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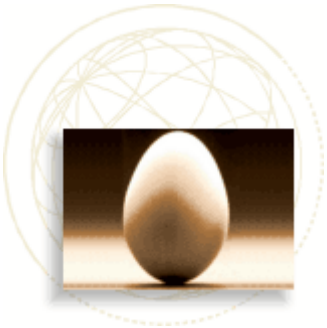

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99-0676	U	GPA/D4/1 WT/DS163/1 Catalogue record	Korea - Measures Affecting Government Procurement - Request for Consultations by the United States Preview (HTML)	22/02/1999	☑ 1 p. 33KB	☐ 1 p. 33KB	☐ 1 p. 31KB
97-3396	U	GPA/D1/2/Rev.1 WT/DS73/4/Rev.1 Catalogue record	Japan - Procurement of a Navigation Satellite - Notification of a Mutually-Agreed Solution - Revision Preview (HTML)	14/08/1997	☑ 1 p. 22KB	☐ 1 p. 23KB	☐ 1 p. 23KB
97-3345	U	GPA/D1/2 WT/DS73/4 Catalogue record	Japan - Procurement of a Navigation Satellite - Communication from the Chairman of the Panel Preview (HTML)	08/08/1997	☑ 1 p. 20KB	☐ 1 p. 22KB	☐ 1 p. 21KB
97-3107	U	GPA/D3/1 WT/DS95/1 Catalogue record	United States - Measure Affecting Government Procurement - Request for Consultations by Japan Preview (HTML)	21/07/1997	☑ 1 p. 21KB	☐ 1 p. 25KB	☐ 1 p. 25KB
97-2641	U	GPA/D2/1 WT/DS88/1	United States - Measure Affecting Government Procurement - Request for Consultations by the European	26/06/1997	☑	☐	☐

		Catalogue record	Communities Preview (HTML)		2 p. 22KB	2 p. 26KB	2 p. 26KB
97-1309	U	GPA/D1/1 WT/DS73/1 Catalogue record	Japan - Procurement of a Navigation Satellite - Request for Consultations by the European Communities Preview (HTML)	01/04/1997	E 1 p. 25KB	F 2 p. 26KB	S 2 p. 27KB

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1 7 KB	99-0676	GPA/D4/1 WT/DS163/1	Korea - Measures Affecting Government Procurement - Request for Consultations by the United States	22/02/1999	1	U	T/WT/DS/163−1.DOC
2 3 KB	97-3396	GPA/D1/2/Rev.1 WT/DS73/4/Rev.1	Japan - Procurement of a Navigation Satellite - Notification of a Mutually-Agreed Solution - Revision	14/08/1997	1	U	T/WT/DS/73−4R1.WPF
3 3 KB	97-3345	GPA/D1/2 WT/DS73/4	Japan - Procurement of a Navigation Satellite - Communication from the Chairman of the Panel	08/08/1997	1	U	T/WT/DS/73−4.WPF
4 5 KB	97-3107	GPA/D3/1 WT/DS95/1	United States - Measure Affecting Government Procurement - Request for Consultations by Japan	21/07/1997	1	U	T/WT/DS/95−1.WPF
5 5 KB	97-2641	GPA/D2/1 WT/DS88/1	United States - Measure Affecting Government Procurement - Request for Consultations by the European Communities	26/06/1997	2	U	T/WT/DS/88−1.WPF
6 5 KB	97-1309	GPA/D1/1 WT/DS73/1	Japan - Procurement of a Navigation Satellite - Request for Consultations by the European Communities	01/04/1997	1	U	T/WT/DS/73−1.WPF

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98-0800	U	WT/DS73/5 Catalogue record	Japan - Procurement of a Navigation Satellite - Notification of Mutually-Agreed Solution Preview (HTML)	03/03/1998	☑ 2 p. 22KB	☐ 2 p. 25KB	☐ 2 p. 25KB
97-3396	U	GPA/D1/2/Rev.1 WT/DS73/4/Rev.1 Catalogue record	Japan - Procurement of a Navigation Satellite - Notification of a Mutually-Agreed Solution - Revision Preview (HTML)	14/08/1997	☑ 1 p. 22KB	☐ 1 p. 23KB	☐ 1 p. 23KB
97-3345	U	GPA/D1/2 WT/DS73/4 Catalogue record	Japan - Procurement of a Navigation Satellite - Communication from the Chairman of the Panel Preview (HTML)	08/08/1997	☑ 1 p. 20KB	☐ 1 p. 22KB	☐ 1 p. 21KB
97-1825	U	WT/DS73/3 Catalogue record	Japan - Procurement of a Navigation Satellite - Acceptance by Japan of the Request to Join Consultations by the United States Preview (HTML)	29/04/1997	☑ 1 p. 35KB	☐ 1 p. 35KB	☐ 1 p. 35KB
97-1505	U	WT/DS73/2 Catalogue record	Japan - Procurement of a Navigation Satellite - Request to Join Consultations - Communication from the United	11/04/1997	☑	☐	☐

			States Preview (HTML)		1 p. 23KB	1 p. 23KB	1 p. 25KB
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Doc#	Access	Symbol	Title - HTML format	Date	Original format E	F	S
98-2152	D	GPA/M/8 Catalogue record	Committee on Government Procurement - Minutes of the Meeting Held on 18 February 1998 Preview (HTML)	26/05/1998	[x] 8 p. 55KB	[ ] 8 p. 57KB	[ ] 8 p. 53KB

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2 3 KB	97-3396	GPA/D1/2/Rev.1 WT/DS73/4/Rev.1	Japan - Procurement of a Navigation Satellite - Notification of a Mutually-Agreed Solution - Revision	14/08/1997	1	U	T/WT/DS/73−4R1.WPF
3 3 KB	97-3345	GPA/D1/2 WT/DS73/4	Japan - Procurement of a Navigation Satellite - Communication from the Chairman of the Panel	08/08/1997	1	U	T/WT/DS/73−4.WPF
4 4 KB	97-1825	WT/DS73/3	Japan - Procurement of a Navigation Satellite - Acceptance by Japan of the Request to Join Consultations by the United States	29/04/1997	1	U	T/WT/DS/73−3.WPF
5 4 KB	97-1505	WT/DS73/2	Japan - Procurement of a Navigation Satellite - Request to Join Consultations - Communication from the United States	11/04/1997	1	U	T/WT/DS/73−2.WPF
6 5 KB	97-1309	GPA/D1/1 WT/DS73/1	Japan - Procurement of a Navigation Satellite - Request for Consultations by the European Communities	01/04/1997	1	U	T/WT/DS/73−1.WPF

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WORLD TRADE ORGANIZATION

WT/DS73/5
3 March 1998

(98-0800)

Original: English

JAPAN - PROCUREMENT OF A NAVIGATION SATELLITE

Notification of Mutually-Agreed Solution

The following communication, dated 19 February 1998, from the Permanent Delegation of the European Commission and the Permanent Mission of Japan, is circulated pursuant to Article 3.6 of the DSU.

We would like to refer to the consultations which were held between the European Communities and the Government of Japan concerning "Japan - Purchase of MTSAT Satellite-based Augmentation System" and, in particular, to the information previously circulated concerning the conclusion of these consultations (Documents WT/DS73/4/Rev.1 and GPA/D1/2/Rev.1 of 14 August 1997).

We have the honour to communicate herewith on behalf of the Government of Japan and the European Communities the attached Joint Statement concerning the resolution of this complaint.

JOINT STATEMENT FOR FOLLOW-UP TO US ENQUIRY IN THE WTO COMMITTEE ON THE AGREEMENT ON GOVERNMENT PROCUREMENT AND THE DISPUTE SETTLEMENT BODY CONCERNING RESOLUTION OF MSAS COMPLAINT BY THE EUROPEAN COMMUNITIES AND JAPAN

In reply to the request by the United States (US) regarding the complaint (WT/DS73/1) of 26 March 1997 in respect of a procurement tender published by the Ministry of Transport of Japan (MOT) to purchase MTSAT Satellite-based Augmentation System (MSAS), the European Communities and Japan can inform the US that the European Commission and the Ministry of Transport of Japan have reached a settlement through the establishment of cooperation between the European Tripartite Group (consisting of the European Commission, the European Space Agency and Euro control) on the one hand and the MOT on the other in the field of interoperability between MSAS and European Geostationary Navigation Overlay Service (EGNOS). This cooperation is aimed at jointly contributing to the implementation of a global seamless navigation service for aeronautical end-users through the interoperability among MSAS, EGNOS and other equivalent systems.

It has also been agreed that the requirements for interoperability will be mentioned in MSAS and EGNOS documentation for all future procurement in and after 1998, on condition that both sides reach the conclusion that the interoperability is feasible.

WORLD TRADE ORGANIZATION

WT/DS73/4/Rev.1
GPA/D1/2/Rev.1
14 August 1997
(97-3396)

Original: English

JAPAN - PROCUREMENT OF A NAVIGATION SATELLITE

Notification of a Mutually-Agreed Solution

Revision

The following communication, dated 31 July 1997, from the Permanent Delegation of the European Commission to the Permanent Mission of Japan and the Dispute Settlement Body is circulated in accordance with Article 12.12 of the DSU.

My authorities have requested me to inform you that the European Communities have found a mutually agreed solution, within the meaning of Article 3.6 of the DSU, with Japan over the complaint (WT/DS73/1) of 26 March 1997 in respect of a procurement tender published by the Ministry of Transport (MoT) of Japan to purchase MTSAT Satellite-based Augmentation System (MSAS).

WORLD TRADE ORGANIZATION

WT|DS73|4
GPA|D1|2
8 August 1997
(97-3345)

Original: English

JAPAN - PROCUREMENT OF A NAVIGATION SATELLITE

Communication from the Chairman of the Panel

The following communication, dated 31 July 1997 and addressed to the Dispute Settlement Body, is circulated in accordance with Article 12.12 of the DSU.

My authorities have requested me to inform you that the European Communities have found a mutually agreed solution, within the meaning of Article 3.6 of the DSU, with Japan over the complaint (WT|DS73|1) of 26 March 1997 in respect of a procurement tender published by the Ministry of Transport (MoT) of Japan to purchase MTSAT Satellite-based Augmentation System (MSAS).

WORLD TRADE ORGANIZATION

ORGANISATION MONDIALE DU COMMERCE

ORGANIZACIÓN MUNDIAL DEL COMERCIO

WT/DS73/3

29 April 1997

(97-1825)

Original: English/anglais/inglés

JAPAN - PROCUREMENT OF A NAVIGATION SATELLITE

Acceptance by Japan of the Request to Join Consultations by the United States

In a communication dated 14 April 1997, Japan informed the Dispute Settlement Body that it had accepted the request of the United States (WT/DS73/2) to join consultations which the European Communities had requested with Japan (WT/DS73/1, GPA/D1/1).

JAPON - ACHAT D'UN SATELLITE DE NAVIGATION

Acceptation par le Japon de la demande de participation aux consultations présentée par les Etats-Unis

Par une communication datée du 14 avril 1997, le Japon a informé l'Organe de règlement des différends qu'il avait accepté la demande présentée par les Etats-Unis (WT/DS73/2) en vue de participer aux consultations que les Communautés européennes ont demandé à tenir avec le Japon (WT/DS73/1, GPA/D1/1).

JAPÓN - ADQUISICIÓN DE UN SATÉLITE DE NAVEGACIÓN

Aceptación por el Japón de la solicitud de asociación a las consultas presentadas por los Estados Unidos

Por una comunicación de fecha 14 de abril de 1997, el Japón informó al Órgano de Solución de Diferencias de que había aceptado la solicitud de los Estados Unidos (WT]DS73]2) de asociarse a las consultas que las Comunidades Europeas habían solicitado celebrar con el Japón (WT]DS73]1, GPA]D1]1).

WORLD TRADE ORGANIZATION

WT/DS73/2
11 April 1997

(97-1505)

Original: English

JAPAN - PROCUREMENT OF A NAVIGATION SATELLITE

Request to Join Consultations

Communication from the United States

The following communication, dated 9 April 1997, from the Permanent Mission of the United States to the Permanent Delegation of the European Commission, the Permanent Mission of Japan and to the Dispute Settlement Body, is circulated in accordance with Article 4.11 of the DSU.

Pursuant to paragraph 11 of Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the United States Government hereby notifies the European Communities that, in light of the substantial trade interest of the United States, it desires to be joined in the consultations requested by the European Communities in a communication circulated to WTO Members on 1 April 1997 (WT/DS73/1) entitled Japan - Procurement of a Navigation Satellite.

As a significant exporter of satellites and satellite systems integration programs, the United States has a substantial trade interest in the matter that is the subject of the Japanese request. In addition, the European Communities has raised issues relating to technical standards developed in the United States, which is indicative of our substantial trade interest.

WORLD TRADE ORGANIZATION

WT|DS73|1
GPA|D1|1
1 April 1997

(97-1309)

Original: English

JAPAN - PROCUREMENT OF A NAVIGATION SATELLITE

Request for Consultations by the European Communities

The following communication, dated 26 March 1997, from the Permanent Delegation of the European Commission to the Permanent Mission of Japan and to the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with Japan pursuant to Article XXII of the Government Procurement Agreement and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes regarding a recent procurement tender published by the Ministry of Transportation (MoT) of Japan to purchase a multi-functional satellite for the installation of a Global Navigation Satellite System (MSAS) for Air Traffic Management.

Following the publication by the MoT of MSAS specifications in August 1996, the European Commission raised the concern on several occasions that these specifications refer explicitly to those of the US WAAS and that a more neutral formulation was requested allowing for extended interoperability. This would prevent European companies from being discriminated against and allow them to participate in the tender, if they wanted to do so.

When publishing a call for tender on 15 November 1996, no account was taken of the concerns raised by the Community. As a result, European bidders had no effective possibility of participating in the tender and were treated less favourably than suppliers of other Parties. This situation raises the question of compatibility of the above-mentioned tender and related measures with the Government Procurement Agreement (GPA), as MoT is covered under Annex I of Appendix I of Japan•s commitments under this agreement. The European Community considers that the direct reference in the specifications of the tender to the US system is in contravention of the general provision on Non-discrimination under Article III GPA.

The Community considers, moreover, that the direct reference in the specifications of the tender to the US system is also in contravention of provisions concerning technical specifications as laid down in Article VI (3) GPA. This requires inter alia that technical specifications shall be in terms of performance rather than design and that there shall not be any reference to a particular trademark, design or type, etc.

Finally, since US WAAS specifications are not public, the reference to such specifications also appears to infringe Article XII (2) GPA. This provision requires that tender documentation shall contain all information necessary to permit suppliers to submit responsive tenders. Such documentation should include a complete description of any requirements, including technical specifications, which have to be fulfilled.

I look forward to receiving your reply to this request and to fixing a mutually acceptable date for consultations.

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99-0557	U	WT/DS88/5 WT/DS95/5 Catalogue record	United States - Measure Affecting Government Procurement - Communication from the Chairman of the Panel Preview (HTML)	12/02/1999	E ☑ 1 p. 28KB	F ☐ 1 p. 28KB	S ☐ 1 p. 27KB
99-0054	U	WT/DS88/4 WT/DS95/4 Catalogue record	United States - Measure Affecting Government Procurement - Constitution of the Panel Established at the Request of the European Communities and Japan - Comm *[…]*nication from the DSB Chairman Preview (HTML)	11/01/1999	E ☑ 1 p. 31KB	F ☐ 1 p. 29KB	S ☐ 1 p. 27KB
98-3473	U	WT/DS88/3 Catalogue record	United States - Measure Affecting Government Procurement - Request for Establishment of a Panel by the European Communities Preview (HTML)	09/09/1998	E ☑ 2 p. 33KB	F ☐ 2 p. 32KB	S ☐ 2 p. 31KB
97-2756	U	WT/DS88/2 Catalogue record	United States - Measure Affecting Government Procurement - Request to Join Consultations -	02/07/1997	E	F	S

			Communication from Japan Preview (HTML)		1 p. 20KB	1 p. 21KB	1 p. 23KB
97-2641	U	GPA/D2/1 WT/DS88/1 Catalogue record	United States - Measure Affecting Government Procurement - Request for Consultations by the European Communities Preview (HTML)	26/06/1997	E 2 p. 22KB	F 2 p. 26KB	S 2 p. 26KB

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1 5 KB	00-0543	WT/DS88/6 WT/DS95/6	United States - Measure Affecting Government Procurement - Lapse of Authority for Establishment of the Panel - Note by the Secretariat	14/02/2000	1	U	T/WT/DS/88−6.DOC
2 3 KB	99-0557	WT/DS88/5 WT/DS95/5	United States - Measure Affecting Government Procurement - Communication from the Chairman of the Panel	12/02/1999	1	U	T/WT/DS/88−5.DOC
3 4 KB	99-0054	WT/DS88/4 WT/DS95/4	United States - Measure Affecting Government Procurement - Constitution of the Panel Established at the Request of the European Communities and Japan - Communication from the DSB Chairman	11/01/1999	1	U	T/WT/DS/88−4.DOC
4 8 KB	98-3473	WT/DS88/3	United States - Measure Affecting Government Procurement - Request for Establishment of a Panel by the European Communities	09/09/1998	2	U	T/WT/DS/88−3.DOC
5 3 KB	97-2756	WT/DS88/2	United States - Measure Affecting Government Procurement - Request to Join Consultations - Communication from Japan	02/07/1997	1	U	T/WT/DS/88−2.WPF
6 5 KB	97-2641	GPA/D2/1 WT/DS88/1	United States - Measure Affecting Government Procurement - Request for Consultations by the European Communities	26/06/1997	2	U	T/WT/DS/88−1.WPF

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1 5 KB	00-0543	WT/DS88/6 WT/DS95/6	United States - Measure Affecting Government Procurement - Lapse of Authority for Establishment of the Panel - Note by the Secretariat	14/02/2000	1	U	T/WT/DS/88−6.DOC
2 3 KB	99-0557	WT/DS88/5 WT/DS95/5	United States - Measure Affecting Government Procurement - Communication from the Chairman of the Panel	12/02/1999	1	U	T/WT/DS/88−5.DOC
3 4 KB	99-0054	WT/DS88/4 WT/DS95/4	United States - Measure Affecting Government Procurement - Constitution of the Panel Established at the Request of the European Communities and Japan - Communication from the DSB Chairman	11/01/1999	1	U	T/WT/DS/88−4.DOC
4 7 KB	98-3494	WT/DS95/3	United States - Measure Affecting Government Procurement - Request for the Establishment of a Panel by Japan	09/09/1998	2	U	T/WT/DS/95−3.DOC
5 3 KB	97-3210	WT/DS95/2	United States - Measure Affecting Government Procurement - Request to Join Consultations - Communication from the European Communities	30/07/1997	1	U	T/WT/DS/95−2.WPF
6 5 KB	97-3107	GPA/D3/1 WT/DS95/1	United States - Measure Affecting Government Procurement - Request for Consultations by Japan	21/07/1997	1	U	T/WT/DS/95−1.WPF

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WORLD TRADE ORGANIZATION
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WT/DS88/6
WT/DS95/6
14 February 2000

(00-0543)

UNITED STATES – MEASURE AFFECTING GOVERNMENT PROCUREMENT

Lapse of Authority for Establishment of the Panel

Note by the Secretariat

At the request of the European Communities and Japan, the Panel suspended its work on 10 February 1999 (WT/DS88/5, WT/DS95/5). Since the Panel has not been requested to resume its work, pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapsed as of 11 February 2000.

