

13 February 2012

**LEGAL REVIEW OF THE REVISED AGREEMENT
ON GOVERNMENT PROCUREMENT**

Joint Submission by Canada and the United States

The following joint submission, dated 10 February 2012, is being circulated at the request of the Delegations of Canada and the United States.

The following sets out proposed rectifications to the texts circulated in GPA/112 dated 16 December 2011.

* In English only.

PROTOCOL AMENDING THE AGREEMENT ON GOVERNMENT PROCUREMENT

The Parties to the *Agreement on Government Procurement*, done at Marrakesh on 15 April 1994, (hereinafter referred to as "the 1994 Agreement"),

Having undertaken further negotiations pursuant to Article XXIV:7(b) and (c) of the 1994 Agreement;

Hereby *agree* as follows:

1. The Preamble, Articles I through XXIV, and Appendices of the 1994 Agreement shall be deleted and replaced by the provisions as set forth in the Annex hereto.
2. This Protocol shall be open for acceptance by the Parties to the 1994 Agreement.
3. This Protocol shall enter into force for those Parties to the 1994 Agreement that have deposited their respective instruments of acceptance ~~thereof~~ of this Protocol, on the 30th day following such deposit by two thirds of the Parties to the 1994 Agreement. Thereafter this Protocol shall enter into force for each Party to the 1994 Agreement which has deposited its instrument of acceptance ~~thereof~~ of this Protocol, on the 30th day following the date of such deposit.
4. This Protocol shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party to the 1994 Agreement a certified true copy of this Protocol, and a notification of each acceptance thereof.
5. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this [...] day of [...] two thousand and [...] in a single copy, in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.

ANNEX 2

REVISED TEXT OF THE AGREEMENT ON GOVERNMENT PROCUREMENT^a

[N.B.: The title of the Agreement needs to be deleted as it is NOT being amended. Retaining this title would be inconsistent with the terms of the Protocol.]

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[N.B.: The Table of Contents is not a formal part of the Agreement so should be deleted. If it is retained, it would need to be cited in the Protocol.]

Preamble

The Parties to this Agreement (hereinafter referred to as "the Parties"),

Recognizing the need for an effective multilateral framework for government procurement, with a view to achieving greater liberalization and expansion of, and improving the framework for, the conduct of international trade;

Recognizing that measures regarding government procurement should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods or services, or to discriminate among foreign suppliers, goods or services;

^a This text brings together Articles I-XXI of the revised Agreement as set out in GPA/W/313 of 16 December 2010 and GPA/W/313/Corr.1 of 13 January 2011 and Article XXII of the revised Agreement as set out in Job No. 10493 of 14 December 2011.

Recognizing that the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties' economies and the functioning of the multilateral trading system;

Recognizing that the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party;

Recognizing the need to take into account the development, financial and trade needs of developing countries, in particular the least developed countries;

Recognizing the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption;

Recognizing the importance of using, and encouraging the use of, electronic means for procurement covered by this Agreement;

Desiring to encourage acceptance of and accession to this Agreement by WTO Members not party to it;

~~*Having undertaken* further negotiations in pursuance of these objectives pursuant to Article XXIV:7(b) and (c) of the Agreement on Government Procurement done at Marrakesh on 15 April 1994 (hereinafter referred to as "the 1994 Agreement");~~

[N.B.: This paragraph has been deleted as it is not necessary to refer to Article XXIV of the 1994 Agreement in the Revised Agreement, as the basis for the negotiations. That point is covered in the first paragraph of the Protocol.]

[NOTE: Articles I through XXI are not included for purposes of this submission.]

Article XXII Final Provisions

Acceptance and Entry into Force

1. This Agreement shall enter into force on 1 January 1996 for those governments* whose agreed coverage is contained in the Annexes of Appendix I of this Agreement, and which have, by signature, accepted the Agreement on 15 April 1994, or have, by that date, signed the Agreement subject to ratification and have subsequently ratified the Agreement before 1 January 1996.

Accession

2. Any Member of the WTO may accede to this Agreement on terms to be agreed between that Member and the Parties, ~~as set out~~ with such terms stated in a decision of the Committee. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession that states the terms so agreed. This Agreement shall enter into force for a Member acceding to it on the 30th day following the deposit of its instrument of accession.

* For the purpose of this Agreement, the term "government" is deemed to include the competent authorities of the European Union.

Reservations

3. No Party may enter a reservation in respect of any provision of this Agreement.

Domestic Legislation

4. Each Party shall ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by its procuring entities, with the provisions of this Agreement.

