishing whether contracts fell over or below the threshold. The matter had been discussed bilaterally and under Article VII:3 and 4 but regrettably no satisfactory solution had been found. The Agreement explicitly stated that a contract with a value of SDR 150.000 or more was subject to it and no provisions allowed deductions from the contract value in determining whether or not the Agreement applied. The fact that the Agreement was silent on how to treat taxes for threshold purposes did not make a deduction of the VAT permissible. To the contrary, because the contract value of SDR 150.000 was the criterion for coverage, the absence of an explicit reference to possible deductions made the Agreement clear. He also commented on the argument that negotiating partners had been aware of the EC's practice but nevertheless had not taken it up before the Agreement entered into force. In the US view the process of negotiations had not been one in which delegations had traded assurances on their respective abolition of certain practices because all had rightfully expected any practice not fully consistent with the Agreement to be revised. This applied, in the case of the US for instance, to the Buy American Act. The matter before the Committee was therefore one of compliance with obligations. His delegation hoped that the EC would, through the conciliation procedure, agree to align its procedures with those required by the Agreement.

4. The representative of the European Communities stated that the purpose of the threshold was to establish a certain equitability between the Parties in terms of volumes of goods exchanged under the Agreement. Very wide differences existed between levels of VAT in the Community, both between products and between member States. Therefore, to include the VAT in the calculation for threshold purposes would mean to create an inequitable situation where the threshold in terms of goods would be reduced - the more so the higher the VAT - in one member State as compared to another member State of the Community and as compared to another Party to the Agreement. He emphasized that the Agreement dealt with the exchange of goods and not with taxes and that his delegation's position was therefore in his view completely compatible with the Agreement. Furthermore, the real value of the threshold had been diminished over the last couple of years because of inflation and - perhaps more importantly - experience showed that the estimation of the value of contracts was an extremely arbitrary one. He suggested therefore that it was more important to have a better defined method of contract calculation than looking for additional percentage points to be added in such a calculation. He noted in this connection that the VAT was a tax imposed on end consumption and at the earliest calculated at the point of delivery. An entity putting out a notice for an intermediary product, for instance, could not determine the effective rate of VAT at the moment of award or even not at the point of delivery because payments of VAT on purchases were offset against VAT on outgoing transactions by that entity, the result being a net sum. To follow the course suggested by the United States would amount to introducing a totally arbitrary figure which would come in addition to a rather rough estimate of the contract price. The EC was presently analysing what impact the VAT system might have on government procurement; the subject was complex and some time would be needed before any conclusions could be arrived at. He suggested that rather than pursuing the dispute the subject might be taken up in the process of Article IX:6(b) negotiations.

5. The representative of the United States, commenting on the argument that inclusion of the VAT would reduce the threshold, held that the exclusion of the VAT in fact had raised the level of contracts of interest to the United States from SDR 150.000 to SDR 185-190.000. As to the argument that the Agreement dealt with goods and not taxes, he noted that Article I:1(b) dealt with the contract values and not values of goods. The fact that inflation had lowered the threshold was in his view not relevant; for some countries this element had, moreover, been offset by exchange rate developments. If EC's experience showed that it was difficult to determine the VAT in advance, this was in his view an additional argument in favour of including - not excluding - it. He wondered why in the light of the said difficulties the EC had not based itself on contract values in the past. He agreed that tax questions constituted a complex subject but not all possible implications needed of to be settled in the context of the Agreement on Government Procurement. His delegation did not accept that proper implementation of the Agreement should be a matter for re-negotiation. However, if the EC felt that the VAT should be excluded from the contract value, that might be a subject for renegotiations. In conclusion, he

considered that the conciliation process in the Committee had been unsuccessful. His delegation would proceed to review the possible actions available to it, including the possibility of requesting a panel to be set up. It would notify the Chairman through the secretariat if it decided to request a panel.

6. The Committee noted the views expressed by the two Parties and that no mutually satisfactory solution to the dispute had been found. It further noted the statement by the United States delegation to the effect that it did not consider it useful to pursue the conciliation process, that this delegation was going to reflect on the options available to it, and that it might, in this context, request the establishment of a panel.

7. The Chairman drew the attention of the Committee to Article VII:7 and 8 and stated that if such a request were addressed to him prior to the next meeting, the Committee would take a decision in this regard at that meeting.

8. It was so decided.

9. It was further decided not to take up the proposed agenda item: "Treatment of taxes and customs duties in relation to the threshold" in the meeting with observers on 16 December 1982.

