

# GENERAL AGREEMENT ON

# TARIFFS AND TRADE

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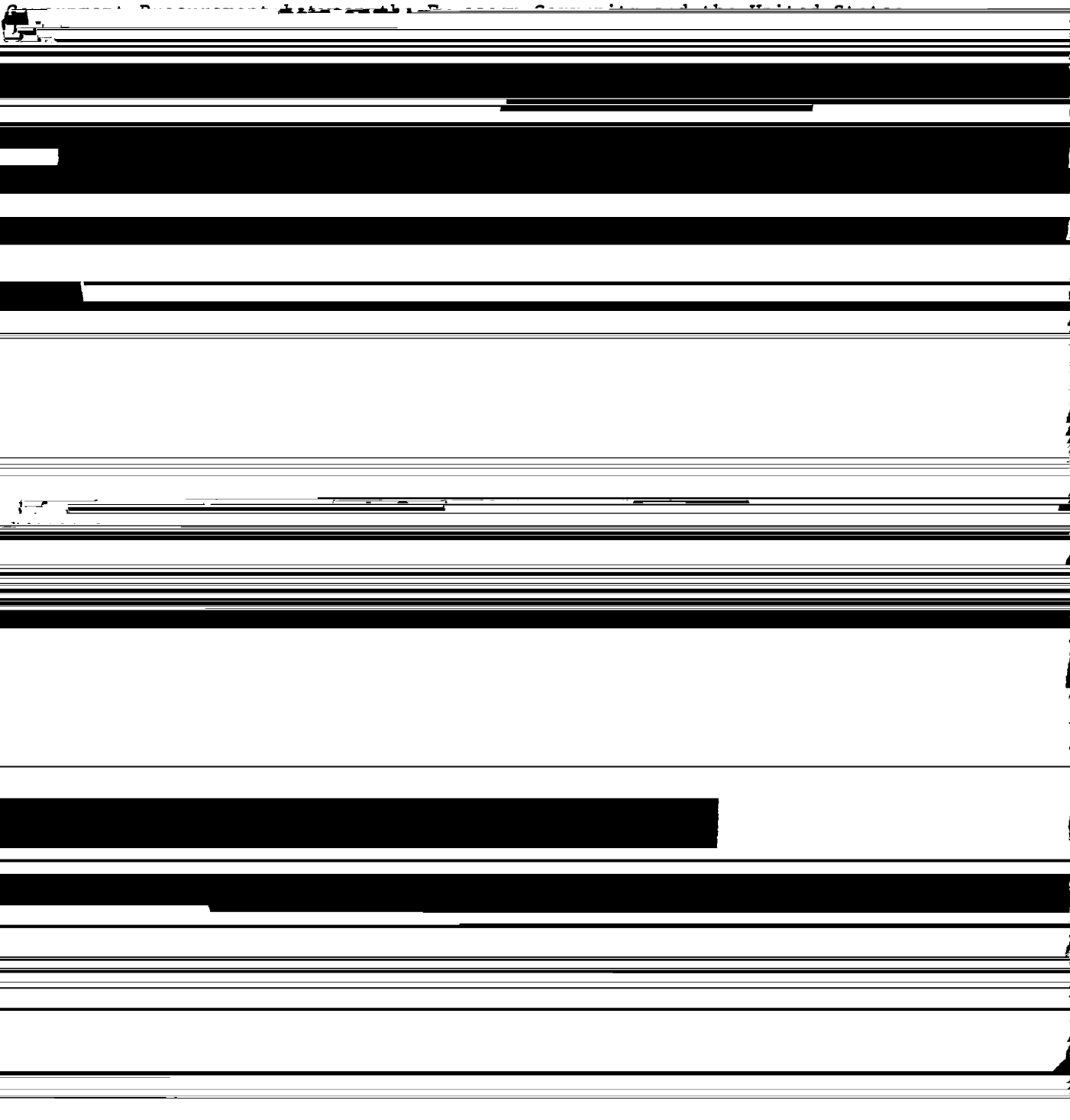
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## UNITED STATES - PROCUREMENT OF A SONAR MAPPING SYSTEM

### Report of the Panel

#### I. INTRODUCTION

1.1 Consultations pursuant to Article VII:3-5 of the Agreement on



of a sonar mapping system took place in Washington D.C. on 26 June 1991.

