Committee on Government Procurement

MINUTES OF THE MEETING HELD ON 8-9 JULY 1981

Chairman: Mr. V. Segalla

1. The Committee on Government Procurement held its third meeting on 8-9 July 1981.

2. The agenda of the meeting was adopted as follows:

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3. Under the procedures for the participation of observers (GPR/M/1, Annex I), the Committee considered a request from the delegation of Thailand and agreed to invite this delegation to follow the proceedings of the Committee in an observer capacity.

A - Accession of further countries to the Agreement

4. The observer for the Philippines stated that the Philippines had always viewed the Agreement on Government Procurement as a singular achievement of the participating countries, to establish for the first time an international framework for the conduct of government procurement based on the principle of most-favoured-nation treatment between domestic suppliers and products vis-à-vis foreign suppliers and products, aimed at ensuring greater international competition. In this light the Philippines was seriously considering acceptance of the Agreement and was pleased to inform the Committee that exploratory bilateral talks had been initiated with some of its Signatory trading partners. Although a cursory view of the lists of entities and items submitted by the Signatories to the Agreement indicated that only few and insignificant items were of interest at the moment, the Philippines' view was that acceptance of the Agreement would in the long run ensure participation in the government procurement processes of the Code's Signatories on items of potential interest to it. It hoped, therefore, that the Signatories - particularly Philippines' trading partners - would look at its interest as a part of the whole negotiation package in the context of the Tokyo Round and would view the Philippines' initial efforts favourably, considering that significant changes had taken place recently in the Philippine trade régime, including the liberalization of tariff and monetary policies, involving items of actual and particular interest to most developed countries. Should the Philippines finally decide to accept the Agreement, however, such acceptance would be along the same line as that made by Singapore with regard to the commitment of the ASEAN countries under the ASEAN Preferential Trading Arrangement to accord each other a preferential margin of 2.5 per cent or $40,000 in respect of international tenders for government procurement of goods and auxiliary services from untied loans.

5. The representative of the United Kingdom on behalf of Hong Kong, recalling that his delegation had on many occasions stated that developing countries should be encouraged to accede to the Agreement, welcomed the statement of intention made by the observer of the Philippines and hoped that the Parties with whom bilateral talks were being held would show reasonableness and understanding in these talks.

6. The representative of the European Communities expressed great interest in the Philippine statement. The EC stood ready for their part to start bilateral discussions.
7. The representative of Singapore also welcomed the Philippine statement and announced full support for its efforts to accede to the Agreement.

8. The Committee took note of the statements made. The Chairman expressed the wish that the Committee would soon have a new member.

B - Implementation and administration of the Agreement

9. The Committee continued its examination of national implementing legislation based on information members had submitted in the GPR/3/Add-and GPR/4/Add- series.

10. The representative of the United States in a general statement remarked that his delegation was generally satisfied with the measures Parties had taken to implement the Agreement. However, as it remained to be seen how laws and regulations would be followed in practice, the Committee would have to monitor developments on a continuous basis.

11. The Committee then took up the implementation and administration of the Agreement in a member-by-member order. The following minutes cover clarifications and in a number of cases additional information sought or given at the meeting to the extent that such data had not been provided previously, either in written submissions or in meetings.

(i) Austria (GPR/4/Add.10)

12. The representative of Austria informed the Committee that the Austrian Parliament had unanimously approved the Agreement. Upon ratification by the Federal President in the near future, the Agreement would be published as a federal law. No implementing legislation was required since the Agreement would have direct legal force. However, as explained in GPR/4/Add.10, a commission had discussed the need to modify existing regulations to provide clear guidelines to procurement officers. This work was finished and awaited formal approval by the Council of Ministers, whereafter the draft regulations would become a public document and be submitted to the Committee. For the moment, however, his delegation had no documents to submit in the GPR/3/Add.series. A law which would not be before Parliament this year, was also being drafted with the aim of achieving uniformity in government procurement; this might entail certain changes in the present regulations. However, such a law would conform in all respects to international agreements, in particular the GATT Agreement. He added that several entities had published invitations to tender in the "Amtsblatt zur Wiener Zeitung" under the heading "Public invitation of tenders". The first such publication had appeared on 5 April 1981.
13. The representative of the United States reserved his right to revert to any further submission by Austria at a future date.

(ii) Canada (GPR/3/Add.4; GPR/4/Add.3)

14. Replying to a question from the representative of Sweden, the representative of Canada stated that an information circular had been sent to federal entities not covered by the Agreement; the precise date could be provided if necessary.

15. As to the so-called "Late Tender Rules" of the Department of Supply and Services to the effect that foreign suppliers must mail their tenders 96 hours in advance of tender closing, the representative of Canada pointed out that irrespective of the receipt date, tenders mailed abroad within that limit would be assumed to have met the tender delivery date. Tenders posted from Canada, whether from Canadian suppliers or agents of foreign suppliers in Canada, would have to be received prior to the close of bids.

16. The representative of Sweden also took up the purpose of the type of information that should be given in notices of proposed purchases. The list drawn up (page 44 of GPR/3/Add.4) did in his opinion not contain information as to whether the procedure was open or selective, as required by Article V:4(b) of the Agreement. The representative of Canada replied that Canada used a selective tendering system, as implicitly borne out by the procedures described in GPR/3/Add.4. In accordance with Article V:6, the "Canada Gazette" had on 17 January 1981 provided this information.

17. On information in tender documentation provided to suppliers the representative of Sweden noted that Article V:12(i) and (j) of the Agreement were not reflected in Canadian legislation, viz. terms of payment and any other terms or conditions. The representative of Canada stated that Canada did not charge for tender documentation.

