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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.¹

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."²

1.4 The European Communities and Japan reserved third party rights.

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

² WT/DSB/M/64.

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 ASPECTS³

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 Group⁴, 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

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

⁴ 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.⁵ The Decision further specified procedures relating to outstanding work to be completed prior to the entry into force of the Agreement.⁶

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.

⁵ GPR/SPEC/77.

⁶ 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.

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.⁷

2.11 Further, in a communication dated 20 September 1991⁸, 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.⁹

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.¹⁰

2. *Korea's Accession Offers*

(a) Offer of 25 June 1990

2.13 In its initial offer¹¹, 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.¹² However, the offer also proposed coverage of a number of boards¹³, agencies¹⁴, offices¹⁵ and administration bodies.¹⁶ It also proposed coverage of one corporation (the Korea Na-

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

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

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

¹⁰ 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.

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

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

¹³ The Board of Audit and Inspection, the Economic Planning Board and the National Unification Board.

¹⁴ The Government Legislation Agency and the Patriots and Veterans Affairs Agency.

¹⁵ The Office of Supply, the Supreme Public Prosecutors Office and the Korea Industrial Property Office.

¹⁶ 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.¹⁷

(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.¹⁸

(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.

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

¹⁸ 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.

(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 States¹⁹ and the European Communities²⁰, Korea provided a *Supplementary Explanation* of its initial offer of 25 June 1990.²¹

(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 Transportation²²: 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 Construction²³: 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 Communications²⁴: 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 Supply²⁵: 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.²⁶ 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:

¹⁹ 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)

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

²¹ *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)

²² *Ibid.* p. 11.

²³ *Ibid.* p. 10.

²⁴ *Ibid.* p. 11.

²⁵ *Ibid.*

²⁶ *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 1990.²⁷ 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.²⁸

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-

²⁷ Document GPR/Spec/73, p. 2.

²⁸ Ibid.

chon, City of Kwangju and City of Taejon.²⁹ 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 3.³⁰

(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."³¹ 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 5.³²

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 Services³³ 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.³⁴

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.

²⁹ Ibid. p. 5.

³⁰ Ibid. p. 6.

³¹ Ibid. p. 3.

³² Ibid. p. 8.

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

³⁴ Document GPR/Spec/73, pp. 7-8.

(d) Offer of 14 December 1993

2.35 Korea made its final formal offer prior to accession on 14 December 1993.³⁵ The offer again stated that Korea reserved the right to make technical changes to the offer and to correct any errors, omissions or inaccuracies prior to 15 April 1994³⁶, being the date by which the Agreement on Government Procurement (1994) and the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations were scheduled to be signed.

2.36 The structure of Korea's final offer was largely the same as for Korea's offer dated 14 August 1992. Specifically, the offer again 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 purported to apply to all products. Further, it specified the services that would be covered in Annex 4 and construction services in Annex 5. The offer again contained thresholds in Annexes 1, 2, 3 and 4 and specified in Annex 5, a threshold for construction services of 5,000,000 SDR for Annex 1 entities, 15,000,000 SDR for Annex 2 entities and 15,000,000 SDR for Annex 3 entities.

(i) Coverage of Entities

2.37 Korea's final offer and its previous offer of 14 August 1992 were the same in all relevant respects in respect of coverage under Annex 1. However, the lists of entities covered under Annexes 2 and 3 were expanded in the final offer.

2.38 Specifically, in addition to the entities for which coverage was proposed under Annex 2 in its offer of 14 August 1992, Korea also proposed coverage of the following entities in its final offer: Kyonggi-do, Kang-won-do, Chungchongbuk-do, Chungchongnam-do, Kyongsangbuk-do, Kyongsangnam-do, Chollabuk-do, Chollanam-do and Cheju-do. Unlike the offer of 14 August 1992, the final offer did not state that the Offices of Subway Construction were not covered under Annex 2.

