IMPLEMENTATION OF GOVERNMENT PROCUREMENT IN THE WTO SYSTEM

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THESIS

Submitted to
School of Public Policy and Management, KDI
in partial fulfillment of the requirements
for the degree of

MASTER OF STRATEGY & GLOBAL MANAGEMENT

2000

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I. Introduction

Government and their subsidiary agencies are among the world's largest purchasers of goods, services and works. Such purchase often represent 10% to 15% of a country's GNP. The international trade in government-purchased products and services is steadily on the increase and currently amounts to trillions of dollars. Most of these large markets have traditionally been closed to foreign suppliers and contractors through the operation of formal and informal systems of discrimination favoring the domestic industry.

The Agreement on Government Procurement (GPA) that was negotiated in the Tokyo Round required its member countries to accord national and MFN treatment to government purchases. The obligation to extend such treatment applied to purchases made by the government agencies listed by each member country in the annexes to the Agreement. Theses annexes formed an integral part of the Agreement. The Agreement further required the listed agencies to make their purchases by inviting tenders, in which foreign suppliers should have a fair and equitable opportunity to participate.

The Tokyo Round Agreement, which applied to trade in goods, was extensively revised and broadened in the Uruguay Round to cover government purchases of services. The new GPA is, however, plurilateral and WTO member countries are not obliged to join it. The Agreement's current countries[1] are

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[1] Signatories : Austria, Belgium, Canada, Denmark, European Community, Finland, France, Germany, Greece, Hong Kong(China), Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, the

predominantly developed countries. Only two developing countries/areas – Hong Kong and the Republic of Korea – have so far acceded to it.

Korea became a signatory to the Agreement on Government Procurement signed at Marrakesh on 15 April 1994. While the GPA entered into force for existing Parties on 1 January 1996, it entered into force for Korea on 1 January 1997.

The report of the Panel on *Korea – Measures Affecting Government Procurement* was adopted by the Dispute Settlement Body on 19 June 2000. This dispute related to the Inchon International Airport (IIA) project, which was being constructed in the Republic of Korea. At issue was whether the entities that had had procurement responsibility for the project since its inception are "covered entities" under the GPA. The United States also raised the issue of whether the procurement practices of these entities were or had been inconsistent with Korea's obligations under the Agreement on Government Procurement and whether they nullified or impaired benefits accruing to the United States under that Agreement.

In this dispute, the panel concluded that the entities which had been conducting procurement for the IIA project were not covered entities under Korea's Appendix I of the GPA and were not otherwise covered by Korea's obligations under the GPA. The panel also concluded that the United States had

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Netherlands, Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, the United Kingdom, and the United States

not demonstrated that benefits reasonably expected to accrue under the GPA, or in the negotiations resulting in Korea's accession to the GPA, were nullified or impaired by measures taken by Korea.

This was the first time that a Panel had to interpret the terms of the GPA. This dispute was mainly related to the interpretation of the Appendix of the GPA and demonstrated the basic principle and method in the process of interpretation. It also showed the basic concept of non-violation argument from the disputes of GATT and WTO and profound legal theory whether the expected benefits can be argued as non-violation. Further, it gave us a good precedence by its legal decision regarding the error in negotiation as we can use it when we give concession during international trade negotiation or when we check counterpart's concession.

This paper aims to present the implementation of government procurement in the WTO system by the legal analysis of the rulings by the Panel on *Korea - Measures Affecting Government Procurement*. In this paper, I present the broad overview of the basic structure of the WTO GPA in chapter II. In chapter III, the historical review of the Korea's accession to the WTO GPA is presented. Chapter IV examines the dispute panel decision: *Korea – Measures Affecting Government Procurement*. Chapter V provides the proposals to be considered in future efforts to enhance the current GPA. The conclusion is given in Section VI.

II. Basic Structure of the WTO GPA

1. General

Government Procurement refers to the activity a government in purchasing goods and services for its own requirements and not for resale. Government purchases of goods and services at the national and subnational level are substantial. By one estimate, the world market for government procurement exceeds $1 trillion annually. For the very reason that governments purchase significant amounts of goods and services, historically strong political pressures exist for making such purchases exclusively from local sellers.

2. Historical Background to the Evolution of Rules

In the General Agreement on Tariffs and Trade(GATT), originally negotiated in 1947, government procurement was explicitly excluded from the key national treatment obligation. Since it is estimated that government procurement typically represents 10-15% of GDP, this represents a considerable gap in the multilateral trading system. A growing awareness of the trade-restrictive effects of discriminatory procurement policies and of the desirability of fulfilling these gaps in the trading system resulted in a first effort to bring government procurement under internationally agreed trade rules in the Tokyo Round of Trade Negotiations. As a result, the first Agreement on Government Procurement was signed in 1979 and entered into force in 1981.

In parallel with the Uruguay Round, Parties to the Agreement held

negotiations to extend the scope and coverage of the Agreement. The Agreement on Government Procurement (GPA) was signed in Marrakesh on 15 April 1994 and entered into force on 1 January 1996.

The renegotiated GPA improved the Tokyo Round Government Procurement Code in at least three aspects. First, the Code's rules on bid challenge procedures and dispute resolution are strengthened. Second, the new Agreement expands the Code vertically by covering subcentral levels of government and central government-owned utilities and transportation facilities. Third, the new Agreement expands the Government Procurement Code horizontally by covering government procurement of services and construction contracts.[2] Besides these achievements, the negotiators added an important new Member, Korea.

The GPA is one of the WTO's so-called Annex IV or Plurilateral Agreements, signifying that it applies only to WTO Members that have signed it.[3]

3. The Agreement on Government Procurement

A. The Aim of the Agreement

The objective of the GPA is to subject government procurement to international competition by extending the GATT principles of nondiscrimination

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[2] Roj Bhala and Kevin Kennedy, *World Trade Law*, Lexis Law Publishing(1998), p.1314-1315

[3] There are four Plurilateral agreements: the GPA, the civil aircraft agreement, and the arrangements on

(national treatment and MFN) and transparency to the tendering procedures of government entities. The GPA applies only to those entities listed in schedules(Annexes) of each signatory nation. Over time, the entity coverage has been expanded through periodic negotiations.[4]

B. Coverage of the Agreement

The agreement applies to any law, regulation, procedure, or practice regarding any procurement by entities covered by the Agreement as specified in Appendix I.[5] Appendix I is divided into five Annexes that contain the equivalent of the schedule of commitments made under GATT and GATS:

- Annex 1, central government entities
- Annex 2, subcentral government entities
- Annex 3, all other entities that procure in accordance with the provision of the Agreement, e.g., government-owned utilities
- Annex 4, Services
- Annex 5, construction contracts

Each Annex also contains value thresholds for each party.