II. FACTUAL ASPECTS

2.1 The National Science Foundation (NSF) is an agency of the United States Government with responsibility for conducting scientific research. It has the authority to contract goods and services to do so.

The NSF is listed among the United States entities to which the Agreement on Government Procurement applies, and is thus a "covered entity". Since 1959 the NSF has carried out a programme of Antarctic research. Currently, the NSF is responsible for the management, administration and funding of Antarctic research under the United States Antarctic Research Program. Under this Program, since 1968, the NSF has competitively tendered successive multi-year contracts with private contractors to provide Antarctic research services. The current contract, dated 1 October 1989 and submitted to the Panel at its request is with Antarctic Support

Associates (ASA), a private company. It requires ASA to provide a wide range of logistical and other supporting services for the research programme and to procure products necessary for its fulfilment.

2.2 The contract between the NSF and ASA, referred to as DPP89-22832, is a multi-year contract for an amount of US\$251 million. It covers a wide range of activities, including the construction, maintenance and operation of research, housing, logistical and transport facilities and the provision of all manner of logistical support. The budgeted amount for the period

~~Contract Requirements such as the Requirement that contracts can only be~~

awarded to United States firms and citizens (E.6).

2.4 By a tender notice published in the Commerce Business Daily of 27 February 1991. Antarctic Support Associates announced its intention to

procure a "multibeam sonar, deep ocean, swath mapping system". According to the notice, the system, whose purpose is to map the ocean floor with a wide beam swath, was to be mounted in the hull of a new research vessel with icebreaking capabilities. The final and complete technical

specifications for the system were to be announced in the "Request for Proposal" (RFP). It was also stated: "The Buy American Act applies to this procurement which means that the system cannot be foreign manufactured." In response to a question by the Panel, the United States confirmed that the system that was being advertised for in the Commerce Business Daily by ASA was the sonar mapping system.

2.5 In the subsequent Request for Proposal of 30 May 1991. ASA informed

mapping system manufactured outside the United States. It was further provided that this Section would not be applicable to any procurement covered by the Agreement on Government Procurement.

Section 307 of Public Law 101-302 reads as follows:

"Section 307. None of the funds appropriated by this or any other Act with respect to any fiscal year for contractual services support of the United States Antarctic Program may be obligated for procurement of a multibeam bathymetric sonar mapping system manufactured outside of the United States: Provided, that not to exceed 2,400,000 shall be available for the total cost of such procurement, including software: Provided Further, that this section shall not be applicable to any procurement covered by the GATT Agreement on Government Procurement."

According to FAR 52.203-10, entitled "Remedies for Illegal and Improper Activity", the text of which is quoted in full in the contract between the NSF and ASA, the NSF would disallow funds if ASA purchased a sonar mapping system of non-United States origin since the purchase would be in

violation of this section of Public Law 101-302 and therefore not an

Draft Contract for the Acquisition of the Sonar Mapping System

2.8 The draft of a subcontract between the ASA, as the buyer, and the eventual winning bidder for the supply of the sonar mapping system, specifically refers to the prime contract DPP89-22832 between the NSF and ASA and states that, in the performance of such a prime contract, ASA

requires the manufacture of a bathymetric sonar mapping system. It repeats most of the FAR clauses incorporated in the NSF-ASA contract, by reference with the same force and effect as if they were given in full text.

including 52.225-3 "Buy American Act" (Supplies) which specifies that in

it was a direct product procurement, above the threshold, by an entity  
approved by the Agreement notwithstanding the fact that the system was to

be procured through an upstream product procurement contract between a  
private company (ASA) and the supplier of the system and that the prime

potential foreign suppliers, was contrary to Article II:1 of the Agreement  
on Government Procurement.