2.39 In relation to Annex 3, the final offer did not include the various Office of Waterworks that had been specified in the offer of 14 August 1992. However, the final proposal for Annex 3³⁷ included four banks (Korea Development Bank, Small and Medium Industry Bank, Citizens National Bank and Korea Housing Bank) and 17 corporations (Korea Tobacco & Ginseng Corporation, Korea Security Printing and Minting Corporation, Korea Electric Power Corporation, Dai Han Coal Corporation, Korea Mining Promotion Corporation, Korea Petroleum Development Corporation, Korea General Chemical Corporation, Korea Trade Promotion Corporation, Korea Highway Corporation, Korea National Housing Corporation, Korea Water Resources Corporation, Korea Land Development Corporation, Rural Development Corporation, Agricultural and Fishery Marketing Corporation, Korea National Tourism Corporation, Korea Labor Welfare Corporation, Korea Gas Corporation). It also included Korea Telecom and National Textbook Ltd.

³⁵ "Korea's Offer in the Agreement on Government Procurement", dated 14 December 1993.

³⁶ Ibid. p. 1.

³⁷ Ibid. p. 9.

(ii) Coverage of Products and Services

2.40 As in the case of Korea's offer of 14 August 1992, the final offer applied to all products except for goods referred to in parentheses next to the names of some of the listed entities. It also applied to a list of services specified in Annex 4 which was broader than the list of services that were included in the offer of 14 August 1992.³⁸ Korea's final offer also included a range of construction services to be covered under Annex 5.³⁹

(iii) Explanations and Qualifications

2.41 The note concerning the application of Annex 1 to "subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the *Government Organization Act*" that appeared in Korea's initial offer and its offer of 14 August 1992 also appeared in its final offer as Note 1 to Annex 1.

2.42 The Note that appeared in Annex 5 of Korea's offer of 14 August 1992 concerning special procurement procedures was deleted from the final offer. The qualifications to Annexes 4 and 5 in the offer of 14 August 1992 regarding "the Revised Conditional Offer of the Republic of Korea Concerning Initial Commitments on Trade in Services" were also deleted from the final offer.

2.43 The final offer additionally contained the following note (Note 1) which applied to Annex 2:

"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."

2.44 The final offer also introduced general notes that applied to all the Annexes.⁴⁰ General Note 1 provided:

"Korea will not extend the benefit of this Agreement

- (a) as regards the award of contracts by 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 the suppliers and service providers of member states of the European Community, 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."

2.45 In the final offer, qualifications again appeared in parentheses next to the names of some listed entities.

³⁸ Ibid. p. 13.

³⁹ Ibid. p. 17.

⁴⁰ Ibid. p. 18.

(e) The Government Organization Act

2.46 As noted above at paragraph 2.41, Korea's final offer provided in Note 1 to Annex 1 that all central government entities listed in Annex 1 included their "subordinate linear organizations, special local administrative organs and attached organs as prescribed in the *Government Organization Act* of the Republic of Korea". This qualification also appeared in Korea's previous accession offers.⁴¹

2.47 As at 30 December 1989, Article 2 of the *Government Organization Act* entitled "Establishment and Organization of Central Administrative Organs" provided in sub-article (3) that:

"The subordinate linear organizations of the central administrative organs shall be Cha-Gwan (Vice-Minister), Cha-Jang (Deputy Administrator), Sil-Jang (Office Director), Guk-Jang (Bureau Director) or Bu-Jang (Department Director) and Gwa-Jang (Division Director), under Vice-Minister or Deputy Administrator, as division not belonging to Office, Bureau or Department may be set up except those otherwise prescribed by special provisions in this Act or any other laws. The subordinate linear organizations undertaking national police affairs under the Ministry of Home Affairs, however shall be Bon-Bu-Jang (Chief Commissioner of Policy), Bu-Jang (Department Director) and Gwa-Jang (Division Director); and for those undertaking civil defense affairs, Bon-Bu-Jang (Chief of Civil Defense Headquarters), Guk-Jang (Bureau Director) and Gwa-Jang (Division Director)."