ETATS UNIS – MESURE AFFECTANT LES MARCHES PUBLICS

Caducité du pouvoir conféré pour l'établissement du Groupe spécial

Note du Secrétariat

A la demande des Communautés européennes et du Japon, le Groupe spécial a suspendu ses travaux le 10 février 1999 (WT/DS88/5, WT/DS95/5). Etant donné qu'il n'a pas été demandé au Groupe spécial de reprendre ses travaux, conformément à l'article 12:12 du Mémorandum d'accord sur le règlement des différends, le pouvoir conféré pour l'établissement du Groupe spécial est devenu caduc le 11 février 2000.

ESTADOS UNIDOS – MEDIDA QUE AFECTA A LA CONTRATACION PUBLICA

Caducidad de la decisión de establecer el Grupo Especial

Nota de la Secretaría

A instancias de las Comunidades Europeas y del Japón, el Grupo Especial suspendió sus trabajos el 10 de febrero de 1999 (WT/DS88/5, WT/DS95/5). Al no haberse pedido al Grupo Especial que reanude sus trabajos, la decisión de establecerlo, en virtud de lo dispuesto en el párrafo 12 del artículo 12 del Entendimiento relativo a la solución de diferencias, ha quedado sin efecto el 11 de febrero de 2000.

WORLD TRADE ORGANIZATION

WT/DS88/5
WT/DS95/5
12 February 1999
(99-0557)

Original: English

UNITED STATES – MEASURE AFFECTING GOVERNMENT PROCUREMENT

Communication from the Chairman of the Panel

The following communication, dated 10 February 1999 and addressed to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 12.12 of the DSU.

In the context of the US court ruling barring implementation of the measure at issue, the European Communities and Japan have requested the Panel to suspend its work in accordance with Article 12.12 of the DSU. The panel has agreed to this request.

WORLD TRADE ORGANIZATION

WT/DS88/4
WT/DS95/4
11 January 1999

(99-0054)

UNITED STATES – MEASURE AFFECTING GOVERNMENT PROCUREMENT

Constitution of the Panel Established at the Request of
the European Communities and Japan

Communication from the DSB Chairman

1. At its meeting on 21 October 1998, the DSB established a single panel pursuant to the requests of the European Communities and Japan (WT/DS88/3 and WT/DS95/3 respectively), in accordance with Article 9 of the DSU (WT/DSB/M/49).

2. At that meeting, the DSB agreed that the Panel should have standard terms of reference pursuant to Article XXII:4 of the Agreement on Government Procurement. The terms of reference of the Panel are therefore the following:

> "To examine, in the light of the relevant provisions of the Agreement on Government Procurement, the matter referred to the DSB by the European Communities in document WT/DS88/3 and by Japan in document WT/DS95/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that Agreement."

3. On 6 January 1999, the Panel was constituted with the following composition:

Chairman: Mr. Ole Lundby

Members: Mr. Sergio Escudero
Mr. Nigel Shipman

4. Japan has reserved third-party rights to participate in the panel proceedings in relation to the complaint raised by the European Communities.

WORLD TRADE ORGANIZATION

WT/DS88/3
9 September 1998

(98-3473)

Original: English

UNITED STATES – MEASURE AFFECTING GOVERNMENT PROCUREMENT

Request for Establishment of a Panel by the European Communities

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

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

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

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

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

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

./.

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

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

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

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

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

WORLD TRADE ORGANIZATION

WT/DS88/2
2 July 1997

(97-2756)

Original: English

UNITED STATES - MEASURE AFFECTING GOVERNMENT PROCUREMENT

Request to Join Consultations

Communication from Japan

The following communication, dated 27 June 1997, from the Permanent Mission of Japan to the Permanent Mission of the United States, the Permanent Delegation of the European Commission and to the Dispute Settlement Body, is circulated in accordance with Article 4.11 of the DSU.

Pursuant to paragraph 1 of Article XXII of the Government Procurement Agreement and to paragraph 11 of Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the Government of Japan hereby notifies the United States Government that, in light of the substantial trade interest of Japan, it desires to be joined in the consultations requested by the European Communities in a communication circulated to WTO Members on 26 June 1997 (WT/DS88/1, GPA/D2/1) entitled United States- Measures Affecting Government Procurement.

WORLD TRADE ORGANIZATION

WT]DS88]1
GPA]D2]1

26 June 1997

(97-2641)

Original: English

UNITED STATES - MEASURE AFFECTING GOVERNMENT PROCUREMENT

Request for Consultations by the European Communities

The following communication, dated 20 June 1997, from the Permanent Delegation of the European Commission to the Permanent Mission of the United States and to the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the United States pursuant to Article XXII of the Government Procurement Agreement (GPA) and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes regarding the Act Regulating State Contracts with Companies doing Business with or in Burma (Myanmar) enacted by the Commonwealth of Massachusetts on 25 June 1996 (Chapter 130 of the Acts of 1996). This Act provides, in essence, that public authorities of the Commonwealth of Massachusetts are not allowed to procure goods or services from any persons, whether US or foreign, who do business with Burma (Myanmar).

The European Communities consider that, as Massachusetts is covered under the US offer to this Agreement, the measure described above violates the obligations of the US under the GPA: specifically, the European Communities are of the view that the Massachusetts legislation contravenes, though not necessarily exclusively, the following provisions of the GPA: Article VIII(b), given that it imposes conditions on a tendering company which are not essential to ensure the firm•s capability to fulfil the contract; Article X as it imposes qualification criteria based on political rather than economic considerations, and Article XIII to the

extent that the statute allows the award of contracts to be based on political instead of economic considerations.

This measure also appears to nullify or impair the benefits accruing to the European Communities under this Agreement, particularly as it limits the access of EC suppliers to procurement by a sub-federal authority covered by the Government Procurement Agreement in such a way so as to result in a de facto reduction of the US sub-federal offer under the GPA.

The European Communities additionally consider that this measure has the effect of impeding the attainment of the objectives of the GPA, including that of maintaining a balance of rights and obligations.

The European Communities are also very concerned by the recent proliferation of similar initiatives taken or proposed by Massachusetts and other sub-federal authorities.

.]

This request for consultations is without prejudice to the potential pursuit of actions under the General Agreement for Trade in Services.

I look forward to receiving your reply to this request and to fixing a mutually acceptable date for consultations.

WORLD TRADE ORGANIZATION

WT/DS95/3
9 September 1998

(98-3494)

Original: English

UNITED STATES – MEASURE AFFECTING GOVERNMENT PROCUREMENT

Request for the Establishment of a Panel by Japan

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

On 18 July 1997, the Government of Japan requested consultations with the United States pursuant to Article XXII of the Agreement on Government Procurement (hereinafter the "GPA") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the "DSU") regarding the Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar) enacted by the Commonwealth of Massachusetts on 25 June 1996 (WT/DS95/1, GPA/D3/1).

On 22 July, 2 October and 17 December 1997, the Government of Japan and the Government of the United States held consultations in Geneva. Unfortunately, these consultations failed to settle the dispute on this matter.

In light of the above, the Government of Japan hereby requests that a panel be established at the next meeting of the Dispute Settlement Body ("DSB") pursuant to Article 4.7 and 6 of the DSU and to Article XXII of the GPA, with standard terms of reference provided for in Article XXII:4 of the GPA.

Measure at Issue

The measure at issue in this request is the Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar) enacted by the Commonwealth of Massachusetts on 25 June 1996 (Chapter 130 of the Acts of 1996) (hereinafter the "Act"). Under the Act, the public authorities of the Commonwealth of Massachusetts are, in principle, not allowed to procure goods or services from the persons, whether US or foreign, who are listed in the respected purchase list as doing business with or in Burma (Myanmar). In particular, the Executive Offices of Massachusetts offered by the United States under the GPA are not allowed to award a contract to such persons if there is a comparable low bid or offer by a person who is not on the list.

./.

Legal Basis of the Complaint

The Government of Japan considers that the measure described above is inconsistent with the obligations of the US under the GPA. In particular, the Government of Japan claims that:

- Under the Act, the suppliers who are on the restricted purchase list are not provided treatment no less favorable than that accorded to the suppliers who are not on the list, thus being inconsistent with Article III:1;

- The Act treats a locally-established supplier less favorably than another locally-established supplier on the basis of the degree of foreign affiliation or ownership, thus being inconsistent with Article III:2(a);

- The Act imposes conditions for participating in tendering procedures which are not essential to ensure a firm's capability to fulfil the contract, thus being inconsistent with Article VIII(b);

- The Act prohibits entities from making awards to the tenderer whose tender is the lowest, except under the specific evaluation criteria which is inconsistent with the GPA, thus being inconsistent with Article XIII:4(b).

The Government of Japan asks that this request be placed on the agenda for the meeting of the Dispute Settlement to be held on 22 September 1998.

WORLD TRADE ORGANIZATION

WT/DS95/2
30 July 1997

(97-3210)

Original: English

UNITED STATES - MEASURE AFFECTING GOVERNMENT PROCUREMENT

Request to Join Consultations

Communication from the European Communities

The following communication, dated 23 July 1997, from the Permanent Delegation of the European Commission to the Permanent Mission of Japan, the Permanent Mission of the United States and to the Dispute Settlement Body, is circulated in accordance with Article 4.11 of the DSU.

I am writing to inform you that, pursuant to paragraph 11 of Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the European Communities wish to be joined in the consultations under Article XXII of the Agreement on Government Procurement requested on 18 July 1997 by Japan with the United States regarding the Act Regulating State Contracts with Companies doing Business with or in Burma (Myanmar) enacted by the Commonwealth of Massachusetts on 25 June 1996.

The European Communities have a substantial trade interest in the market concerned and they have already held consultations with the United States under Article XXII of the Government Procurement Agreement on 22 July 1997.

WORLD TRADE ORGANIZATION

WT]DS95]1
GPA]D3]1
21 July 1997
(97-3107)

Original: English

UNITED STATES - MEASURE AFFECTING GOVERNMENT PROCUREMENT

Request for Consultations by Japan

The following communication, dated 18 July 1997, from the Permanent Mission of Japan to the Permanent Mission of the United States and to the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

I hereby extend a request on behalf of the Government of Japan for consultations with the United States pursuant to Article XXII of the Agreement on Government Procurement (hereinafter the •GPA•) and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes regarding the Act Regulating State Contracts with Companies doing Business with or in Burma (Myanmar) enacted by the Commonwealth of Massachusetts on 25 June 1996 (hereinafter the •Act•). This Act effectively prohibits the public authorities of Massachusetts, including all the executive offices covered by the GPA, from procuring goods or services from any person contained in the restricted purchase list solely because the said person does business with or is in Myanmar.

The Government of Japan considers that the measure is inconsistent with the obligations of the United States under the WTO Agreement, including, in particular, the GPA. The provisions of the GPA with which the measure appears to be inconsistent include, but are not limited to, the following Articles: paragraph 2 of Article III, paragraph (b) of Article VIII, Article X and paragraph 4 of Article XIII.

With regard to this request, I regret to point out that the United States has given no indication of a reply to the request dated 17 March 1997 from my authorities for information pursuant to paragraphs 1 and 3 of Article XIX of the GPA. The Government of Japan has also been very concerned about the recent

legislative initiatives similar to the Act, which have been taken or proposed by the sub-federal authorities in the United States.

I look forward to receiving your reply to this request and hope that you can understand the intention of my authorities to hold the consultations at the same time as the European Communities, which are already scheduled with the United States for 22 July 1997.

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00-1679	U	WT/DS163/R Catalogue record	Korea - Measures Affecting Government Procurement - Report of the Panel Preview (HTML)	01/05/2000	☑ 195 p. 1052KB	☐ 233 p. 1243KB	☐ 234 p. 1073KB
00-0359	U	WT/DS163/6 Catalogue record	Korea - Measures Affecting Government Procurement - Communication from the Chairman of the Panel Preview (HTML)	31/01/2000	☑ 1 p. 30KB	☐ 1 p. 30KB	☐ 1 p. 27KB
99-3624	U	WT/DS163/5 Catalogue record	Korea - Measures Affecting Government Procurement - Constitution of the Panel Established at the Request of the United States - Communication from the DSB Chairman Preview (HTML)	03/09/1999	☑ 1 p. 30KB	☐ 1 p. 30KB	☐ 1 p. 27KB
99-2009	U	WT/DS163/4 Catalogue record	Korea - Measures Affecting Government Procurement - Request for the Establishement of a Panel by the United	11/05/1999	E	F	S

			States Preview (HTML)		☑ 2 p. 34KB	☐ 2 p. 33KB	☐ 2 p. 31KB
99-0942	U	WT/DS163/3 Catalogue record	Korea - Measures Affecting Government Procurement - Request to Join Consultations - Communication from Japan Preview (HTML)	09/03/1999	E ☑ 1 p. 29KB	F ☐ 1 p. 30KB	S ☐ 1 p. 28KB
99-0910	U	WT/DS163/2 Catalogue record	Korea - Measures Affecting Government Procurement - Request to Join Consultations - Communication from the European Communities Preview (HTML)	08/03/1999	E ☑ 1 p. 30KB	F ☐ 1 p. 29KB	S ☐ 1 p. 27KB

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00-3060	D	WT/DSB/M/84 Catalogue record	Dispute Settlement Body - Minutes of Meeting - Held in the Centre William Rappard on 19 June 2000 Preview (HTML)	24/07/2000	E [x] 21 p. 128KB F [ ] 24 p. 150KB S [ ] 23 p. 132KB

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2 739 KB	00-1679	WT/DS163/R	Korea - Measures Affecting Government Procurement - Report of the Panel	01/05/2000	195	U	T/WT/DS/163R.DOC
3 3 KB	00-0359	WT/DS163/6	Korea - Measures Affecting Government Procurement - Communication from the Chairman of the Panel	31/01/2000	1	U	T/WT/DS/163−6.DOC
4 3 KB	99-3624	WT/DS163/5	Korea - Measures Affecting Government Procurement - Constitution of the Panel Established at the Request of the United States - Communication from the DSB Chairman	03/09/1999	1	U	T/WT/DS/163−5.DOC
5 6 KB	99-2009	WT/DS163/4	Korea - Measures Affecting Government Procurement - Request for the Establishement of a Panel by the United States	11/05/1999	2	U	T/WT/DS/163−4.DOC
6 3 KB	99-0942	WT/DS163/3	Korea - Measures Affecting Government Procurement - Request to Join Consultations - Communication from Japan	09/03/1999	1	U	T/WT/DS/163−3.DOC
7 3 KB	99-0910	WT/DS163/2	Korea - Measures Affecting Government Procurement - Request to Join Consultations - Communication from the European Communities	08/03/1999	1	U	T/WT/DS/163−2.DOC

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WORLD TRADE ORGANIZATION
ORGANISATION MONDIALE DU COMMERCE
ORGANIZACIÓN MUNDIAL DEL COMERCIO

WT/DS163/7
6 November 2000
(00-4679)

KOREA - MEASURES AFFECTING GOVERNMENT PROCUREMENT

Panel Report

Action by the Dispute Settlement Body

At its meeting on 19 June 2000, and in conformity with Article 2.1 of the DSU, the Dispute Settlement Body adopted the Panel report on "Korea - Measures Affecting Government Procurement" (WT/DS163/R).

COREE - MESURES AFFECTANT LES MARCHES PUBLICS

Rapport du Groupe spécial

Dispositions prises par l'Organe de règlement des différends

À sa réunion du 19 juin 2000, et conformément à l'article 2:1 du Mémorandum d'accord sur le règlement des différends, l'Organe de règlement des différends a adopté le rapport du Groupe spécial intitulé "Corée - Mesures affectant les marchés publics" (WT/DS163/R).