(ii) Detailed Arguments

3.6 Article I-1(a) whose interpretation is dealt with in the arguments of

the two parties, reads as follows:

"This Agreement applies to:

- (a) any law, regulation, procedure and practice regarding any procurement of products, through such methods as purchase or as lease, rental or hire-purchase, with or without an option to buy, by the entities subject to this Agreement. This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se."

The relationship between the NSF and ASA

3.7 The European Community argued that the procurement of the sonar mapping system was covered by Article I of the Agreement because, notwithstanding the fact that in contractual terms it was to be effected through a subcontract between two private companies, in reality an entity

covered by the Agreement (the NSF) was effecting the procurement of a product, whose value was above the threshold of SDR 130,000. The fact that

procurement by the governmental entity. Numerous Federal Acquisition Regulation clauses were included in the contract for the acquisition of the sonar mapping system, in particular clause 52.249-2 ("Termination for

which showed that the NCR could directly interfere with the subcontract














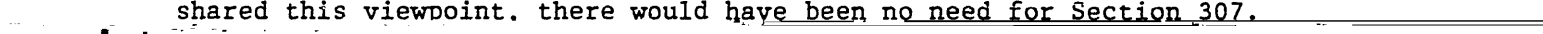





replies provided by ASA's predecessor, the sonar mapping system was indicated as government furnished property. This, in combination with the fact that in the current NSF-ASA contract a modern suite of oceanographic

equipment was to be provided - presumably by the NSF - including swath mapping and multi-channel seismic systems, showed that it was the original intention to have the system purchased directly by the government (NSF) - which would have implied that the government made a direct government procurement, outside any service contract. This was confirmed by the









during bilateral consultations the United States had stated that ASA's reference to the system as government furnished property was erroneous



but also of the legislative arm of government. The fact that Section 307 of P.L. 101-302 singled out the procurement of the sonar mapping system (a good) for "Buy American" was all the more remarkable in the light of the United States argument that this procurement was in any case excluded from the application of the Agreement on Government Procurement as being a



subcontract of a service contract. If the United States Congress had shared this viewpoint, there would have been no need for Section 307.



the value of the incidental product procurement did not exceed that of the

services themselves. To the contrary, the clear implication of the first part of that sentence was that the product procurement remained in

incidental services were no longer included therein, if their value were above that of the product concerned. Since, in the view of the Community "service contracts per se" could not simply be defined as mixed contracts, more than 50 per cent of whose value was attributed to services the term