2.48 Article 3 of the 1989 *Government Organization Act* entitled "Establishment of Special Local Administrative Organs" provided in sub-article (1) that:

"Each central administrative organ may have local administrative organs as prescribed by Presidential Decree except those especially prescribed by laws, in case they are necessary for the implementation of the duties under its jurisdiction."

2.49 Article 4 of the 1989 *Government Organization Act* entitled "Establishment of Attached Organizations" provided that:

"In an administrative organ, there may be established by the Presidential Decree organizations for experiment and research, education and training, culture, medicine, manufacturing or advice, respectively, if necessary for the fulfilment duties under its jurisdiction."

2.50 The above provisions remained largely the same in all relevant respects despite various changes that were made to the *Government Organization Act* from 30 December 1989 until Korea's GPA obligations came into effect. However, the English translation of the title of Article 2(3) was amended to prescribe "subsidiary organs of central administrative agencies" rather than "subordinate linear organizations of the central administrative organs", the latter phrase being used in the 1989 version of the Act.

⁴¹ See paras. 2.17 and 2.32.

3. *Communication between the Parties During Korea's Accession*

2.51 The United States began bilateral negotiations with Korea regarding its accession bid on 22 April 1991. During the course of these negotiations, the United States put a series of questions to Korea regarding its offer.⁴² Question 6 asked:

"How does the Airport Development Group relate to the Ministry of Communications? Does Korea's offer of coverage of the Ministry of Communications include purchases for the Airport Development Group? Please identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction."

2.52 In response, Korea answered⁴³:

"The new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation. The new airport construction project is scheduled to be completed by 1997 after the completion of the basic plan by 1992 and the working plan by 1993. The US company, Bechtel, is taking part in the basic plan projects.

The responsible organization 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."

4. *Korea's Accession*

2.53 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.

2.54 While the GPA entered into force for existing Parties on 1 January 1996, it entered into force for Korea on 1 January 1997.⁴⁴

2.55 In its final form at accession, Korea's Appendix I to the GPA was identical in all relevant respects to Korea's final offer of 14 December 1993.

D. *Korea's Implementation of the GPA*

1. *Modification of Korea's Appendix I*

2.56 On 24 October 1997, Korea notified the Committee on Government Procurement of a proposed modification to Appendix I pursuant to Article XXIV:6(a) of the GPA.⁴⁵ Paragraph 3 of the relevant communication stated:

⁴² Letter from the US Trade Mission to the Mission of the Republic of Korea, dated 1 May 1991.

⁴³ Korea's Answers to Questions from the USTR delivered on 1 May 1991, dated July 1991.

⁴⁴ Article XXIV:3(a) of the GPA.

"Delete "Ministry of Construction" and "Ministry of Transportation."
Add "Ministry of Construction and Transportation" instead. This rectification is based on the fact that the "Ministry of Construction" and the "Ministry of Transportation" have been merged to form the "Ministry of Construction and Transportation"."

2.57 In accordance with procedures of Article XXIV:6, the changes proposed by Korea entered into force on 23 November 1997.⁴⁶

2. *Notification of National Implementing Legislation*

2.58 Korea notified its national implementing legislation to the Committee on Government Procurement in accordance with the Committee's Decision of 4 June 1996.⁴⁷

E. *The Incheon International Airport Project*

1. *General Description of the Project*

2.59 The project in question concerns the construction of Incheon International Airport. The airport is being built on reclaimed land between two islands, Yongjong and Yongyu⁴⁸, and is 52 kilometres west of the centre of the Republic of Korea's capital, Seoul. More specifically, it is located in the official district of Unsee-Dong, Chung-Ku, Incheon City.

2.60 The project commenced in 1990. The first phase of construction (which includes airport start-up and commissioning) is 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.⁴⁹

2.61 It is estimated that the first phase of construction will cost W 300.9 billion. This includes the cost of land acquisition, compensation for fishing rights, the actual cost of construction and support expenses including design and supervision. The total cost of the project is estimated to be in the vicinity of W 2,964 billion. According to a publication regarding the IIA project, the government contribution to the cost of the project is projected to be 40 per cent of the total cost and the remainder will come from other sources including domestic and overseas capital markets.⁵⁰

⁴⁵ Document GPA/W/59, dated 24 October 1997.