COREA - MEDIDAS QUE AFECTAN A LA CONTRATACIÓN PÚBLICA

Informe del Grupo Especial

Actuación del Órgano de Solución de Diferencias

En su reunión de 19 de junio de 2000, y de conformidad con el párrafo 1 del artículo 2 del ESD, el Órgano de Solución de Diferencias adoptó el informe titulado "Corea - Medidas que afectan a la contratación pública" (WT/DS163/R).

WORLD TRADE ORGANIZATION

WT/DS163/R
1 May 2000

(00-1679)

Original: English

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Report of the Panel

The report of the Panel on *Korea – Measures Affecting Government Procurement* is being circulated to all Parties to the Government Procurement Agreement, pursuant to the DSU. The report is being circulated as an unrestricted document from 1 May 2000 pursuant to the Procedures for the Circulation and Derestriction of GPA Documents (GPA/1/Add.2). Parties to the GPA are reminded that in accordance with the DSU only parties to the dispute may appeal a Panel report, an appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel, and that there shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

TABLE OF CONTENTS

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 Inchon 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.

1.5 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.

[1] WT/DS163/4 reproduced in Annex 1 to this report.
[2] WT/DSB/M/64.

II. FACTUAL ASPECTS[3]

A. INTRODUCTION

2.1 This dispute relates to the Inchon 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[4], 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 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]

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[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.

[5] GPR/SPEC/77.

[6] Specifically, paragraph 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, paragraph 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.

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.

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 1991[8], 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]

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[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.

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 offer[11], 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 boards[13], agencies[14], offices[15] and administration bodies.[16] It also proposed coverage of one corporation (the Korea National 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:

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[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 Administration, 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.

> "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.

(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[19] and the European Communities[20], Korea provided a S*upplementary 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 Transportation[22]: 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[23]: 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[24]: 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.

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[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.

2.24 The following entities were proposed to be covered under the Office Supply[25]: 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:
>
> - 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.

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[25] *Ibid.*
[26] *Ibid.* pp. 26 –28.
[27] Document GPR/Spec/73, p. 2.
[28] *Ibid.*

(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 Inchon, 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 Inchon; 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 Services[33] 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 domestics laws and regulations.[34]

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[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.

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.

(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 1994[36], 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 3[37] 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.

(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

[35] "Korea's Offer in the Agreement on Government Procurement", dated 14 December 1993.
[36] *Ibid.* p. 1.
[37] *Ibid.* p. 9.

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.

(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]

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[38] *Ibid.* p. 13.
[39] *Ibid.* p. 17.
[40] *Ibid.* p. 18.
[41] See paragraphs 2.17 and 2.32.

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.

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 answered[43]:

[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.

> "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:

> "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]

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[44] Article XXIV:3(a) of the GPA.
[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.

E. THE INCHON INTERNATIONAL AIRPORT PROJECT

1. General Description of the Project

2.59 The project in question concerns the construction of Inchon International Airport. The airport is being built on reclaimed land between two islands, Yongjong and Yongyu[48], 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, Inchon 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]

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 completed[53] 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

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[48] "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time," p. 3.
[49] *Ibid.* p. 14.
[50] *Ibid.* p. 41.
[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.

> 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 project[57], 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."

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 Inchon 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:

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

> "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 1994[58] 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]

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[58] Excerpt from MOCT website, p. 2.
[59] *Ibid.* Article 7(1).
[60] *Ibid.* Article 12-2.
[61] *Ibid.* Article 15.

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."

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 1990[65] 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:

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[62] *Ibid.* Article 13(1).
[63] Korea's Answer to Question 14 from the Panel, dated 29 November 1999.
[64] KAA History from KAA website.
[65] *Ibid.*

> "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 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 plans[67] and statements of account[68] for approval by the Minister of Construction and Transportation. Funds can be borrowed by KAA from various bodies with the approval of MOCT.[69]

Legal Status

[66] *Korea Airport Corporation Act*, Article 16.
[67] *Ibid.* Article 19.
[68] *Ibid.* Article 20.
[69] *Ibid.* Article 23.

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 directors[70] 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 Inchon 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."

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[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]

Procurement

[74] Exhibit Kor-15.
[75] Sources of Fund for KAA (Exhibit Kor-109).

2.102 The rules according to which the Korea Airport Corporation procures are set out in the *Contract Procedure Rules of Korea Airport Authority*.[76] In addition, Article 90 of these rules provide that:

> "With respect to the provisions not stipulated herein, the government contract related laws, regulations and so on shall be applied."

2.103 Teams of approximately 23 KAA employees are used for the opening and evaluation of bids for contracts tendered by KAA.[77]

(v) The Korea Airport Construction Authority (KOACA)

Origins

2.104 The Korea Airport Construction Authority (KOACA) was created pursuant to the *Korea Airport Construction Authority Act*, which was enacted on 3 August 1994 and entered into force on 1 September 1994.[78] That Act purported to transfer KAA's rights and responsibilities in relation to the IIA project to KOACA. Specifically, Article 5 of the Addenda to the Act provided that:

> "(1) Property and rights/obligations of Korea Airport Corporation related to the New Airport Construction Project before the enforcement of this Act, shall be entirely assigned to KOACA…
>
> (4) Any acts conducted by Korea Airport Corporation or taken upon Korea Airport Corporation in relation to New Airport Construction Project before [KOACA's] foundation, shall be considered as those conducted by or taken upon Korea Airport Corporation."

Scope of Responsibility

2.105 Article 1 of the *Korea Airport Construction Authority Act* provided that KOACA:

> "… will carry out the New International Airport Construction Project … around the Seoul metropolitan area for ensuring smooth air transportation and contributing to the national economic development."

2.106 Article 7 of the Act defines the projects for which KOACA is responsible. That Article specifically referred to the IIA project but also listed "other airport construction related projects entrusted by the government."[79]

2.107 Article 1 of the *By-Laws (Articles of Authority) of Korea Airport Construction Authority*[80] further provides that:

> "The object of this Authority is to facilitate the air transportation and further to contribute to the development of national economy by efficiently propelling the New Capital Airport Construction Project … ."

2.108 The By-laws further elaborate on KOACA's responsibilities.

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[76] Exhibit Kor-18.
[77] Korea's Answer to Question 15 from the Panel, dated 29 November 1999.
[78] *Korea Airport Construction Authority Act*, Article 1 of Addenda.
[79] Sub-articles 2 and 3 are blank.
[80] Exhibit Kor-45.

Relationship with MOCT

2.109 Article 31 of the *Korea Airport Construction Authority Act*, entitled "Direction and Supervision" is identical in all relevant respects to Article 28 of the *Korea Airport Corporation Act* which prescribes the relationship between MOCT and KAA and which is referred to above in paragraph 2.90.

2.110 MOCT's power and KOACA's responsibilities *vis-à-vis* MOCT are essentially the same as for KAA.[81] In addition, the *Korea Airport Construction Authority Act* provides that "the title the land and facilities of new airport created or built as the consequence of the new airport construction project by KOACA … shall be vested to the State upon completion."[82]

Legal Status

2.111 As in the case of KAA, KOACA is a juristic person and has corporate status.[83]

Composition

2.112 The composition of KOACA's board of directors is identical in all relevant respects to KAA.[84] As with KAA, KOACA's board of directors (which, according to the *Korea Airport Construction Authority Act*, shall be composed of the president, vice-president and directors)[85] is required to decide on "important matters."[86]

2.113 As in the case of KAA, KOACA's board of directors are not government employees[87] and neither are its employees. Again, similarly with KAA's empowering legislation, Article 35 of the *Korea Airport Construction Authority Act* provides that officers and employees of KOACA are to be considered public officials in the application of certain provision of Korea's *Criminal Act* and Article 15 provides that the employees are employed and dismissed as prescribed by KOACA's articles of incorporation.

Role in Relation to Inchon International Airport Project

2.114 KOACA's role in relation to the IIA project was defined by the *Korea Airport Construction Authority Act* and the *By-Laws (Articles of Authority) of Korea Airport Construction Authority*. Further, at the time that KOACA was created, the *Korea Airport Corporation Act* was also amended. Specifically, Article 7(5-2) which vested KAA with jurisdiction in respect of "the new airport construction project" was deleted.

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[81] See paragraph 2.91.

[82] *Korea Airport Construction Authority Act*, Article 19(1).

[83] Article 3 of the *Korea Airport Construction Authority Act* states that the KOACA is a juristic person. Article 4(1) states that "KOACA shall come into existence by making a registration of incorporation at the location of its principal office".

[84] Article 8 of the *Korea Airport Construction Authority Act* prescribes the composition of the KOACA. Specifically, it provides that:

> (1) Officers of KOACA shall be composed of five directors including a president of the board of directors and a vice president and an auditor.
> (2) The president and auditor shall be appointed and dismissed by the Minister of Construction and Transportation.
> (3) The vice president and auditor shall be appointed and dismissed by the president of KOACA with the approval of the Minister of Construction and Transportation.

[85] *Korea Airport Construction Authority Act*, Article 14(2). Exhibit Kor-110 lists KOACA directors.

[86] *Korea Airport Construction Authority Act*, Article 14(1).

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

Funding

2.115 During KOACA's term as operator of the IIA project (that is, from September 1994 until 1 February 1999), it relied upon 78 per cent government funding, 14 per cent domestic and foreign debt, 7 per cent bonds and 1 per cent other means for the IIA project in 1994; 80 per cent government funding, 19 per cent domestic and foreign debt, 2 per cent bonds in 1995; 69 per cent government funding, 28 per cent domestic and foreign debt, 4 per cent bonds in 1996; 38 per cent government funding, 58 per cent domestic and foreign debt, 2 per cent bonds in 1997; 41 per cent government funding, 46 per cent domestic and foreign debt, 14 per cent bonds in 1998.[88]

Procurement

2.116 The rules according to which the KOACA procures are set out in the *Contract Administration Regulations of Korea Airport Construction Authority*.[89] In addition, Article 3 of these regulations provide that:

> "With respect to all contract administration matters of the KOACA, it shall be governed by the provisions of this contract administration regulations. Matters not stipulated in this contract administrations regulations shall be governed by Contracts to which the State is a Party…such as government procurement contracts."

2.117 As in the case of KAA, teams of approximately 23 KOACA employees are used for the opening and evaluation of bids for contracts tendered by KOACA.[90]

(vi) The Inchon International Airport Corporation (IIAC)

Origins

2.118 The Inchon International Airport Corporation (IIAC) was created on 1 February 1999 pursuant to the *Law on Inchon International Airport Corporation*. That law also purported to amend the *Korea Airport Corporation Act* and the *Seoul Airport Act.*[91] It was enacted on 26 January 1999 and came into effect on 1 February 1999.[92] The effect of those amendments was that KOACA was reconstituted as IIAC. This is evident from Article 5 of the Additional Rule contained in the *Law on Inchon International Airport Corporation*, which provides that:

> "(1) The IIAC inherits the assets, right and responsibilities of the Metropolitan New Airport Public Corporation (KOACA) when this law is enforced the moment the IIAC is established…
>
> (4) All the activities related with the Metropolitan New Airport Public Corporation (KOACA) and activities performed toward this IIAC are regarded as the ones that the IIAC conducted or are conducted toward the IIAC."

Scope of Responsibility

2.119 Article 1 of the *Law on Inchon International Airport Corporation* provides that:

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[88] Sources of Fund for New Airport Construction (KOACA and IIAC) (Exhibit Kor-109).
[89] Exhibit Kor-47.
[90] Korea's Answer to Question 15 from the Panel, dated 29 November 1999.
[91] *Law on Inchon International Airport Corporation*, Article 10 of the Additional Rule.
[92] *Ibid.* Article 1 of the Additional Rule.

> "This law is focused on effective operation of air freight delivery and improvement of national economy by managing efficiently Inchon International Airport … with [the] establishment of Inchon International Airport Corporation."

2.120 Article 10(1) of the Law defines the projects for which IIAC is responsible. Specifically it states that the IIAC is responsible for, among other things, "construction business" associated with the IIA project; management, operation and maintenance of IIA; the development of businesses in areas adjacent to the airport to ensure the efficient management and operation of the IIA; and "other business" related to construction, management and operation, for which it has a licence from the Korean Government or other autonomous entities.

2.121 Article 2(1) of the *By-Laws (Articles of Incorporation) of Inchon International Airport Corporation*[93] further provides that the IIAC has authority, among other things, to construct the IIA in accordance with Article 2 of the *Seoul Airport Act*; to maintain, operate and repair the IIA; to develop neighbouring areas which are necessary for the effective operation and maintenance of the IIA; and "other businesses" related to construction and operation of the IIA which are delegated to IIAC by national local governments.

Relationship with MOCT

2.122 Article 16 of the *Law on Inchon International Airport Corporation*, entitled "Direction and Supervision," prescribes the relationship between IIAC and MOCT but in somewhat different terms to that prescribed as between MOCT and KAA[94] and also as between MOCT and KOACA.[95] Specifically, Article 16 provides that:

> "The Minister of Construction and Transportation can direct and supervise the IIAC about the matters that are necessary for increase of public goods which are designated by the Presidential Decree in managing the Airport. However, this isn't applied to the jobs related with the managing object promised by the law of the paragraph 1 of Article 13 which is about the improvement of the corporation's managing environment and about privatization."

2.123 Moreover, MOCT is empowered to permit the use of, lend or concede gratuitously national assets to IIAC.[96]

Legal Status

2.124 Article 2 of the *Law on Inchon International Airport Corporation* provides that "IIAC is supposed to be incorporated body." IIAC's corporate status is confirmed in Article 1 of *By-Laws (Articles of Incorporation) of Inchon International Airport Corporation* which provides that*:*

> "This Corporation is established by Inchon International Airport Corporation Law and shall be called … Inchon International Airport Corporation … ."

Composition

2.125 According to Article 6(1) of the Additional Rule of the *Law on Inchon International Airport Corporation*, the composition of the IIAC, at least at the time of it creation, was identical to the

[93] Exhibit Kor-54.
[94] See paragraph 2.90.
[95] See paragraph 2.109.
[96] *Law on Inchon International Airport Corporation*, Article 11.

composition of KOACA. Article 6(1), entitled "Interim measures for staffs and workers of the KOACA" provides that:

> "(1) The president, chief director and the auditor of the Metropolitan New Airport Public Corporation (KOACA) shall be regarded as the president, chief director and auditor according to this law, however the term of office shall be till new president, chief director and auditor are newly appointed.
>
> (2) The workers of the Metropolitan New Airport Public Corporation (KOACA) shall be employed as the workers of the IIAC."

2.126 The Law additionally provides that the board of directors is "implemented to process the works related with establishing the corporation"[97] and that "the board [of directors] for establishment consists of less than seven members appointed by the Minister of Construction and Transportation, and he becomes the chairman of the board."[98]

2.127 Under IIAC's articles of incorporation, the Corporation is governed by twelve directors, six of whom, as non-standing directors, are elected by the Corporation's stockholders and constitute the board of directors. IIAC's president, as one of the six standing directors, is nominated by a nominating committee and elected by the stockholders, while the remaining five standing directors are simply elected by stockholders.[99]

2.128 Again, as in the case of KAA and KOACA, neither IIAC's members of its board of directors are government employees[100] nor are its staff. IIAC currently employs 557 persons.

Role in Relation to Inchon International Airport Project

2.129 On 26 January 1999, IIAC was listed as a potential operator for the Inchon International Airport through an amendment to Article 6(1) of the *Seoul Airport Act*. Article 6(1) as amended provides:

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

Funding

2.130 During IIAC's term as operator of the IIA project (that is, from 2 February 1999 onwards), it relied upon 25 per cent government funding, 24 per cent domestic and foreign debt, 41 per cent bonds and 10 per cent other means in 1999.[101]

Procurement

2.131 The rules according to which the IIAC procures are set out in the *Contract Administration Regulations of Inchon International Airport Corporation*.[102] In addition, Article 3 of these regulations provides that:

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[97] *Law on Inchon International Airport Corporation*, Article 3(1) of the Additional Rule.
[98] *Ibid.* Article 3(2).
[99] IIAC Articles of Incorporation, Articles 26, 27, 35.
[100] Exhibit Kor-110 lists IIAC directors. In Korea's Answers to Question 10 from the Panel, dated 3 November 1999, Korea notes that none of these directors are government employees.
[101] Sources of Fund for New Airport Construction (KOACA and IIAC).

> "With respect to all contract administration matters of the IIAC, it shall be governed by the provisions of this contract administration regulations. Matters not stipulated in this contract administrations regulations shall be governed by Contracts to which the State is a Party … such as government procurement contracts."

2.132 Again, as in the cases of KAA and KOACA, a "Property Management & Contract" team of approximately 23 IIAC employees is used for the opening and evaluation of bids for contracts tendered by the IIAC.[103]

(vii) Office of Supply

2.133 The *Procurement Fund Act* provides that the Office of Supply is primarily responsible for procurement using government procurement funds ("the Fund").[104] The projects for which the Fund may be used are set out in Article 6 of the Act:

> "The Fund shall be used for the following projects:
>
> 1. Purchasing, transport, manufacturing, storing, supplying and their accompanying projects
>
> 2. Management and operation of facilities and their accompanying projects
>
> 3. Other projects necessary in operation of the Fund."

2.134 The procurement procedures, which the Office of Supply is obliged to follow are referred to in Article 13 of the *Procurement Fund Act*. Specifically, Article 13 provides:

> "Matters necessary for the procurement procedures and ranges, such as purchasing, saving for emergency, manufacturing, and supplying of procurement goods and contracts for construction of facilities shall be provided for by the Presidential Decree."