The product coverage of the Agreement is also determined by the Annexes. As far as goods are concerned, in principle all procurement is covered,

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bovine meat and dairy products.

[4] Bernard M. Hoekman and Petros C. Mavroidis, "Basic Elements of the Agreement on Government Procurement", in *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement*, edited by Bernard M. Hoekman and Petros C. Mavroidis, The University of Michigan Press(1997), p.13

[5] Government Procurement Code Article I:1 <http://www.wto.org/wto/govt/govt.htm>

unless specified otherwise in an Annex.

C. Substantive provisions

The Agreement's most important obligation requires purchasing entities to extend to imported products, services and suppliers national and MFN treatment. The first prevents them from giving price or other preferences to domestic suppliers; the second prohibits them from discriminating among outside supplying countries.[6]

D. Operational Provisions

The agreement contains a number of detailed procedural obligations which procuring entities have to fulfill to ensure the effective application of its basic principles. The purpose of these procedural requirements is to guarantee that access to covered procurement is effectively open and that an equal opportunity is given to foreign supplies and suppliers in competing for government contracts.

The Agreement allows the use of open, selective and limited tendering procedures, provided they are consistent with the provisions laid out in Articles VII to XVI. Under open procedures all interested suppliers may submit a tender.[7] Under selective tendering procedures only those suppliers invited to do so by the entity may submit a tender.[8] To ensure optimum effective international

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[6] International Trade Center, *Business Guide to the Uruguay Round*, Commonwealth Secretariat(1996), p.300

[7] Government Procurement Code Article VII:3(a)

[8] *id*, Articles VII:3(b) and X

competition, purchasing entities are required to invite tenders from the maximum number of foreign suppliers. Under limited tendering procedures the entity contacts the potential suppliers individually. [9] The Agreement closely circumscribes the situations in which this method can be used, for example in the absence of tenders in response to an open tender or selective tender or in cases of collusion, or for reasons of extreme urgency brought about by events unforeseeable by the entity. [10]

The Agreement contains obligations on technical specifications in order to prevent entities from discriminating against and among foreign foods and suppliers through the technical characteristics of products and services that they specify. [11]

Prior to the actual tendering process, Parties are required to publish an invitation to participate in the form of a tender notice in a publicly accessible publication indicated in Appendix II to the Agreement. [12]

E. Greater Public Scrutiny of Award Decisions

Information must also be provided, after the award of the contract, on the award decision in the form of a notice, giving information on such matters as the nature and quantity of the products and services in the contract award, the name and address of the winning tenderer, and the value of the winning award or the

[9] *id*, Article VII:3(c)
[10] *id*, Article XV
[11] *id*, Article VI
[12] *id*, Articles IX and XII

highest and the lowest offer taken into account in the award contract. In addition, if an unsuccessful bidder requests it, the purchasing entity is required to give the bidder its reasons for both the rejection and the selection.[13]

There is a general requirement to publish laws, regulations, judicial decisions, administrative rulings of general application and any procedures regarding government procurement covered by the Agreement.[14]

F. Challenge Procedure

The Agreement also calls on its member countries to establish at the national level an independent review body to hear challenges or complaints and requests for redress from domestic or foreign suppliers against a purchasing entity which in their view has not adhered to the rules of the Agreement in awarding a contract. The procedure for investigating such challenges should provide for: interim measures to correct breaches of the Agreement's rules, including measures which may result in the suspension of the procurement process; or payment of compensation to the challenging tenderer, which may be limited to the costs of preparing the tender or the challenge.

In addition, when the government of the country where the foreign supplier is situated is satisfied that the rules of the Agreement have not been followed by the entity in awarding the contract, it can invoke WTO dispute

[13] *id*, Article XVIII
[14] *id*, Article XIX

settlement procedures.[15]

G. Special Provisions for Developing Countries

The Agreement recognizes the development, financial and trade needs of developing countries, in particular least-development countries, and allows special and differential treatment in order to meet their specific development objectives. Development objectives of developing countries should be taken into account in the negotiation of coverage of procurement by entities in developed and developing countries. The Agreement also contains provisions on: technical assistance; establishment of information centers giving information on procurement practices and procedures in developed countries; and special treatment for least-developed countries.[16]

III. Korea's Accession to WTO GPA

Korea tried to participate in Tokyo Round Agreement but it was frustrated due to large difference between Korea's concession offer and the Parties request. United States strongly requested Korea to be a party of the GPA in US-Korea trade negotiations and Korea promised to accede. In a communication dated 25 June 1990, Korea indicated its interest in exploring the possibility of acceding to the GPA.

Further, in a communication dated 20 September 1991, the Government

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[15] *id*, Article X
[16] *id*, Article V

of the Republic of Korea indicated that following submission of its initial offer to the Committee on Government Procurement on 25 June 1990, it had held bilateral consultations with the Parties in relation to its offer list. The communication also requested permission to participate in the Uruguay Round negotiations. This request was acceded to.

Leading up to its accession to the GPA on 15 April 1994, Korea submitted to the Committee on Government Procurement, a series of offers concerning its commitments under the GPA upon accession.

Korea became a signatory to the Agreement on Government Procurement signed at Marrakesh on 15 April 1994. There were no further changes made to Korea's accession offer between the date of Korea's final offer, namely, 14 December 1993, and the signing of the new GPA at the Marrakesh Ministerial Conference in April 1994.

While the GPA entered into force for existing Parties on 1 January 1996, it entered into force for Korea on 1 January 1997.

IV. Dispute in WTO: "*Korea – Measures Affecting Government Procurement*"

1. Factual Summary

A. Factual Background

On 16 February 1999, the United States requested Korea to hold consultations pursuant to Article 4 of the Understanding on Rules and Procedures

Governing the Settlement of Disputes ("DSU") and Article XXII of the Agreement on Government Procurement regarding certain procurement practices of entities concerned with the procurement of airport construction for Inchon International Airport ("IIA") in Korea. The European Communities requested to join in the consultations on 8 March 1999 and Japan made the same request on 9 March 1999. Korea accepted neither of these requests.

A mutually satisfactory solution was not reached during the consultations held between the United States and Korea on 17 March 1999. In a communication dated 11 May 1999, the United States requested the Dispute Settlement Body (DSB) establish a panel to examine the matter.[17]

B. Korea's Accession Offers

Leading up to its accession to the GPA on 15 April 1994, Korea submitted to the Committee on Government Procurement, a series of offers concerning its commitments under the GPA upon accession. ***Table 1*** summarizes Korea's accession offers.

