

## KOREA - MEASURES AFFECTING GOVERNMENT PROCUREMENT

### Report of the Panel

WT/DS163/R

*Adopted by the Dispute Settlement Body  
on 19 June 2000*

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## I. PROCEDURAL BACKGROUND

1.1 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 (WT/DS163/1 and GPA/D4/1) regarding certain procurement practices of entities concerned with the procurement of airport construction for Incheon International Airport ("IIA") in Korea. The European Communities requested to join in the consultations on 8 March 1999 (WT/DS163/2) and Japan made the same request on 9 March 1999 (WT/DS163/3). Korea accepted neither of these requests.

1.2 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) to establish a panel to examine the matter.<sup>1</sup>

1.3 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:

"To examine, in the light of the relevant provisions of the Agreement on Government Procurement, the matter referred to the DSB by the United States in document WT/DS163/4, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that Agreement."<sup>2</sup>

1.4 The European Communities and Japan reserved third party rights.

<sup>1</sup> WT/DS163/4 reproduced in Annex 1 to this report.

<sup>2</sup> WT/DSB/M/64.

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1.5 The Panel was composed on 30 August 1999 (WT/DS163/5). The composition of the Panel was as follows:

Chairman: Mr. Michael D. Cartland  
Panelists: Ms. Marie-Gabrielle Ineichen-Fleisch  
Mr. Peter-Armin Trepte

1.6 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.

## II. FACTUAL ASPECTS<sup>3</sup>

### A. Introduction

2.1 This dispute relates to the Incheon International Airport (IIA) project, which is being constructed in the Republic of Korea. At issue is whether the entities that have had procurement responsibility for the project since its inception are "covered entities" under the Agreement on Government Procurement. The United States also raised the issue of whether the procurement practices of these entities are or have been inconsistent with Korea's obligations under the Agreement on Government Procurement and whether they nullify or impair benefits accruing to the United States under that Agreement.

### B. *The Agreement on Government Procurement*

#### 1. *Uruguay Round Negotiations of the GPA*

2.2 The original Agreement on Government Procurement was negotiated during the Tokyo Round of trade negotiations and was done in Geneva on 12 April 1979 ("Tokyo Round Agreement"). This Agreement was amended following negotiations in pursuance of Article IX:6(b) through a Protocol which entered into force on 14 February 1988. During the Uruguay Round of Trade Negotiations, Parties to the Tokyo Round Agreement held further negotiations in the context of an Informal Working Group<sup>4</sup>, which involved the broadening of entity coverage, expansion of the coverage to services and construction services and further improvements of the text of the Agreement.

2.3 Coverage negotiations were initiated through a bilateral request/offer process in September 1990. These negotiations involved the tabling of offers and the submission of requests by interested Parties to their trading partners.

2.4 Following the bilateral negotiations for improvement and the finalization of specific offers which occurred in 1993, the final text of the Agreement with the attached draft schedule of parties was issued on 15 December 1993. On that date, the Informal Working Group adopted a Decision concluding negotiations and agreeing that the text entitled Agreement on Government Procurement, together with Annexes

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<sup>3</sup> All Korean legislation referred to in this report was translated into English by the Government of the Republic of Korea.

<sup>4</sup> The Informal Working Group on Negotiations was originally established in May 1985 to improve the text of the Tokyo Round Agreement.

1-5 of Appendix I of each of the participants embodied the results of their negotiations as at that date.<sup>5</sup> The Decision further specified procedures relating to outstanding work to be completed prior to the entry into force of the Agreement.<sup>6</sup>

2.5 Further, a decision of the Informal Working Group on negotiations, dated 17 January 1994, entitled "Modifications of the Annexes to Appendix I to the Agreement on Government Procurement before its Entry into Force on 1 January 1996", set out procedures for the incorporation into the Agreement of modifications expanding coverage that were agreed and resulted from negotiations between the date of signature of the Agreement and the date of its entry into force.

2.6 The Agreement on Government Procurement (1994) (the GPA) was signed in Marrakesh on 15 April 1994. The GPA entered into force on 1 January 1996.

## 2. *Overview of the Scope and Coverage of the GPA*

2.7 The GPA establishes an agreed framework of rights and obligations among its Parties with respect to their national laws, regulations, procedures and practices in the area of government procurement.

2.8 The obligations under the Agreement apply to procurement:

- (a) by procuring entities that each Party has listed in Annexes 1 to 3 of Appendix I relating respectively to "central government entities," "sub-central government entities" and "other entities";
- (b) of all products; and
- (c) of services and construction services that are specified in lists found respectively in Annexes 4 and 5 of Appendix I.