B. Preparation for negotiations foreseen in Article IX:6(b) of the Agreement

10. The discussion focused to a large extent on the proposals put forward, especially the United States communication in GPR/Spec/19 which was a proposed work programme. Both comments of a general and specific nature were made. These have been grouped together below under the various topics which came up for discussion.

(i) General remarks

11. In his introduction of the proposed work programme, the representative of the United States stated that although some time was still to lapse before the beginning of the actual negotiations, work would need to be initiated in order to get a factual base for these negotiations by the autumn of 1983. The proposed collection of data was a modest approach which took into account the difficulties involved in such an exercise. He emphasized that the work programme proposed was not an attempt by his delegation to seek concessions or offers by others at this stage. He added that he did not expect the negotiations to be a rapid process and therefore did not consider it indispensable that all elements in the work programme be completed before the negotiations started.

12. The representative of Canada agreed that a work programme should be established which should begin with a process of information gathering aiming at laying a factual basis for later negotiations. The time-frame suggested by the United States in this regard was in his view a reasonable

one. His delegation's proposals in GPR/Spec/17 had been intended as an identification of areas and had been tabled without commitment.

13. The representative of Sweden stated that his delegation did not exclude any issue from consideration since at this stage of the preparations it was not a question of exchanging concessions. He expected, however, that the more items which were to be treated, the more aggregated data would have to be accepted. The level of ambition should be kept to the sort of aggregates which were exchanged in the MTNs. He favoured an early start of the preparatory work and thought that it would be reasonable and possible to have concluded the data collection phase by the end of 1983.

14. The representative of Japan also preferred to start the preparatory work as early as possible. The gathering of information was necessary, but ought to be kept to realistic levels, to avoid imposing undue burdens on national administrations. The US proposal was a useful basis to start from although his delegation did not agree with all items contained therein. His delegation would revert to specific points when the preparations proper started early in 1983.

15. The representative of the European Communities took as a starting point the reference in Article IX:6(b) to the concepts of "broadening" and "improving" the Agreement. In his opinion, on the basis of the Agreement as it presently stood no Party could claim that it had always acted in complete conformity with it. He thought that the discussion of the statistical submissions would show many anomalies and problems not foreseen at the outset and the Committee might wish to consider clarifications concerning interpretation so as to avoid a multiplicity of interpretations in the future. As to the broadening of the Agreement, his delegation found common ground with both the Swedish and Japanese view points. He warned against a too much optimism with regard to the time which would be needed for data collection.

16. The representative of Singapore stated that his delegation saw several problems and questions with regard to the Agreement as it presently stood. The attention should be focused on such problems and in particular on the multiplicity of possible interpretations, to ensure more clarity and security in the implementation and operation of the Agreement. The Parties were still assessing the benefits of the Agreement and until such work had been completed on national levels and the impact of the Agreement fully understood in the international community at large, his delegation thought it ill-advised to expand the existing coverage.

(ii) Expanded entity coverage

17. The Chairman suggested that one way to proceed in this matter might be to invite delegations to submit lists of their non-covered entities prior to the next meeting and revert to the question of statistics then.

18. The representative of the United States supported this approach on the understanding that such lists should be without prejudice to delegations!

subsequent negotiating positions. In introducing his delegation's proposal concerning data collection, he stated that statistics might be limited to budget figures rather than individual procurement data. Instead of seeking a common base period for all Parties, it might also be sufficient to establish common orders of magnitude. Although the US suggestion was to collect data on all entities not presently covered by the Agreement the precise modalities might be more suitably discussed when the lists had been provided. He added that his delegation was particularly interested in entities in the telecommunications, power generation and transportation areas.

19. The representative of Canada noted the interest expressed in these areas and recalled that his delegation had particularly identified entities procuring telecommunications, power generation and transmission, and ground transportation - particularly urban mass transit-equipment. In respect to the United States proposal he suggested that information be provided both on a volume and value basis, covering a reasonable time-period.

20. The representative of Sweden recalled that his delegation's submission (GPR/Spec/16) had included expanded entity coverage among issues which might be taken up in the context of the negotiations, as a logical interpretation of the language of Article IX:6(b). Concerning data collection he suggested the exclusion of entities whose total annual purchases did not exceed the threshold.