The *Government Organization Act* (1989) entitled "Establishment and Organization of Central Administrative", "Establishment of Special Local Administrative Organs" and "Establishment of Attached Organizations" provisions. The provisions of the Act remained largely the same in all relevant respects despite various changes that were made to the Government Act from 30

[17] Report of the Panel, *Korea – Measures Affecting Government Procurement*, (WT/DS163/R), adopted on 19 June 2000, paragraph. 1.2

December 1989 until Korea's GPA obligations came into effect.

C. The Inchon International Airport Project

The project concerned the construction of Inchon International Airport (IIA). The airport was being built on land between two islands, Yongjong and Yongyu. The project commenced in 1990. The first phase of construction was scheduled to be completed by the end of 2000. Later phases of airport construction will continue until 2020 and will be based on future traffic demand.

While the Ministry of Construction and Transportation (MOCT) and the New Airport Development Group (NADG) under that Ministry were originally responsible for the IIA project, the *Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction* ("*Seoul Airport Act*") contemplated the appointment of an operator for the IIA project. However, the Act did not specify the identity of the operator.

Since the inception of the project, authority for the IIA project had been assigned to various authorities or "operators" by the Korean National Assembly. On 14 December 1991, authority was assigned to Korea Airports Authority (KAA). On 1 September 1994, authority was transferred to Korea Airport Construction Authority (KOACA). Finally, authority was transferred to the Inchon International Airport Corporation (IIAC) on 1 February 1999. ***Table 2*** summarizes the entities related to the IIA project.

The *Procurement Fund Act* provides that the Office of Supply is primarily responsible for procurement using government procurement funds.

D. Procedural Background

At its meeting on 16 June 1999, the Dispute Settlement Body agreed to establish a panel in accordance with the provisions of Article 6 of the DSU and Article XXII of the GPA, with the following standard terms of reference pursuant to Article XXII:4 GPA. The European Communities and Japan reserved third party rights.

The Panel was composed on 30 August 1999. The Panel heard the parties to the dispute on 19 October 1999 and 11 November 1999. The interim report was issued to the parties on 3 March 2000. The report of the Panel was circulated as an unrestricted document from 1 May 2000 and was adopted by the DSB on 19 June 2000.

2. Issues

A. Entities covered under Korea's Appendix I of GPA

(1) United States

a) According to the United States, "central government entity" in Annex 1 includes branch offices and subsidiary organizations as Note 1 states that Annex 1 entities "include" certain other organizations. "Include" is a broadening term, not a limiting one. Thus, the organizations described in Note 1 are in addition to the central government entities themselves.

b) Even though NADG has not been expressly listed in Korea's Schedule, it is nevertheless covered under the GPA by virtue of MOCT's listing.

NADG is the organization responsible for IIA construction and that, therefore, the IIA is a project of a covered entity. KAA and its successors are branch offices or subsidiary organizations of MOCT and the IIA project would, therefore, also be covered.

c) In regard to the project, given the degree of control exercised by MOCT over KAA and its successors, procurements by those entities are actually procurements by MOCT and the GPA requirements apply to those procurements.

The United States pointed to *Seoul Airport Act* as evidence. Article 4(1) of that Act provides that MOCT will establish a "master plan" for the IIA project. The United States also referred to Article 7(1) which requires MOCT's approval of the project operator's "execution plan" and Article 12 which requires the project operator to submit reports to MOCT.

The United States then referred to the numerous provisions in the Korean *Aviation Act* which require the project operator, KAA, to work under the supervision of MOCT. The United States also refers to the obligation of the project operator to report to the MOCT under the *Seoul Airport Act*.

The United States pointed to MOCT's website which listed the NADG as responsible for IIA construction, along with other press and business group reports that also referred to MOCT or NADG responsibility for the IIA project.

d) The United States further noted that the reference to "procurement

for airports" in paragraph (b) of General Note 1 of Korea's Appendix[18] confirms that there are, in fact, entities listed in Annex 1 of Korea's Schedule that are responsible for procurement for airports. Since MOCT, the NADG, KAA, KOACA and IIAC are the only entities Korea has held out as being responsible for procurements for airports, these are the entities that must be covered under Annex 1 for all countries not referred to in the General Note.

According to the United States, all of these factors showed that MOCT was in control of KAA and its successors, or, at the very least, was in control of the IIA project.[19]

(2) Korea

a) Korea responded that there was no textual basis for the US arguments about branch offices and subsidiary organizations as Note 1 to Annex 1 defines the scope of the coverage of central government entities under Annex 1. This is the most reasonable interpretation of the phrase "as prescribed in the Government Organization Act" that is contained in Note 1. Korea disagreed that KAA or its successors could be properly described as branch or subsidiary organizations of MOCT. While Korea disagreed that there was a "control" test contained in the

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[18] General Note 1of Korea's Appendix reads as follows:
"Korea will not extend the benefits of this Agreement
(a) as regards the award of contracts by the National Railroad Administration,
(b) as regards procurement for airports by the entities listed in Annex 1,
(c) as regards procurement for urban transportation (including subways) by the entities listed in Annexes 1 and 2
to suppliers and service providers of member States of the European Communities, Austria, Norway, Sweden, Finland and Switzerland, until such time as Korea has accepted that those countries give comparable and effective access for Korean undertakings to their relevant markets."

[19] *supra*, paragraphs 7.15-7.22

WTO GPA, Korea also argued that KAA was independent both overall and with respect to the IIA project. This is because KAA was established by law as an independent juristic entity; it authored and adopted its own by-laws; it had its own management and employees who were not government employees; it authored and adopted its own procurement rules distinct from the general government rules; it published bid announcements and requests for proposals of its own accord; it concluded contracts with successful bidders on its own behalf; and it funded portions of the IIA with its own monies.

b) According to Korea, Article 94(1) of the *Aviation Act* states that it is the controlling provision of law unless "otherwise provided by law." In this case, the *Seoul Airport Act* was the controlling law and it explicitly authorized an entity other than MOCT to have the responsibility for the IIA project.

With respect to MOCT's website, Korea argued that this was a product of MOCT's public relations department and was not a binding classification of responsibilities.

