MINUTES OF THE MEETING HELD ON 20 JUNE 1991

Chairman: Mr. David Hayes (United Kingdom)

1. The following agenda was adopted:

A. The Trondheim Electronic Toll Collection System  
B. Other Business
   (i) Brief statement on the work of the Informal Working Group on Negotiations

A. The Trondheim Electronic Toll Collection System

2. The Chairman recalled that the meeting had been called following a request by the United States (ref. GATT/AIR/3196, GPR/W/106), regarding a dispute with the Government of Norway. The United States first brought this up at the Committee meeting in April of this year.

3. The representative of the United States stated that the basis for the immediate United States complaint was Norway’s procurement of electronic toll collection equipment, for the city of Trondheim. The Norwegian authorities had single tendered this procurement favouring a Norwegian supplier, excluding viable and eager competition from a capable United States supplier.

4. In addition he stated that the United States wished to reserve its rights to re-open and include the Oslo procurement case in this complaint. He recalled that the procurement by the Norwegian authorities of electronic toll collection equipment for the city of Oslo had been the subject of a United States dispute settlement procedure under the Code, only last year. In that particular case, Oslo authorities had selected the United States supplier for the contract. This decision was overturned by the Government of Norway’s Ministry of Transportation in favour of a Norwegian supplier, despite the fact that the Norwegian product was not yet on the market or had not been awarded a type approval for operation by the PTT. After lengthy consultations, a settlement was reached. As a result of the settlement, Norway did pledge to conduct all future procurements of this type of equipment in accordance with the provisions of the Code, and on the basis of open and non-discriminatory standards and specifications. The
United States authorities were of the opinion that the Norwegian discrimination - now once again encountered in the Trondheim procurement case and by the same United States supplier as in the Oslo case - had broken the terms of that earlier settlement. According to his authorities, both cases were evidence of a recurring and intentional discrimination in Norway's procurement of electronic identification equipment.

5. He went on to say that in his authorities' view, Norway had violated Article II of the Code, which requires non-discrimination in procurement covered by the Code. There was no disagreement between Norway and the United States that the contract for Trondheim was Code-covered.

6. However, Norway claimed that it was allowed to single tender the procurement under Article V. The United States authorities emphatically rejected that argument. Firstly because Norway had ignored Article V:16's prohibition on single tendering for the purpose of favouring domestic suppliers. Norway had single tendered the Trondheim project to the same Norwegian supplier that was finally awarded the Oslo project - according to United States authorities, a supplier that would not have won the contract without the political intervention of senior level Norwegian officials. Secondly because Article V:16(e) makes reference to the procurement of a prototype. The United States authorities were of the opinion that although Norway's procurement of this equipment was maybe innovative, maybe required customisation of existing equipment - or more likely, some software modifications - maybe required the writing of more detailed specifications, was possibly new to the market in this exact configuration - it was not a prototype. He warned that if the Committee were to accept Norway's interpretation of this provision, almost all procurements which were not "off-the-shelf" would suddenly become non-Code-covered. The United States believed that Norway's argument was contrary both to the explicit language and to the spirit of the Code. It was a dangerous one which, if accepted, could render much of the Code ineffective.

7. The United States representative argued that the repetitive instances of discriminatory procurement of this type of equipment spoke for themselves: Norway intended to use its government procurement of this kind of equipment to give its Norwegian suppliers a competitive advantage in Norway and in the markets of other Code Signatories by providing Norwegian suppliers with significant Norwegian government contracts as a base for further sales. The commercial implications of the Norwegian actions were clear and severe. If the Norwegian actions in this case were allowed to stand, competing suppliers from other Code countries could be permanently disadvantaged.

8. The Government of the United States was well aware of the facts in this case. It had experienced exactly the same problem before. It had held discussions with the Government of Norway concerning this case, and it was evident that there was no point in holding further consultations to repeat the same arguments again.