5. Each Party shall inform the Committee of any changes to its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

Future Negotiations and Future Work Programmes

6. Each Party shall seek to avoid introducing or continuing discriminatory measures that distort open procurement.

7. Not later than the end of three years from the date of entry into force of the Protocol Amending the Agreement on Government Procurement, adopted on [DATE], and periodically thereafter, the Parties shall undertake further negotiations, with a view to improving the Agreement, progressively reducing and eliminating discriminatory measures, and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, taking into consideration the needs of developing countries.

8. (a) The Committee shall undertake further work to facilitate the implementation of the Agreement and the negotiations provided for in paragraph 7, through the adoption of work programmes for the following items:

- (i) the treatment of small and medium-sized enterprises;
- (ii) the collection and dissemination of statistical data;
- (iii) the treatment of sustainable procurement;
- (iv) exclusions and restrictions in Parties' Annexes; and
- (v) safety standards in international procurement.

(b) The Committee:

- (i) may adopt a decision that contains a list of work programmes on additional items, which may be reviewed and updated periodically; and
- (ii) shall adopt a decision setting out the work to be undertaken on a each particular work programme under subparagraph (a) or and any work programme adopted under subparagraph (b)(i).

9. Following the conclusion of the work programme to harmonize rules of origin for goods being undertaken under the Agreement on Rules of Origin in Annex 1A of the WTO Agreement and negotiations regarding trade in services, the Parties shall take the results of that work programme and those negotiations into account in amending Article IV:5, as appropriate.

10. Not later than the end of the fifth year from the date of entry into force of the ~~p~~Protocol of amendment to this Amending the Agreement on Government Procurement, the Committee shall examine the applicability of Article XX:2(b).

Amendments

11. The Parties may amend this Agreement. ~~The A~~ A decision to approve an amendment and to submit it for acceptance by the Parties shall be made taken by consensus. An amendment shall ~~become effective as follows~~ enter into force:

- (a) ~~except as provided for in subparagraph (b), an amendment shall take effect, in respect of those Parties that accept it, upon acceptance by two thirds of the Parties and thereafter for each other Party upon acceptance by it;~~
- (b) for all Parties upon acceptance by two thirds of the Parties if it is an amendment that the Committee, by consensus, has determined to be of a nature that would not alter the rights and obligations of the Parties shall take effect for all Parties upon acceptance by two thirds of the Parties.

Withdrawal

12. Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of 60 days from the date the Director-General of the WTO receives written notice of the withdrawal. Any Party may, upon such notification, request an immediate meeting of the Committee.

13. Where a Party to this Agreement ceases to be a Member of the WTO, it shall cease to be a Party to this Agreement with effect on the date on which it ceases to be a Member of the WTO.

Non-application of this Agreement between Particular Parties

14. This Agreement shall not apply as between any two Parties where either Party, at the time ~~it~~ either Party accepts or accedes to this Agreement, does not consent to such application.

Appendices

15. The Appendices to this Agreement constitute an integral part thereof.

Secretariat

16. This Agreement shall be serviced by the WTO Secretariat.

Deposit

17. This Agreement shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party a certified true copy of this Agreement, of each rectification or modification thereto pursuant to Article XIX and of each amendment pursuant to paragraph 11, and a notification of each accession thereto pursuant to paragraph 2 and of each withdrawal pursuant to paragraphs 12 or 13.

Registration

18. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

~~Done at Marrakesh this fifteenth day of April one thousand nine hundred and ninety four in a single copy, in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.~~

[N.B.: *The "Done at clause" is not part of the Articles of the Agreement. Therefore, it is not being changed. The "Done at" clause for the Protocol of amendment is appropriately in the Protocol of amendment itself.*]

APPENDIX I

[Insert each Party's Annexes to Appendix I]

APPENDIX II

[Add electronic or paper media where each Party publishes procurement information, pursuant to Art. VI:2]

APPENDIX III

[Add electronic or paper media in which each Party publishes required notices, pursuant to Article VI:2]

APPENDIX IV

[Add website address or addresses where each Party publishes statistics and contract award notices, pursuant to Article VI:2]



21 February 2012

**LEGAL REVIEW OF THE REVISED AGREEMENT
ON GOVERNMENT PROCUREMENT**

Submission by the European Union

The following submission, dated 20 February 2012, is being circulated at the request of the Delegation of the European Union.

* In English only.