Korea further argued that the indicia of independence clearly indicated that KAA was an independent entity for purposes of coverage by the GPA. Other entities such as KAA were typically Annex 3 entities both in Korea and in other GPA signatories, if the negotiators agreed to their coverage at all.

c) In regard to General Note 1(b), Korea responded that procurement for some airports was conducted by covered Annex 1 entities. Specifically, the Seoul and Pusan Regional Airport Authorities are local administrative organs as

provided in the *Government Organization Act* and are therefore covered by reason of Note 1 to Annex 1. Thus, there is nothing inconsistent about General Note 1(b) and Korea's position that KAA and its successors, and therefore the IIA project, are not covered.[20]

B. Practices in Violation of GPA

(1) United States

The United States contended that Korea was in violation of Articles by imposing deadlines of less than 40 days for receiving tenders from the date of publication of the procurement announcements; by imposing qualification requirements specifying that an interested foreign supplier must have a license that in turn requires that supplier to build or purchase manufacturing facilities in Korea; by imposing domestic partnering requirements that force foreign firms to partner with, or act as subcontractors to, local Korean firms; and by not establishing effective domestic procedures enabling foreign suppliers to challenge alleged breaches of the GPA for procurements related to the IIA project.

(2) Korea

Korea requested the Panel to reject the complaints to the United States on the basis that the entities conducting procurement for the IIA are not covered entities under Korea's Appendix I of the GPA.[21]

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[20] *id*, paragraphs 7.23-7.27
[21] *id*, paragraphs 7.1-7.4

C. Non-violation Claim: Nullification or Impairment of Benefits

(1) United States

The United States proposed that a successful determination of a non-violation nullification and impairment in the GPA requires to find the following: (1) a concession was negotiated and exists; (2) a measure is applied that upsets the established competitive relationship; and (3) the measure could not have been reasonably anticipated at the time the concession was negotiated. The United States argued that the outstanding issue in this case is whether or not there was a concession.

The United States contended that during Korea's GPA accession negotiations, the United States bargained for and received from Korea the coverage of all government entities responsible for the procurement of products and services related to new airport construction projects under Annex 1, but Korea's measures were against its expectation. The United States argued that these measures resulted in the nullifying or impairing benefits - a competitive relationship worth - potentially US$6 billion accruing to the United States under the GPA.[22]

(2) Korea

In response, Korea argued that the burden placed upon the United States to support its non-violation claim under Article XXII:2 of the GPA was

[22] *id*, paragraphs 7.88-7.89

substantial. Korea noted that under DSU Article 26:1(a), "the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement."[23]

3. Findings

A. GPA Coverage of the Inchon International Airport Project

(1) General

The United States had claimed that the procurement practices with respect to the IIA were not consistent with the provisions of the GPA. Korea had taken no position with respect to these allegations; rather, Korea argued that the entities responsible for IIA procurement were not covered by Korea's GPA commitments contained in Appendix I to the GPA.

Since Korea's final offer of concessions on 14 December 1993 and the Members' agreement to the WTO GPA and Korea's accession to it on 15 April 1994, three entities have been responsible for IIA procurement: KAA, KOACA and IIAC. Both parties agreed that Korea had never utilized the procedures contained in GPA Article XXIV:6 for modification of its Schedules with respect to airport construction. The issue is whether KAA was a covered entity at the time that Korea concluded its accession negotiations.

The GPA Schedule is divided into five annexes covering different types

[23] *id*, paragraph 7.90

of procuring entities. The most relevant annexes are: Annex 1 containing central government entities; Annex 2 containing sub-central government entities; and, Annex 3 containing other entities that procure in accordance with the provisions of the GPA. Generally, there are different procurement thresholds for each Annex.

The question arises as to how to interpret these Schedules in the event of a disagreement. In the dispute on *European Communities – Customs Classification of Certain Computer Equipment*, the Appellate Body addressed the question of whether and how to apply the normal rules of treaty interpretation contained in the *Vienna Convention* to the interpretation of the language contained in a Member's tariff schedule. The Appellate Body provided the following views:

> "Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention."[24]

Like GATT Article II:7 which refers to the tariff Schedules as "integral"

[24] Appellate Body Report on *European Communities – Customs Classification of Certain Computer*

parts of the Agreement, Article XXIV:12 of the GPA states that: "The Notes, Appendices and Annexes to this Agreement constitute an integral part thereof." Accordingly, the panel referred to the customary rules of interpretation of public international law as summarized in the *Vienna Convention* in order to interpret Korea's GPA Schedule.[25]

The Panel, therefore, examined Korea's Schedule and determined whether, within the ordinary meaning of the terms therein, the entity responsible for IIA procurement is covered. Then, in accordance with Article 32[26], the Panel examined the preparatory work and the circumstances of the conclusion of the treaty including the questions asked of Korea by GPA members during the accession process and Korea's responses thereto and the negotiating history[27].

Equipment, WT/DS62, WT/DS67, WT/DS68, adopted on 22 June 1998, at paragraph 84

[25] Article 31 of the Vienna Convention reads as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

2. The context for the purpose of a treaty interpretation shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions;

(b) any subsequent practice in application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

[26] Article 32 of the Vienna Convention provides guidance on supplementary means of interpretation. It reads as follows:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

[27] *supra*, paragraphs 7.4-7.13

(2) Covered Entities under Korea Annex 1

Regarding the claim of a violation of Korea's commitments under the GPA, there were two issues. The first one was the interpretation of Korea's Schedule of commitments. The second one was whether there was some other test that we should apply to determine if the entity in question was covered by Korea's GPA commitments even if not listed. The United States had argued in this regard that the proper test should be whether the procuring entity was "controlled" by a listed entity.

(a) Interpretation of Annex 1 of Korea's Schedule

In regard to the status of Note 1 to Annex 1, the Panel noted the panel finding in *United States - Restrictions on Imports of Sugar* ("*United States - Sugar*") wherein the panel observed that Headnotes could be used to qualify the tariff concessions themselves.[28] The Panel stated that the implication of the Findings in *United States - Sugar* for this case would be that a GPA signatory could use Notes to its Schedules to qualify the entity coverage itself.

Note 1 to Annex 1 states that the "central government entities include their subordinate linear organizations, special local administrative organs, and attached organs as **prescribed** in the *Government Organization Act* of the Republic of Korea." As the panel thought that the definitions of "prescribe" and "define" are so close as to make the words virtually synonymous, it agreed with

[28] Report of the Panel on *United States - Restrictions on Imports of Sugar*, adopted on 22 June 1989, (BISD 36S/331) at paragraphs 5.2-5.3 and 5.7.

Korea that the phrase "as prescribed in" means that the *Government Organization Act* defines the terms listed in the Note.