21. The representative of the European Communities stated that in considering the possibility of increasing the number of entities covered by the Agreement, the EC had encountered serious statistical problems which were not likely to be solved quickly - whether one were to opt for arbitrary estimates or more exact data. More clarifications as to non-covered entities would be needed because not only the base year for various data might differ, but entities were not always comparable. In this connection he mentioned that in many of the areas suggested by Canada for inclusion in a list it was difficult to distinguish a private company from a public one. Moreover, some public entities operated entirely as if they were private enterprises. His delegation would make its best efforts but would have considerable difficulties in establishing a list, and subsequently to submit data.

22. The representative of Switzerland stressed that the gathering of information should be without prejudice to subsequent negotiations and that on that understanding members should try to establish complete entity lists, independent of the threshold.

23. The representative of Japan warned against overburdening national authorities with respect to data gathering and called for clear criteria in the selection of entities.

24. The representative of Austria reserved his delegation's position in the sense that it could not promise to establish lists of non-covered entities.

He noted in this connection that there was strong opposition to the Agreement in economic circles in his country.

25. After a further exchange of views on the selection criteria, the Committee agreed - without prejudice to subsequent negotiating positions - to invite delegations to make their best efforts to submit prior to the next meeting lists of their respective entities "under direct or substantial control of Parties" (ref. Article I:1(c)) which were not presently covered by the Agreement. The Committee agreed to discuss at its next meeting the modalities concerning statistics that might be furnished with regard to procurement by entities not covered.

(iii) Services

26. The representative of Austria recalled that Article IX:6(b) of the Agreement only required that the possibility of including service contracts should be explored. While his delegation was prepared to make a study he stated that his authorities held the view that services was not a matter to be taken up in the GATT. Any preparatory work on services would have to be without prejudice to his delegation's position.

27. The representative of Switzerland also stressed that a work programme on services had to be without prejudice to future negotiations. In fact, he regarded it as unlikely that services would be covered by the further negotiations. At any rate in his delegation's view such negotiations would be premature. Data collection, if any, was likely to be a theoretical exercise without much purpose; work should rather concentrate on consolidating the present Agreement. His delegation would not, however, oppose a consensus being reached in the matter.

28. The representative of Sweden recalled that his delegation had proposed the inclusion of services in a preparatory work (GPR/Spec/16). Best efforts ought to be made to collect information on services; his delegation intended to make an identification of services along the lines suggested by the United States in GPR/Spec/19, an exercise he thought ought to be a feasible one.

29. The representative of the European Communities recognized the obligations of the Agreement but shared the reticence expressed by others. He argued that the work of the Committee on services should be seen in the light of the Ministerial Declaration of 29 November 1982 and be undertaken in parallel with other work in the GATT.

30. The representative of the United States recalled the commitment Parties had undertaken in Article IX:6(b), and held that it was unrealistic to postpone work on the possible inclusion of service contracts in the Agreement in anticipation of general and time-consuming work to be done elsewhere in the GATT. If the negotiations were to begin before the end of 1983, preparations had to be made and the Agreement provided that services be considered "at an early stage". He hoped that other members did not

misconceive US intentions in this regard; his delegation had not identified its own interests so far, information on service contracts by governments was very scarce and to collect such information could not in his opinion be characterized as a very ambitious task.

31. The representative of Canada felt that the United States proposal provided a useful background for negotiations concerning services, an area which his delegation had also suggested to be taken up for discussion and possible inclusion in the preparatory work (GPR/Spec/17).

32. The Committee agreed that preparatory work in this field was without prejudice to whether or not the Agreement would subsequently be expanded to cover services. Delegations were invited to submit through the secretariat before the next meeting documentation in which they would try to identify types of services that are traded internationally and that are acquired by governments.

33. Three subsequent US proposals in GPR/Spec/19 on services were not discussed.

(iv) Leasing

34. The representative of Canada made the same remark with regard to leasing as he made concerning services (para.31 above). The representative of Sweden stated that his delegation regarded leasing to be a special case of services and that work should proceed in parallel.

35. The representative of Austria stated that in his delegation's view leasing was not covered by the Agreement.

36. The representative of the European Communities announced that it would put forward at the meeting with observers on 16 December 1982 a note describing existing practices in the EEC in the field of leasing and similar transactions. ¹ Further information would be difficult to provide for the time being.

37. The Committee agreed to invite delegations which had not yet done so, to provide information before the next meeting on their governments' practices with regard to leasing and similar arrangements.