2.135 The bodies for which the Office of Supply is required to procure are defined pursuant to a series of provisions in the *Procurement Fund Act*. First, the goods procured are defined in Article 2(2) and 2(3) of the Act:

> "(2) Procurement goods refers to goods demanded…
>
> (3) Goods demanded refers to goods required by a demanding agency pursuant to paragraph 5 and designated by Presidential Decree."

2.136 Secondly, Article 2(5) defines a "demanding agency" as a national agency, a local government organization or other agencies designated by Presidential Decree.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

A. UNITED STATES

3.1 The United States requested the Panel to make the following findings:

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[102] Exhibit Kor-55.
[103] Korea's Answer to Question 15 from the Panel, dated 29 November 1999.
[104] *Procurement Fund Act*, Article 4(1).

"That MOCT (including the New Airport Development Group under MOCT), KAA, KOACA, and IIAC, all of which are or have been in the past Korean Government entities involved in procurement for the Inchon International Airport project, are covered under Korea's Appendix I of the GPA and:

(a) That by imposing bid deadlines for the receipt of tenders that are shorter than the GPA-required 40 days, Korea is in violation of Article XI:1(a) and XI:2(a) of the GPA.

(b) That by imposing qualification requirements specifying that an interested foreign supplier must have a licence that in turn requires that supplier to build or purchase manufacturing facilities in Korea, just so the supplier may be eligible to bid as a prime contractor, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.

(c) That by imposing domestic partnering requirements that force foreign firms to partner with, or act as subcontractors to, local Korean firms, just so the foreign firms may participate in tendering procedures, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.

(d) That by not establishing effective domestic procedures enabling foreign suppliers to challenge alleged breaches of the GPA for procurements related to the Inchon International Airport project, Korea is in violation of Article XX of the GPA."

3.2 The United States also requested the Panel to make the following finding:

"That should the Panel determine that the above measures do not violate the GPA, the measures nevertheless nullify or impair benefits accruing to the United States under the GPA, pursuant to Article XXII:2 of the GPA."

B. KOREA

3.3 Korea requested the Panel to reject the complaints to the United States on the basis of the following finding:

"That the entities conducting procurement for the Inchon International Airport are not covered entities under Korea's Appendix I of the GPA."

IV. ARGUMENTS OF THE PARTIES

A. ENTITIES COVERED UNDER KOREA'S APPENDIX I OF THE GPA

1. Interpretation of Appendix I and Notes

4.1 **Both parties argue** that regard should be had to the *Vienna Convention on the Law of Treaties* in interpreting Korea's Appendix I to the GPA.

4.2 In support of its argument that regard should be had to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* in interpreting Korea's Appendix I to the GPA, the **United States notes** that the Appellate Body and previous panels have consistently looked to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* for guidance in interpreting the provisions of the WTO

agreements and that these articles have "attained the status of a rule of customary or general international law."[105]

4.3 **Korea agrees** that the *Vienna Convention on the Law of Treaties* contains customary rules of interpretation that should be used in interpreting Korea's Note 1 to Annex 1.[106]

2. Appendix I, Annex 1: Branch Offices and Subsidiary Organizations

(a) Status of Notes, Annexes and Appendices to the GPA

4.4 **Both parties argue** that, according to Article XXIV:12 of the GPA, which states that the "Notes, Appendices and Annexes to this Agreement constitute an integral part thereof," Annex 1 and, specifically, the term "central government entity," must be interpreted "in accordance with customary rules of interpretation of public international law," pursuant to Article 3:2 of the DSU.[107]

(b) Interpretation of "Central Government Entity" according to the Ordinary Meaning

4.5 **The United States argues** that when interpreted according to its ordinary meaning, in its context and in light of the object and purpose of the GPA, the scope of "central government entity" in Annex 1 of the GPA includes coverage of its branch offices and subsidiary organizations unless otherwise provided for in the GPA. The United States asserts that its argument is based on a textual interpretation of the GPA, pursuant to Article 31 of the *Vienna Convention on the Law of Treaties*.

4.6 To further explain its argument, the United States contends that since all "central government entities" are composed of branch offices and subsidiary organizations, *a fortiori*, the scope of coverage of a "central government entity" must include these subordinate units, unless otherwise specified. The United States further argues that coverage of an entity that excludes its subordinate units actually amounts to no coverage at all. In support, the United States refers to its arguments in paragraphs 4.323 and 4.324.

4.7 **In response, Korea argues** that the claim that, "the coverage of a 'central government entity' under Annex 1 of the GPA includes coverage of its subordinate units, i.e. its branch offices and subsidiary organizations" is unsupported by any text of the GPA. Korea notes in this respect that the words "branch office" or "subsidiary organization" do not appear anywhere in the text of the GPA or in Korea's Appendix I.

4.8 Korea states that the United States is using the rules of the *Vienna Convention on the Law of Treaties* to interpret the "ordinary meaning" of treaty language that does not appear in the treaty. According to Korea, the terms "branch office" and "subsidiary organization," are terms that do not appear in the GPA and are, instead, merely labels with no significance in and of themselves.

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[105] The United States refers to Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, (Adopted 1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R ("*Japan - Alcoholic Beverages*"), pp. 9-10 and to Appellate Body report on *United States - Standards for Reformulated and Conventional Gasoline* (Adopted 20 May 1996) WT/DS2/AB/R ("*United States - Reformulated Gas*"), pp. 16-17, and panel report on *United States - Reformulated Gas* (Adopted 20 May 1996) WT/DS2/R, paragraph 6.7.

[106] Korea further notes that the Appellate Body has stated that tariff concessions in a Member's Schedule – much like commitments in a GPA signatory's Appendix I – are "part of the terms of the treaty," to be interpreted by resort to the rules of interpretation included in the Vienna Convention. *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (*"EC-LAN"*)(Adopted 22 June 1998), paragraph 84. Korea also refers to *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Adopted 6 November 1998), paragraph 114 ("A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted").

[107] Appellate Body report on *EC-LAN*, (WT/DS62, 67, 68/AB/R), paragraph 84.

4.9 **The United States argues in response** that the terms "branch offices" and "subsidiary organizations" are merely used as generic terms to depict the different types of subdivisions within a given entity. In support of this assertion, the United States notes that, as quoted often by Korea from a United States International Trade Commission Report, the GPA "is aimed at government ministries [sic] and their subdivisions,"[108] and these subdivisions necessarily include branch offices and subsidiary organizations.

4.10 In support of its argument that branch offices and subsidiary organisations are not covered under the GPA, **Korea uses** an analogy to corporate law. Korea states that, in that field, a "branch" is defined as a "division, office, or other unit of business located at a different location from main office or headquarters."[109] Korea states that a subsidiary corporation, on the other hand, is "one in which another corporation (i.e. parent corporation) owns at least a majority of the shares and thus has control."[110] Korea argues that what is significant about these definitions, for the purposes of this case, is that a "branch" normally is not an independent entity, but is simply a division, office or other unit located somewhere else. Korea states that special local administrative organs could be considered branches, because they generally are located at some place other than the main office or headquarters.

4.11 Korea further argues that a branch has the same GPA obligations as the parent entity. On the other hand, it is Korea's view that a subsidiary is a separate legal entity. According to Korea, a subsidiary does not necessarily acquire the GPA obligations of another entity, even another entity that controls it to some extent.

(c) Application of the Ordinary Meaning of "Central Government Entity" to the Present Case

4.12 **The United States argues** that MOCT, like all other Korean "central government entities," is composed of branch offices and subsidiary organizations. In support, the United States refers to its arguments in paragraphs 4.435 and 4.436. The United States further argues that since the NADG, KAA, KOACA, and IIAC are either branch offices or subsidiary organizations of a covered "central government entity," namely, MOCT, coverage of MOCT under the GPA includes coverage of NADG, KAA, KOACA, and IIAC.

(i) NADG

4.13 **The United States notes** that the ordinary meaning of "entity" is an organization, a "being...the existence of a thing...all that exists...a thing that has a real existence."[111] The United States further notes that "central government" describes the level within a government structure at which the entity exists, i.e., at the national level as opposed to the state or local level. The United States argues that MOCT is, therefore, a GPA-covered entity at the national level of the Korean government structure. The United States argues that as with most, if not all, national-level entities in Korea, MOCT is organized into many branch offices and that the NADG is such an office. The United States asserts that it is undisputed that a listing of a "central government entity" under Annex 1 encompasses its branch offices, unless otherwise specified because, according to the United States, the two cannot be naturally separated for the purposes of GPA coverage. The United States refers to its arguments in 4.344.

4.14 **In response, Korea argues** that NADG is a not a "branch office" of MOCT and that the term "branch office" is not used by Korea for NADG. Korea states that NADG is, in fact, specially

[108] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979).
[109] Black's Law Dictionary (1990).
[110] *Ibid.*
[111] The New Shorter Oxford English Dictionary (1993 ed.), p. 830.

organized, ad hoc MOCT task force, and is not itself a legal person under Korean law.[112] Korea states that, as a result, NADG has no authority to undertake binding legal actions, such as contracting, on its own behalf. Korea further notes that NADG's regulations do not provide authority for procurement by NADG for IIA. Korea states that, therefore, both as to procurement and all other activities, NADG is MOCT itself – the entity listed on Annex 1. In support of this argument, Korea notes that Article 3 of NADG's regulations names MOCT's Assistant Minister of Planning and Management as the head of the task force, and MOCT's Director General of MOCT's Civil Aviation Bureau as the second in charge.

4.15 **In response to Korea's argument that NADG is MOCT itself, the United States questions** why the New Airport Development Group has a different name than MOCT, why did Korea in 1991 refer to the New Airport Development Group as "the New Airport Development Group under" MOCT, and not just as MOCT and how can the New Airport Development Group be "established within" MOCT in one instance yet be MOCT in another?

(ii) KAA, KOACA and IIAC

4.16 **Korea argues** that KAA, KOACA and IIAC are not subsidiary organizations of MOCT. In support of this argument, Korea notes that KAA, KOACA and IIAC are independent legal persons under Korean law. Korea further states that KAA, KOACA and IIAC, like the entities included on Korea's Annex 3, were established individually by special law. Korea states that each is identified as a legal or "juristic" person, rather than as an agency or instrumentality of MOCT or any other ministry. Korea further states that, as a separate legal person, each entity contracts on its own behalf, pursuant to its own bid announcements and its own procurement regulations. Each has its own officers and directors, and its employees are not government civil servants or employees.

4.17 **In response, the United States refers** to its arguments in paragraph 4.587. The United States also notes that, in fact, the affairs of KAA have always been the responsibility of the Civil Aviation Bureau, a branch office of MOCT.[113]

4.18 **In response to a question from the United States, Korea asserts** that all non-listed entities that are "independent legal persons" under domestic law are not covered under Annex 1 of the GPA. Korea states in this respect that Article I of the GPA and Annex 1 speak of "entities." Korea notes that the New Shorter Oxford English Dictionary defines "entity" as a "thing that has a real existence." In the context of the GPA, in Korea's view, an "entity" has real existence when it is a juristic or legal person in its own right, with its own officers, its own directors, its own rules and regulations. Korea argues that KAA, KOACA, IIAC are such entities.

4.19 **In response, the United States argues** that, merely because an entity is a separate legal person does not automatically mean it cannot be a subsidiary organization of another entity. The United States refers to its arguments in paragraph 4.435 for support. In support of its argument, the United States notes that "subsidiary" is defined as "serving to help, assist, or supplement, auxiliary, supplementary . . . subordinate, secondary." Thus, according to the United States, if one entity is supplementary or subordinate to another entity, it is a subsidiary organization of that other entity, regardless of its domestic legal status. The United States also refers to its arguments in paragraph 4.252.

(d) Significance of Note 1 to Annex 1

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[112] *Regulation on Establishment of the New International Airport Construction Working Group*, MOT Order No. 902, 1 June 1990, Article 2 ("The Working Group is to be established under the authority of the Minister of Transportation.").

[113] The Presidential Order on the Organization of the Ministry of Construction and Transportation, Article 16 (US Exhibit 71).

4.20 **Korea argues** that even if the ordinary meaning of "central government entity" includes "branch offices" and "subsidiary organizations," the United States' argument must be rejected because it ignores the ordinary meaning of Note 1 to Korea's Annex 1, which identifies the universe of bodies included within an entity listed on Annex 1, and which renders the ordinary meaning of the term "central government entity" irrelevant. Korea further argues that its commitments in Note 1 do not permit expansion of GPA coverage beyond those entities identified as "subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the *Government Organization Act* of the Republic of Korea." In support of this argument, Korea states that Note 1 provides specific, textual evidence of the intent and the agreement of the parties to the GPA, and as an "integral part"[114] of the GPA, it must be accorded both its ordinary meaning, and the "special meaning" it imposes upon the term "central government entity" for the purposes of Korea's Annex 1. Korea further states that Note 1 evidences and itself provides a "special meaning," under Article 31(4) of the *Vienna Convention on the Law of Treaties*, for the term "central government entity."[115]

4.21 **The United States responds** that, in its view, the text of Korea's Annex 1 fully supports the interpretation put forward by the United States. The United States asserts that it is wrong to argue that Note 1 exclusively governs the means of identifying the universe of entities internal to an Annex 1 entity that, while not themselves listed in Annex 1, are nevertheless covered under Annex 1 by virtue of their relationship to listed "central government entities." In support of its argument, the United States refers to the fact that Korea has admitted coverage of branch offices, such as the New Airport Development Group, which are neither "subordinate linear organizations," "special local administrative organs," nor "attached organs." Thus, according to the United States, these three terms cannot be exhaustive with regard to the "universe" of subordinate units within Korean "central government entities."

4.22 Further, the United States argues that Note 1 does not define the scope of "central government entity." Rather, according to the United States, Note 1 expands it. The United States contends that such an interpretation is consistent with the principle of effectiveness. The United States further asserts that such an interpretation is also consistent with the reasoning that Note 1 cannot both define and expand the scope of "central government entity." The United States refers to its arguments in paragraphs 4.159 and 4.161 and 4.163.

(e) Relevance of the Annex 1 List

(i) Explicit Listing

4.23 **The United States notes** that it is undisputed that the New Airport Development Group, a branch office of MOCT, is covered by virtue of the listing of MOCT in Annex 1, and not by its own listing. The United States argues that, therefore, the mere fact that the name of a branch office or a subsidiary organization is not explicitly listed in Annex 1 does not automatically mean that the branch office or subsidiary organization is outside the purview of the GPA.

4.24 The United States further argues that if all unlisted branch offices of enumerated "central government entities" were deemed excluded from Annex 1 coverage, then most Korean "central government entities" would not be effectively covered, since most of these entities are made up of branch offices, of which none are listed by name in Korea's Annex 1. The United States contends that, moreover, if the GPA only applied to enumerated subsidiary organizations, a Party, after agreeing to cover a "central government entity," could then unilaterally and without compensatory

[114] GPA Article XXIV:12.

[115] *Vienna Convention*, Article 31(4) ("A special meaning shall be given to a term if it is established that the parties so intended.").

adjustments transfer procurement authority from the "central government entity" to its unlisted subsidiary organization, all the while retaining control of the procurements by this subsidiary organization within the "central government entity." According to the United States, the result would be a GPA emptied of its substance.

4.25 **In response, Korea refers** to its arguments in paragraphs 4.160, 4.31 and 4.290.

(ii) Transfer of Procurement Authority

4.26 **Korea notes** that since the United States considers KAA, KOACA and IIAC to be the same and interchangeable, "transfers" between them could have no cognizable effect under the terms of the GPA at issue in this case. Korea asserts that the only remaining "transfer" about which the United States apparently complains, must be the Korean National Assembly's decision to assign responsibility for the IIA project to KAA. Korea states that it was fully within its right to undertake this so-called "transfer unilaterally and without compensatory adjustments" because it occurred in December 1991, two years before Korea submitted its final offer for accession to the GPA, and five years before the effective date of the GPA for Korea. Korea notes that if a similar "transfer" occurred today, a GPA signatory would not be able to accomplish it "unilaterally and without compensatory adjustments." It would be required, under Article XXIV:6(a), to address claims for compensatory adjustments. Korea further asserts that it is one thing to transfer procurement authority from a not yet covered entity (MOCT in 1991) to a non-covered entity (KAA), and something else to transfer it from a covered entity to a non-covered entity. Korea states that the United States submissions do not appear to make this distinction, or to allow for the application of Article XXIV:6.

4.27 **In response, the United States argues** that it is irrelevant that Korea did not make its final offer until three years after the shift of procurement authority to KAA. As a subsidiary organization of MOCT, KAA remains covered under Annex 1 of the GPA because (1) all branch offices and subsidiary organizations of "central government entities" are automatically covered under Annex 1, unless otherwise specified, and (2) procurements by a subsidiary organizations are in fact procurements by a listed "central government entity" – pursuant to Article I of the GPA. Furthermore, the United States argues that pursuant to Article I, KAA remains covered regardless of whether or not it is a subsidiary organization of MOCT because KAA was merely the operator of the IIA construction project, and MOCT remained the entity responsible for IIA construction.

4.28 **Korea also states** that it has demonstrated that the Korean National Assembly made the various transfers of responsibility for the IIA project for entirely legitimate reasons. To illustrate that governments transfer authority over projects or portfolios for many legitimate reasons, Korea states that prior to passage of the *Energy Policy Act of 1992*[116], the United States Department of Energy was responsible for the production and sale of uranium fuel enrichment services for commercial nuclear power plants.[117] Korea states that this responsibility involved procurement authority for the various facilities associated with uranium enrichment, including the Department of Energy's gaseous diffusion enrichment plants.[118] Korea notes that the *Energy Policy Act of 1992* created the United States Enrichment Corporation, and transferred the Energy Department's responsibility for the sale and production of uranium enrichment services to the Corporation. Korea further notes that the transfer

[116] Public Law No. 102-486, Title IX.