⁴⁶ WT/Let/207.

⁴⁷ GPA/1/Add.1 and GPA/12/Rev.1, dated 9 June 1997.

⁴⁸ "Incheon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 3.

⁴⁹ Ibid. p. 14.

⁵⁰ Ibid. p. 41.

2. *Chronology*

(a) Project Stages

2.62 On 14 June 1990 the site for the IIA project was selected.⁵¹ In November 1990, the preparation of the Master Plan commenced.⁵² On 24 December 1991, the Master Plan was completed⁵³ and was announced on 16 June 1992.⁵⁴ On 12 November 1992, the ground-breaking ceremony occurred at the IIA site and site preparation commenced.⁵⁵ As at February 1999, the first phase of construction (airport start-up and commissioning) was 62.7 per cent complete.⁵⁶

(b) Entities

(i) Introduction

2.63 An act regarding the IIA project, entitled the *Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction* ("*Seoul Airport Act*"), was enacted on 31 May 1991. Article 1 of the *Seoul Airport Act* provides that:

"The purpose of this Act is, by specifying the matters necessary for the speedy construction of a new airport in the Seoul Metropolitan area, to push ahead efficiently with the new airport construction project to meet the rapidly growing demands for air transport service in the Seoul Metropolitan area and to contribute to the development of national economy."

2.64 While the Ministry of Transportation and, more specifically, the New Airport Development Group under that Ministry, was originally responsible for the IIA project⁵⁷, the *Seoul Airport Act* contemplated the appointment of an operator for the IIA project. However, the Act did not specify the identity of the operator. Rather, it left this issue open. Specifically, it provided in Article 6(1) that:

"The new airport construction project shall be implemented by the state, local governments, or a government-invested institution as determined by the Presidential Decree."

2.65 Further, Article 6(2) provided that:

"The Minister of Construction and Transportation may, where he deems it necessary for efficient execution of the new airport construction project, arrange for a person other than those referred to in paragraph (1) to implement part of the project."

⁵¹ History of KOACA (Document from KOACA website) and "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 42.

⁵² Timeline of events relating to Inchon International Airport construction prepared by the US.

⁵³ History of KOACA and "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 42.

⁵⁴ History of KOACA.

⁵⁵ History of KOACA and "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 42.

⁵⁶ "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 42.

⁵⁷ Korea's Answers to Questions from the USTR delivered on 1 May 1991, dated July 1991.

2.66 Since the inception of the project, authority for the IIA project has 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 Incheon International Airport Corporation (IIAC) on 1 February 1999.

(ii) MOCT

2.67 The Ministry of Transportation originally had jurisdiction over the IIA project. Pursuant to Article 40 of the *Government Organization Act* as it existed in June 1993, it derived its authority from Article 40 of the *Government Organization Act*. Article 40(1) provided that:

"The Minister of Transportation shall have jurisdiction over the affairs relating to land, air and marine transportation and tourism."

2.68 The current version of the *Government Organization Act* contains a similar provision in Article 42.

2.69 Of relevance is the *Aviation Act*, which was wholly amended on 14 December 1991. Article 1 of the Act as it then existed provided that:

"The purpose of this Act is to contribute to the development of aviation and the promotion of public welfare by determining methods to assure the safety in air navigation, increasing the efficiency of installation and management of air navigation facilities, and establishing the order in the air transportation services, pursuant to the provisions of the International Civil Aviation Treaty and in conformity with standards and ways as adopted by the Annex to the said Treaty."

2.70 Article 1 of the current version of the *Aviation Act* contains a similar provision.

2.71 Additionally, Article 94(1) of the 14 December 1991 version of the *Aviation Act* provided that:

"Except as provided otherwise by this Act or other laws and regulations, the airport development projects shall be carried out by the Minister of Transportation."