18. Another provision to the effect that "tenders shall normally be submitted on approved standard forms" was also questioned by the representative of Sweden. The representative of Canada replied that such forms helped the procurement process but that tender documentation provided in another form would be accepted provided all required information was contained therein.

19. Concerning "Single Tendering Exceptions" the representative of Sweden felt that the requirement in Article V:15(e) ought to have been included in the Canadian legislation. The representative of Canada replied that this addition had been felt redundant but, like all the other points raised by the Swedish delegation, could, if necessary, be formally added to GPR/3/Add.4. Upon the wish expressed by the representative of Sweden, he stated that the Canadian submission would be duly supplemented on this particular point.
20. With respect to overall EC implementation, the representative of the United States noted a continued failure to meet the 30 day time limit for accepting tenders. He hoped the necessary measures would be taken to improve performance in this particular area. Secondly, many of the announcements of tender continued to be quite vague in the description of products to be procured. Here again, he hoped that remedial measures could be taken.

21. The representative of the European Communities recognized that the matters raised were of a certain importance because they related to the overall transparency provisions of the Agreement. The GATT Agreement had introduced certain changes in the time-limits of the EC Supplies Directive of 1978 and although the member States had been as diligent as possible in order to make these changes, the situation was not entirely satisfactory. The Commission was considering various measures that might be necessary for full compliance on this point. The EC were not specifically aware of the problem raised concerning product description, but were prepared to look into the matter.

(a) Belgium

22. Responding to questions by the representative of the United States as to whether there was a specific legal requirement to notify unsuccessful bidders within seven working days, the representative of Belgium stated that the general Belgian regulations met most of the GATT Agreement's requirements and that therefore on this point no specific requirement was laid down in the instrument implementing the Agreement. Under the general award procedures, once a bid had been accepted, a document containing classification of bidders would be transmitted to bidders who so requested. Under the general tendering procedures, the bidders had to be informed that an award had been designated and had the right to ask for the motivations for the choice made. The general regulations would be submitted to the secretariat.

23. In reply to questions by the representative of Sweden concerning the way proposed purchases were advertised, the representative of the European Communities explained that the greater part of notices falling under the Agreement were published in the Official Journal of the EC and were identified as such. Belgium had retained the facility to publish contracts between 140,000 E.C.U. and 200,000 E.C.U. in a national publication, and here again identification was required. On another point concerning the opinion of the Council of State - referred to in GPR/4/Add.9, item 1(a) - the answer had subsequently been furnished in GPR/3/Add.10 concerning Arrêté royal of 12 May 1981. The representative of Belgium stated that the contact point would be designated in each publication of tender notices. With regard to the functioning of the complaint and review procedures he did not see any particular problems in practice as the
possibilities for recourse were numerous. Concerning compliance with Article I:2 of the Agreement, the EC had informed entities not covered through a letter addressed from a commissioner to each member State; this letter would in the case of Belgium be reflected in a circular to be published in "Le Moniteur Belge".

24. Concerning the implementation of Article I:2, the representative of the European Communities made the general remark that the letter referred to had been sent to all member States authorities drawing their attention to the terms of the said Article and requesting each authority to take the necessary measures within their national competence to ensure that the content of that letter was passed on to non-covered entities.

(b) Denmark

25. The representative of the United States raised the question whether bids by telephone were permitted. The representative of the European Communities explained that the circular reproduced in GPR/3/Add.10 covered both the EC Directive governing relations between EC member states, and the GATT Agreement. The statement relevant to the GATT Agreement (second paragraph, page 28), showed clearly that bids made by telephone had to be confirmed by letter and be received by the entity before the expiry of the time-limit in order to be valid. The representative of Denmark confirmed this explanation.

(c) France

26. In reply to the representative of Sweden who sought information additional to that provided in GPR/4/Add.9, (page 6, item 1(f)), the representative of the European Communities stated that the Official Journal of the EC appeared 4 times per week. The representative of France stated that the Bulletin officiel des annonces des marchés publics was issued once per week.

27. The representative of the European Communities stated - in response to the United States - that the text of Decree No. 79-98 of 12 January 1979 would be submitted to the Committee.

(d) Federal Republic of Germany

28. The representative of Germany explained to the representative of Sweden that in case of doubt, purchasing entities were required to select the highest estimate of a contract (GPR/4/Add.9, page 4 (item 1(d))) in order that the Agreement might cover as many purchases as possible. On a point raised by the representative of the United States, it was his delegation's view that the German legislation was in conformity with Article VI:3 in laying down that seven working days after the award of a contract, a tenderer might consider his offer as not having been accepted if he had not been informed otherwise. Article VI:3 required information and had as its object equal treatment of tenderers; this procedure amounted to the
same thing. The representative of the United States stated that the Agreement required written communication or publication and noted that if the award date was not known, tenderers had no basis for knowing when the seven days had expired. He therefore continued to question whether this German practice was in full conformity with the Agreement.

(e) Ireland

29. The representative of Ireland, replying to questions by the representative of Sweden, stated that the selective tendering technique was used in Ireland in accordance with the EC Directive. The circular referred to in GPR/4/Add.9 (page 7 (item 1(f)) and reproduced in full in GPR/3/Add.10, (pages 54-57), was not available to the general public but was an internal instruction from the Ministry of Finance to the purchasing departments. Irish entities covered by the Agreement were required to inform authorities under their control in relation to Article 1:2. Subsequent to action taken at Community level their attention had again been drawn to Article 1:2, reiterating the need for information to non-covered authorities as well as information in due course about relevant action taken.