ANNEX 1

**PROPOSED DECISION OF THE COMMITTEE ON GOVERNMENT PROCUREMENT
ON ADOPTION APPROVAL OF "THE PROTOCOL AMENDING THE AGREEMENT ON
GOVERNMENT PROCUREMENT"**

[Explanatory note: The term "adopt" should be replaced with "approve" to align with the terminology used in Article XXII of the new GPA text and Article XXIV:9 of the 1994 GPA. The Committee adopts final decisions, which do not necessitate acceptance by the Parties (as for instance in the context of work programmes), but approves amendments to the Agreement and thereby establishes the text as authentic and definitive (within the meaning of Article 10 VCLT).]

Decision of [day/month/year]

The Committee on Government Procurement,

Having regard to paragraph 9 of Article XXIV of the WTO Agreement on Government Procurement done at Marrakesh on 15 April 1994 ("the 1994 Agreement");

Having undertaken further negotiations pursuant to Article XXIV:7(b) and (c) of the 1994 Agreement and reached agreement on amendments to improve the 1994 Agreement;

Noting the consensus among the Parties to the 1994 Agreement, all of whom are participating in this Decision, to ~~adopt~~ approve the Protocol Amending the Agreement on Government Procurement ("the Protocol") attached to this Decision and to submit the Protocol to their respective Governments for acceptance;

Considering that not all the Parties to the 1994 Agreement may be able to conclude their domestic procedures for acceptance of the Protocol by the time the Protocol has entered into force and that therefore, there may be a period when not all the Parties to the 1994 Agreement are Parties to the Protocol;

Decides as follows:

1. The Protocol Amending the Agreement on Government Procurement attached to this Decision is hereby ~~adopted~~ approved, and open for acceptance by Parties to the 1994 Agreement.
2. Pursuant to paragraph 3 of the Protocol and consistent with paragraph 9 of Article XXIV of the 1994 Agreement, the Protocol shall enter into force for those Parties to the 1994 Agreement that have deposited their respective instruments of acceptance thereof, on the 30th day following such deposit by two thirds of the Parties to the 1994 Agreement. Thereafter the Protocol shall enter into force for each Party to the 1994 Agreement that has deposited its instrument of acceptance thereof, on the 30th day following the date of such deposit.
3. Upon the entry into force of the Protocol,
 - (a) as between a Party to the 1994 Agreement, which is also a Party to the Protocol, and a Party only to the 1994 Agreement, the 1994 Agreement shall apply, including Appendix I of the 1994 Agreement;

- (b) notwithstanding subparagraph (a), a Party to the 1994 Agreement for which the Protocol has entered into force may maintain or adopt any measure consistent with the Protocol, even if that measure is inconsistent with the 1994 Agreement and even with respect to a Party to the 1994 Agreement for which the Protocol has not entered into force; and
 - (c) a Party that has accepted the Protocol shall only be required to provide access to the procurement that it covers under Appendix I attached to the Protocol to the other Parties that have accepted the Protocol.
4. Any terms of accession to the 1994 Agreement agreed after the date of this Decision, pursuant to paragraph 2 of Article XXIV of the 1994 Agreement, shall provide that, upon entry into force of the Protocol:
- (a) the acceding WTO Member shall be bound by the Protocol;
 - (b) as between such acceding WTO Member and a Party only to the 1994 Agreement, the 1994 Agreement shall apply, including the Party's Annexes to Appendix I of the 1994 Agreement;
 - (c) notwithstanding subparagraph (b), the acceding WTO Member may maintain or adopt any measure consistent with the Protocol, even if that measure is inconsistent with the 1994 Agreement and even with respect to a Party only to the 1994 Agreement; and
 - (d) notwithstanding subparagraphs (b) and (c), the acceding WTO Member shall provide access to the procurement that it covers to all Parties to the 1994 Agreement, including those Parties that have not accepted the Protocol.

PROTOCOL AMENDING THE AGREEMENT ON GOVERNMENT PROCUREMENT

The Parties to the Agreement on Government Procurement, done at Marrakesh on 15 April 1994, (hereinafter referred to as "the 1994 Agreement"),

Having undertaken further negotiations pursuant to Article XXIV:7(b) and (c) of the 1994 Agreement;

Hereby *agree* as follows:

1. The Preamble, Articles I through XXIV, and Appendices of the 1994 Agreement shall be deleted and replaced by the provisions as set forth in the Annex hereto.
2. This Protocol shall be open for acceptance by the Parties to the 1994 Agreement.
3. This Protocol shall enter into force for those Parties to the 1994 Agreement that have deposited their respective instruments of acceptance thereof, on the 30th day following such deposit by two thirds of the Parties to the 1994 Agreement. Thereafter this Protocol shall enter into force for each Party to the 1994 Agreement which has deposited its instrument of acceptance thereof, on the 30th day following the date of such deposit.

