

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

GPR/M/Spec/7
28 March 1984

Committee on Government Procurement

MINUTES OF MEETING HELD ON 15 FEBRUARY 1984

Chairman: Mr. B. Henrikson

1. The Committee's meeting on 15 February 1984 was restricted to the Parties only.
2. The following item was on the agenda: "Report of the Panel on Value-Added Tax and Threshold" (GPR/Spec/31).
3. The Chairman recalled that the Committee had decided at its meeting held on 31 January 1984 to revert to this matter (GPR/Spec/32, item B). He stated that the report was before the Committee in accordance with Article VII:11 of the Agreement, which he quoted. He noted that, as the report had been circulated on 17 January 1984, the time limit referred to in Article VII:11 expired on 16 February 1984, unless extended.
4. The representative of the United States stated that when the Committee had considered the report on 31 January 1984, the representative of the European Economic Community had attempted to reopen the issues which had been argued by the disputants before the Panel and on which the Panel in its report had reached reasoned conclusions. Among other things, the representative of the European Economic Community had argued that the Panel's findings and conclusions were illogical and had, in spite of the Panel's finding in paragraph 25 of the report, reiterated his argument that the EEC's practice was justifiable because it had been in existence before the entry into force of the Agreement. The United States believed that the Panel had reached a clear, unambiguous and correct conclusion in paragraph 28 of the report. This report was reasoned and took into account all arguments advanced by the parties to the dispute. The Committee should therefore, at this meeting, adopt the report and recommend that the EEC brought its practice into conformity with the Agreement. Under Article VII:11, the Committee had the obligation to take appropriate action within thirty days and therefore had to act on the report at this meeting. In this context, it had to consider how its action might affect the dispute settlement process under the Agreement as well as that under other Tokyo Round Agreements and, possibly, the General Agreement itself. He hoped the Parties would show that they would work within the system and that the system itself was workable.
5. The representative of the European Economic Community stated that the Agreement was, as all Parties knew, silent on the question whether to include or to exclude taxes when calculating the value of a contract. The principal merit of the report was, in his view, that it had admitted this fact and the fact that the matter had not been the subject of negotiations. This was an important element which the Committee had to take into account.

His delegation considered paragraph 28 of the Panel's report to be a proposal made in an attempt to find one possible interpretation of the Agreement in view of the absence of negotiations and documentation on the matter. The Panel had not explicitly recognized that there were, basically, four categories of Parties: (i) those who excluded taxes; (ii) those who included taxes; (iii) those who did not have taxes; and (iv) those who normally applied taxes like the VAT but who, exceptionally or as a rule, exempted governmental entities from paying taxes on their purchases. The variety of situations made it far from certain that the EEC represented such an exception as the Panel seemed to claim. The EEC was not entirely convinced that the differences existing between various Parties created a disequilibrium but, if a problem existed in this regard, it was for the Parties, who in negotiating the Agreement had not taken up the matter, to seek a solution. For this purpose each Party should indicate to the Committee in which of the categories mentioned it found itself. Once a clarification had been obtained and an imbalance, if any, found to exist, his delegation would be ready to cooperate in good faith with the other members in order to ensure that all Parties were placed on an equal footing. Even if the United States had brought the case under the dispute settlement procedures, the matter before the Committee was not a dispute relating to a particular, concrete situation but one of interpretation. Therefore, instead of taking the time-limit in Article VII:11 literally, the Parties should discuss the means whereby a solution, which might take different forms, could be found. In this situation, the EEC did not accept adoption of the Panel's interpretation of the Agreement. The Committee would have to come back to the problem that there were different interpretations of the Agreement in the Committee itself.

6. The representative of the United States stated that the dispute was indeed a specific dispute brought by his delegation under the procedures of the Agreement. In categorizing four types of Parties according to their treatment of taxes, the EEC implied that the Panel's conclusions might be interpreted to mean that Parties who included taxes were wrong and Parties who excluded taxes were right in doing so and that, in addition, because some Parties fell in neither category, a question of interpretation arose. As the United States read the conclusions, however, they stated that the term "contract value" should be interpreted to mean the full cost to entity, taking into account all the elements which would normally enter into the final price. This conclusion put all Parties in the three last categories mentioned by the EEC on an equal footing and only the EEC's practice fell in a separate category. The VAT question had been discussed at many Committee meetings before the formation of the Panel; if the EEC had wished to raise the points it now raised, it would have been free to do so then. In his opinion, this type of discussion was inappropriate at this stage.

7. The representative of the European Economic Community maintained that all categories of Parties, except those who included taxes without exemption for government procurement, were on an equal footing. It could therefore be argued that only those who included taxes found themselves in a particular position.