(f) Italy

30. The representative of the United States sought clarification as to the criteria for being inscribed in bidders' lists and the publication of such lists. The representative of Italy observed that permanent lists were not obligatory. The circular of the Ministry of the Treasury was not an implementing circular because the Agreement was directly applicable by virtue of the Treaty of Rome. It gave, however, a number of precisions and on this particular point provided, inter alia, that suppliers should be included in any such lists within a reasonable period of time and be informed of decisions in this regard (Reference: GPR/3/Add.10, page 62 (item 2(b)). Each department used its own official bulletin and the criteria were established by each of the entities concerned, with no overall coordination. However, the circular provided that all applicants should be inscribed; exceptions would evidently be made for certain cases specified in the Agreement itself. The representative of the European Communities confirmed that until 15 June 1981, four contract notices put out under the Agreement had been published in Italy. The representative of Italy added that this figure should be seen in the light of the delay which for certain reasons had occurred in adopting the EC Directive.

31. The representative of the European Communities stated that he would have to come back to a point made by the representative of the United States, concerning the Agreement's requirements that publications utilized for the annual publication of information on permanent lists of suppliers in the case of selective tendering procedures should be listed in Annex III to the Agreement. Finally, the representative of Italy, in reply to the representative of Canada, stated that the Italian submission in the GPR/4/Add-series would be made in the near future.
32. The representative of the European Communities stated that, as requested by the representative of the United States, the circular issued by the Ministry of Public Works dated 22 September 1980 would be submitted to the secretariat.

33. In reply to the representative of Sweden, the representative of the European Communities stated that Luxembourg had published three contract notices under the GATT procedures in the period up to 15 June 1981. He would come back to a question concerning the establishment of contact points. To a final question concerning non-discrimination, he referred to the reply given at the last meeting (GPR/M/2, paragraph 42).

34. To a clarification sought by the representative of the United States concerning a Dutch reply to the checklist (GPR/4/Add.9, page 10, item 1(f)), the representative of the Netherlands stated that regarding delivery of products, a distinction had been made between the various phases of the procurement process. The GATT Agreement, directly applicable in the Netherlands, governed the procedures before award. The actual contract itself was covered by the legislation indicated on page 10 of GPR/4/Add.9. He added that the Government in procuring goods was acting as a private party subject to Dutch law.

35. The representative of Canada, referring to information given that the United Kingdom did not maintain permanent lists of qualified suppliers in the sense of Article V (GPR/M/2, paragraph 44), noted that a so-called accelerated procedure existed which, as his delegation understood it, had often the effect of preventing consideration of bids from companies which had not previously supplied to the Government. This was in his opinion tantamount to having a list of qualified suppliers in that a satisfactory delivery performance was required in order to be considered. Although this system was not unique to the United Kingdom, he understood that it accounted for twice as many contracts as in other EC member States. He therefore appreciated information on the operation of this procedure.

36. The representative of the European Communities recalled that Article V:10(d) did permit urgency procedures under certain circumstances. He fully understood the concern expressed about difficulties to become qualified under the accelerated procedure. It was the understanding of the EC including the member States that recourse to this procedure should be regarded as an exception. The question would be looked into with the member States; he had no figure which could compare the United Kingdom with other members. The representative of the United Kingdom added that under the guidance issued (GPR/3/Add.10, page 101) entities were clearly
advised to give adequate time for tenderers and that the periods mentioned were minimum periods which might be extended (idem, page 102). While he was not in a position to confirm a percentage figure which had been quoted, he questioned whether it could be considered as extraordinary. The issue raised would be looked into in the course of the Treasury's close watch on the way in which entities operated.

37. The representative of the United States observed that the accelerated process seemed to have the characteristic of a permanent tendering procedure. The matter might be looked into in the future.

38. Concerning procedures for the hearing and review of complaints, where the representative of Sweden reverted to replies furnished in GPR/4/Add.9, the representative of the European Communities recalled that the EC as such was signatory to the Agreement, and that as a matter of procedure complaints should be notified to the delegation of the Communities in Geneva. The member States would subsequently be brought into the process. The same formal procedure would apply - in reverse order - if a complaint was brought by an EC member State against another Party. The EC would submit to the Committee the Community's procedures on this matter as soon as possible.

39. Responding to other questions by the representative of Sweden, the representative of the United Kingdom stated that an information centre had not yet been established. On the question of informing non-covered entities, he felt sure that this had been done although it was in a number of cases done by entities rather than the Treasury, and exact dates could not be given.

40. The United Kingdom delegate then addressed questions raised by the representative of the United States on priority suppliers (GPR/3/Add.10, page 101, paragraph 29) and the meaning of the reference to contracts that might be kept confidential (idem, page 103, paragraph 39). The priority suppliers referred to were prison workshops and sheltered workshops for severely handicapped people, falling under Article VIII of the Agreement. The paragraph dealing with confidentiality contained information to unsuccessful tenderers about the successful tenderer who might take legal proceedings if certain information was divulged without his permission. Even the existence of an awarded contract might fall into that category, for instance under the exceptions clause of Article VIII of the Agreement.

41. In reply to the comments made by the representative of the United Kingdom, the representative of the United States expressed concern over a situation where a contract, otherwise falling under the Agreement, would be kept confidential. He felt that the explanations given were somewhat reassuring and hoped the question was one of drafting. The representative of the United Kingdom emphasized that the language appeared in the context of seeking the
consent of the successful tenderer and was not aimed at avoiding the publication of contracts.