[117] The testimony of William H. Timbers, Jr., President and Chief Executive Officer, United States Enrichment Corporation, before the Subcommittee on Energy and Power of the House Committee on Commerce, 21 February 1995, pp. 3, 4 (Testimony of USEC President and CEO); Uranium Enrichment Activities Leading to Establishment of the US Enrichment Corporation, GAO Report GAO/RCED-94-227FS, 27 July 1994, p. 4 (1994 GAO Report); United States General Accounting Office, *Status of Open Recommendations FY97*, at http://www.gao.gov/openrecs97/abstracts/rc95245.htm.

[118] Uranium Enrichment: Process to Privatize the US Enrichment Corporation Needs to be Strengthened, GAO Report GAO/RCED-95-245, 14 September 1995, p. 5 (1995 GAO Report).

took effect when the Corporation commenced operations on 1 July 1993.[119] Korea states that the transfer from the Energy Department extended the procurement authority associated with the project to the Corporation, although the Act exempted the Corporation from many of the federal procurement requirements included in the *Federal Property and Administrative Services Act* of 1949, as amended, and the *Competition in Contracting Act* of 1984, as amended.[120] The Corporation issued its own procurement policies and procedures, which it contends, adhere to the United States' Federal Acquisition Regulations.[121]

4.29 Korea further states that subsequent to this transfer, and pursuant to the *United States Enrichment Corporation Privatization Act* of 1996 (passed on 26 April 1996, months after the effective date of the GPA), the United States privatized the Corporation, ultimately selling its shares in the Corporation on the New York Stock Exchange on 23 July 1998.[122]

4.30 Korea notes that this involved, effectively, two transfers and three entities for the same activity in a period of five years. Korea further notes that there is nothing unusual or dubious about these transfers and nor is there anything unusual or dubious about the transfer of responsibility for the IIA project between the various Korean entities.

(f) Article I:3 of the GPA

4.31 **Korea argues** that the GPA does, in fact, provide a means of attaining coverage for procurements by non-listed entities. More specifically, Korea refers to Article I:3 which provides as follows:

> "Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply *mutatis mutandis* to such requirements."

4.32 Korea interprets this Article as meaning that where covered entities ("entities, in the context of a procurement covered by this Agreement")[123] require non-covered entities ("enterprises not included in Appendix I")[124] to adhere to particular requirements in awarding contracts pursuant to the latter's procurement responsibilities, the substantive national treatment and non-discrimination obligations included in Article III of the GPA must be observed. In Korea's view, Article I:3 effectively provides a standard to convert non-covered entities into de facto covered entities.

4.33 Further, in response to a question from the Panel, Korea argues that Article I:3 provides, "a formulation which offers a way of distinguishing between those [non-listed] 'organs' or 'organisations'

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[119] 1994 GAO Report, p. 4.

[120] *Energy Policy Act*, Section 1312(f) and 1994 GAO Report, p. 7 and Testimony of USEC President and CEO, p. 6.

[121] 1994 GAO Report, p. 7.

[122] United States Enrichment Corporation website, http://www.usec.com/Content/ThirdTier/whoweare/cnt_about_privatization.html.

[123] Korea argues that the GPA does not use the terms "covered" versus "non-covered" entities. The terms "covered" and "non-covered" are shorthand terms adopted by the parties to this dispute. In the GPA, the use of the term "entity" automatically signifies coverage. See, e.g., the reference to simply "entities" in GPA Articles III:2(a), III:2(b), VI:1, VI:2, VI:4. The phrase "in the context of a procurement covered by this Agreement," therefore, clarifies that the procurement at issue, besides being conducted by a covered entity, must also be for a good or service for which the signatory has committed.

[124] Korea argues that the use of the term "entity" in the GPA automatically signifies coverage. Therefore, the term "enterprises" was most likely adopted in Article I:3 to distinguish such bodies from "entities," and to convey the intent to address in that Article the relevance of requirements imposed by covered entities upon bodies that are not covered.

which are 'attached/connected/affiliated' etc. to MOCT and are, therefore, covered entities for the purposes of the GPA and those which are not."[125]

4.34 Korea notes that if MOCT required KAA to award contracts with particular requirements, then, by operation of Article I:3, KAA would be covered by the national treatment and non-discrimination requirements of Article III of the GPA. However, Korea argues that there is no evidence suggesting that MOCT requires KAA, KOACA or IIAC to award IIA procurement contracts in accordance with Article I:3.

4.35 **In response, the United States argues** that Article I:3 cannot be used in this dispute because KAA, KOACA, and IIAC are not entities "not included in Appendix I." The United States further argues that a plain reading of Article I:3 makes it clear that it addresses the issue of subcontracts, not primary contracts. The United States questions how else can a non-covered entity be conducting a "procurement covered under this Agreement"? Further, the United States argues that adopting the approach proposed by Korea in relation to Article I:3 would mean that rectifications and modifications could be effected without the use of Article XXIV:6. The United States contends that this would render Article XXIV:6 an inutility. The United States emphasizes that Article I:3 cannot be interpreted as a means of expanding GPA coverage "beyond the list of entities included in a signatory's Appendix I."

4.36 The United States also contends that Korea's arguments contained in paragraphs 4.20, 4.31 and 4.296 regarding Article I:3 would lead to the result that, with the exception of Korea, every GPA Party's non-listed subdivisions of its "central government entities" would not be covered, because "only named entities, not other entities over which they may exert some control, are covered." The United States further contends that because these "non-covered" subdivisions are required by their covered "central government entities" "to award contracts in accordance with particular requirements," these subdivisions would then be subject to Article III of the GPA (non-discrimination), but not to the rest of the GPA disciplines. In contrast, Korea's non-listed subdivisions (*i.e.*, the "subordinate linear organizations," "special local administrative organs," and "attached organs" of listed entities) would be subject to all GPA disciplines, because "central government entity" for Korea – according to its Note 1 to Annex 1 – encompasses the entities' subdivisions. The United States concludes that, in short, Korea's arguments would result in major reductions of concessions for all GPA Parties, while singling out Korea as the sole Party providing full coverage of its non-listed entities. The United States argues that the text of the GPA does not support such a conclusion.[126]

3. Appendix I, Annex 1: The Scope of "Central Government Entities"

(a) The "Control" Test

4.37 Article I:1 of the GPA provides as follows:

> "This Agreement applies to any law, regulation or practice regarding any procurement by entities covered by this Agreement as specified in Appendix I."

4.38 **The United States argues** that Article I:1 should be considered to determine whether procurements by KAA, KOACA, and IIAC are in fact procurements by MOCT.

4.39 The United States contends that a textual interpretation of Article I:1, and specifically of the word, "by," suggests an analysis of the relationship between MOCT and these three entities *vis-à-vis* the procurement of IIA construction. According to the United States, in making this analysis, factors such as control, funding, ownership, and benefit may be considered. The United States argues that in

[125] Korea's Answer to Question 11 from the Panel, dated 29 November 1999.
[126] US Response to Korea's Answer to Question 5 from the Panel, dated 29 November 1999.

the present dispute, MOCT controls, finances, benefits from, and owns the procurements of KAA, KOACA, and IIAC. The United States refers in this respect to a list of provisions from Korean law that, according to the United States, evidences MOCT's ultimate control and responsibility over the IIA project, the entities related to this project, and the procurements of these entities.[127]

4.40 The United States concludes that procurements by KAA, KOACA, and IIAC are procurements by MOCT and that, therefore, they are covered under Annex 1 of the GPA pursuant to Article I:1 of the Agreement.

(b) Factors Illustrating Control

(i) Status of Project Operators

4.41 **The United States notes** that the term "project operators" is defined in Article 95(1) of Korea's *Aviation Act*, which states:

> "Any operator of the airport development projects as prescribed in Article 94(2) [is] (hereinafter referred to as "project operator")... ."[128]

4.42 The United States also notes that Article 94(2) of that Act, in turn, describes a "project operator" as "any person other than the Minister of Construction and Transportation" who has obtained "the permission of the Minister of Construction and Transportation" "to operate the airport development projects."[129]

4.43 The United States contends that in further defining "project operator," the *Aviation Act* goes into explicit detail regarding the role and duties of project operators and the authority of MOCT over project operators carrying out airport development projects. The United States notes that, for example, project operators can only carry out airport development projects with the approval, permission, and consent of MOCT.[130] The United States further notes that the *Aviation Act* requires potential project operators to obtain approval from MOCT of their proposed operational plan, which must "specify or be accompanied by design drawings necessary for operating the projects, financing scheme, period of operation, and other matters prescribed by the Ordinance of the Ministry of Construction and Transportation."[131] The United States notes that, moreover, project operators must obtain approval from MOCT that the work performed conforms to project requirements.[132]

4.44 The United States further notes that the *Enforcement Decree of the Aviation Act* supplements the *Aviation Act* as follows:

> "Any person who desires to execute the airport development projects under Article 94(2) of the [Aviation] Act, shall submit to the Minister of Construction and Transportation an application for permission specifying the following matters . . .

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[127] US Exhibit 77.

[128] US Answer to Question 19 from the Panel, dated 29 November 1999.

[129] *Ibid.* The United States also notes that "airport development projects" are defined in Article 2(8) of the *Aviation Act* as "projects related to new construction, enlargement or improvement of airport facilities... ."

[130] *Aviation Act*, Article 96 (describing MOCT approval of a project operator's "operational plan." Article 95(1) indicates that the purpose of an operational plan is to obtain the permission of the Minister of Construction and Transportation with regard to an airport development project).

[131] *Ibid.* Article 95.

[132] US Answer to Question 19 from the Panel, dated 29 November 1999, citing Article 104 of the *Aviation Act.*

> [o]bject and details of projects, [p]eriod and method of execution of projects; and [o]ther matters necessary for executing projects ... ."[133]

4.45 Furthermore, according to the United States, the *Act on the Promotion of a New Airport for the Seoul Metropolitan Area Construction* notes that MOCT may designate a "project operator" to implement the Inchon International Airport construction project.[134] However, "the operator of the new airport construction project as provided for in Article 6 (hereinafter referred to as the "project operator") shall draw up the execution plan for the new airport construction project (hereinafter referred to as the "execution plan") containing the scale and contents of the project, the execution period, a financing scheme and such other matters as determined by the Presidential Decree, and obtain approval from the Minister of Construction and Transportation. The same shall apply where he intends to modify the matters already approved ... ."[135]

4.46 The United States argues that aside from the *Aviation Act*, no other law submitted in this case defines the term "project operators." Instead, argues the United States, they merely confirm the designation of KAA, KOACA, and IIAC as IIA project operators. Specifically, the United States notes that the *Seoul Airport Act*, lists the "Operator[s] of New Airport Construction Project."[136] The United States notes that the relevant article of the *Seoul Airport Act* was revised on a number of occasions since its passage in 1991 to include KAA and KOACA in the list of potential IIA project operators.[137] The United States notes that Korea confirms KAA, KOACA and IIAC as IIA project operators by specifically referring to them as "project operators" throughout Korea's submissions.

4.47 Finally, the United States argues that consistent with Article 94 of the *Aviation Act*, the *Seoul Airport Act* gives MOCT authority to choose a different procurement operator at any time, stating that, "[t]he Minister of Construction and Transportation may, where he deems it necessary for the 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."[138] The United States argues that MOCT did just that when it made KAA the IIA project operator in December 1991, KOACA the project operator in August of 1994, and IIAC the project operator in 1999. However, the United States asserts that it is clear that throughout this eight-year period of switching project operators, MOCT retained statutory authority and ultimate control over the entire IIA airport development project.[139]

4.48 **Korea notes** that according to Article 6(1) of the *Seoul Airport Act*, "[t]he new airport construction project shall be implemented by" the operator identified therein. Korea states that although the term "operator" is not defined beyond the entity identified in Article 6(1), the term "new airport construction project" is defined, in Article 2(2) of the *Seoul Airport Act* to include various types of construction. In their respective authorizing statutes, KAA, KOACA and IIAC are charged with undertaking these types of construction projects.[140]

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[133] US Answer to Question 19 from the Panel, dated 29 November 1999, citing Article 27 of the *Enforcement Decree of the Aviation Act.*

[134] *Act on the Promotion of a New Airport for the Seoul Metropolitan Area Construction, US Exhibit 11, Article 6.*

[135] *Ibid.* at Article 7(1).

[136] *Seoul Airport Act*, Article 6.

[137] US Answer to Question 19 from the Panel, dated 29 November 1999.

[138] *Seoul Airport Act*, Article 6(2).

[139] US Answer to Question 19 from the Panel, dated 29 November 1999.

[140] Korea's Answer to Question 10 from the Panel, dated 29 November 1999, citing *Korea Airport Corporation Act*, Article 7(5-2) (assigning KAA responsibility for "New airport construction projects as referred to subparagraph 2 of Article 2 of the Act on the promotion of New Airport Construction in Seoul Metropolitan Area."); *Korea Airport Construction Authority Act*, Article 2 (defining "project" for which KOACA is responsible as "any of the activities stipulated in the subparagraph 2, Article 2, '*Seoul Airport Act*.'"); *Law on Inchon International Airport Corporation*, Article 10(1)(1) (assigning IIAC responsibility for "Construction

4.49 Korea further notes that the title of Article 6 of the 1991 *Seoul Airport Act* – which gave KAA responsibility for the IIA project – is "Operator of New Airport Construction Project."[141] Korea asserts that the wording of this title, and not anything from the *Aviation Act*, is precisely why Korea and the United States used the shorthand term "project operator" when referring to KAA's role.[142] Korea asserts that the United States has specifically stated that a "project operator" may be designated for IIA construction under Article 6 of the *Seoul Airport Act*. Korea further asserts that the United States did not rely on the *Aviation Act* as its source for the term "project operator."[143]

(ii) Independent Legal Persons

4.50 **Korea argues** that MOCT does not control procurements by KAA, KOACA and IIAC. In support of this argument, Korea states that, as specified in their authorizing statutes, KAA, KOACA and IIAC were established by an act of the National Assembly as separate legal persons[144] and are, therefore, independent legal persons under Korean law. Korea further states that these entities authored and adopted their own by-laws, they authored and adopted their own Contract Administration Regulations governing all procurement matters[145], they issue their own requests for proposals and bid announcements, they publish bid announcements and requests for proposals of their own accord, and they conclude contracts with successful bidders on their own behalf. Korea argues that MOCT does not ask these entities, much less require them, to award contracts in accordance with particular requirements.

4.51 **The United States argues**, on the other hand, that a separate legal person may still be an agent or instrumentality of another entity. The United States refers to Black's Law Dictionary, which notes that an "agent" can be an "independent contractor," - that is, a separate legal entity. Further, in the view of the United States, merely having the status of a separate legal person does not in and of itself guarantee independence. The United States refers to its arguments in paragraph 4.424.

4.52 The United States continues by stating that "control" has nothing to do with an entity's legal status. According to the United States, a separate legal entity can be controlled. The United States refers in this respect to the concept of "subsidiary corporation" in corporate law, in which a separate legal entity is a subsidiary by means of control. The United States argues that this does not mean that the subsidiary corporation ceases to be a separate legal entity. The United States contends that while it agrees with Korea that MOCT's control would not lead to the surrender of KAA, KOACA, and IIAC's status as separate legal entities, this fact does not mean that the existence of separate legal entities make them *per se* incapable of being controlled. The United States further argues that laws creating KAA, KOACA and IIAC demonstrate that MOCT "guides", "supervises", "inspects" and "directs" the New Airport Development Group, KAA, KOACA and IIAC.[146]

4.53 The United States also states that if Korea's argument were to be accepted, then any Party to the GPA could unilaterally transform one of its covered entity's subdivisions into a "separate 'juristic' person" and then claim successfully that this "separate juristic" subdivision is no longer covered under

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business of the Metropolitan New Airport (hereinafter referred to as Inchon International Airport) in accordance with the Article 2 of the promotional law on Metropolitan New Airport Construction.").

[141] 1991 *Seoul Airport Act*, Article 6.

[142] Korea's Response to the US Answer to Question 19 from the Panel, dated 29 November 1999.

[143] Korea's Response to the US Answer to Question 19 from the Panel, dated 29 November 1999, *quoting* US First Written Submission, paragraph 20.

[144] *Korean Airport Corporation Act*, Article 3; *Korea Airport Construction Authority Act*, Article 3; *Law on Inchon International Airport Corporation*, Article 2.

[145] *KAA Contract Administration Regulations*, Article 90; *KOACA Contract Administration Regulations*, Article 3; *IIAC Contract Administration Regulations*, Article 3.

[146] In support of this argument, the United States refers to Article 28 of the *Korea Airport Corporation Act*, Article 31 of the *Korea Airport Construction Authority Act* and Article 16 of the *Law on Inchon International Airport Corporation*.

the GPA. The United States further states that if other Parties were to object to this unilateral erosion of bargained-for coverage, the Party making this transformation could – according to Korea – simply claim that the objecting Parties have no rights in the matter because "separate 'juristic' persons" cannot possibly be subdivisions of "central government entities." The United States argues that this would reduce Article XXIV:6 – and the schedules – to inutility, contrary to the customary rules of interpretation of public international law.[147]

(iii) Oversight for Public Safety and Fiscal Propriety

4.54 **Korea also argues** that "control" exercised by a central government entity does not undermine the independence of separate legal persons such as KAA, KOACA and IIAC and, rather, is the minimum degree of oversight required to fulfill a government's fiduciary duty. Korea notes that constructing an airport, like any other public purpose project, is intimately linked to public welfare, safety and finance. In Korea's view, any responsible government will maintain oversight over the entities responsible for the project in order to guarantee to the public that the highest standards of safety and fiscal propriety are observed. Korea argues that this type of oversight does not surrender an entity's status as a separate legal person.