8. The representative of Finland, on behalf also of Norway and Sweden, recalled that the Nordic countries had consistently held the view that the VAT and similar taxes should be included in the price estimate made by the

procuring entity when a purchase was being contemplated. They considered that the text of the Agreement was quite clear in this respect. Furthermore, a uniform practice was necessary for balancing the operation of the Agreement. Therefore, the Nordic countries were satisfied with the findings and conclusions in the report and would welcome a recommendation by the Committee on those lines. However, if for practical reasons it was difficult for the EEC to adapt its practice to the requirements of the Agreement, the Nordic countries would be willing to consider a solution which would allow for some time. This should not, however, be interpreted as willingness on their part to depart from their position on the substance of the matter. It was legitimate to suggest negotiations on any aspects of the Agreement since the improvement negotiations had been launched. If the EEC wished to make proposals, for instance on the exemption of the VAT for threshold purposes, it had the right to do so. However, this could not mean that the EEC in the meantime was free not to adapt its practice to the Agreement. The Nordic countries could not accept a Committee statement to the effect that the Panel had only presented one possible interpretation.

9. The representative of Canada stated that his authorities had considered that the Panel's findings were well founded and reasoned; they fully supported the conclusions in paragraph 28 of the report and considered that the Committee should also accept this interpretation. His authorities equally felt that, in the first case to have been brought under the dispute settlement procedures of the Agreement, it was particularly important that the Committee acted quickly to implement the Panel's findings. He therefore supported a Committee recommendation that the EEC bring its practices into conformity with the obligations of the Agreement as interpreted by the Panel. He recognized that practices might vary but, in his view, this did not alter the conclusions of the report. He recalled that the Panel had found that if entities were exempted from paying taxes, such taxes could be excluded from the contract value. The Committee should consider sympathetically any problems which the EEC might have in implementing a change of practice in the near future. He failed to understand, however, what the EEC implied in proposing to put all Parties on an equal footing. It seemed to mean that, if a Panel had come to a clear-cut conclusion, the Committee should rectify the situation without the Party being in contravention of obligations having to change its practices.

10. The representative of the European Economic Communities noted that delegations seemed to believe that the only possible recommendation was to include taxes. His delegation did not agree with this approach. Other possibilities existed which would place all Parties in the same situation with respect to the number of tenders they opened to international competition. The inclusion of the VAT would create an imbalance in this respect vis-à-vis those Parties which did not have a tax and those who exempted taxes. A recommendation to exclude the tax element was the most logical situation and the only situation which would create an identical situation for all; only one category of Party would then have to amend the present practice.

11. The representative of the United States held that measures were required only from the one category that, for the purposes of determining threshold value, excluded taxes which later entered into the price of the purchase. He did not see why a Party which acted inconsistently with the

Agreement should not have to change its practice. If the EEC had problems in implementing the Panel's findings, this was a matter which could be discussed. He noted, however, that the only Party which objected to the Panel's findings was the one against whom the Panel had found.

12. The representative of Japan stated that his delegation fully supported the Panel's interpretation of the Agreement and the report's adoption at the present meeting.

13. The representative of the United Kingdom for Hong Kong stated that if a government entity invited tenders for a certain contract, and knew that it would have to pay taxes on it, then the contract price at the time of publication should include the tax element. For this simple reason his delegation supported the findings and conclusions of the Panel.

14. The representative of Switzerland stated that his authorities agreed with the Panel's conclusions and hoped the report could be adopted at the present meeting.

15. The representative of Austria stated that his delegation had a flexible position in regard to the substance of the matter, as could be seen from comments made already in 1981. He considered that the Committee should aim at a uniform interpretation which in practice would put each Party on an equal footing and not focus on procedural questions and technicalities.

16. The representative of the European Economic Communities agreed with the representative of Austria in that it was the uniform solution which counted and not questions concerning procedures. His delegation was ready to co-operate towards this aim. However, it was not acceptable for it to take the interpretation of a three-member Panel as the solution as there were other and more feasible possibilities given, among other things, the difficulties which the EEC would have in changing a long-standing practice.

17. The representative of the United States stated that, with the exception of the EEC, a uniform interpretation already existed. This interpretation did not leave the EEC with only one solution in terms of how to bring its practice into conformity with the Panel report, because its member States might either include taxes when calculating the value of contracts for threshold purposes or they might exempt their entities from payment of the tax.

18. The representative of Singapore stated that his Government supported the findings of the Panel and recommended that the Committee act upon the Panel report as soon as possible, with the objective of promoting confidence in the dispute settlement system and finding a genuine solution to the existing problem. He informed the Committee that in his country taxes were not levied on government procurement.

19. The representative of Israel noted that his country had not been a member of the Committee when the Panel had been established. Since there was a wish that each member pronounced itself in the matter he stated that his delegation appreciated the wish to have uniformity of practices, but as a new member it was most interested in the precedent which the first Panel case under the Agreement might constitute. Therefore, the matter should be

solved in accordance with usual GATT practices in order to preserve the rights of each Party.

20. The Committee took note of the statements made.

21. After a short discussion of how to proceed, the following conclusion was agreed upon:

"The Committee members, with the exception of the EEC, agreed that the report should be adopted and a recommendation made that the EEC bring its practices into conformity with the relevant provisions of the Agreement. The EEC stated that the Committee should not be limited to considering one interpretation of the Agreement and proposed that all interpretations which would achieve uniformity of practice should be examined by the Committee before a final conclusion is reached."

22. The Committee further agreed to revert to this question at its next meeting.