(iv) Finland (GPR/3/Add.7; GPR/4/Add.6)

42. In reply to a question by the representative of the United States as to whether Article 1 of the Finnish Decree (GPR/3/Add.7, page 2) implied that leasing was included in the Agreement, the representative of Finland replied that the term "hiring" used in that Article did indeed cover leasing. However, this provision only concerned the definition of procurement as such and was without prejudice to his delegation's position as to whether leasing was or was not covered by the Agreement. With regard to another US question about the purpose and application of Article 7(1) and (2) of the Decree (GPR/3/Add.7, page 3), he explained that these provisions related to a situation where it was impossible for the authorities to judge whether the tenderer would be able to meet his obligations. Article 7(1) related to tenders which, because of lack of precision, could not be properly evaluated and therefore could not be accepted. While noting in general that the Decree applied to all procurement in Finland and therefore might contain provisions which were more flexible than permitted under the GATT Agreement, Finland was willing and able to abide by the latter, including its Article V:14(e), which in fact existed for the same purpose as both Article 7(1) and (3) of the Decree.

43. The representative of Finland said that the reason for the wording concerning single tendering in Article 6, (GPR/3/Add.7, page 7), taken up by the representative of the European Communities, was that it covered all government purchases, whether covered by the Agreement or not. The relevant provision was contained in the Directive by the Ministry of Trade and Industry (GPR/3/Add.7, page 16 (item c)), requiring specifically that the conditions of Article V:15 should apply in single tendering procedures. Concerning information to non-covered entities, Finnish local authorities, i.e. municipalities, were organized in two associations; the Government had informed these organizations of the Agreement. Information had also been given by way of articles in the relevant press and through the publication of the Agreement in "The Collection of the Statutes of Finland".

(v) Hong Kong (GPR/3/Add.6; GPR/4/Add.7)

44. Replying to questions by the representative of Sweden, the representative of the United Kingdom on behalf of Hong Kong stated that the Hong Kong Government Gazette identified tenders as falling under the GATT Agreement. The Government's Stores Regulations would be amended as necessary, but at the present moment his delegation did
not know the exact intention in this regard. The amendment to the Financial Circular had been issued and made available to the secretariat. The issuance of this Circular in April 1981 had in effect also taken care of the information requirements of Article I:2 as it had been sent to all heads of government departments who might be involved in procurement. Further clarifications relating to lists of qualified suppliers (reply 2(c) in GPR/4/Add.7), would be given at a later stage. The same applied to a question raised by the United States delegation which wanted to know the reason why suppliers who did not present tenders after having obtained tender documentation were subsequently removed from the suppliers lists. On this last point, the representative of Hong Kong noted that such removal did not seem to be automatic.

(vi) Japan (GPR/3/Add.5; GPR/4/Add.8)

45. Reverting to a matter his delegation had taken up at the last meeting (GPR/M/2, para. 31), the representative of Canada sought clarification and the representative of Japan confirmed, that Japanese entities would accept applications from suppliers for the verification of qualification at any time throughout the current financial year, ending 31 March 1982. The Japanese authorities remained confident that the normal Japanese procedures for qualifying suppliers were fully in conformity with the Agreement. They had taken this exceptional and temporary measure upon request from foreign governments and suppliers and in view of the fact that foreign suppliers might not have been fully familiar with the system and procedures in Japan. The measure taken should be seen as a practical solution without prejudice to Japan's position on the interpretation of the relevant provisions of the Agreement.

46. The representatives of Canada and the United States welcomed the measure taken and expressed the hope that it would become a permanent feature of Japan's procurement system.

47. The representative of the European Communities also thanked the delegation of Japan for the efforts made to settle the question for the current year. However, he did not share Japan's opinion that the measure should remain exceptional and temporary in nature. He felt that in accordance with the Agreement the lists of qualified suppliers should be open at all times and expressed the hope that the measure would be prolonged for the years to come. If not, his delegation reserved its right to come back to the matter.

48. Three questions by the United States were replied to by the representative of Japan as follows. Concerning Article IV of the Ministry of Finance Ordinance, it was his understanding that while not specifically required, the address of the official in charge and the department to which he belonged would be given in a GATT
language and was already being included by entities in their notices. Secondly, the award procedures of Article 29-6 of the "Laws and Regulations Relevant to the Cabinet Order" provided for the special case in which the entity deemed that the terms of the contract could not be performed adequately by the foreign supplier because his price was too low. This provision should be seen in the light of Article 86 of Cabinet Order of 1947 stipulating that when it was deemed that the terms of the contract could not be performed adequately, the official in charge of contract affairs had to investigate the matter; if he also questioned the ability of the supplier to perform adequately, the written opinion of a particular body dealing with contract examination had to be sought. It was therefore no question of the procedures being more lenient than the Agreement. Thirdly, on the reason why Article II of Cabinet Order No.300 excluded purchases when the manufacturer used the entity's own materials, information would be requested from his authorities. However, in his delegation's understanding, this was a question of procurement of services. The representative of the United States commented on this latter point, saying that the source of the materials used in production was irrelevant to whether the procurement of a manufactured product was a service contract or not.

49. The representative of the European Communities took up a problem which he thought was of general interest, namely the grading of bidders in three categories. In descending order less contracts were allotted in value terms to each of these categories. The conditions for obtaining status under category A seemed not to be in conformity with the principle of non-discrimination because the system was based on points given for the number of years the bidding firm had been established in Japan, for the annual average turnover of business in Japan, and for the capitalized value of assets in Japan. These requirements would ensure that a substantial part of EC bidders, who his delegation felt should be entitled to bid in Japan, would be excluded from category A-bidder status. This constituted a serious barrier not only to suppliers established in Japan but even more so to new or potential entrants to the Japanese market. The EC would have serious problems with accepting this procedure and wished to obtain the full facts in this regard. He therefore asked the delegation of Japan to furnish the necessary information on the subject.

