

UNITED STATES – MEASURE AFFECTING GOVERNMENT PROCUREMENT

Request for Establishment of a Panel by the European Communities

The following communication, dated 8 September 1998, from the Permanent Delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have instructed me to request the establishment of a panel pursuant to Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, and Article XXII of the Agreement on Government Procurement (GPA) with respect to the Massachusetts Act of 25 June, 1996, chapter 130, §1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, ch.7, §§ 22G-22M ("the Law").

The Law forbids State agencies, State authorities and other State entities from procuring goods and services from any person currently doing business with the Union of Myanmar (formerly known as the Nation of Burma). In practice, this is achieved by applying an automatic price penalty of 10% on bids from companies which are deemed to be doing business in or with the Union of Myanmar (as set out in a restricted purchase list which contains the names of such companies, although companies which are not on the list but which are deemed to meet the criteria for inclusion in the list are similarly affected).

In doing so, the Law attaches conditions for the participation of suppliers in tendering procedures which violate the requirement set out in Article VIII(b) of the GPA. Furthermore, by imposing a 10% price increase on the basis of whether or not a company does business in or with Myanmar, the Law violates the basic GPA requirement embodied *inter alia* in Article XIII.4(b).

The Law also does not provide to the suppliers of other Parties offering products or services of the Parties immediate and unconditional treatment no less favourable than that accorded to domestic services and suppliers and that accorded to services and suppliers or any other Party. Moreover, it applies to majority-owned subsidiaries of companies that are listed, as well as majority-owned subsidiaries of companies that themselves have other majority-owned subsidiaries which meet the conditions for listing. In doing so, it breaches the provisions of Article III, paragraphs 1 and 2 of the GPA.

The Law also nullifies or impairs the benefits accruing to the European Communities ("EC") under this Agreement, particularly as it limits the access of EC suppliers to procurement by a sub-federal authority covered by the Government Procurement Agreement in such a way as to result in a de facto reduction of the US sub-federal offer under the GPA.

In a communication dated 20 June 1997 the EC requested consultations with the United States of America with a view to reaching a mutually satisfactory solution of the matter. The request was circulated in document WT/DS88/1 and GPA/D2/1 dated 26 June 1997.

The consultations were held on 22 July, 2 October and 17 December 1997 in Geneva. They have allowed for a full exchange of views and a better understanding of the respective positions, and included discussions about a possible amendment of the Law, but have not led to a satisfactory resolution of the matter.

Therefore, the EC requests that the panel consider and find that this measure is in breach of the US' obligations under the GPA, in particular, of Articles III, VIII(b) and XIII.4(b) and Article XXII.2 of the GPA.

The EC requests that the panel be established with the terms of reference set out in Article XXII.4 of the GPA.

The EC kindly requests that this issue be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 22 September 1998.