As the subordinate linear organizations are defined as individual offices rather than organizations in Article 2(3) of the *Government Organization Act* and it had not been argued that KAA fell within any of these offices, the panel proceeded on the basis that KAA was not a subordinate linear organization.

Article 3(1) provides that: "Each central administrative organ may have local administrative organs as prescribed by the Presidential Decree except those especially prescribed by laws, in case they are necessary for the implementation of the duties under its jurisdiction." As examples of such organizations were the Seoul and Pusan Regional Airport Authorities, the Panel stated that KAA and its successors were not considered local administrative organs.

As mentioned above, KAA did not fall within the terms of Articles 2(3), or 3(1) of the Government Organization Act. The Panel, therefore, concluded that KAA did not fall within the terms of Note 1 to Annex 1 of Korea's Schedule. The panel, however, further evaluated the extent of Korea's commitment because the United States urged the Panel to interpret Note 1 (and, in particular, the word "include") in such a way as to permit them to look beyond Annex 1 itself.[29]

(b) Further Evaluation of the Extent of Korea's Commitment

Korea argued for a narrow reading of the list in Annex 1 by using Note 1

[29] *supra*, paragraphs 7.30-7.37

as a definition. The United States focused on the term "include" and argued that Note 1 broadens the coverage beyond the central government entities listed in Annex 1.

The panel referred to Note 1 of Annex 2 in order to clarify the meaning of the subordinate linear organization. Note 1 to Annex 2 reads in relevant part as follows:

> "The above sub-central administrative government entities include their subordinate organizations under direct control and offices as prescribed in the Local Autonomy Law of the Republic of Korea."

The Panel noted that there are two important observations to make regarding this Note to Annex 2. First, there is a term "subordinate organizations" as opposed to "subordinate linear organizations." This would support an interpretation with respect to Note 1 to Annex 1 that subordinate linear organizations is a term of art and does not have a broader meaning inclusive of subordinate organizations. Second, when Korea wished to make reference to entities under direct control of the listed entities, it made the reference explicit. The absence of such a reference in Note 1 to Annex 1 implies that "direct control" is not a criterion there.

However, the Panel pointed out a peculiar structure of the Annex 1 Schedule where one set of *organizations* is defined in terms of offices rather than entities and to unusual aspect of Note 1 that the comprehensiveness of the list of

offices defining subordinate linear organizations could lead to a conclusion that the individual entities listed in Annex 1 are virtually without substance except as provided in the *Government Organization Act*.

The Panel raised the problem that the Note states that the central government entities in Annex 1 **include** subordinate linear organizations, local administrative organs and attached organs. They agreed with the United States that the term "include" is normally not a limiting or defining term. The relevant definition of "include" is: "contain as *part* of a whole or as a subordinate element."[30]

The Panel examined the negotiating history of Korea's GPA accession to provide some clarity to Note 1 in accordance with paragraph (a) of Article 32 of the *Vienna Convention*. Korea's original offer in 1990 provided for GPA coverage of 35 central government entities. In February 1991, Korea provided to the Tokyo Round Agreement signatories a *Supplementary Explanation of the Note by the Republic of Korea dated 29 June 1990 relating to the Agreement on Government Procurement.* Section 3 of the *Supplementary Explanation* provided a "Clarification of Notes in Korea's Offer."

The Panel noted that this provided two important aspects of the interpretation of Note 1. First, the *Supplementary Explanation* by its terms was intended to *clarify* the coverage of central government organs, as Note 1 was not

[30] *New Shorter Oxford English Dictionary,* (Clarendon Press, 1993), Vol. 1 at p. 1337.

in itself intended as an extension of coverage to entities other than those listed in Annex 1. Secondly, the coverage based on offices was made explicit because Note 1 defines the scope of coverage by listing components of central government entities themselves.

Korea had maintained that the entities for which coverage was provided under Annex 1 of its Schedule were the Seoul and Pusan Regional Aviation offices. The reference to two Regional Aviation Bureaus in the *Supplementary Explanation* supported this assertion. KAA was not included in the list contained in the *Supplementary Explanation*. Furthermore, KAA was not assigned its tasks by the Minister; was not listed in Annex 1; nor did Note 1 explicitly include KAA in coverage.

The panel further examined whether the relationship between MOCT and KAA was such that KAA's procurement was covered with respect to the IIA even though KAA was not explicitly included.

(c) Evaluation of "Control"

The United States argued that KAA might be considered a part of MOCT because it was controlled, at least for the purposes of the IIA project, by MOCT. Korea argued that if the panel were to adopt the US proposed control test, it would cause a number of entities included within Korea's Annex 3 commitments to be put by operation of law under Annex 1 because such entities would arguably be under the "control" of Annex 1 entities. The panel noted that this is important because it would change the threshold levels negotiated with respect to

the Annex 3 entities. The panel observed that the term "direct control" arose in that Note as a means of describing the scope of the concessions in Annex 2 and its absence in Note 1 to Annex 1 implies that it has no applicability to Annex 1.

The United States referred the panel to the Appellate Body decision in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ("*Canada – Dairy*") for guidance on the question of what constitutes "control" of an entity. As the focus of that dispute was whether or not the Canadian milk marketing boards were "government agencies"[31], the panel noted that it is different question than this dispute. The Panel concluded that there was no use of the term "direct control" or even "control" in the sense that the United States wishes to use it[32] because it has not been defined in this manner either in the context used in the Tokyo Round Agreement or elsewhere.

However, the panel also noted that it is not an entirely irrelevant question and that the issue of "control" of one entity over another could be a relevant criterion for determining coverage of the GPA.[33]

(d) Evaluation of the Relationship of the Entities Concerned

An overly narrow interpretation of "central government entity" may result in less coverage under Annex 1 than was intended by the signatories. On the

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[31] Appellate Body Report on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, (WT/DS103 and WT/DS113), adopted on 27 October 1999, at paragraphs 96-102.
[32] The term "control" does appear in Article XXIV:6(b), but it is referring there to privatization. That is, it is used in the same manner as per the analysis in *Canada – Dairy* for determining whether an entity is "governmental" or not rather than for examining the relationship between entities.
[33] *supra*, paragraphs 7.50-7.57

other hand, an overly broad interpretation of the term may result in coverage of entities that were never intended to be covered by signatories.

The Panel viewed that the relevant questions are: (i) Whether an entity (KAA, in this case) is essentially a part of a listed central government entity (MOCT) – in other words, are the entities, legally unified? and (ii) Whether KAA and its successors have been acting on behalf of MOCT.

(i) Are the Entities Legally Unified?