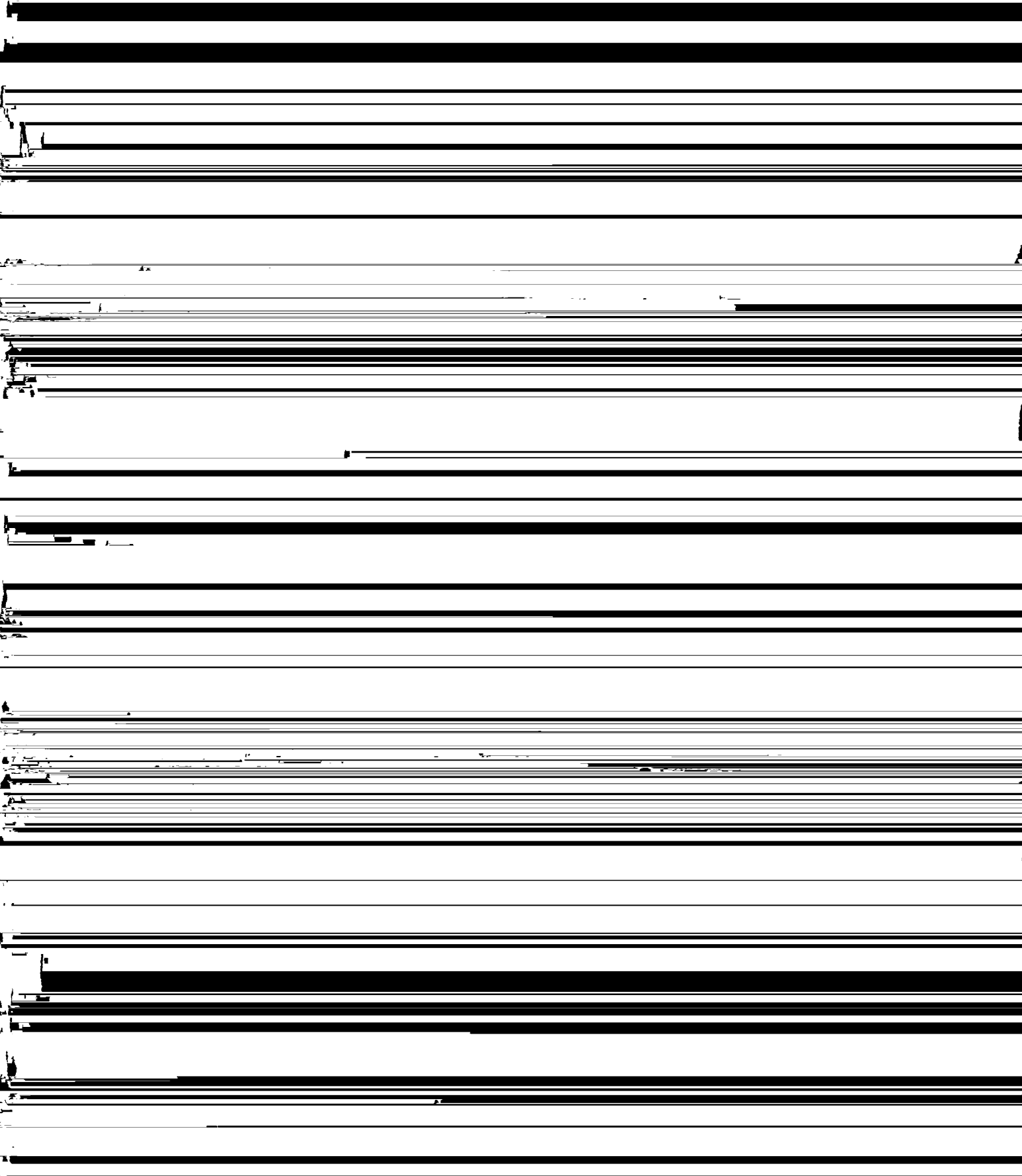
"service contracts per se" must be defined by reference to the essential

subject matter of the contracts concerned. On this basis it could be agreed that the NSF-ASA contract was a service contract per se (because its subject matter was essentially services), but this did not imply that all its upstream contracts were also service contracts.

interpretation would lead to a narrower exclusion from the coverage of the

Agreement than would a "purpose-determined" interpretation of the concept,  
under which it would be difficult to distinguish product procurement from

was a direct government procurement of a product by a covered entity, the acquisition of the sonar mapping system by ASA was made pursuant to an upstream contract of the basic contract. Nowhere in the Agreement or







were all means of obtaining the use or benefit of a product, the word  
"procurement" could be understood to refer to the obtaining of such use or

that such use was to be obtained through procurement "by" an entity, which  
suggests that the entity has some form of controlling influence over the

obtaining of the product.