38. The other US proposal in GPR/Spec/19 was not discussed.

(v) Lowering of the threshold

39. The representative of Sweden suggested that the Committee might be able to draw some initial conclusions on the impact of the present threshold from the 1981 statistics. However, the potential importance of a lowering of the

¹Subsequently issued as GPR/W/20.

threshold was - in statistical terms - probably the most demanding task where his authorities were concerned. He suggested to exclude data collection of purchases below the threshold value.

40. The representative of the European Communities suggested that the question be postponed until the Committee had examined the 1981 statistics.

41. The representative of Japan was reluctant to supply information on values of purchases below the present threshold, which his delegation considered to be adequate. Such data collection would be technically impossible as well, in a short period of time.

42. The representative of Austria stated that his delegation was not in favour of lowering the threshold, for administrative reasons, and added that a collection of data on purchases below the threshold would not be possible as far as his authorities were concerned.

43. The representatives of Canada and the United States underlined that identification of issues that subsequently might be taken up for negotiation did not prejudice the negotiations proper. The representative of the United States added that the question whether the threshold should actually be reduced might be taken up at a later stage .

44. The Committee agreed to postpone to the next meeting the discussion of the lowering of the threshold, including any information-gathering in this connection as suggested by the United States in GPR/Spec/19.

(vi) Lengthening of bid deadlines

45. The representative of the European Communities commented upon the suggestions put forward by the US delegation in GPR/Spec/19 concerning the possible lengthening of bid deadlines from 30 to 45 days, and noted that the present 30 day limits were often not observed. In his view rather than discussing longer deadlines the Committee should concentrate on bringing actual practices into line with present obligations. The US suggestion concerning an apparent ambiguity between Article V:9(a) and Article V:10(d) and a study of certain practical experiences in this regard, was also a matter which in his opinion did not need to be pursued further.

46. The representative of Switzerland stated that the US proposals merited reflection and suggested that a discussion of experiences might be reverted to at an appropriate moment.

47. The representative of Sweden recalled that this matter was among those taken up in his delegation's suggestion in GPR/Spec/16.

48. The Committee agreed that the suggestions contained in the United States proposal would be examined in capitals and be reverted to at a later meeting.

(vii) Elimination of specific derogations

49. Referring to his delegation's suggestions in GPR/Spec/17, the representative of Canada suggested that the work programme should include an exchange of data on the volume and value of products purchased by covered entities, but excluded from coverage under the Agreement by virtue of a derogation. He announced that he would circulate a proposal in writing prior to the next meeting.

50. The Committee took note of the statement made and agreed to revert to this matter at the next meeting.

(viii) Inclusion of a self-denial clause

51. The representative of Canada, referring to his delegation's suggestion in GPR/Spec/17, proposed that the Committee should examine the possibility of adding a provision to the Agreement which would require Parties to refrain from directing purchases or attaching buy-national conditions to the use of funds by local or regional governments or related governmental entities.

52. The representative of the European Communities suggested that the Canadian proposal be clarified. The circumstances referred to, i.e. "buy national" conditions or other directions by governments with respect to the use of funds by local, regional or related government entities, was a matter which in his view was dealt with in Article I:2 of the Agreement.

53. The representative of Canada stated that the intention was to deal with legislation existing in some countries.

54. The representative of the United States understood the Canadian proposal to go beyond Article I:2, which only called upon Parties to inform non-covered entities of the benefits of the Agreement. He agreed that this matter be considered further.

55. The Committee noted that Canada suggested this question to be included in the further negotiations but that no specific proposal for preparatory work had been put forward.

(ix) Transparency

56. The Committee agreed that the observers would be associated with the future preparatory work for Article IX:6(b) negotiations and that this item would be inscribed on the agenda for the next regular meeting. The Committee reserved its right, however, to meet in restricted sessions whenever necessary.

C. First statistical review under the Agreement

57. The representative of the European Communities expressed regret that for technical reasons his delegation had not yet been in a position to furnish 1981 statistics. The EC statistics were expected to be ready before the end of January 1983. He suggested that this item should be dealt with at the next meeting.

58. The representative of the United States agreed that the statistical review should take place when all Parties had met their obligations. His delegation was concerned that a very fundamental requirement had not been met by all Parties in spite of repeated postponements of the date fixed for submissions of statistical reports. In his view all Parties had had more than adequate time at their disposal. He expressed the hope that the EC would submit its statistics by the time indicated.

59. The Committee took note of the statements made and agreed to revert to this agenda item at its next restricted meeting.

60. The Committee agreed on its meeting on 16 December 1982 with observers that its next meeting be held on 23-24 February 1982. The first day will be set aside for a restricted session, to consider items A and C above.