9. The representative of Norway stated that, as pointed out in the Committee meeting of 23 April 1991, the Norwegian authorities regarded the
initiation of the pilot project as being fully consistent with Norway's obligations under the GATT Government Procurement Code.

10. In the April meeting the Committee was informed about the ongoing bilateral contacts between Norway and the United States concerning the Trondheim toll system and only three days after that meeting, United States Trade Representative identified Norway in this year's Title VII Report to Congress on Foreign Government Procurement as a country which discriminates against United States products and services and asked for consultations under the Code. The Norwegian authorities regarded the inclusion of Norway and the reference to the Trondheim toll ring project in a report of this character and scope as being completely unwarranted and totally out of proportion. The first round of bilateral consultations was held in Geneva on 24 May. The Norwegian authorities were preparing the answers to outstanding questions from these consultations, when the United States requested this special meeting of the Committee. That request came only two weeks after the first - and only - round of consultations, and before Norway had been able to follow up the outstanding questions. The Norwegian representative felt that this left as an open question whether the United States was really seeking to obtain a solution through consultations. Norway nevertheless followed up the bilateral consultations. Norway had also accepted the United States request for this special meeting of the Committee, which took place actually no more than thirteen days after it was called for. It was a clear demonstration of the Norwegian flexibility and willingness to accommodate the United States with respect to the procedure.

11. He went on to say that the decision to establish an R&D contract combined with the use of single tendering for the pilot project in Trondheim was consistent with Article V:16(e) of the Code. As a supplement to manual collection, electronic collection of toll fees had been used at individual toll stations in Norway since 1987. However, introducing a fully developed automatic toll ring, mainly based on unmanned stations, had not yet been done in Norway or anywhere else. The Public Roads Administration had undertaken a thorough study of whether or not fully automated toll systems based on electronic collection should be allowed to be introduced in Norway. The possibilities for improved servicing and monitoring of urban traffic by means of new communications technology (ISDN) and for cost reductions especially with regard to the operation of a fully automated system, had made the Public Roads Administration conclude that the concept of electronic toll collection ought to be further developed and tested through an R&D project. The new and unique system which would be developed and tested in Trondheim, would make Trondheim the first city in the world to implement full-scale automatic toll collection for urban traffic.

12. The Norwegian delegate then addressed the point, made by the American representative, concerning the bilateral exchange of letters which solved the Oslo toll ring dispute in April last year. In the exchange of letters of 26 April 1990 between former Minister of Trade and Shipping, Kaci Kullmann Five, and United States Trade Representative, Carla Hills, Norway confirmed that "Norwegian Government procurement that includes electronic
identification equipment (EIE) will be carried out in accordance with the provisions of the Agreement on Government Procurement". Norway furthermore confirmed "that the choice of equipment and software for future procurements will be based on open and non-discriminatory technical standards and specifications". Norway had thus confirmed its obligation to act Code-consistent when acquiring electronic identification equipment for future toll rings. However, Norway had not in the exchange of letters relinquished its rights to use R&D contracts and single tendering, nor for that matter, any other rights according to the Code.

13. The Government Procurement Committee had earlier been informed about the exchange of letters of 26 April 1990 resolving the Oslo toll ring matter. It was expressed in the exchange of letters that the settlement of the Oslo toll ring matter completely removed that case as a matter of contention between Norway and the United States. On this background, the Norwegian authorities found it surprising that the United States authorities now raised this issue again. The exchange of letters of 1990 was a bilateral agreement settling a specific matter between Norway and the United States. As a result of that settlement the United States authorities had explicitly undertaken an obligation to refrain from referring to that issue as an ongoing matter of contention between the two countries.

14. Thus, the United States authorities were raising a matter, the Oslo toll ring project, which had already been resolved through a bilateral agreement, and which was not related to the Trondheim pilot project. In the view of the Norwegian authorities, the United States authorities thus sought in a highly questionable and unacceptable manner, to evade obligations entered into in a bilateral context. The United States effort to link the Trondheim case with the Oslo case was unwarranted, and unsubstantiated in the facts of the two cases.