50. The representative of Japan replied that the concern expressed and the request for information would be passed on to his authorities. It was his view that entities had a legitimate right under the Agreement to determine qualifications for the participation in tenders and to employ and operate their own methods in this regard. As far as his delegation was aware these methods were employed and operated in Japan without discrimination between domestic and foreign suppliers. There was thus no discrepancy vis-à-vis the obligations of the Agreement. In any event, since each entity had its own method, foreign suppliers who had specific problems would be well advised to get in direct contact with the entity concerned.
51. The representative of the European Communities looked forward to receiving supplementary information as indicated, but added that a priori certain conditions linked to turnover, assets and residential requirements in Japan acted as barriers to the development of certain markets; the conditions used in the process of categorization seemed to his delegation to be in contravention of Article V:2(b).

52. The representative of the United States joined the EC delegation in looking forward to receiving more information on Japan's qualification procedures. He went on to share with the Committee certain matters concerning implementation by Japan which were being pursued bilaterally. First, if Japan National Railways was not satisfied with offers received, it would immediately ask the tenderers present at the opening to submit new offers on the spot. If this did not lead to a satisfactory solution, J.N.R. would enter into negotiations with individual suppliers. His delegation questioned whether this practice was in full conformity with the Agreement. Secondly, in the case of recurring purchases Japanese entities were permitted to allow a tender to be put out with only ten days to respond. While this was a minimum requirement and while entities did not have to follow it, it was being used with rising frequency. He suggested that the provisions of the Agreement that allowed for shortening of deadlines in the case of recurring contracts also be read in conjunction with the provisions requiring that the deadlines be sufficient to allow participation by foreign bidders.

53. The representative of Japan stated that the J.N.R. was the only Japanese covered entity practising so-called "fair consultations". This was done in specified cases, such as when the submission of samples was necessary, or when the quality of material presented by the applicant offering the lowest estimated price was found to be lower than the quality proposed by other suppliers, or when in unit price competition the volume offered by the applicant with the lowest estimated cost did not reach the volume required. Again on this point, his delegation would refer the matter to its authorities. With respect to the second concern expressed, he recalled that the Agreement contained no specific provision limiting the minimum period for the receipt of tenders in case of contracts of a recurring nature. He drew the attention of the Committee to the fact that ten days was a minimum requirement and that in addition, the Ministry of Foreign Affairs had encouraged all entities to publish notices of recurring purchases as far in advance as possible.

54. The representative of the European Communities made the further remark that rapid access to documentation was a matter which his delegation would also like to pursue in bilateral discussions, given the fact that time-limits were important and often rather short.
55. The representative of Japan remarked that to his knowledge the only problem said to exist—which ought not to be a problem in a country of Japan's size—was linked to the delegation of procurement power to branches in various parts of the country.

(vii) Norway (GPR/3/Add.8; GPR/4/Add.5)

56. The representative of Norway replied to questions put by the representative of the European Communities as follows: (i) The circumstances in which public notices were not used had been specified in the Regulation on Government Procurement as well as in the Guidelines for the Implementation of the GATT Agreement; as indicated in GPR/3/Add.8, (page 13 (section 20)), exceptions from the requirement of public notice might be made in cases of single tendering covered by Article V:15 of the Agreement; (ii) the Central Purchasing Office was the main purchaser for ministries and most of the other centrally-located State entities for office materials such as stationery, office furniture, typewriters, etc.; (iii) negotiations concerning a final contract were permitted in cases corresponding to those spelt out in Article V:14(g) and 15 of the Agreement; (iv) with respect to the requirements of Article I:2 the Ministry of Industry had arranged an information meeting with all ministries to inform them about the objectives and principles of the Agreement and had also asked ministries responsible for local and regional authorities to transmit information to these authorities; (v) exceptions from the coverage of the Agreement under Article VIII were made for purchases of raw materials and products indispensable for national security. The EC delegation asked in respect of which products the Article was applied this way. The representative of Norway explained that the a priori exclusion related only to products which were not covered by the Agreement.

(viii) Singapore

57. The representative of Singapore informed the Committee that the establishment of detailed mechanisms for the implementation of the Agreement had met with certain difficulties which he hoped would be solved soon. His delegation was nevertheless in a position to make a submission to the GPR/3- and GPR/4-series for circulation to the Committee in the very near future.

(iv) Sweden (GPR/3/Add.2 + Suppl.1; GPR/4/Add.1)

58. In reply to questions by the representative of the United States concerning Article 19 of SFS 1980:850 (GPR/3/Add.2, page 8) and Article 10 (idem, page 5), the representative of Sweden explained that an agency might accept tenders subject to additions, deletions or reservations (to be accepted by the tenderer) not provided for in
the tender if, for instance, the bid was not in accordance with the
tender documentation. Such additions etc., had to be made before the
deadline for the submission of bids had passed. A tenderer not
liable to the VAT was required to provide information regarding the
tax because in the past a few cases had occurred where bids were
submitted by companies exempt from the VAT; this regulation which
had not been used in the last ten years had been inserted in order to
be able to compare bids in a non-discriminatory fashion. He then
turned to a question from the European Communities in relation to
Article V:3 concerning invitations to tender without advertising. He
explained that the provision referred to was intended only for
entities not covered by the Agreement. "GATT entities" were -
according to the same Article of the Ordinance - obliged to advertise
their tender invitations.

(x) Switzerland (GPR/3/Add.9; GPR/4/Add.2)

59. The representative of Switzerland replied to a question by the
representative of Sweden that the letter which was to be sent from
the Federal Council to the cantons was still in draft form. It was
expected to be signed in the autumn.