4. This Protocol shall be deposited with the Director-General of the WTO, who shall promptly furnish to each Party to the 1994 Agreement a certified true copy of this Protocol, and a notification of each acceptance thereof.

5. This Protocol shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this [...] day of [...] two thousand and [...] in a single copy, in the English, French and Spanish languages, each text being authentic, except as otherwise specified with respect to the Appendices hereto.

ANNEX 3

PROPOSED DECISION OF THE COMMITTEE ON GOVERNMENT PROCUREMENT ON
NOTIFICATION REQUIREMENTS UNDER ARTICLES XIX AND XXII OF THE
AGREEMENT

Decision of [day/month/year]

The Committee on Government Procurement,

Considering the importance of transparency of laws and regulations relevant to this Agreement, including changes thereto as required by Article XXII:5 of the Agreement;

Considering also the importance of maintaining accurate lists of entities covered under a Party's Annexes to Appendix I of the Agreement, in accordance with Article XIX of the Agreement;

Acknowledging the challenges to Parties of submitting timely notifications to the Committee of changes to their laws and regulations relevant to the Agreement, as required by Article XXII:5 of the Agreement, and of proposed rectifications to its Annexes to Appendix I, as required by Article XIX:1 of the Agreement;

Considering that the provisions of Article XIX of the Agreement distinguish between notifications of proposed rectifications that do not change the mutually agreed coverage provided for in the Agreement and other types of proposed modifications of its Annexes to Appendix I;

Recognizing that technological changes have allowed many Parties to make use of electronic means to provide information on their government procurement regimes and to notify Parties of changes to that regime;

Hereby decides as follows:

Annual Notifications of Changes in Laws and Regulations

1. Where a Party maintains officially designated electronic media that provide links to its current laws and regulations relevant to this Agreement and its laws and regulations are available in one of the WTO official languages, and such media are listed in Appendix II, the Party may fulfil the requirement in Article XXII:5 by notifying the Committee annually, at the end of the year, of any changes unless such changes are substantive, that is, they may affect the Party's obligations under the Agreement; and in such cases, a notification shall be made immediately.

2. The Parties shall have an opportunity to discuss the annual notification of a Party during the first informal meeting of the Committee in the following year.

Proposed Rectifications of a Party's Annexes to Appendix I

3. The following changes to a Party's Annexes to Appendix I shall be considered a rectification under Article XIX of the Agreement:

- (a) ~~a~~ changes in ~~the~~ a name of an entity;
- (b) merger of ~~one~~ two or more entities listed within an Annex; and

- (c) the separation of an entity listed in an Annex into two or more entities that are all added to the entities listed in the same Annex.

4. In the case of proposed rectifications to a Party's Annexes under Appendix I covered under paragraph 3, the Party shall notify the Committee every two years, commencing with the entry into force of the Protocol of Amendment to the Existing (1994) Agreement.

5. A Party may notify the Committee of an objection to a proposed rectification within 45 days from the date of the circulation to the Parties of the notification. In accordance with Article XIX:2, where a Party submits an objection, it shall set out the reasons for the objection, including the reasons why it believes the proposed rectification would affect the mutually agreed coverage under the Agreement and therefore the proposed rectification is not subject to paragraph 3. If there is no written objection, the proposed rectifications become effective 45 days after the circulation of the notification, as provided for in Article XIX:5(a).

6. Within four years of the adoption of this Decision, the Parties shall review its operation and effectiveness, and make any necessary adjustments.