2.9 Furthermore, GPA coverage under each of the Annexes is contingent upon certain threshold values being exceeded. These threshold values are expressed in terms of Special Drawing Rights (SDRs). GPA coverage under each of the Annexes is also contingent upon the various notes found in the Annexes.

<sup>5</sup> GPR/SPEC/77.

<sup>6</sup> Specifically, para. 4 of the Decision stated:

Participants will submit to the Secretariat by 31 January 1994 the texts of their Annexes in final form for circulation to all participants. Those Annexes will be considered accepted by participants as corresponding to what had been negotiated and agreed, unless the Secretariat is notified to the contrary prior to 28 February 1994. In the event of problems, consultations will be held to resolve the matter.

Further, para. 6 of the Decision stated:

Proposed modifications of the Annexes to Appendix I of participants that expand the coverage of the Agreement and that result from further negotiations between now and the date of signature of the Agreement will be deemed part of the agreed results of the negotiations provided that no participant objects to such modifications. To enable all participants to examine any such modifications in advance of the date of signature, modifications should be notified to other participants through the Secretariat by 31 March 1994.

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C. *Korea's Accession to the Agreement on Government Procurement*

1. *Korea's Application for Accession*

2.10 Korea was not a Party to the Tokyo Round Agreement. However, in a communication dated 25 June 1990, the Government of the Republic of Korea indicated its interest in exploring the possibility of acceding to the GPA. Attached to this communication was a note containing a list of purchasing entities and products for which coverage was proposed together with explanatory notes.<sup>7</sup>

2.11 Further, in a communication dated 20 September 1991<sup>8</sup>, the Government 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.<sup>9</sup>

2.12 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.<sup>10</sup>

2. *Korea's Accession Offers*

(a) Offer of 25 June 1990

2.13 In its initial offer<sup>11</sup>, Korea listed the purchasing entities for which GPA coverage would be provided without categorizing those entities. The offer did not contain thresholds above which the GPA would apply.

(i) Coverage of Entities

2.14 Korea's initial offer included primarily government ministries.<sup>12</sup> However, the offer also proposed coverage of a number of boards<sup>13</sup>, agencies<sup>14</sup>, offices<sup>15</sup> and administration bodies.<sup>16</sup> It also proposed coverage of one corporation (the Korea Na-

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<sup>7</sup> Letter from the Permanent Mission of the Republic of Korea to the Director-General, GATT, dated 25 June 1990.

<sup>8</sup> Communication from the Delegation of the Republic of Korea, Document GPR/W/109, dated 20 September 1991.

<sup>9</sup> GPR/M/50 indicates that the Republic of Korea was a full participant in the Uruguay Round negotiations.

<sup>10</sup> The original offer was attached to a communication to the Director-General, dated 25 June 1990. Subsequent offers were submitted on 14 August 1992 in document GPR/Spec/73 and on 14 December 1993.

<sup>11</sup> Document accompanying Korea's letter to the GATT, dated 25 June 1990.

<sup>12</sup> Specifically, of the 37 entities that were proposed to be covered by Korea in its initial offer, 19 were ministries. *Ibid.* pp. 2-3.

<sup>13</sup> The Board of Audit and Inspection, the Economic Planning Board and the National Unification Board.

<sup>14</sup> The Government Legislation Agency and the Patriots and Veterans Affairs Agency.

<sup>15</sup> The Office of Supply, the Supreme Public Prosecutors Office and the Korea Industrial Property Office.

<sup>16</sup> The National Tax Administration, the Customs Administration, the Military Manpower Administration, the Rural Development Administration, the Forestry Administration, the Fisheries Admini-

tional Housing Corporation) and one authority (the Korea Telecommunication Authority).

2.15 Relevantly, Korea's offer proposed coverage of the Ministry of Construction, the Ministry of Transportation and the Office of Supply. The offer specified that the Office of Supply was only covered in relation to purchases made by the Office of Supply in its capacity as a central purchasing entity on behalf of entities referred to elsewhere on Korea's proposed list of covered entities.<sup>17</sup>

(ii) Coverage of Products and Services

2.16 By implication, the initial offer applied to all products. However, a limited list of products specified in Annex A applied to the Korea Telecommunication Authority.<sup>18</sup>

(iii) Explanations and Qualifications

2.17 Notes appeared at the end of the list of covered entities. Note 1 to the offer stated that:

"Purchasing entities include all their subordinate linear organizations, special local administrative organs and attached organs as prescribed in the Government Organization Act of the Republic of Korea."

2.18 Note 2 stated that:

"This Agreement shall not apply to the procurements with regard to which special procurement procedures are required and/or permitted in accordance with the laws and regulations of the Republic of Korea which are effective at the time of entry into force of this Agreement for the Republic of Korea."