15. Furthermore, the Norwegian authorities were of the opinion that the exchange of letters of 1990 regarding the Oslo toll ring matter was a bilateral issue between the two countries, and as such fell outside the scope of a GATT dispute concerning the Trondheim pilot project. Even if the United States side wished to re-open the dispute settlement proceedings under the Government Procurement Code in the Oslo matter, which, as noted above, would be in violation of the bilateral agreement settling the matter, the Norwegian authorities would still regard the Oslo toll ring matter as being separate from the Trondheim pilot project, and as such irrelevant to the case at hand.

16. The delegation of Japan expressed the hope that this case be settled in the appropriate multilateral forum. He commented on the fact that Norway was identified by the United States under its national Title VII legislation, which stipulates national sanctions. He recalled that the case under review was covered by multilateral disciplines and could only be settled through Code procedures. He hoped that the case could be solved without unilateral sanctions.
17. The United States delegate, commenting on the Norwegian intervention clarified that Norway was the only country notified under its Title VII legislation for a specific case. The Trondheim case was the only clear-cut Code violation. He explained further that the reason why the United States authorities were moving so fast was that the financial position of a United States firm - which twice now had been shut out - was at stake. Responding to the Norwegian allegation that the Trondheim project was a pilot project and therefore covered by the provisions of Article V:16(e), he stated that the project would produce the final product thereby stretching the concept of "pilot". However, the key point according to him was the question of new technology: how did the Government of Norway know that this technology or equipment did not exist elsewhere in the world other than through an open publication of the project? The United States company that had an interest in this case maintained that it now had the required technology. Thirdly, referring to the exchange of letters settling the previous procurement dispute between the United States and Norway, he acknowledged that that case was settled bilaterally. Norway nevertheless had made a prospective pledge in that exchange of letters which covered the Trondheim case.

18. The Norwegian representative repeated that Norway was the first country in the world to establish this kind of electronic toll collecting system and went on to give an illustrative list of the technical complexities involved in this case. He stressed the point that this kind of technology needed to be developed through a Research and Development contract, and was thus covered by the provisions of Article V:16(e) of the Code.

19. The representative of the United States replied that the illustrative list of complexities involved was interesting but that nowhere had he heard that the only company among the Code Signatories able to handle them was the Norwegian company. Tendering out was what was called for.

20. He went on to state that his delegation was seeking the good offices of this Committee today to reverse the decision of the Norwegian Government. In the absence of such a successful conciliation by the Committee today, the United States would seek the immediate establishment of a panel.

21. The representative of Norway, referring to the provisions of Article VII:7, replied that he could not accept the establishment of a panel today because he felt that further discussions should be allowed to take place for both sides to get a clearer picture of the situation. Conciliation efforts, as provided for in the Code, should be made under the auspices of this Committee.

22. The United States representative expressed his profound disappointment and argued that the conciliatory phase provided for in the Code seemed not appropriate in this case, because a principle disagreement about the Code-consistency of the Norwegian handling of this case existed between the United States and Norway and no stalling of time was going to resolve that.
23. The Chairman offered his good offices to both parties in finding a multilateral solution to the dispute. He proposed to return to the United States request for the establishment of a panel at a later meeting of this Committee, the date of which he would set in consultation with both parties. He recalled that the three-month deadline, as provided for in Article VII:7 would run as from the date of this meeting.

24. The Committee so agreed.

B. Other Business

(i) Brief statement on the work of the Informal Working Group on Negotiations

25. The Chairman informed the members of the Committee that informal negotiations would be held from 9 through 11 or 12 July 1991. In addition, a formal Committee meeting would be held on 12 July, upon request by one member. Precise timing for this Committee meeting and its agenda would be made known at a later stage.

26. The Committee took note of this information.