4.55 Korea argues that the MOCT's authority to appoint board members, the reporting requirements incumbent upon KAA, KOACA and IIAC, MOCT's oversight of fiscal decision-making, and its maintenance of blue-ribbon consultative commissions regarding the IIA project is consistent with the nature of the task with which KAA, KOACA and IIAC have been charged. Korea further argues that, apart from the obvious public safety issues associated with the construction of an airport, a certain amount of government oversight is justified to ensure that appropriate standards of fiscal propriety are observed. Korea notes that the budget for the IIA project stands at approximately $6 billion, with 40 per cent derived from public funds. According to Korea, accountability is needed to guarantee the observation of the highest standards of fiscal responsibility.

4.56 Additionally, Korea argues that the type of oversight referred to by the United States – the requirement that KAA, KOACA or IIAC seek approval for and report on certain of its actions – also ensures accountability. Korea argues that the approval and reporting requirements to which KAA, KOACA and IIAC are subject ensures that there is a public record evidencing their accountability for what they do. Korea states that they do not surrender their status as separate legal persons merely because they are called to account for their actions.

4.57 Finally, Korea argues that, even assuming for the sake of argument that the United States' control test applies, KAA, KOACA and IIAC cannot be considered to be controlled by MOCT under this test. Korea argues that this follows from the fact that the degree of control is not extreme but, rather, is only the degree of control necessary to ensure that the interests of the public are reflected in the operations of each corporation. Korea asserts that the United States itself, in discussing the control exercised over its own Amtrak and Comsat by central government entities, reasoned that "the retained links with the government may be seen as only those necessary to ensure that the interests of the public are reflected in the operations of [Amtrak and Comsat]," and that these links do not support the extension of GPA coverage to Amtrak and Comsat since "the code is aimed at government ministeries [sic] and their subdivisions – not the myriad organizations tangential to the essential function of government."[148]

4.58 **In response, the United States argues** that there is no support for the argument that MOCT's direction and supervision of KAA and KOACA are merely aimed at public policy matters in the texts

[147] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[148] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), p. 44.

of the *Korea Airport Corporation Act*, the *Korea Airport Construction Authority Act*, and the *Inchon International Airport Corporation Act*.

(iv) Master Plan for IIA Project

4.59 **In support of its argument** that MOCT remains in ultimate control of the IIA project, **the United States refers** to Article 4(1) of the *Seoul Airport Act*, which requires the MOCT to establish the "master plan" for the IIA project. The United States notes that Article 4(2) stipulates that the master plan includes: 1. General direction of construction; 2. Outline of the construction plan; 3. Construction period; 4. Financing plan; and 5. Such other matters as the Minister of Construction and Transportation deems necessary.

4.60 **Korea argues in response** that Article 4 of the *Seoul Airport Act* does not authorize MOCT to undertake procurement for IIA or to require the project operator to award contracts for IIA procurements in accordance with any particular requirements.

4.61 **The United States also notes** that as project operators, NADG, KAA, KOACA and IIAC were and are required to follow the "master plan." The United States further notes that the NADG, KAA, KOACA, and IIAC are required to obtain MOCT approval for their project execution plans.

(v) Reporting Obligations

4.62 In further support of its argument that MOCT controls the IIA project operators, the **United States notes** that MOCT may:

> "where necessary for the implementation of the Act, order the project operator to make necessary reports on the new airport construction project or to submit necessary data, and may have public officials serving at his Ministry enter the project operator's office, the workplace or other relevant places to inspect the business of the new airport construction project"[149]

4.63 The United States also notes that if and when the project operator:

> "has completed the work on the new airport construction project, [he shall] submit a work completion report to the Minister of Construction and Transportation and obtain confirmation of the completion of work"[150]

(vi) Appointment and Dismissal

4.64 Also, in further support of its argument that MOCT controls each of the IIA "project operators," the **United States contends** that directors of NADG are accountable to the MOCT. Further, the presidents, vice-presidents, and auditors of KAA, KOACA, and IIAC are appointed and dismissed by MOCT while the rest of their boards are appointed and dismissed by the president "with the approval of" MOCT.

4.65 **In response, Korea argues that** KAA, KOACA and IIAC are governed by their own boards of directors that control all matters related to major corporate investments and all other major

[149] US Answer to Question 19 from the Panel, dated 29 November 1999, citing Article 14(1) of the *Seoul Airport Act.*

[150] *Ibid.* citing Article 12-2(1) of the *Seoul Airport Act.*

corporate issues of any significance.[151] Further, Korea states that KAA, KOACA and IIAC hire and fire a workforce that is not in the government's employ.[152]

(vii) Power to Cancel Permission or Approval

4.66 **In further support** of its control argument, **the United States notes** that Article 13(1) of the *Seoul Airport Act* provides that the MOCT retains final authority to:

> "cancel the permission or approval granted pursuant to this Act or order the suspension of or alteration in the work, or the reconstruction, modification or relocation of facilities:
>
> 1. Where the operator has obtained permission or approval under this Act by deceit or other wrongful means;
>
> 2. Where the operator has breached an order or disposition issued under this Act; and
>
> 3. Where continued execution of the new airport construction project has been made impossible owing to change of circumstances"[153]

4.67 **Korea argues in response** that MOCT's oversight authority is related to MOCT's mandate to police any potential criminal conduct by KAA, KOACA and IIAC. More specifically, Korea argues that MOCT is able to cancel, suspend or alter any action undertaken by KAA, KOACA or IIAC only where conduct by those entities is illegal or otherwise wrongful. Korea notes in this respect that it is only in exceptional situations, where KAA employees have committed certain criminal violations, that they will be treated as public officials. Korea further notes that under Article 30 of the *Korea Airport Corporation Act*, this "legal fiction" will result in the application of Chapter VII of the *Korean Criminal Act* to KAA employees.[154] Korea argues that MOCT oversight of the type described in Article 8(2) of the *Korea Airport Corporation Act* is aimed at policing such conduct. Korea states that it is "good government" to police the conduct of KAA, KOACA or IIAC officials, routing out any potential criminal conduct, or cancelling or suspending any "wrongful" or "deceitful" actions that might be undertaken by those officials.

(viii) Power to Dictate Technical and Non-Technical Requirements

4.68 In further support of its argument that MOCT controls the IIA procuring entities, the **United States argues** that MOCT dictates what technical or non-technical requirements are necessary for each procurement, the decision of which determines the final selection of the products or services. The United States notes that through its New Airport Development Group and its "New Airport Construction Deliberation Commission", MOCT *inter alia* deliberates on "important issues relating to building techniques, construction technology and traffic impact, etc. of the new airport construction project"; researches and develops "systems and regulations" concerning the airport; and plans, designs and oversees "actual works of [the airport's] civil engineering facilities, site preparation, supporting complex construction supporting facilities and accessible transport facilities."

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[151] Korea refers to, for example, *KAA By-laws*, Articles 4(3), 4(1)(6), 14, 25; *KOACA By-laws*, Articles 7(1), 30; *IIAC Articles of Incorporation*, Articles 17, 47.

[152] *Korea Airport Corporation Act*, Article 13; *Korea Airport Construction Authority Act*, Article 15; *Law on Inchon International Airport Corporation*, Additional Rule Article 6(2) (KOACA employees, who were by virtue of Article 15 of the *Korea Airport Construction Authority Act* not government employees, became employees of IIAC).

[153] US Answer to Question 19 from the Panel, dated 29 November 1999.

[154] *Criminal Act*, Act No. 293, 14 September 1953 (as amended by Act No. 2745, 25 March 1975).

4.69 **In response, Korea notes** that there is no evidence to demonstrate that MOCT dictates technical or non-technical requirements for procurements by KAA, KOACA or IIAC. Korea argues that the United States has not established that KAA, KOACA or IIAC are "required" by MOCT or any other covered entity "to award contracts in accordance with particular requirements," which is the standard provided in Article I:3 of the GPA to extend coverage to unlisted entities. According to Korea, neither the statutory provisions regarding MOCT's responsibility for the Inchon airport's basic plan, nor the statutory provisions requiring KAA, KOACA and IIAC to request approval for and report on certain of their actions, instruct MOCT to require KAA, KOACA or IIAC to award Inchon airport contracts in accordance with any particular requirements. Korea argues that it has in fact demonstrated that no such requirements exist, given its demonstration that KAA, KOACA and IIAC: are separate legal persons; have adopted their own procurement regulations; are empowered to and have in fact conducted procurements on their own behalf; and, have signed contracts on their own behalf.

(ix) Financing of IIA Project

4.70 **The United States also argues** that MOCT is responsible for all budget and funding matters related to the airport and, more particularly, that MOCT finances all IIA procurements. In support of this argument, the United States refers to Article 15 of the *Seoul Airport Act*, which, it argues, permits the Government of Korea - that is, MOCT - to grant a subsidy or a fiscal loan to the project operator to help him finance all or part of the expenses needed for the new airport construction project. The United States further argues that MOCT provides free loans of national assets, it concedes gratuitously any state property to KAA, KOACA and IIAC, it guarantees the bonds issued by these entities, and establishes the financial plans for the repayment of debt incurred by these entities from the construction of the airport. The United States also states that if these entities attempt to collect rents or charges for the use of airport facilities, borrow funds, or sell airport property, they must obtain MOCT's approval. Finally, the United States argues that MOCT funds the NADG.

4.71 **Korea argues in response** that there is no evidence indicating that MOCT finances all IIA procurements. Further, Korea argues that KAA, KOACA and IIAC fund portions of IIA procurement with their own funds.

4.72 In support of its argument regarding finance of the IIA project, **the United States refers** to a document entitled, "Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time." The United States contends that this document shows that 40 per cent of the funding for the IIA construction project will come from government grant. The United States further states that the remaining IIA funding will come from borrowing guaranteed by the government, government land sales, and KAA. The United States notes that Korea is anticipating at this time that only 11.7 per cent of the IIA funding will come from private investment and that IIAC may not be privatized.

(x) Property in IIA Project

4.73 **The United States also argues** that MOCT retains possession of all products or services procured for the IIA project. The United States argues that the *Seoul Airport Act* confirms 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. The United States also notes that the *Korea Airport Construction Authority Act* states that the ownership of new airport facilities constructed through the new airport construction project belongs to MOCT as soon as the construction is finished.

4.74 The United States also notes that the *Seoul Airport Act* provides that if the project operator chooses to "set up or expand in or relocate to the projected area or its adjoining area such facilities for the production of various construction materials as are required for the new airport construction

project,"[155] "receive advance money for all or part of the land price from the persons who will be provided with a portion of the land to be created by the implementation of the new airport construction project,"[156] or "issue bonds convertible to land (hereinafter referred to as the "land redemption bonds")[157] the project operator must obtain the approval of MOCT."[158]

(c) Is Control Related to Procurement?

4.75 **Korea asserts** that the "control" factors identified by the United States are essentially two-fold: "control" stemming from MOCT's responsibility for formulating and amending the basic plan; and, "control" stemming from the statutory requirement that KAA, KOACA and IIAC request approval for and report on certain of their actions.

4.76 Korea argues that these factors are not related to procurement. Further, Korea argues that these factors do not demonstrate that MOCT requires KAA, KOACA and IIAC to award contracts in accordance with particular requirements.

4.77 Regarding the first category of control referred to in paragraph 4.75, Korea notes that Article 4(2) of the *Seoul Airport Act* describes what should be included in the basic or master plan. Korea argues that the Act does not direct or authorize MOCT to undertake procurement for IIA nor does it instruct MOCT to require KAA, KOACA or IIAC to award IIA contracts in accordance with any particular requirements.

4.78 Regarding the second category of MOCT control referred to in paragraph 4.75, Korea states that the United States only provides one example where MOCT oversight was connected to procurement by KAA, KOACA and IIAC. Korea makes specific reference to the assertion by the United States that MOCT's authority to cancel, suspend or alter actions undertaken by KAA, KOACA or IIAC, under Article 13(1) of the *Seoul Airport Act*, includes the right to cancel, suspend, or change any procurement decision. Korea argues that MOCT is authorized to exercise this discretionary authority only in instances where conduct by KAA, KOACA or IIAC is illegal, otherwise wrongful or unenforceable.[159] Korea reiterates that this power is related simply to MOCT's task to police any potentially criminal conduct by KAA, KOACA or IIAC.

4.79 **The United States argues** that MOCT is responsible for all "affairs relating to air transportation" and it oversees the "construction and administration of…airports and all other matters concerning construction and transport safety affairs." The United States asserts that although the New Airport Development Group, KAA, KOACA or IIAC may purport to have the procuring authority for the IIA project, they are merely procurement agencies acting on behalf of MOCT. The United States maintains that such procurements are, in fact, conducted by MOCT and, therefore, are within the scope and meaning of Korea's Annex 1 of the GPA.

(d) Relevance of the Aviation Act to the IIA Project

(i) MOCT and the Aviation Act

[155] *Seoul Airport Act*, Article 8-2(3).
[156] *Ibid.* Article 11.
[157] *Ibid.*
[158] US Answer to Question 19 from the Panel, dated 29 November 1999.
[159] *Seoul Airport Act*, Article 13(1). Article 13(1)(3) lists impossibility owing to changed circumstances as a reason justifying MOCT cancellation, suspension or alteration of action by KAA, KOACA or IIAC. "Impossibility" is a general term of contract law dictating that in exceptional circumstances, changed circumstances can excuse a party from performance of a contract. See generally E. Allan Farnsworth, CONTRACTS, § 9.5 (2nd Ed., 1990) (Little, Brown, Boston). Thus, "impossibility" owing to changed circumstances leads to the same result as illegality or other wrong – the action by KAA, KOACA or IIAC is *unenforceable* as a matter of law.

4.80 **The United States argues** that Article 94(1) of the *Aviation Act* confers on MOCT authority over airport development projects. The United States also argues that the *Aviation Act* confirms MOCT's control. The United States refers to the following provisions of that Act in support of its argument:[160]

> "The airport development projects shall be carried out by the Minister of Construction and Transportation . . . 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 ... .[161]
>
> Any operator of the airport development projects . . . shall make an operational plan before he undertakes the work under the conditions as prescribed by the Presidential Decree. In this case, the project operator as prescribed in Article 94(2) shall produce an operational plan to obtain the permission of the Minister of Construction and Transportation . . . The operational plan . . . shall specify or be accompanied by design drawings necessary for operating the projects, financing scheme, period of operation and matters as prescribed by the Ordinance of the Ministry of Construction and Transportation . . ."[162]

4.81 The United States notes that the *Aviation Act* defines "airport development projects" as "projects related to new construction, enlargement or improvement of airport facilities."[163]

4.82 Further, the United States relies upon the *Enforcement Decree of the Aviation Act* which, it says, supplements the *Aviation Act*:

> "Any person who desires to execute the airport development projects under Article 94(2) of the Act, shall submit to the Minister of Construction and Transportation an application for permission specifying the following matters . . . [o]bject and details of projects, [p]eriod and method of execution of projects; and [o]ther matters necessary for executing projects ... ."[164]

4.83 The United States argues that, according to the *Aviation Act*, MOCT not only carried out past "projects related to new construction, enlargement or improvement of airport facilities," but is also presently carrying out the IIA construction project.[165] The United States notes that MOCT has the authority to choose and transfer the project operators of the construction project at will: it was MOCT that transferred IIA procurement responsibility from KAA to KOACA and from KOACA to IIAC. As project operators, according to the United States, KAA, KOACA amd IIAC are mere tools used by MOCT to construct the IIA.

4.84 Finally, the United States argues that various provisions in the *Aviation Act* confirm the subordinate nature of project operators.[166]

4.85 **In response, Korea argues** that although some Articles of the *Aviation Act* were incorporated by reference into the *Seoul Airport Act*, the Articles mentioned by the United States – Articles 2(8),

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[160] US Answer to Question 18 from the Panel, dated 29 November 1999.
[161] *Aviation Act*, Article 94.
[162] *Ibid.* Article 95.
[163] US Answer to Question 18 from the Panel, dated 29 November 1999, citing Article 2(8) of the *Aviation Act.*
[164] *Enforcement Decree of the Aviation Act*, Article 27.
[165] *Aviation Act*, Articles 94 and 2(8).
[166] Articles 95, 96, 103, and 104 of the *Aviation Act*.

94(1), 94(2), 103, 103(1), 104(2), 107 and 108 of the *Aviation Act* – were not so incorporated. Korea concludes that the United States' arguments must, therefore, be rejected.[167]

(ii) Applicability of the Aviation Act

Later Act Supersedes the Former

4.86 **Korea argues** that the *Aviation Act* is not applicable to the IIA project because, in May 1991, the National Assembly enacted the *Seoul Airport Act*. Korea argues that this Act governs the IIA project.