The Panel viewed that KAA was not legally unified with or a part of MOCT. There are many factors leading this conclusion - KAA was established by law as an independent juristic entity; it authored and adopted its own by-laws; it had its own management and employees who were not government employees; it published bid announcements and requests for proposals of its own accord; it concluded contracts with successful bidders on its own behalf; and it funded portions of the IIA project with its own monies. The Panel agreed that KAA and its successors and find that these entities were not a part of MOCT.

(ii) Legal Responsibility for the IIA Project

In order to determine whether or not KAA and its successors were acting on behalf of MOCT, that is, the IIA project was really the legal responsibility of MOCT, the Panel reviewed the laws governing construction of the IIA.

The United States relied heavily on the Korean Aviation Act for support for its position that MOCT had the legal responsibility for the IIA project. Paragraphs (1) and (2) of Article 94 read as follows:

(1) The airport development projects shall be carried out by the Minister of Construction and Transportation: *Provided*, that this shall not apply in case (of) provided otherwise [sic] by this Act or other Acts and subordinate statutes.

(2) Any person other than the Minister of Construction and Transportation, who desires to operate the airport development projects, shall obtain the permission of the Minister of Construction and Transportation, under the conditions as prescribed by the Presidential Decree.

Korea had responded that the provision in Article 94(1) means that the *Seoul Airport Act* is the ultimate controlling statute rather than the *Aviation Act*. The *Aviation Act* provides for at least two methods of airport construction. One is by MOCT, in which case the whole of the *Aviation Act* applies. The other is by other entities as provided otherwise by law. The Panel agreed with Korea's reading of these statutes and concluded that *Seoul Airport Act* is such a law.

(iii) Conclusion

The question of "control" is not an explicit provision of the GPA. Rather, it is a matter of interpretation for the content of the Schedules themselves. The United States pointed out that procurement by NADG was unarguably covered by the GPA even though it was neither listed explicitly nor directly within the definition of a subordinate linear organization or otherwise in Note 1 to Annex 1.

Even though Korea responded that NADG was merely an ad hoc task force within MOCT, the Panel viewed that this response of Korea somewhat avoided the challenge of this example. If the Schedule is completely silent on an entity, it may be necessary to look somewhat further to see if there is an affiliation of two entities such that they could be considered legally the same entity (which appears to be the case between MOCT and NADG) or one could be acting on behalf of another.

The Panel wanted to complete the examination of the scope of Korea's Annex 1 through the relevant aspects of negotiating history of Korea's accession to the GPA. After reviewing the negotiating history, the Panel concluded that the IIA project were not covered as the entities engaged in procurement for the project were not covered entities within the meaning of Article I of the GPA. Furthermore, the kind of affiliation that the Panel concluded was necessary to render an unlisted entity subject to the GPA is not present in this case. Therefore, the Panel did not proceed further and made specific findings with respect to the alleged inconsistencies of Korea's procurement practices in this regard.[34]

B. Allegation of Non-violation Nullification or Impairment

(1) General

The Panel noted that the basis for the non-violation claim that the United

[34] *id*, paragraphs 7.58-7.83

States had made in the context of this case was different from the usual case. In order to explain this difference clearly, it is necessary to note the bases of a traditional non-violation claim.

The panel in *Japan – Measures Affecting Consumer Photographic Film and Paper* (WT/DS44) ("*Japan – Film*") summarized the traditional test for non-violation cases as follows:

> "The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure."[35]

The Panel added the notion that had been developed in all these cases that the nullification or impairment of the benefit as a result of the measure must be contrary to the reasonable expectations of the complaining party at the time of the agreement. The panel changed the third condition as nullification or impairment of the benefit due to the application of the measure that could not have been reasonably expected by the exporting Member.

A key difference between a traditional non-violation case and the present one would be that the question of "reasonable expectation" is whether or not it

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[35] *Japan - Film*, at paragraph 10.41, citing, *EEC - Oilseeds*, BISD 37S/86, paragraphs 142-152;

was reasonably to be expected that the benefit under an existing concession would be impaired by the measures. However here, the question is whether or not there was a reasonable expectation of an entitlement to a benefit that had accrued pursuant to the *negotiation* rather than pursuant to a *concession*.[36]

(2) Non-violation Claims in the Context of Principles of Customary International Law

The non-violation remedy, which has developed in GATT/WTO, should not be viewed in isolation from general principles of customary international law. The basic premise is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners. The Panel viewed that this was a further development of the principle of *pacta sunt servanda* in the context of Article XXIII:1(b) of the GATT 1947. The principle of *pacta sunt servanda* is expressed in Article 26 of the Vienna Convention as follows:

> "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

The non-violation doctrine goes further than the object and purpose of the treaty as expressed in its terminology. One must respect actual provisions (i.e., concessions) as far as their effect on competitive opportunities is concerned. It is an extension of the good faith requirement in this sense.

Australian Subsidy on Ammonium Sulphate, BISD II/188, 192-193.

Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. The Panel viewed that the customary rules of international law apply to the WTO treaties to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently.

According to the Panel, if non-violation represents an extension of the good faith requirements in the implementation of a treaty and can also be applied to good faith and error in negotiations under the GPA, and the special remedies for non-violation contained in DSU Article 26[37] should also be applied, as Korea had argued, rather than the traditional remedies of treaty law which are not suitable to the situation of the GPA.[38]

(a) The Traditional Approach: Extended pacta sunt servanda

Because the United States raised the non-violation issue in this dispute under the traditional approach, the Panel examined the facts of the dispute in that context first. The Panel ran the analysis slightly different from that of previous GATT non-violation cases as follows: (1) there was an agreed concession on entities; (2) resulting from that there was a reasonable expectation of enjoying competitive bidding opportunities; (3) an action which does not violate GPA

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[36] *supra*, paragraphs 7.84-7.87

[37] Article 26:1(a) of the DSU requires that: "[T]he complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement."

[38] *supra*, paragraphs 7.93-7.102

rules is taken by the Member that made the concession, including the concessions on entities; and (4) resulting from that, the expected competitive bidding opportunities are not available and the benefits of the concession have been nullified and impaired.

The February 1991 explanation noted airport coverage under the Ministry of Transportation and it showed two unnamed regional airport authorities and one named airport entity. The IIA project was not mentioned nor was KAA. The meaning of the proposed Note 1 to Annex 1 was clarified in a manner which clearly indicated it was intended as a guide to the scope of the coverage under Annex 1.