2.72 Article 94(1) of the current version of the *Aviation Act* which incorporates amendments up to and including 13 December 1997 contains a similar provision.

2.73 "Airport development projects" to which Article 94(1) of the December 1991 version of the *Aviation Act* referred was defined in Article 2(14) of the *Aviation Act* as "projects related to new construction, enlargement or improvement of airport facilities, executed under this Act". The current *Aviation Act* defines "airport development projects" in identical terms.

2.74 Article 94(2) of the December 1991 version of the *Aviation Act* provided that:

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

2.75 Article 94(2) of the current *Aviation Act* contains a similar provision but requires the operator to obtain permission from the Minister of Construction and Transportation rather than the Minister of Transportation.

2.76 The Ministry of Transportation and the Ministry of Construction merged on 23 December 1994⁵⁸ to create the Ministry of Construction and Transportation (MOCT). Accordingly, references to the Ministry of Transportation in Korean legislation including the *Government Organization Act* and the *Aviation Act* were replaced by references to MOCT.

2.77 The *Seoul Airport Act* also refers to the MOCT's role in relation to the IIA project. Article 3(1) of the Act provides:

"The Minister of Construction and Transportation is empowered to designate an area necessary for the execution of the new airport construction project as the projected area for the construction of the new airport for the Seoul Metropolitan area ... or to effect a change in the already designated projected area."

2.78 Article 4(1) of the *Seoul Airport Act* vests MOCT with the responsibility for drawing up the Master Plan for the IIA project. It provides that:

"Where the Minister of Construction and Transportation has designated and announced publicly the projected area pursuant to Article 3, he shall draw up a master plan relating to the new airport construction"

2.79 Article 4-2 also empowers MOCT to make alterations to the master plan and Article 4-3 obliges MOCT to publicly notify the master plan upon its completion.

2.80 MOCT is required to approve execution plans prepared by the operator.⁵⁹ MOCT is also required to certify completion of the work undertaken by the project operator.⁶⁰ MOCT has the power to grant a subsidy or loan to the operator to help finance expenses associated with the project.⁶¹ Further, MOCT may cancel or suspend permission of approval granted under the Act in certain circumstances.⁶² Finally, Article 12-3(1) of the Act provides that:

"The title to the land and facilities created or built as a consequence of the new airport construction project shall vest in the State upon completion"

(iii) New Airport Development Group (NADG)

2.81 In June 1990, MOCT created an internal organization, which is generally referred to as the New Airport Development Group (NADG), to assume responsibility for the IIA project. NADG was created pursuant to the *Regulation on Establishment of the New International Airport Construction Working Group*, which was enacted by Ministerial Order of the Minister of Transportation on 1 June 1990. NADG has been referred to by a variety of names including the "New International Airport Construction Working Group," "Corps of the New International Airport Construction Project," the "New Airport Construction Planning Team" and the "IIA Construction Corps."

⁵⁸ Excerpt from MOCT website, p. 2.

⁵⁹ Ibid. Article 7(1).

⁶⁰ Ibid. Article 12-2.

⁶¹ Ibid. Article 15.

⁶² Ibid. Article 13(1).

2.82 At present, 30 government employees are assigned to NADG.⁶³ Specifically, 1 director general, 3 directors, 10 deputy directors, 14 assistant directors and 2 secretaries have been assigned from the current operator to NADG.

2.83 NADG is divided into two divisions - a planning division and a technology division. Pursuant to Article 6(1) of NADG's Regulations, the planning division is responsible for a number of matters including those concerning the establishment, inspection, and analysis of the basic operation plan for the IIA project; the coordination and control of matters related to the project; the funding for construction of the project; and the development of laws and systems for the airport's construction.