4.87 In support of its argument, Korea notes that 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."[168]

4.88 Korea notes that one reason to consider the *Seoul Airport Act*, rather than the *Aviation Act*, as determinative for questions regarding the construction of IIA, is that the *Seoul Airport Act* was enacted subsequent to the *Aviation Act*.[169]

4.89 Korea notes as a matter of clarification that the *Aviation Act* was superseded by the *Seoul Airport Act* for the purposes of IIA construction only. Korea notes that the *Aviation Act* still exists and is operative for other purposes.[170] Specifically, Korea states that apart from Section 2 of its Chapter V, titled "Airport," the *Aviation Act* regulates a variety of areas irrelevant to an airport like IIA that is not yet completed or operating: Chapter II, regarding "Aircraft"; Chapter III, "Airman"; Chapter IV, "Operation of Aircraft"; Chapter VI, "Air Transportation Business, Etc."; Chapter VII, "Aircraft Handling Business, Etc."; Chapter VIII, "Foreign Aircraft"; Chapter VIII-2, "Investigation of Aviation Accident"; Chapter IX, "Supplementary Provisions"; and, Chapter X, "Penal Provisions". Korea states that, furthermore, the provisions of Section 2 of Chapter V of the *Aviation Act* continue to apply to other airport construction projects in Korea, in the absence of "other Acts" or "other laws" providing otherwise.[171]

4.90 **In response, the United States argues** that Korea cites no provision in the *Seoul Airport Act* that would support a conclusion that the *Seoul Airport Act* supersedes the *Aviation Act*.[172]

4.91 The United States notes specifically that nowhere in Article 8 of the *Seoul Airport Act* entitled "Relations with Other Acts" does it say that the *Seoul Airport Act* supersedes the *Aviation Act*. On the contrary, the United States argues that Article 8 of the *Seoul Airport Act* specifically cross-references the *Aviation Act* and states that the approval of the "execution plans" under the *Seoul Airport Act* shall constitute approval under the *Aviation Act*.[173]

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[167] Korea's Response to the US Answer to Question 18 from the Panel, dated 29 November 1999.
[168] 1997 *Seoul Airport Act*, Article 1.
[169] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[170] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[171] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[172] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[173] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999, citing Article 8 of the *Seoul Airport Act* which states, in relevant part:
Article 8 (Relations with Other Acts)

4.92 The United States argues that if the *Seoul Airport Act* were intended to supersede provisions of the *Aviation Act* relating to airport development projects, as Korea argues, there would be no need for the *Seoul Airport Act* to indicate that approval of the execution plan would also constitute approval under Article 95(1) of the *Aviation Act*, i.e., Article 95(1) of the *Aviation Act* would simply not apply to the IIA project. Thus, according to the United States, Article 8 of the *Seoul Airport Act* clearly demonstrates first, that the *Aviation Act* is not superseded by the *Seoul Airport Act*, and secondly, that the IIA project is included in the airport development projects to which the *Aviation Act* applies.[174]

4.93 The United States notes that other Korean statutes illustrate that when one law "replaces" or "supersedes" another, this change is clearly and unambiguously stated in law as a matter of statutory drafting. The United States notes that, for example, when Korea enacted the law creating the IIAC, which superseded the KOACA law and transferred the duties of IIA project operator from KOACA to IIAC, the new IIAC law made it clear that the IIAC law displaced the KOACA law. The United States refers for support of its argument to Article 2 (Additional Rule) of the *Law on Inchon International Airport Corporation* which states:

> "Article 2. (Abolition of other law) The law on Metropolitan New Airport Public Corporation shall be abolished."[175]

4.94 The United States concludes that there is no indication in the *Seoul Airport Act*, the laws establishing KAA, KOACA, or IIAC (or any of the by-laws for those entities), or in any other law or regulation that the *Seoul Airport Act* supersedes the *Aviation Act* in any way.[176]

Specific Act Takes Precedence over General

4.95 **Korea argues** that the material articles of the *Seoul Airport Act* replace often in virtually verbatim form parallel Articles in the *Aviation Act* dealing with the construction of an airport. Korea argues that it is axiomatic that a more specific rule, i.e., one narrowly targeted at a particular project like the IIA, replaces a more general, albeit co-existing rule, i.e., one broadly addressed to any airport project.[177]

4.96 Korea also submits that as to construction of the IIA, where the *Seoul Airport Act* contains Articles corresponding directly with identical or similar Articles contained in the *Aviation Act* – the purpose of which is, considerably more general, "to contribute to the development of aviation and the promotion of public welfare" – the provisions of the *Seoul Airport Act* apply.[178]

4.97 Korea notes that, for example, Article 94 of the 1997 *Aviation Act*, entitled "Operator of Airport Development," states at subparagraph (1) that MOCT shall carry out airport development projects.[179] Korea notes that Article 6 of the 1997 *Seoul Airport Act*, not coincidentally entitled

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> (1) Where the project operator obtains approval for the execution plan pursuant to Article 7, it shall be presumed that the following approval, permission, authorization, decision, designation, licensing, consultation, consent...have been granted or made...and where the Minister of Construction and Transportation brings to public notice of the approval of the execution plan, it shall be presumed that a public notification or announcement of authorization and permission, etc. has been made or granted pursuant to on the of following Acts:
>
> …
>
> 16. Approval of an execution plan as stipulated in Article 95(1) of the Aviation Act...

[174] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[175] *Ibid.*
[176] *Ibid.*
[177] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[178] *Ibid.*
[179] *Ibid.* citing 1997 *Aviation Act*, Article 94(1).

"Operator of New Airport Construction Project," states at subparagraph (1) that KOACA (by its alias, the Seoul Metropolitan Area New Airport Construction Corporation) shall implement the IIA project.[180]

4.98 Korea notes that, similarly, the 1991 *Aviation Act*, at Article 94(1), under the title "Operator of Airport Development Projects," states that MOCT shall carry out airport development projects[181] while the 1991 *Seoul Airport Act*, at Article 6(1), under the title "Operator of New Airport Construction Project," states that KAA shall implement the IIA project.[182]

4.99 Korea argues that, therefore, with regard to the IIA project, the more specific provision of *Seoul Airport Act* take precedence over the more general provision of the *Aviation Act*, with the result being that KAA, KOACA or IIAC, rather than MOCT, carry responsibility for the IIA project.[183]

4.100 Korea notes that examples of the National Assembly's substitution of Articles in the *Aviation Act* with Articles from the *Seoul Airport Act* are plentiful. Korea refers to the charts below, which compare the two Acts in 1997 and 1991. Korea notes that the Korean National Assembly elected, for the purposes of IIA construction, to replicate and replace the terms of Section 2 of Chapter V of the *Aviation Act* with the terms of the *Seoul Airport Act*. Korea notes that the titles of the corresponding articles are often virtually identical, which, according to Korea, establishes the clear intent of the National Assembly to replace the regulatory framework of the *Aviation Act*, for purposes of construction of the IIA, with the new framework of the *Seoul Airport Act*.[184]

1997 Aviation Act	***1997 Seoul Airport Act***
Article 89 (Establishment of Basic Airport Development Plan)	Article 4 (Drawing-up of Master Plan for New Airport Construction)
Article 90 (Modification, etc. of Basic Plan)	Article 4-2 (Alterations, etc. to Master Plan)
Article 91 (Public Announcement on Basic Plan)	Article 4-3 (Public Notice of Master Plan)
Article 92 (Contents of Basic Plan)	Article 4 (Drawing-up of Master Plan for New Airport Construction)
Article 93 (Restriction on Act, etc.)	Article 5 (Restriction on Acts, etc.)
Article 94 (Operator of Airport Development Projects)	Article 6 (Operator of New Airport Construction Project)
Article 95 (Establishment, Approval, etc. of Operational Plan)	Article 7 (Approval of Execution Plan)
Article 96 (Relations With Other Acts)	Article 8 (Relations With Other Acts)
Article 97 (Access to and Use of Land)	Article 9 (Entry Into and Use of Land)
Article 98 (Expropriation of Land, etc.)	Article 10 (Expropriation of Lands, etc.)
Article 99 (Restriction, etc. on Disposal of State-owned Land)	Article 12 (Restriction, etc. on Disposal of State and Public Lands)
Article 100 (Entrustment With Affairs Concerning Land Purchase, etc.)	Article 16 (Entrustment of Land Purchase Business, etc.)
Article 101 (Execution of Appurtenant Work)	Article 7-2 (Execution of Appurtenant Work)
Article 104 (Inspection of Completion)	Article 12-2 (Confirmation of Completion of Work)
Article 104 (Inspection of Completion)	Article 14 (Report and Inspection, etc.)
Article 105 (Reversion of Airport Facilities and Exemption From Rent)	Article 12-3 (Title, etc., to Facilities)
Article 110 (Supervision)	Article 13 (Supervision)

[180] *Ibid.* citing Article 6(1) of the 1997 *Seoul Airport Act.*
[181] 1991 *Aviation Act*, Article 94(1).
[182] Korea's Answer to Question 9 from the Panel, dated 29 November 1999, citing Article 6(1) of the 1991 *Seoul Airport Act.*
[183] *Ibid.*
[184] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

1991 Aviation Act	*1991 Seoul Airport Act*
Article 89 (Establishment of Basic Airport Development Plan)	Article 4 (Drawing-up of Master Plan for New Airport Construction)
Article 93 (Restriction on Act, etc.)	Article 5 (Restriction on Acts, etc.)
Article 94 (Operator of Airport Development Projects)	Article 6 (Operator of New Airport Construction Project)
Article 95 (Establishment, Approval, etc. of Operational Plan)	Article 7 (Approval of Project Plan)
Article 96 (Relations With Other Laws)	Article 8 (Relations With Other Acts)
Article 97 (Access to and Use of Land)	Article 9 (Entry Into and Use of Land)
Article 98 (Expropriation of Land, etc.)	Article 10 (Expropriation of Lands, etc.)
Article 99 (Restriction, etc. on Disposal of State-owned Land)	Article 12 (Restriction, etc. on Disposal of State and Public Lands)
Article 100 (Entrustment with Affairs Concerning Land Purchase, etc.)	Article 16 (Entrustment of Land Purchase Business, etc.)

4.101 **In response, the United States argues** that, first, there is an inherent contradiction in Korea's argument that the articles of the *Seoul Airport Act* " replace" certain articles in the *Aviation Act*, when these very articles in the *Aviation Act* are still in force today.[185] The United States contends that Korea cites no provision in any act that suggests this to be true, nor can Korea provide evidence that the provisions of the *Aviation Act* apply to all airport development projects except the IIA project.[186]

4.102 Second, the United States refers to the above charts in which Korea points to 17 articles in the 1997 *Aviation Act* that have "similar" titles to Articles in the 1997 *Seoul Airport Act*. The United States argues that, however, given that the 1997 *Aviation Act* contains 184 Articles (not including six addenda articles), the mere fact that 17 of these 184 articles (less than 10 per cent) have "similar" titles to another act is not persuasive. According to the United States, if a Korean statute could "take precedence over," "supersede," or "replace" another statute, simply by showing that its article titles are "similar" to 10 per cent of the titles in the second statute, then a large number of Korea laws would no longer be in existence. In addition, contends the United States, many of the "similar" titles in Korea's chart can be found in acts other than the *Aviation Act*. The United States notes, for example, such article titles as "Relations With Other Acts," "Restriction, etc. on Disposal of States and Public Lands," "Entrustment of Land Purchase Business, etc.," and "Supervision" can be found in the KAA law, the law establishing KOACA, and the IIAC law. Moreover, the United States submits that many of the titles of Korea's 17 articles are neither similar, nor virtually identical. For example, "Reversion of Airport Facilities and Exemption From Rent" is not identical to "Title, etc., to Facilities." Likewise, "Contents of Basic Plan" is not identical to "Drawing up Master Plan for New Airport Construction."[187]

4.103 The United States notes, third, that the substance of the articles that Korea maintains as "similar" or "identical" are not always so. The United States notes that, for example, while the titles of Article 104 of the *Aviation Act* (Inspection of Completion) and Article 14 of the *Seoul Airport Act* (Report and Inspection, etc.) appear similar, their texts are quite different. The United States refers to the following side-by-side chart of the two articles[188]:

[185] The US notes that in its Response to Question 9 from the Panel, dated 29 November 1999, Korea states that, "The *Aviation Act* is, of course, still in effect."
[186] US Response to Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[187] *Ibid.*
[188] *Ibid.*

1997 Aviation Act	*1997 Seoul Airport Act*
Article 104 (Inspection of Completion) (1) When a project operator, as described in Article 94(2) has completed the work, he shall submit without delay a report on work completion to the Minister of Construction and Transportation to undergo the inspection of completion. (2) The Minister of Construction and Transportation shall, upon receiving an application for inspection and completion under paragraph (1), conduct the inspection of completion, and in a case where he deems that the work has been executed in conformity with the permission on the work, he shall deliver a certificate of completion to the applicant. (3) When the certificate of completion inspection is delivered under paragraph (2), the inspection, authorization, etc. of completion on the work according to approval, permission, license, etc. under the subparagraphs of Article 96(1) shall be considered to be obtained. (4) The land and airport facilities which are created or installed by the airport development projects, shall not be used before a certificate or completion inspection as referred to in paragraph (2) is delivered: Provided, That this shall not apply in a case where a permission on use prior to completion is granted by the Minister of Construction and Transportation.	**Article 14 (Report of Inspection, etc.)** (1) The Minister of Construction and Transportation may, where necessary for the implementation of the Act, order the project operator to make necessary reports on the new airport construction project or to submit necessary data, and may have public officials serving at his Ministry enter the project operator's office, the workplace or other relevant places to inspect the business of the new airport construction project. (2) The public officials conducting an inspection of the affairs pertaining to the new airport construction project under paragraph (1) shall carry a certificate indicating his mandated powers and produce it to relevant personnel. (3) Matters necessary for the certificate as provided for in paragraph (2) shall be determined by the Ordinance of the Ministry of Construction and Transportation.

4.104 The United States asserts that each of the examples above shows the weaknesses in Korea's argument, and reinforces the US position that the *Seoul Airport Act* does not replace the *Aviation Act*. The United States reiterates that the acts are entirely consistent with one another. The United States concludes that, indeed, to the extent that certain articles are similar, it is because the *Aviation Act* is the foundation upon which supplementary laws like the *Seoul Airport Act* are based.[189]

[189] *Ibid.*

Incorporation by Reference

4.105 **Korea acknowledges** that the National Assembly chose to incorporate certain provisions of the *Aviation Act* into the *Seoul Airport Act*, placing occasional specific references to the former in the latter. Korea notes that the 1997 *Seoul Airport Act* does, for example, at Article 2(2)(a), list Article 2(6) of the *Aviation Act* as the source for the definition of the term "airport facilities." Korea notes that, similarly, Article 2(1) of the 1997 *Seoul Airport Act* incorporates Article 111 of the *Aviation Act*; Article 111 in turn refers to certain of the Articles in Section 1 of Chapter V of the Aviation Act, concerning "Aerodrome and Navigation Aids" (navaids). Korea states that pursuant to Article 111, Article 75 of the *Aviation Act*, regarding the installation of navaids by MOCT or another entity granted permission to so install, does not apply. Korea states that Articles 77(1), 81 or 87, each of which address subsequent acts regarding entities granted permission to install navaids, also do not apply. However, Korea notes that Article 111 of the *Aviation Act* refers to and thus incorporates into the *Seoul Airport Act*, Article 76 of the *Aviation Act*, regarding public notice of navaid installation; Article 77(2), regarding inspection and further public announcement of installed navaids; Article 79, regarding delayed or discontinued use of navaids; Article 80, regarding management of navaids; Article 82, regarding the restriction of various "obstacles"; Article 83, regarding the requirement of aviation obstacle lights and beacons; Article 85, regarding forbidden or illegal acts; and, Article 86, regarding rent due to parties using navaids once they are installed. Finally, Korea notes that Articles 105(3) and 105(4) of the 1997 *Aviation Act*, by virtue of Article 12-3(2) of the 1997 *Seoul Airport Act*, permit investors or project operators to operate and derive revenue from airport facilities.[190]

4.106 Korea notes that the 1991 *Seoul Airport Act* similarly incorporates by reference several provisions of the 1991 *Aviation Act*. Article 2(2)(b) of the 1991 *Seoul Airport Act* turns to the 1991 *Aviation Act* for a definition of the term "aircraft handling business."[191] Korea states that, moreover, the reference in Article 2(1) of the 1991 *Seoul Airport Act* to Article 111 of the 1991 *Aviation Act* is identical to the parallel reference in the 1997 Acts, incorporating by reference Articles 76, 77(2), 79, 80, 82, 83, 85 and 86 of the 1991 *Aviation Act*. Korea states that, finally, by virtue of Article 8(1) of the 1991 *Seoul Airport Act*, subparagraph 16, KAA's "operational plan" is to be approved by the Minister of Transportation under Article 95(1) of the 1991 *Aviation Act*. Korea notes that such approval was already required under Article 7 of the 1991 *Seoul Airport Act*.[192]

4.107 Korea argues that these specific Articles of the *Aviation Act*, while incorporated by reference into the *Seoul Airport Act*, do not demonstrate that MOCT, rather than KAA, KOACA or IIAC, is the entity responsible for procurement for the IIA construction project. Korea argues that even if the United States' "control" test was determinative of GPA coverage, these specific Articles do not demonstrate "control" by MOCT over KAA, KOACA or IIAC. Further, Korea argues that they do not demonstrate, under the test included in Article I:3 of the GPA, that MOCT "requires" KAA, KOACA or IIAC "to award contracts in accordance with particular requirements." In support of its argument, Korea refers to evidence showing that KAA, KOACA and IIAC conduct their own procurements and conclude their own contracts, pursuant to their own *Contract Administration Regulations*.[193]

4.108 Korea concludes that it has demonstrated that the National Assembly enacted amendments to the *Seoul Airport Act* and the *Korea Airport Corporation Act*, rather than the *Aviation Act*, in order to appoint KAA as the entity responsible for IIA construction in December 1991. Korea further states

[190] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[191] Korea notes that there appears to be a typographical error in Article 2(2)(b). Rather than Article 2(26) of the 1991 *Aviation Act*, the definition of the term "aircraft handling business" is found at Article 2(30) of the 1991 *Aviation Act.*

[192] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[193] *Ibid.*

that along with Article 6(1) of the *Seoul Airport Act*, which was amended in December 1991 to appoint KAA to the IIA project, amendments to KAA's authorizing statute, the *Korea Airport Corporation Act*, assigned to KAA the IIA project "as referred to [in] subparagraph 2 of Article 2 of the *Seoul Airport Act*."[194]

4.109 **In response, the United States argues** that the *Seoul Airport Act* does not appoint the entity responsible for the IIA project — it merely lists a range of entities that could be IIA project operators. It then grants MOCT ultimate authority to select any entity to be the project operator for the IIA project.