On 1 May 1991, the United States sent a series of questions to Korea including a question regarding coverage of airport construction. On 31 May 1991, the Korea National Assembly enacted the *Seoul Airport Act* which Korea had told the panel was the legal basis for the shift of authority away from MOCT. Otherwise the *Aviation Act* would have required that the Minister of Transportation build the facility. On 26 June 1991, the Ministry of Transportation began the preparatory legislative work that would result in KAA being designated in December 1991 as the responsible entity for the IIA project.

On 1 July 1991, Korea provided its response to the US questions:

> "The new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation. The responsible organisation for procurement of goods and services relating to the new airport

construction is the Office of Supply. But at present, the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage."

On 10 July 1991, the MOT published a public notice of draft legislation containing proposed amendments to the *Seoul Airport Act.* On 21 October 1991, the draft legislation was transferred to the National Assembly and was adopted by the National Assembly on 20 November 1991 and signed by the President and published in the *Official Gazette* on 14 December 1991.

The Panel reminded the panel in *Japan – Film.* In one situation that arose in that dispute, the United States showed that the relevant measure (a Cabinet Decision) was only published nine days before the conclusion of the Kennedy Round of negotiations. The panel made the following finding:

"Because of the short time period between this particular measure's publication and the formal conclusion of the Kennedy Round, we consider it difficult to conclude that the United States should be charged with having anticipated the 1967 Cabinet Decision since it would be unrealistic to expect that the United States would have had an opportunity to reopen tariff negotiations on individual products in the last few days of a multilateral negotiating round."

On the other hand, when the measure pre-dated the conclusion of the Round by a month and a half, the panel reached a different conclusion.

The Panel summarized their conclusion non-violation claims as follows:

Korea's answer to the US question in July 1991 was insufficient. Members have a right to expect full and forthright answers to their questions submitted during negotiations, particularly with respect to Schedules of affirmative commitments such as those appended to the GPA. However, Members must protect their own interests as well and in this case the United States did not do so. It had a significant amount of time to realize, particularly in light of the wide knowledge of KAA's role, that its understanding of the Korean answer was not accurate. Therefore, we find that, even if the principles of a traditional non-violation case were applicable in this situation the United States has failed to carry its burden of proof to establish that it had reasonable expectations that a benefit had accrued.[39]

(b) Errors in Treaty Formation

The traditional claim of non-violation does not fit well with the situation existing in this dispute. Non-violation claims, as the doctrine has developed over the course of GATT and WTO disputes, have been based on nullification or impairment of benefits reasonably expected to flow from negotiated concessions. In this case, it was the negotiations that allegedly gave rise to the reasonable expectations rather than any concessions.

Korea's response to the US question was not as forthright and could be characterized as at best incomplete in light of existing Korean legislation and ongoing plans for further legislation. The Panel inquired as to whether the United

[39] *id*, paragraphs 7.103-7.119

States was induced into error about a fact or situation which it assumed existed in the relation to the agreement being negotiated regarding Korea's accession to the GPA. In this case, it clearly appears that the United States was in error when it assumed that the GPA as a result of the entity coverage offered by Korea covered the IIA project.

Error in respect of a treaty is a concept that has developed in customary international law through the case law of the Permanent International Court of Justice and of the International Court of Justice. Since article 48 of the *Vienna Convention on the Law of Treaties of 1969*[40] has been derived largely from case law of the relevant jurisdiction, the PCIJ and the ICJ, there can be little doubt that it presently represents customary international law and the panel applied it to the facts of this case.

In the treaty negotiations, the United States believed that the IIA project was covered, but it was not correct. The Panel viewed from the behavior of the United States that this purported concession arguably formed an essential basis of its consent to be bound by the treaty as finally agreed. Hence the initial conditions for error under Article 48(1) of the *Vienna Convention* seem to us to be satisfied. However, Article 48(2) is another question.

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[40] Article 48 of the *Vienna Convention* (Error) read as follows:

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error related to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.
2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

Although the duty to demonstrate good faith and transparency in GPA negotiations is particularly strong for the "offering" party, this does not relieve the other negotiating partners from their duty of diligence to verify these offers as best as they can. The Panel did not think the evidence at all supports a finding that the United States had contributed by its own conduct to the error, but given the elements had mentioned earlier (such as the two and a half year interval between Korea's answer to the US question and its final offer, the actions by the European Community in respect of Korea's offer, the subsequent four-month period, of which at least one month was explicitly designated for verification, etc.), they viewed that the circumstances were such as to put the United States on notice of a possible error.

For these reasons, the Panel concluded that the US had not demonstrated error successfully as a basis for a claim of non-violation nullification or impairment of benefits.[41]

V. Remaining Questions

The main agenda for GPA, which are currently discussed in WTO, are further negotiations regarding improvement of GPA and extension of its coverage by the Committee on Government Procurement and development of transparency in government procurement practices by the Working Group on Transparency in

[41] *supra*, paragraphs 7.120-7.126

Government Procurement.

1. Further Negotiations regarding Improvement of GPA and Extension of its Coverage

Article XXIV:7(b) and (c) of the Agreement calls on the Parties, not later than the end of the third year from the date of its entry into force, to undertake further negotiations, with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties and eliminating any remaining discriminatory measures and practices.

According to the article, the Committee on Government Procurement agreed to undertake an early review which was initiated in February 1997 in informal consultations, with an examination of modalities. This review has covered, in particular, the following elements: simplification and improvement of the Agreement, including adaptation to advances in the area of information technology; expansion of the coverage of the Agreement; and elimination of discriminatory measures and practices which distort open procurement.

Base on a categorization of issues agreed to at the June 2000 meeting, Parties had discussions under the Article-by-Article review relating to Articles VII-XV and XVIII, paragraphs 1, 3 and 4, the basic principles of the Agreement (Articles XIX:1, III, IV, XVI, XVII:1), technical specifications (Article VI), and bid review (Articles XVIII:2, XX). Parties also considered the other aspects of the Article XXIV:7 negotiations - the elimination of discriminatory measures and

the expansion of coverage.

A target date of these overall work programs will be mid-2001 or the Fourth Ministerial Conference if it held around that time.[42]

An objective of the negotiations under Article XXIV:7 is the expansion of the membership of the Agreement by making it more accessible to non-Parties. In this connection, the Committee sent a communication to the WTO Members in 1997, drawing their attention, as well as the attention of governments which are in the process of acceding to the WTO, to this work and inviting them to participate as observers in the meetings of the Committee. Considering discussion about the GPA in Uruguay Round was limited to the Parties only, it is a progress that discussion about the GPA was open to the non-Parties.