2.84 Further elaboration of the role of the NADG in relation to the IIA project is found in the *Rules of the Corps of New International Airport Construction Project and Rapid Railway Construction Project Foundation*, which were created by a directive of MOCT on 3 November 1996. Among other matters, the Rules prescribe the structure of NADG. Specifically, Article 3 of the Rules provides that the Corps is to be comprised of a planning department, a facility department and an operation support team. Article 3 of the Rules also makes it clear that members of the Corps are MOCT public officials.

2.85 Article 6 of the Rules defines the responsibilities of the three departments of the Corps. Article 6(1) provides that the planning division has responsibility for various types of "work" related to a range of topics including the establishment and modification of the master planning for the IIA project; budgeting; IIA project funding; and IIA project control and analysis.

(iv) The Korean Airports Authority (KAA)

Origins

2.86 The predecessor to the KAA was the Korea International Airports Authority.⁶⁴ The Korea International Airports Authority was renamed as the Korea Airports Authority on 7 April 1990⁶⁵ but is referred to in all the relevant legislation as the Korea Airport Corporation.

2.87 The *Korea Airport Corporation Act*, which was originally enacted on 28 December 1979, constitutes and regulates the KAA. Article 1 of the 3 August 1994 version of the *Korea Airport Corporation Act* provides:

"The purpose of this Act is to ensure smooth air transportation and to contribute to the totally integrated development of aviation by establishing the Korea Airport Corporation ... [which will be responsible for] constructing airport facilities, and managing and operating them efficiently."

Scope of Responsibility

2.88 The *Korea Airport Corporation Act* defines the rights and responsibilities of the KAA. Specifically, Article 7 provides that the Corporation shall carry out a range

⁶³ Korea's Answer to Question 14 from the Panel, dated 29 November 1999.

⁶⁴ KAA History from KAA website.

⁶⁵ Ibid.

of projects including the management, operation, repair and maintenance of passenger and freight terminals, and their ancillary and supporting facilities; the management, operation, repair and maintenance of runways and moorings; the repair and maintenance of aeronautical communication facilities and aviation security facilities; landscaping and beautification of airports and installations; incidental projects; and other projects entrusted to KAA by the Minister of Construction and Transportation for management, operation and improvement of airport facilities.

2.89 The provisions in the Act are supplemented by the *By-Laws of Korea Airport Corporation*, the most recent amendment to which was made on 30 December 1991. Article 2 of the 30 December 1991 version of the *By-Laws* states that the objectives of KAA "shall be to build airport facilities and manage the airport, promoting smooth operation of air transportation, developing comprehensive air transportation businesses." Article 4 further elaborates on the projects that KAA is required to undertake.

Relationship with MOCT

2.90 Article 28 of the *Korea Airport Corporation Act*, entitled "Direction and Supervision," prescribes the relationship between KAA and MOCT. Specifically, it provides that:

- (1) The Minister of Construction and Transportation shall direct and control the Corporation, and if it is deemed necessary to do so, he may have the Corporation report matters concerning its affairs, accounting and property, or have a public official under his control inspect books, documents, facilities and other things of the Corporation.
- (2) If it is found that any unlawful or unreasonable acts are committed as a result of the inspection under the provisions of paragraph (1), the Minister of Construction and Transportation may order the Corporation to take corrective measures.
- (3) Any public official who conducts the inspection under the provisions of paragraph (1), shall produce a certificate indicating his competence to the persons concerned.

2.91 Among other things, MOCT is empowered to permit use of, lend or concede gratuitously any state property to KAA.⁶⁶ In addition, KAA is required to annually prepare business plans⁶⁷ and statements of account⁶⁸ for approval by the Minister of Construction and Transportation. Funds can be borrowed by KAA from various bodies with the approval of MOCT.⁶⁹

⁶⁶ *Korea Airport Corporation Act*, Article 16.

⁶⁷ *Ibid.* Article 19.

⁶⁸ *Ibid.* Article 20.

⁶⁹ *Ibid.* Article 23.

Legal Status

2.92 Article 3 of the *Korea Airport Corporation Act* states that the Korea Airport Corporation (that is, KAA) is a juristic person. Article 4(1) further states that the "Corporation shall come into existence by making a registration of incorporation at the location of its principal office."