(xi) United States (GPR/3/Add.1; GPR/4/Add.4)

60. In reply to questions from the representative of Sweden, the
representative of the United States stated that it was not necessary
to be on a bidders' mailing list in order to be able to tender.
Neither should it be seen as any significant advantage to be on such
a list because they were simply used as supplementary means for
advertisement. Any firm could get on the list, but this did not mean
an assurance of automatic receipt of documents, not to speak of
preferential treatment in this regard. His authorities would examine
whether the existence of these lists could be made better known;
this might increase competition and be of interest to the US
Government. Concerning hearing and review of complaints, a
complainant should first address the contracting officer handling the
transaction in question and, if not satisfied at that level, could go
up to the head of the Department. Subsequently, the complainant
could seek a ruling from the General Accounting Office as to whether
the practice followed conformed to federal regulations, or seek
relief through the court system, or both. Article 1:2 had been
complied with by a letter from the US Trade Representative to all
State authorities regarding the benefits of the Agreement. In
addition, federal entities not covered by the Agreement had been
notified, and they were aware of the benefits through their
participation in the trade policy formulation process, their access
to Federal Procurement Regulations and to the Annual Report of the
President on Trade Agreements. Two months ago, the USTR had met with
a group comprising all purchasing entities to discuss the Agreement.
in detail. With respect to the expiration date of 1 January 1983 for the Federal Procurement Regulations (GPR/3/Add.1, page 9), he explained that the reason for this was the common US practice to make regulations temporary - for a maximum of two years - in order that interested parties might give comments which could subsequently be taken into account. He expected that the temporary regulations would become permanent in the near future.

61. The representative of the European Communities requested clarification concerning the significance for Parties of the inclusion in the United States submission of certain matters such as the Buy American Trade Agreements Act, Balance-of-Payments Programme Provisions and certain NASA regulations (GPR/3/Add.1, pages 25-36). More specifically he asked in what sense Parties were "designated" as "qualifying" countries for the purposes of the legislation referred to; this question was relevant, inter alia, to the rule that 50 per cent of the "participating/designated country end product" had to be manufactured in that designated or participating country or in the United States to qualify for waiver from the Buy American preference.

62. The representative of the United States replied that he would have to revert to the clarification sought.

63. Under this item of the agenda the representative of the European Communities took up the question of the interpretation of Article VI:6. One member State of the EC had been approached by another Party with the request that information referred to in this provision should be supplied automatically and in all cases to another Party if the information was of concern to that Party. His delegation was somewhat concerned about this request; the provisions of Article VI did in its view apply only after certain procedures had been followed without satisfaction on the part of the Party seeking information. The EC were not willing to give a favourable reaction to the request made.

64. The Committee took note of the statements made and agreed to retain this item on the agenda.

C. Leasing

65. The Chairman recalled the exchange of views on the matter which had taken place at the two previous meetings and drew the attention of delegations to working documents submitted by the delegations of the United States, Sweden, and the European Communities.

66. The representative of the United States introduced his delegation's submissions (GPR/W/3 and 4) of which the first, containing a declaration on leasing, had been put forward in response to requests made at the April meeting of the Committee.
67. The representative of the European Communities recalled that his delegation had approached this item as one which related to the scope of the Agreement and that if taken up at future meetings, the agenda title ought to reflect this. He then introduced the working paper of his delegation (subsequently issued as GPR/W/6), referring particularly to the possible distinction between contractual arrangements which were covered by the Agreement and those which were not. The criterion the EC suggested should be used was whether the transaction in question generated obligations between the parties to transfer ownership of the products concerned. Turning to the United States note on scope of coverage (GPR/W/4), he stated that the concept of lease with a commitment to buy, dealt with therein, was unknown to his delegation; he felt this was a financing arrangement or a hire purchase agreement which in the EC's view represented an agreement for the unconditional transfer of ownership. Such a transaction - however seldom it might occur at central government level - would, because of its nature, fall within the terms of the Agreement. A lease with an option to buy, however, would under the EC's criterion fall outside the Agreement in so far as there was no binding obligation to change ownership, and Parties had therefore no obligation to publish a notice. The EC had no fixed view on what the situation was once the entity exercised the option to buy. However, it appeared that this problem was of little practical importance because at that stage the residual value of the goods would in most cases probably not exceed the threshold. Concerning the proposed draft declaration (GPR/W/3), his delegation appreciated the efforts made by the US delegation to respond to requests from other members but emphasized that the EC, while supporting the principle that there should be no circumvention of obligations under the Agreement, would not be able to subscribe to such a declaration: firstly, leasing did not fall within the scope of the Agreement, and, secondly, a declaration of this sort was not appropriate. He failed to see why it was necessary to emphasize one of many possibilities of circumvention, in particular since remedies were available under the Agreement itself.

68. The representative of Sweden recalled his delegation's view (as reflected in GPR/W/5) that leasing was not included in the Agreement. Sweden did, for practical purposes, issue tender invitations containing the option to lease. This did not mean, however, that in case the entity chose to lease, leasing would be considered as falling under the Agreement. His delegation was in a position to support the draft declaration proposed by the United States.

69. The representative of Canada agreed that contracts which involved a purchase obligation did fall within the Agreement, but that pure leasing or rental contracts did not. He agreed with the Swedish suggestion that the matter might appropriately be discussed
in the context of the review negotiations foreseen in the Agreement. Like the Swedish delegation, Canada could accept the proposed draft declaration.

70. The representative of the United States felt that a certain agreement had emerged that leasing with a commitment to buy, also called a hire-purchase transaction, fell within the Agreement. Leasing with an option to buy might in his view pose certain problems because the residual value could, contrary to what the EC representative suggested, be substantially above the threshold, for example in the case of large computer systems. His delegation was interested to know whether Parties which pre-identified contracts as falling under the Agreement did so also in cases where the invitation to tender was for either sale or lease.