2.19 The initial offer also contained four footnotes that qualified the scope of coverage in respect of some of the listed entities. Footnote 1 excluded coverage of procurement by the Ministry of Home Affairs for the purpose of maintaining public order. Footnote 2 excluded coverage of procurement by the Ministry of Agriculture, Forestry and Fisheries for the purposes of stabilizing the demand and supply situation of agricultural products and ensuring provision of basic national foodstuffs. Footnote 3 stated that procurement by the Office of Supply was only covered when the Office of Supply was acting for a listed centralized purchasing entity. Footnote 4 noted that the Korea Telecommunication Authority was covered only in relation to the goods listed in Annex A except for goods procured by the local branch offices of that Authority.

stration, the Industrial Advancement Administration and the Korea Maritime and Port Administration.

<sup>17</sup> Footnote 3 of document accompanying Korea's letter to the GATT, dated 25 June 1990.

<sup>18</sup> The listed products were vehicles, clothing, paper and stationery, tools, poles, conduits, cable splicing materials, line distributing materials, wire (except cables), power supplies and accessories, air conditioning and control equipment, circuit protective devices, test and measuring instruments, telegraph or telephone-type terminals (except for public terminals), other miscellaneous machinery, appliances and materials, computers (off-line or stand-alone use) and peripherals for off-line computer systems, data terminal equipment and modems, word processors and keyboard printers.

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(b) *Supplementary Explanation* of Offer of 25 June 1990

2.20 By a communication, dated 28 February 1991, which was circulated at least to the United States<sup>19</sup> and the European Communities<sup>20</sup>, Korea provided a *Supplementary Explanation* of its initial offer of 25 June 1990.<sup>21</sup>

(i) Entities

2.21 This *Supplementary Explanation* identified entities that had not been specifically listed in the initial offer but were proposed to be covered under the entities that had been listed in that offer. The *Supplementary Explanation* listed the following entities for which coverage was proposed under the Ministry of Transportation<sup>22</sup>: Regional Aviation Bureaus (2); CHEJU Regional Aviation Office; Flight Inspection Office; VOR-TAC Stations (5); and Marine Accident Inquiry Office (5).

2.22 The following entities were proposed to be covered under the Ministry of Construction<sup>23</sup>: National Construction Research Institute; Central Equipment Management Office; Regional Construction and Management Institutes; District Construction Offices; Cheju-do Development Construction Office; Flood Control Offices; Construction Officials Training Institute; and the National Geography Institute.

2.23 The following entities were proposed to be covered under the Ministry of Communications<sup>24</sup>: Regional Communications Offices; Post Offices; Communications Officials Training Institute; Postal Service Research Institute; Radio Research Laboratory; Postal Money Order and Giro Center; Central Radio Monitoring Office; and the Supply and Construction Office.

2.24 The following entities were proposed to be covered under the Office Supply<sup>25</sup>: Central Supply Office; and Regional Supply Offices (10).

(ii) Notes

2.25 The *Supplementary Explanation* also elaborated on the notes to Korea's initial offer.<sup>26</sup> Specifically, the explanation stated the following in relation to Note 1:

"Note 1 is established to clarify the coverage of central government organs, which come under 35 of 37 purchasing entities.

The meaning and categories of subordinate linear organizations, special local administrative organs and attached organs are prescribed in the Government Organization Act of Korea as follows:

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<sup>19</sup> Questions 9, 10 and 14 of the United States' questions, entitled "Questions Relating to Korea's Request to Accede to the Agreement on Government Procurement," sent to Korea on 1 May 1991 indicate that the United States received a copy of this communication. (US Exhibit 4)

<sup>20</sup> Annex II to the European Communities' Answers to the Panel's Questions, dated 3 November 1999.

<sup>21</sup> *Supplementary Explanation of the Note by the Republic of Korea*, dated 29 June 1990, relating to the Agreement on Government Procurement, dated February 1991. (Exhibit Kor-117)

<sup>22</sup> *Ibid.* p. 11.

<sup>23</sup> *Ibid.* p. 10.

<sup>24</sup> *Ibid.* p. 11.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* pp. 26 -28.



- Subordinate linear organizations: office of the minister, vice-minister, assistant minister, director general, director etc.
- Special local administrative organs: the organs established in local regions by central government organs when necessary, for example, local tax offices by the National Tax Administration and local post offices by the Ministry of Communication.
- Attached organs: the organs established by central government organs for the purpose of R&D, training and education, culture, medical care, and consulting. These include the Central Officials Training Institute by the Ministry of Government Administration and the National Film Production Center by the Ministry of Information."