Composition

2.93 Article 8 of the *Korea Airport Corporation Act* prescribes the composition of the Corporation. Specifically, it provides that:

- (1) The Corporation shall be composed of officers falling under each of the following subparagraphs:
 1. A president of the board of directors;
 2. A vice-president;
 3. Not more than five directors; and
 4. An auditor.
- (2) The president, vice-president and auditor shall be appointed and dismissed by the Minister of Construction and Transportation.

2.94 KAA's board of directors⁷⁰ is required to decide on "important matters."⁷¹ The Act provides that "the board of directors shall be composed of the president, vice-president and directors".⁷² Article 8(3) of the Act provides that:

"The directors shall be appointed and dismissed by the president with the approval of the Minister of Construction and Transportation."

2.95 The members of KAA's board of directors are not government employees.⁷³ Further, KAA employees are not government employees. However, Article 30 of the *Korea Airport Corporation Act* provides that officers and employees of KAA are to be considered public officials in the application of certain provision of Korea's *Criminal Act*. Further, Article 13 of the *Korea Airport Corporation Act* provides that the employees are employed and dismissed as prescribed by KAA's articles of incorporation.

Role in Relation to Incheon International Airport Project

2.96 On 14 December 1991, the Korea Airports Corporation or KAA was listed as a potential operator for the IIA project. This was achieved through an amendment to Article 6(1) of the *Seoul Airport Act*. Article 6(1) as amended provided:

"The new airport construction project shall be implemented by the state, local governments, the Korea Airport Corporation established pursuant to the Korea Airport Corporation Act, or a government-invested institution as determined by the Presidential Decree."

⁷⁰ Exhibit Kor-110 lists KAA directors.

⁷¹ *Korea Airport Corporation Act*, Article 12(1).

⁷² *Ibid.* Article 12(2).

⁷³ Korea's Answer to Question 10 from the Panel, dated 3 November 1999.

2.97 Simultaneously, the *Korea Airport Corporation Act* was amended. As amended, Article 7, which defined the projects for which KAA is responsible, provided in sub-article 5-2 that KAA was responsible for:

"New airport construction project pursuant to paragraph 2 of Article 2 of Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction."

2.98 Article 2 of the *Seoul Airport Act* was also amended on 14 December 1991 to provide that:

"2. The term "new airport construction project" means any of the following activities:

- (a) Construction of such airport facilities as stipulated in subparagraph 6 of Article 2 of the Aviation Act ...
- (c) Construction of urban railways, roads and port facilities etc. which are necessary to transport passengers and cargo using the Seoul Metropolitan area new airport
- (d) Creation of the infrastructure connected with airport services such as convenience facilities for airport users and persons etc. engaged in air transport service and such other aviation-related services as determined by the Presidential Decree ... air cargo distribution facilities and information communication facilities etc.
- (e) Creation of infrastructure for facilities beneficial to the living such as accommodation facilities, etc., in favor of persons engaged in aviation-related services and persons who will be deprived of their residence because of the new airport construction project; and
- (f) Reclamation of public water surface to create the projected area for the construction of the new airport."

2.99 Further, Article 4(6) of the *By-Laws of Korea Airport Corporation*⁷⁴ was amended with the approval of the Minister of Transportation on 30 December 1991 to provide that KAA was required to, among other things, "build the new capital area airport."

2.100 On 31 January 1992, KAA established the New Airport Construction Office to implement the IIA project.

Funding

2.101 During KAA's term as operator of the IIA project (that is, from 14 December 1991 until 14 August 1994), it exclusively relied upon government funds for the IIA project in 1992; 78 per cent government funds, 3.5 per cent debts and bonds and 18 per cent other means in 1993; 77 per cent government funding, 21 per cent debts and bonds and 1 per cent other means in 1994.⁷⁵

⁷⁴ Exhibit Kor-15.

⁷⁵ Sources of Fund for KAA (Exhibit Kor-109).