4.6 Some guidance as to the meaning of government procurement can be  
obtained from examination of those provisions of the General Agreement in

Having obtained title at the moment of the purchase the NSF, at the expiry of the contract with ASA, would be able to choose whether to continue to use, or to dispose of, the system. Whereas ownership is not a necessary

element of government procurement, as is clear from the various methods of procurement mentioned in Article I:1(a), transfer of title to the Government is a strong indication that government procurement is involved. The NSF would also enjoy the benefits of the system's purchase - Antarctic



~~them from the Agreement's coverage. The European Community disagreed.~~

arguing that the purpose of the Agreement was to secure coverage of "any procurement of products" by covered entities and that any exclusions from

the coverage of products would have to be explicitly stated. The fact that services incidental to the supply of products were covered by the Agreement did not imply, a contrario, that products incidental to the supply of services were excluded from coverage. It argued that service contracts per se must be understood as meaning contracts for the procurement of services as such. Thus, only the service portions of contracts under which both goods and services were procured would be excluded.

4.18 The Panel found that analysis of the meaning of the phrase "service contracts per se" in isolation could not provide a convincing answer as to which of these interpretations are correct. It could be used as meaning



on the contention of the European Community that the procurement of the sonar mapping system was not in fact part of the service contract between the NSF and ASA. Having decided that it was government procurement of a product above the threshold and that the obligations of the NSF under the

Agreement could not be modified by its choice of the legal means through which the procurement was carried out, it made no difference whether the draft contract between ASA and the eventual supplier of the sonar mapping system was or was not a subcontract of the service contract between the NSF and ASA. This was a mere question of form within the control of the NSF

4.24 The Panel therefore concluded that the exclusion of "service contracts per se" cannot be taken to mean the exclusion of any products above threshold procured through them by covered entities. Consequently the procurement of the sonar mapping system, whether or not it was to take place under a service contract, was covered by the Agreement.

## V. CONCLUSIONS

5.1 The Panel concludes that the procurement of a sonar mapping system falls within the scope of the Agreement on Government Procurement and is thus subject to the provisions contained therein.

5.2 The Panel recommends that the Committee on Government Procurement request the United States to conduct the proposed procurement consistently with its obligations under the Agreement on Government Procurement.

ANNEX 1

Commission of the European Communities

Geneva, 31 July 1991

AIDE MEMOIRE

Multibeam sonar mapping system

The facts

By a tender notice published in the Commerce Business Daily of 27 February 1991, Antarctic Support Associates (ASA) announced its intention to procure a sonar mapping system. It was indicated that "Buy American" provisions would apply to the purchase.

By letter of 30 May 1991, ASA informed potential suppliers that it was seeking "a company to manufacture in the United States" a sonar mapping system. This letter refers to a prime contract with the National Science Foundation (NSF).

The National Science Foundation is a United States Government agency

These responsibilities include ensuring the provision of facilities in

the contract.

The tender notice of 27 February 1991 and the request for proposals of 30 May 1991 clearly relate to the purchase of this item of "government furnished property".

Although the purchase is being carried out by ASA, it is clearly being done on behalf of NSF.

The contract (referred to throughout by ASA as "the sub-contract"), which incorporates clauses from the Federal Acquisition Regulations (FAR) provides for assignment of the contract "at any time ... to the Foundation (the NSF), or to any party selected by the Foundation".

The purchase is financed by public funds provided through the NSF.

The sonar mapping system will become the property of the NSF.

NSF is a covered entity under the Government Procurement Agreement.

There is no exception under the Agreement on Government Procurement for purchase of a sonar mapping system.

The value of the sonar mapping system is clearly above the threshold of the Agreement (estimated value \$2.4 million).

The procurement of the sonar mapping system can be separated from the services to be rendered under the various NSF and ASA contracts. The embedding of this procurement in contracts which, otherwise, largely relate to the provision of services does not make it fall outside the scope of the Government Procurement Agreement defined in Article I as relating to any



The EC considered the results of these consultations to be unsatisfactory and, by letter of 2 July 1991, requested the Committee to meet under the terms of Article VII:6 of the Agreement on Government Procurement.

#### Conclusion

The "Buy American" provision, incorporated in the tender notice and the request for proposals for the sonar mapping system constitutes an infringement of United States obligations under Article II of the Agreement on Government Procurement.

The reference in the specifications to a proprietary product constitutes an infringement of Article IV of the Agreement on Government Procurement.