INFORMAL CLOSING SESSION, WEDNESDAY, 29 FEBRUARY 2012

Chairman's (Mr. Nicholas Niggli, Switzerland) Statement
(Made at the Informal Closing Session, 29 February 2012)**

1. Welcome to the informal closing session. The purpose of this session is simply to confirm the procedural steps that we discussed earlier this morning.
- A. PROCESS RELATED TO THE ADOPTION OF THE RESULTS OF THE NEGOTIATIONS ON 30 MARCH
2. As regards the process to be followed in the coming days and weeks to formally adopt the results of the GPA renegotiation, the deadline of the end of March, which is clearly set out in the Ministerial Decision of 15 December (GPA/112 of 16 December 2011), represents an **absolute commitment that is binding on all Parties and on the Committee collectively**.
3. To meet this deadline, the following steps have been agreed with regard to the **period leading up to 30 March 2012**:
 - First of all, all delegations will circulate **rectified final offers**, to be sent to the Secretariat by **Thursday, 8 March 2012**, at the latest. The rectified final offers need to be **truly final offers** that are **acceptable to all delegations and resolve all issues** that have been raised.
 - The same deadline of Thursday, 8 March applies for **resolution of all outstanding text-related issues**. Indeed, these should be resolved this week if at all possible. To that end, I ask that delegations with outstanding concerns submit their points to the Secretariat in the next couple of days. The Secretariat has also asked me to indicate that it along with its legal advisors are available for off-line discussions with any delegation, at any stage where this is helpful.
 - I strongly encourage all delegations to **front-end load** all aspects of this work. Delegations should not wait until just before the deadline of 8 March to send in their respective inputs.
 - A complete package comprising all elements of the rectified negotiating package will be circulated to all Parties by the Secretariat, based on the inputs received, by **c.o.b. Monday, 12 March 2012**.
 - In the highly undesirable case that delegations need to raise any absolutely essential final comments on the rectified final offers circulated in the package, they should do so bilaterally, directly with the delegation concerned, and find a mutually acceptable solution within the shortest delay possible. Delegations will have the opportunity to submit mutually agreed corrections of rectified final offers no later than **Friday, 16 March 2012**.

* In English only.

** This text is circulated on the Chairman's responsibility.

- In the weeks leading up to the meeting on 30 March, I will convene a short, informal consultation with the Geneva Heads of Delegations to go over the procedures to be followed on 30 March 2012.

4. As regards the **procedures to be followed at the formal meeting on 30 March 2012**, the following points should be noted:

- The Heads of Delegations present in that meeting will be considered as representing the relevant Parties for the purposes of adopting the results of the negotiations by virtue of their accreditation to the WTO. However, where any Parties are not represented at the HODs level, and to the extent that their representatives have not been accredited to the WTO, those representatives will need to obtain the requisite credentials. Please, no-one should neglect this point.
- Needless to say, **Ministers or other senior officials** are very welcome and encouraged to come to Geneva for the final conclusion on the 30th. Please communicate any plans, in this regard, to me through the Secretariat.
- With regard to **internal legal requirements** that need to be fulfilled in order to fully adopt all elements of the negotiations on 30 March 2012, this is, of course the responsibility of each Party. I, nonetheless **expect and assume that all Parties are fully on top of these matters**.
- Reflecting the approach taken by Ministers in December, **all elements of the negotiating package will be adopted together, by a single gavel-stroke**. This recognizes that these elements are integral parts of the overall package. Nonetheless, it is also recognized that only the revised GPA text and Annexes, together with the Protocol of Amendment will need to be sent for formal acceptance. The various other decisions will be taken up in the Committee and will come into force, as foreseen in the decisions themselves, when the revised Agreement is in force.

5. In the **aftermath of the meeting of 30 March 2012**, the following steps will need to be taken by Parties:

- Parties will be expected to **promptly carry out any internal procedures** required for them to accept the Protocol of Amendment (attaching the revised GPA text and Annexes) and then to **submit their instruments of acceptance**. Again, the internal procedures to be followed are of course the responsibility of each Party.
- In the time leading up to the entry into force of the Agreement, and ideally in parallel to the internal procedures, Parties will also have to prepare the content of their Appendices II-IV. The complete sets of Appendices need to be submitted, at the latest, when the Protocol of Amendment enters into force for each Party.

B. **PLANS FOR THE COMMITTEE'S ACTIVITIES DURING THE REST OF THE YEAR**

6. With regard to the Committee's activities during the rest of the year, two further substantive sessions will be held following the formal meeting on 30 March. The Secretariat and I will reflect further on the exact dates and communicate the dates selected in a fax to delegations. The substantive work during these two sessions will focus mainly on pending accessions but should also carry forward the outstanding work on arbitration procedures and indicative criteria. The precise focus of the sessions will be determined in consultation with Parties and with the relevant accession candidates.

7. In addition to the accessions of particular Parties and review of the status of all outstanding accession candidates, consideration will be given to more general issues, relating to the accession process, including relevant documents and information to be provided by accession candidates. This may involve the updating of documents issued previously on these matters.