(c) Offer of 14 August 1992

2.26 The second offer made by Korea was first circulated informally to members of the Informal Working Group on 12 May 1992 and then formally to the Committee on Government Procurement on 14 August 1992 in document GPR/Spec/73. The offer was stated to be made in substitution for the initial offer made on 25 June 1990.<sup>27</sup> Korea further stated that it reserved the right to withdraw, amend or supplement its offer in the future taking into account the offers made by other Parties and the progress made during negotiations on the expansion of the Agreement.<sup>28</sup>

2.27 The offer listed the purchasing entities for which GPA coverage would be provided and specified the GPA Annexes under which coverage would be provided for those entities. The offer did not specify the products that would be covered by Korea's offer but, by implication, the offer applied to all products. The offer specified the services that would be covered in Annex 4 and construction services that would be covered in Annex 5. The offer also contained thresholds in Annexes 1, 2 and 3 above which the GPA would apply for all products and for the services and construction services referred to in Annexes 4 and 5.

(i) Coverage of Entities

2.28 The entities that were proposed to be covered under Annex 1 in Korea's offer of 14 August 1992 were substantially the same as the entities for which Korea proposed coverage in its initial offer. As in the case of the initial offer, Korea proposed coverage under Annex 1 of the Ministry of Construction, Ministry of Communication and the Ministry of Transportation. It also continued to propose coverage of the Office of Supply subject to the same limitation that was expressed in Korea's initial offer, namely that procurement by the Office of Supply was only covered in relation to purchasing undertaken on behalf of entities listed in Annex 1.

2.29 Korea also proposed coverage of entities at the sub-central level that had not been included in its initial offer. Specifically, Korea proposed coverage under Annex 2 of the Seoul Metropolitan Government, City of Pusan, City of Taegu, City of In-

<sup>27</sup> Document GPR/Spec/73, p. 2.

<sup>28</sup> Ibid.

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chon, City of Kwangju and City of Taejon.<sup>29</sup> The offer indicated that the Offices of Subway Construction were not covered under Annex 2.

2.30 Finally, Korea proposed coverage under Annex 3 of the Office of Waterworks, Seoul Metropolitan Government; Office of Waterworks, City of Pusan; Office of Waterworks, City of Taegu; Office of Waterworks, City of Incheon; Office of Waterworks, City of Kwangju; Office of Waterworks, City of Taejon. It also proposed coverage of Korea Telecom, Korea National Railroad, Korea Container Terminal Authority, Korea Development Bank, Korea National Housing Corporation and Agricultural and Fishery Marketing Corporation under Annex 3.<sup>30</sup>

(ii) Coverage of Products and Services

2.31 Korea's offer of 14 August 1992 applied to all products except for goods referred to in parentheses next to the names of some of the listed entities. Further, unlike the initial offer, the offer of 14 August 1992 did propose coverage of services. It proposed coverage of a list of services specified in Annex 4. The offer also proposed coverage of construction services listed in Annex 5.

(iii) Explanations and Qualifications

2.32 Note 1, which appeared at the end of Korea's initial offer and stated that listed purchasing entities include "subordinate linear organizations, special local administrative organs and attached organs as prescribed in the *Government Organization Act*," was repeated in identical terms in Korea's offer of 14 August 1992. However, in the case of the later offer, the qualification appeared as a preface to the list of entities contained in Annex 1 and purported to relate exclusively to "central government entities."<sup>31</sup> Note 2, which concerned procurements that were subject to special procurement procedures and qualified Korea's initial offer, appeared in similar terms in the offer of 14 August 1992 but only applied to Annex 5.<sup>32</sup>

2.33 In the offer of 14 August 1992, Annexes 4 and 5 were made subject to a new qualification which provided that the exceptions and restrictions contained in the Revised Conditional Offer of the Republic of Korea Concerning Initial Commitments on Trade in Services<sup>33</sup> would apply to services listed in those Annexes and that the Korean Government may impose restrictions on qualification, registration, licensing and/or other authorization requirements on service providers according to domestic laws and regulations.<sup>34</sup>

2.34 The qualifications that had appeared in footnotes 1 and 2 in the initial offer did not appear in the offer of 14 August 1992. However, other qualifications appeared in the later offer in parentheses next to the names of some listed entities.

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<sup>29</sup> Ibid. p. 5.

<sup>30</sup> Ibid. p. 6.

<sup>31</sup> Ibid. p. 3.

<sup>32</sup> Ibid. p. 8.

<sup>33</sup> MTN.TNC/W/61/Rev.1, dated 19 February 1992.

<sup>34</sup> Document GPR/Spec/73, pp. 7-8.