2. Development of Transparency in Government Procurement Practices

For the last three-and-a-half years the WTO has actively pursued a work programme on the subject of transparency in government procurement. This has been based on a mandate adopted by Ministers at the WTO Singapore Ministerial Conference held in December 1996 to: "establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an

[42] WTO Committee on Government Procurement, *Report (2000) of the Committee on Government Procurement*, (GPA/44), 2 November 2000, p5

appropriate agreement."[43]

The Singapore mandate reflects the heavy emphasis placed throughout the WTO system of rules and practices on transparency. The object of the transparency provisions in GPA is not only to ensure that adequate information on procurement opportunities is made available and that decisions are fairly taken, but also to facilitate monitoring of the commitments made under that Agreement not to discriminate against suppliers and supplies from other Parties.

The WTO Working Group on Transparency in Government Procurement, since its first meeting in May 1997, has met many times. The Working Group initiated its work by hearing presentations from other intergovernmental organizations which have international instruments and activities relevant to transparency in government procurement, notably the United Nations Commission for International Trade Law (UNCITRAL) and the World Bank. It then considered a WTO comparative study of the transparency-related provisions in existing international instruments on government procurement procedures as well as in national practices. This covered the procedures under the plurilateral WTO Agreement on Government Procurement, the UNCITRAL Model Law and the World Bank Guidelines, as well as available material on national practices.

The next stage in the work of the Working Group was the systematic study of 12 issues that were identified as important in relation to transparency in

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[43] WTO Working Group on Transparency in Government Procurement to the General Council, *Report (2000) to the General Council*, (WT/WGTGP/4), 31 October, 2000, p1

government procurement. These are: definition and scope of government procurement; procurement methods; publication of information on national legislation and procedures; information on procurement opportunities, tendering and qualification procedures; time-periods; transparency of decisions on qualification; transparency of decisions on contract awards; domestic review procedures; other matters related to transparency; maintenance of records of proceedings; information technology; language; fight against bribery and corruption; information to be provided to other governments (notification); WTO dispute settlement procedures; and technical cooperation and special and differential treatment for developing countries. Written contributions on national practices, on issues meriting study and setting out ideas for action have been presented by many members to the Working Group.

The work has shown a high degree of common thinking on many of the issues referred to above. The main questions on which further work is required include the scope of the transactions that would be covered by a transparency agreement, the treatment of single tendering practices, which are inherently less transparent, domestic review or challenge procedures and the applicability of WTO procedures for settling disputes between governments concerning allegations of non-compliance with the rules of a transparency agreement.

Many individual Members have focused on transparency measures as a key element of their overall domestic efforts to build confidence in the management of government affairs, establish a stable and predicable commercial

environment, and provide a solid foundation for future growth and development. As these merits of Transparency in Government Procurement do not automatically guarantee for the developing countries to accede the market by accession of GPA, it is meaningful that the Working Group aimed at drawing up an agreement to which all WTO Members will be parties. In discussing about above-mentioned issues in Transparency in Government Procurement, domestic policy and practices of the development should be reflected.

VI. Conclusion

The United States initiated this dispute because Korea's practices in the procurement for its Inchon airport project had favored Korean firms over foreign firms. The United States argued that Korea's practices, including the use of domestic partnering, short deadlines and certain licensing requirements were inconsistent with the GPA. Korea did not contest these claims but instead argued that the entities procuring for the airport project were simply not covered under its GPA obligations.

The GPA coverage was defined by entity-based schedules as negotiated by individual parties to the Agreement. A GPA schedule typically consisted of a "positive" listing of entities that were covered, with explicit provisions. Korea's GPA schedule consisted of a "negative" listing of subdivisions, yet the Panel had treated it as a "positive" listing. The Panel had effectively narrowed Korea's GPA coverage contrary to the expectations of the United States. It also called into

question the balance of concessions achieved during the GPA negotiations. Additionally, in creating its own criteria to determine whether an unlisted entity was covered by the GPA on the basis of it being controlled by a GPA-covered entity, the Panel had not taken into account the possibility of a de facto control of the entities in question by other GPA-covered Korean entities. The Panel had held that the specific entities responsible for procurement at the Inchon International Airport were not included in Korea's commitments. The Panel had, therefore, concluded that the GPA did not even apply to procurements by those entities and had thus rejected the US claims.

More importantly, the Panel had also rejected the US non-violation claim. The United States argued that it had reasonably expected that it had received Korea's commitment to extend GPA-consistent treatment to US suppliers for procurement for the Inchon International Airport. The Panel had noted that the first step in analyzing any non-violation case was to determine whether there had been an agreed concession. In this particular case, there was no such a concession since the entities responsible for procurement at the Inchon International Airport were not included in Korea's commitments. The Panel had noted that a non-violation case could not be sustained. The Panel had stated that an alternative, non-traditional type of non-violation claim could be sustained, under customary international law rather than under the DSU or the GPA, on the basis of reasonable expectations accrued pursuant to negotiations rather than concessions. Even under its non-traditional analysis, the Panel had concluded

that the US expectations of the GPA's coverage for the entities responsible for Inchon Airport procurement were not reasonable.

For Korea, the most difficult part in this dispute was to explain Korean institutional system to the Panel as well as the United States since it was difficult to understand logically. It was also a pivotal point in the dispute. However, the Panel correctly understood Korean legal system.

The lessons Korea can get in this dispute are as follows:

First, even though there have been large progress in negotiation technology in trade as 5 years have passed since the WTO system started, there remain many rooms to improve in the legal area. Therefore, more participation of lawyers is desirable in process of negotiation, submission of concession schedule and dispute settlement in order to discipline the legal expert.

Second, it is necessary to correctly translate the Korean laws into English. The correction of the translation in a trade dispute causes distrust in our position. If the legal documents were correctly translated, it results in induction of more investment and prevention of trade dispute. We can recall how the parties argued the meaning of the word in related legal documents in this dispute.

Third, legislation system should be improved. In Korea, when a law is established, they do not specify the related law or the parent law. Accordingly, it requires very complicated examinations to find which law is related to a law. Sometimes, we come to realize that some laws and regulations are inconsistent in

process of examinations. Therefore, we must be careful when we establish a law or a regulation.

In WTO, the Members are currently discussing about the GPA amendments for the next round as follows: further negotiations regarding improvement of GPA and extension of its coverage by the Committee on Government Procurement and development of transparency in government procurement practices by the Working Group on Transparency in Government Procurement. In this regard, Korea should actively participate in the discussions and prepare for the future bearing these live lessons in mind. It is hoped that the present review and discussion can initiate more in-depth research and contemplation on this agenda.

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