71. The representative of the United Kingdom on behalf of Hong Kong stated that leasing with a commitment to buy after a period of time was different from hire purchase which was a purchase by instalments, with the ownership passing once the instalments had been paid. If an option to buy was exercised it seemed to him there could be no question that the provisions of the Agreement applied, provided the threshold value was surpassed. It would be necessary to work out a suitable procedure which could apply at that stage. Concerning pre-identified notices either for sale or lease, he considered that if the entity decided to lease, the Agreement would not apply, but if it decided to purchase, the Agreement would have to be followed. His delegation supported the proposed draft declaration with certain changes of wording concerning the concept of "procurement".

72. The representative of Canada stated that Canadian entities also used the technique of calling for tenders for either leasing or purchasing contracts. In these cases Canada followed the procedures of the Agreement. However, it was an interesting question what the obligations, if any, were if the entity concerned awarded a leasing contract with an option to buy and that option was later exercised.

73. The representative of Switzerland stated that his delegation preferred to consider the issue of leasing in the context of the 3-year review, the result of which might be the inclusion of leasing or an appropriate declaration. However, if there was a consensus in the Committee, he would not oppose a temporary declaration.

74. The representative of Japan stated that although the definition of leasing was not clear, Japan used no such practices with a view to circumventing the Agreement. Computers, office machinery, etc., were normally procured through one year rental contracts for the purpose of avoiding possible disadvantages caused by technological innovation. This practice had been used for some time. Japan's position on the proposed draft declaration was similar to that of the EC.
75. The representative of Norway could agree to the draft declaration but (like the EC delegation) questioned whether a joint declaration was a proper form.

76. The representative of Finland recalled that his delegation's position had been expressed earlier. Leasing was not widely used in Finland although he could not state exactly to which extent. The substance of the draft declaration did not cause problems for his delegation but he did not consider this an urgent matter.

77. The representative of Singapore stated that in his delegation's view leasing was not covered by the Agreement. He had no basic objections to the proposed declaration and was prepared to examine the question with other members in order to reach a consensus.

78. The representative of the United States noted that a consensus was evolving on the substance of the draft declaration although not on the form. On this latter point he recalled that the issue had developed from a disagreement over whether leasing was covered by the Agreement. His delegation had no very strong views on the form and would reflect on the matter to see whether the aim contained in the draft declaration could be accomplished in a manner acceptable to all Parties. He encouraged other delegations to reflect further on the points raised by the United States, in particular with respect to leasing with an option to buy, and to give more information on their own leasing practices, if possible.

79. The Committee took note of the statements made and agreed to pursue the problems related to the scope of the Agreement at the next meeting.

D. Identification of contracts falling under the Agreement and treatment of borderline cases

80. The Chairman recalled the exchange of views at both previous meetings.

81. The representative of the European Communities stated that his delegation's view on these matters was well known. The consultations suggested at the April meeting had taken place, as a result of which his delegation believed that there was a general consensus on the need to identify contract notices falling under the Agreement in the interest of overall transparency. However, despite the general consensus on the principle not all Parties did in fact identify contracts. In the EC a very small number of contract notices was not identified. If a consensus could be reached on the matter the EC would take all necessary steps to ensure that all Community contract notices were duly identified where they fell within the scope of the Agreement.
82. The representative of United Kingdom on behalf of Hong Kong stated that Hong Kong identified all contracts which came within the Agreement and wished that all Parties did the same. He therefore welcomed the EC statement and hoped that all Parties would express the same willingness. He added that Hong Kong had so far - with a small administration - been very concerned with its compliance. More thought would now be given to benefits and opportunities for Hong Kong suppliers under the Agreement. The identification of contracts falling under the Agreement was most important in this respect.

83. The representative of the United States recalled the long-standing practice of United States purchasing agencies concerning full transparency in the field of government procurement. He stated that while the Agreement did not contain any requirement for pre-identification, his delegation was strongly committed to the effective functioning of the Agreement and was pleased with the consensus which had emerged. It would take some time to change present regulations, but the United States was willing and able to join in this consensus.

84. The Chairman noted that all delegations acknowledged the need for identification of contract notices published under the terms of the Agreement. He further noted that all delegations either presently identified or intended to do so; it was agreed to retain the item on the agenda for the next meeting.

E. Treatment of taxes and customs duties in relation to the threshold

85. The Chairman recalled the Committee's previous discussion of this subject and noted that the question which remained open was whether or not taxes and customs duties should be taken into account when entities determine whether a contract falls over or below the threshold.

86. The representative of the United States recalled that the Agreement was based on the value of a procurement contract. As this value had to be seen as a whole, he expressed concern with a concept which would allow the deletion of certain elements of this value, in particular the exclusion of the VAT in determining the estimated value of a contract for threshold purposes. He expressed the hope that this was a matter on which a consensus could now be reached.

87. The representative of Austria informed the Committee that a commission composed of all Austrian entities covered by the Agreement had decided to include customs duties but not taxes for threshold purposes. One argument for this had been the different treatment by Austrian entities of import taxes; some, the so-called Government enterprises like the Austrian State Printing Office, were entitled to deduct the full amount of import tax. The decision had also been influenced by the existing differences of opinion in the Committee.
If the Committee arrived at an agreement to include customs duties and taxes for threshold purposes, Austria would make all efforts to follow such a decision.

88. The representative of the European Communities, addressing the question of taxes, recalled that Article I:1(b) made no specific reference to whether taxes should be included or excluded from the value. The EC drew a distinction between the value of a contract for the purpose of the threshold and for settlement upon award by the contracting authority. The reason for this distinction was that depending on the practice of the entity or country in question, taxes might or might not be payable after the award of the contract. In order to make the system operate, it was necessary to base the prior estimation of the value of the contract on the value of the goods on the market, without reference to taxes such as sales tax, VAT, etc. This approach was intended to avoid distortion; since taxes differed from one country to another, one would have different threshold values, affecting the overall balance of the Agreement. In the EC's view this had been neither the intention of the drafters nor could it be that of the present Parties.

89. The representative of the United Kingdom on behalf of Hong Kong stated that the contract value must include taxes if they were payable because they formed part of the real cost involved and reflected the differences between countries in the contract price. He was not convinced by the arguments put forward by the EC.

90. The representative of the United States agreed with the representative of the United Kingdom on behalf of Hong Kong. He was concerned with the view that certain elements could be excluded from the threshold value because the Agreement did not provide expressly for their inclusion. Otherwise all kinds of deductions could be made, e.g. for taxes, transport charges, differences in quantities purchased. The value inclusive of taxes and duties was in the US view the real value in the market place.

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

F. Preparation of annual review

92. The Committee requested the secretariat to circulate on its own responsibility a working document containing an outline for the annual review which might serve as a basis for delegations in their preparation for the review, to be held at the next meeting. In this connexion, additional information from Parties would have to be submitted by 20 September 1981.
G. Other business

(i) Deristriiction of documents

93. Upon a proposal by the delegation of the United States, the Committee agreed to derestrict the Addenda to GPR/3 containing the basic documents concerning the implementation and administration of the Agreement by the Parties.

(ii) Consultations under the Agreement

94. The representative of the United States suggested that the Committee consider procedures for consultations under Article VII:3. He asked that the Committee consider whether the procedures under Article XXII should also apply for the purposes of the Agreement, i.e. that Parties notify such consultations and permit interested third Parties to join these consultations.

95. The representative of the European Communities stated that the procedure adopted on 12 November 1958 was in his view additional to the normal Article XXII bilateral procedure, and was an optional one. He did not see the need for an equivalent procedure in the context of the Government Procurement Agreement. The question of notifications to this Committee about consultations was a different matter from third Parties joining in such consultations. It was important that consultations remained bilateral, if a Party so wished.

96. The Committee agreed to pursue this matter at its next meeting.

(iii) Statistics

97. The representative of the United States recalled that the Committee had come close to a consensus on statistics submitted under Article VI:9(a) to the effect that they should be submitted on a country basis for all Parties, and Article VI:9(c), requiring information to be reported both on a country and entity basis. He enquired whether any further thought had been given to the matter by the EC. The representative of the European Communities stated that no further consideration had been given to going beyond the requirements of Article VI:9. The EC would obviously comply with the requirements of that provision.

98. The Committee took note of the statements made.

(iv) Certain purchasing practices by entities not covered by the Agreement

99. The representative of the European Communities made a declaration saying that the EC were very concerned about the tendency which seemed to be on the increase, at least in one signatory country, to
extend and reinforce buy-national rules and legislation in areas not covered by the Agreement, in particular at local and regional level. This tendency was against the spirit of the Agreement and created the wrong atmosphere for effective operation and implementation of it. It could furthermore endanger or impair the balance of concessions obtained with such difficulty in the course of the negotiation of the Agreement. The Communities expected that signatories employed all means at their disposal, including judicial means, to combat this tendency. Finally, the Communities reserved the right to come back to this matter at future meetings of the Committee.

100. The representative of the United States shared the concern about the existence of buy-national restrictions among non-covered entities. He hoped that new restrictions of this nature could be avoided and existing restrictions eliminated. The Federal Government tried to discourage new buy-national legislation through appropriate means. However, State authorities interpreted the spirit of the Agreement to be reciprocity and it was difficult to ask States to restrain themselves while at the same time buy-national movements were increasing in a number of Parties. He hoped that through the efforts of Parties under Article 1:2, entities in sectors such as power generating, telecommunications and transportation, would open their markets to full competition.

101. The representatives of Sweden and Canada supported the statement made by the European Communities.

102. The Committee took note of the statements made.

(v) Rectifications of a purely formal nature and minor amendments relating to Annexes I-IV

103. The Chairman informed the Committee that since the last meeting rectifications of a purely formal nature and minor amendments to the Annexes to the Agreement, proposed in GPR/8, 9 and 10 had become effective. An additional proposed rectification to Annex IV presented by Finland (GPR/11) would come into force after 30 days if no objection was raised.

(vi) Panelists

104. The Chairman stated that no new candidates had been put forward by Parties since the last meeting. Names of persons available to serve on panels have been given by the EC (in respect of six member States), Finland, Hong Kong, Japan, Sweden and United States. As Chairman it was his duty, in the light of Article VII:8 of the Agreement, to request delegations who had not yet done so to nominate persons as soon as possible.
105. The representative of Canada informed the Committee of the names of the two persons nominated by his Government. These names would be communicated shortly.

(vii) Date and agenda of next meeting

106. The Committee agreed to hold its fourth meeting on 13 - 15 October 1981 with the following agenda:

A. Accession of further countries to the Agreement.
B. Implementation and administration of the Agreement.
C. Problems related to the scope of the Agreement.
D. Identification of contracts falling under the Agreement and treatment of borderline cases.
E. Treatment of taxes and customs duties in relation to the threshold.
F. Procedures for consultations under the Agreement.
G. Annual review and adoption of report to the CONTRACTING PARTIES.
H. Other business.