4.110 The United States further argues that the *Aviation Act* is the primary Korean law relating to aviation matters, and it addresses a range of aviation-related issues, including aircraft registration, aviation safety, air transportation businesses, and airport development projects. According to the United States, this *Act* is then supplemented by a host of additional Korean laws and measures in these areas.[195] The United States argues that the *Seoul Airport Act* is just one such law, that it provides ancillary rules for the IIA project.[196]

4.111 As such, the United States argues that the *Seoul Airport Act* is entirely consistent with the *Aviation Act*. The United States notes that, for instance, Article 2(2) of the *Seoul Airport Act* cross-references the *Aviation Act* by defining the term "new airport construction project" as "[c]onstruction of such airport facilities as stipulated in subparagraph 6 of Article 2 of the *Aviation Act*. In fact, the United States notes that there is no provision in either act (or in any other Korean law) that expressly or implicitly suggests that the *Seoul Airport Act* "replaces" or "supersedes" the *Aviation Act*. [197]

(iii) Proviso in Article 94(1) of the Aviation Act

4.112 **Korea notes** that Article 94(1) of the 1997 *Aviation Act* states that MOCT shall carry out airport development projects, "provided that this shall not apply in case (of) provided otherwise by this Act or other Acts and subordinate statutes." Korea notes that, similarly, Article 94(1) of the 1991 *Aviation Act* states that "[e]xcept as provided otherwise by this Act or other laws and regulations," MOT shall carry out airport development projects.[198]

4.113 Korea states that the "other Acts" and "other laws" providing that an entity other than MOCT is to implement IIA construction are the *Seoul Airport Act*, the *Korea Airport Corporation Act*, the *Korea Airport Construction Authority Act*, and the *Law on Inchon International Airport Corporation*. Korea also notes that December 1991 amendments to the *Seoul Airport Act* and the *Korea Airport Corporation Act* appointed KAA as the entity responsible for the IIA project, August 1994 amendments to the *Seoul Airport Act* and the September 1994 enactment of the *Korea Airport Construction Authority Act* appointed KOACA to that role and February 1999 amendments to the *Seoul Airport Act*, together with passage of the *Law on Inchon International Airport Corporation*, similarly appointed IIAC to perform this task. Korea argues that in each case, the *proviso* in Article 94(1) of the *Aviation Act* was triggered.[199]

4.114 **In response, the United States argues** that this argument is inconsistent with Korea's argument that the *Aviation Act* was "replaced" and "superseded by the *Seoul Airport Act*." The United States asserts that Korea now argues that the *Aviation Act* in fact does apply to the Inchon

[194] Korea's Response to the US Answer to Question 18 from the Panel, dated 29 November 1999, citing *Korea Airport Corporation Act*, Article 7(5-2). Korea also notes that Footnotes 46 and 47 to Korea's response to Question 9 make the same point with regard to KOACA and IIAC.

[195] Articles 15, 24, 39, 74, 108, and 112 of the *Aviation Act*.

[196] US Response to Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[197] *Ibid.*

[198] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[199] *Ibid.*

International Airport project, and that the *Seoul Airport Act* and other laws "trigger" the *proviso* in Article 94(1). The United States argues that neither the *Aviation Act* was replaced and superseded by the *Seoul Airport Act*, nor was the *proviso* in Article 94(1) triggered by the *Seoul Airport Act*. The United States notes in this respect that Korea concedes that KAA, KOACA, and IIAC are "project operators," as designated by the *Seoul Airport Act*. The United States argues that if the *Seoul Airport Act* designates these entities as "project operators," then this Act cannot trigger the *proviso* in Article 94(1) of the *Aviation Act* as Korea suggests, because the *proviso* relates to MOCT's authority over airport development projects and not to the designation of project operators. The United States asserts that the designation of project operators is addressed in Article 94(2).[200]

4.115 The United States acknowledges that the proviso contained in Article 94(1) of the *Aviation Act* appears to indicate that the statutory authority of MOCT over airport development projects can be modified when specifically provided for in the *Aviation Act* or other statutes. However, the United States argues that there is nothing in the *Aviation Act* or any other Korean law that indicates that MOCT no longer has statutory authority over the IIA project or that this authority has been granted to any entity other than MOCT. Instead, the United States argues that the Korean laws that relate to the IIA project merely confirm the designation of entities such as KAA, KOACA, and IIAC as "project operators" of the IIA project pursuant to Article 94(2) of the *Aviation Act*. The United States further argues that Article 94(2) is separate and distinct from Article 94(1), and does not affect MOCT's statutory authority over the airport construction project.[201]

4.116 The United States argues that the *Aviation Act* provides support that MOCT retains authority over airport development projects following the selection of a project operator. The United States notes that Article 103(1) of the *Aviation Act* states, for example, that: "[i]f there is a person who performs a work or an act to damage or destroy the airport facilities under control of the Minister of Construction and Transportation, the Minister may have the operator of such work or the person doing such act bear the whole or part of the expenses..." According to the United States, this provision recognizes that even when there is a project operator on an airport development project, MOCT maintains its statutory authority over the project. The United States contends that, moreover, after the designation of a project operator, MOCT continues to have authority to direct the project operator[202] and ultimately is responsible for making the determination as to whether the project operator's work "has been executed in conformity with the permission on the work."[203]

(e) Is the Control Test Justified Under the GPA?

(i) Does a Control Test Exist in the GPA?

4.117 **Korea argues** that the United States' test does not exist in the GPA. More specifically, Korea argues that the test itself, the categories of "control" identified by the United States as relevant and the degree of control identified by the United States as sufficient to deem an entity "controlled" are not referred to anywhere in the GPA. Korea further argues that the non-textually-based test proposed by the United States would have the effect of overriding the basis upon which signatories negotiated their GPA commitments – that is, the specific enumeration of lists of entities to which the substantive obligations of the Agreement were to apply. Korea refers to its arguments in paragraphs 4.291 - 4.312.

4.118 **In response, the United States acknowledges** that the *Vienna Convention* requires first and foremost a textual interpretation of a treaty, which would ensure that an explicit enumeration of lists

[200] US Response to Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[201] US Answer to Question 18 from the Panel, dated 29 November 1999.
[202] *Aviation Act*, Articles 103, 107, 108.
[203] US Answer to Question 18 from the Panel, dated 29 November 1999, citing Article 104(2) of the *Aviation Act.*

of entities would override everything else. However, the United States argues that the relationship between a listed entity and a non-listed entity is a legitimate factor to consider in determining whether certain procurements are covered under the GPA.

4.119 The United States further argues that the notion of "control" does exist in the current GPA. In addition, although it is not applicable to this dispute, the United States notes that Article XXIV:6(b) also relies on the concept of "control":

> Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee . . . In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.

4.120 The United States contends that, indeed, if "control" did not exist in the Agreement, then the coverage of non-listed entities that are "'attached/connected/affiliated' etc." to a listed entity (*e.g.*, branch offices, subsidiary organizations, and other subdivisions) would not be achieved.[204]

4.121 The United States further argues that if the notion of control did not exist in the GPA, the GPA would be rendered a nullity, in contravention of numerous Appellate Body decisions. According to the United States, the implication of Korea's "no control" interpretation would be to allow GPA Members to transfer procurement authority from a listed entity to a non-listed entity that is controlled by the listed entity, thus effectively avoiding being subject to GPA disciplines. The United States argues that, in the context of this dispute, Korea's argument would allow a covered entity such as MOCT to simply designate a new project manager to avoid subjecting the IIA project to the GPA. According to the United States, such a result would be contrary to the object and purpose of the GPA as reflected in its text and context, and cannot be what the drafters of the GPA intended. The United States argues that such an interpretation would have significant negative ramifications on the future applications and interpretations of the Agreement.[205]

4.122 **Korea argues in response** that the United States is wrong when it argues that without a "control" test, GPA signatories would be able to transfer procurement authority from a listed entity to a non-listed entity that is controlled by the listed entity, thus effectively avoiding being subject to GPA disciplines. Korea reiterates that Article I:3 of the GPA in fact provides for the extension of coverage to non-listed bodies where those non-listed bodies are required by covered entities to award contracts in accordance with particular requirements.[206]

4.123 Korea notes that, moreover, the United States contended previously that the concept of "compensatory adjustments" under Article XXIV:6 of the GPA would provide a remedy in these circumstances.[207] Korea refers to its arguments contained in paragraphs 4.26 and 4.560.

(ii) Relevant Appellate Body Decisions

4.124 **The United States emphasizes** that the absence of the word "control" in the GPA text does not mean that such a test cannot and should not be applied. To support this argument, the United States refers to *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (*Canada - Dairy*).[208] The United States contends that in the *Canada - Dairy* decision, the

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[204] US Response to Korea's Answer to Question 5 from the Panel, dated 29 November 1999.
[205] US Answer to Question 20 from the Panel, dated 29 November 1999.
[206] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.
[207] *Ibid.*
[208] *Canada – Dairy*, WT/DS103/AB/R, WT/DS113/R (adopted on 27 October 1999).

Appellate Body applied a control test to determine whether a provincial board made up of milk producers was actually a "government" for the purposes of Article 9.1(a) of the *Agreement on Agriculture*. The United States argues that there is no reference to "control" in Article 9.1(a), yet the Appellate Body applied such a test to pierce through the fiction created by the provincial board to find that the board was actually a "government." In the view of the United States, the instant case is closely analogous.

4.125 The United States also asserts that the Appellate Body decision provides guidance on the determination of "control" in its report. The United States makes reference to the following excerpts from that decision:

> "A "government agency" is, in our view, an entity which exercises powers vested in it by a "government" for the purpose of performing functions of a "governmental" character, that is, to "regulate," "restrain," "supervise" or "control" the conduct of private citizens. As with any agency relationship, a "government agency" may enjoy a degree of discretion in the exercise of its functions . . .
>
> The "governmental" character of the boards' functions, as well as the extent of their regulatory control is underlined by the fact that their orders and regulations are enforceable in courts of law. Thus, the powers of the provincial boards are augmented by the machinery of the State itself, and the boards have at their disposal the public force to ensure that their regulatory functions and decisions are carried out. Although the provincial boards enjoy a high degree of discretion in the exercise of their powers, governments retain "ultimate control" over them. The Panel was, therefore, correct to conclude that the provincial milk marketing boards are "government agencies.""[209]

4.126 The United States argues that the Appellate Body in the *Canada – Dairy* case agreed with the panel's analysis that the Government of Canada had "ultimate control" over Canada's provincial milk marketing boards based on two factors: delegation of power (that is, whether the marketing boards acted under explicit authority granted to them by the government), and function (that is, whether the marketing boards acted in the manner in which the government would have acted otherwise).

4.127 The United States asserts that the Appellate Body decision supports the United States' interpretation of Article I:1. Further, the United States argues that it uses the same analysis in this dispute as the Appellate Body in the *Canada - Dairy* case to determine whether KAA, KOACA and IIAC are subdivisions of MOCT. The United States argues that it verified, through the use of Korea's laws, that KAA's, KOACA's and IIAC's powers derive from authority explicitly delegated to them as project operators by MOCT and that they cannot act outside the purview of their delegated powers. The United States also argues that its "control" analysis confirms that KAA, KOACA and IIAC are only performing functions that, had the authority not been delegated to them, MOCT would itself be performing.

4.128 **In response, Korea notes** that there is no evidence to indicate that the authority of KAA (and KOACA and IIAC) has been delegated from MOCT. Korea argues that, rather, the authority of KAA and its successors was derived from legislation, passed by the National Assembly.

4.129 Korea also notes that in *Canada – Dairy*, the issue was whether provincial milk marketing boards, composed in part of private citizens, that exercised government power, were "government" for purposes of the *Agreement on Agriculture*. Korea argues that this issue is very different from the issue presented by MOCT and KAA. According to Korea, the question is not whether KAA (and

[209] Appellate Body report in *Canada - Dairy*, paragraphs 97 and 100.

KOACA and IIAC) are government entities. Rather, the question is whether they are covered government entities.

4.130 Korea further notes that the United States cites the opinion of the Appellate Body in the *Canada – Dairy* case for the proposition that the degree of control allegedly exercised by MOCT over KAA, KOACA and IIAC requires a determination that those independent entities are MOCT. In Korea's view, in fact, *Canada – Dairy* establishes the opposite.

(f) The Implications of a Control Test for Parties' Annex 1

(i) Amtrak

4.131 **Korea argues** that if the United States' "control test" were to prevail, a signatory's express decision to leave entities off its lists of commitments would have no effect. To illustrate its point, Korea considers the case of Amtrak, an entity created by the US Congress in 1970 for the purpose of operating the nation's intercity passenger rail service. Amtrak is not included in the United States' commitments. Korea argues that Amtrak is, nonetheless, subject to the control of the Executive Office of the President, which is itself an Annex 1 covered entity. Korea makes the following comments in support of its argument.

4.132 First, Korea notes that Amtrak's board, consists of seven voting members, all of whom are appointed by the Executive Office of the President. Korea states that the Secretary of Transportation, head of another Annex 1 covered entity, the US Department of Transportation, is a voting member of the Amtrak board.

4.133 Secondly, Korea notes that Amtrak is required to submit an annual report to the Executive Office of the President detailing its operations, activities, revenues, expenditures and accomplishments for the previous fiscal year. Korea states that the Secretary of Transportation is also required to prepare an annual report on Amtrak's effectiveness in helping to meet the requirements for a balanced US transportation system. Korea further states that this report is to include recommendations for further legislation regulating Amtrak's activities.

4.134 Thirdly, Korea notes that the Executive Office of the President submits a proposed budget to the US Congress on Amtrak's behalf, and any congressional appropriation is made to the Secretary of Transportation, rather than to Amtrak itself. Korea states in this respect that federal subsidies for Amtrak's operation are massive. Korea specifically states that since 1971, the United States Government has provided a total of $21 billion in federal subsidies to Amtrak. Most recently, the *Amtrak Reform and Accountability Act* of 1997 authorized appropriations to Amtrak of over $5 billion in capital and operating funds for the period 1998-2002 alone.

4.135 Korea further states that despite the fact that KAA, KOACA and IIAC are independent legal persons under Korean law, each of the factors discussed above in relation to Amtrak – authority to appoint board members, composition of the board, reporting requirements, oversight of fiscal decision-making and source of funding – was used by the United States to argue that KAA, KOACA and IIAC are subject to control by MOCT, and by virtue of that control should be considered covered entities. Korea concludes that, similarly, under the United States' test, Amtrak would, by virtue of the control exercised by the Executive Office of the President and the Department of Transportation, be considered a covered entity.

4.136 Korea argues that this outcome would, presumably, prove problematic for the United States since Amtrak's procurement authority includes an explicit requirement that it exclusively buy "unmanufactured articles, material, and supplies mined or produced in the United States," and "manufactured articles, material, and supplies manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States." Korea also

argues that the United States' proposed "control" test would have a broad effect on GPA signatories' commitments generally.

(ii) Comsat

4.137 **To further illustrate its argument, Korea notes** the impact of the United States' "control" test on Comsat, another entity not included in the United States' GPA commitments. Korea states that pursuant to the *Communication Satellite Act* of 1962, the US Congress authorized the creation of Comsat, for the purpose of facilitating the establishment of a commercial communications satellite system. Korea asserts that like Amtrak's authorizing statute, the *Communication Satellite Act* of 1962 states that Comsat "will not be an agency or establishment of the United States Government."[210]

4.138 Korea states that along with the appointment of members to Comsat's board, the Executive Office of the President, an Annex 1 covered entity, undertakes considerable oversight of Comsat's activities. Korea specifically, notes that the President shall "provide for continuous review of all phases of the development and operation of [a communications satellite] system, including the activities of [Comsat]."[211] Korea further notes that Comsat is also required to provide to the Executive Office of the President "annually and at such other times as it deems desirable, a comprehensive and detailed report of its operations, activities, and accomplishments."[212]

4.139 Korea states that, additionally, the US Federal Communications Commission ("FCC"), another Annex 1 covered entity, is directed to perform a number of oversight functions regarding Comsat. Korea notes that, for example, the FCC is empowered "to authorize [Comsat] to issue any shares of capital stock . . . or to borrow any moneys, or to assume any obligation in respect of the securities of any other person, upon a finding that such issuance, borrowing, or assumption is compatible with the public interest, convenience, and necessity."[213]

4.140 Korea further notes that the FCC's control extends to Comsat's procurement. Korea states, more specifically, that the FCC shall "insure effective competition, including the use of competitive bidding where appropriate, in the procurement by [Comsat] . . . of apparatus, equipment, and services required for . . . the communications satellite system."[214] The FCC shall also "approve technical characteristics of the operational communications satellite system to be employed by [Comsat]."[215]

4.141 Korea argues that under the United States' "control" test, the control exercised by the Executive Office of the President and the FCC would make Comsat a covered entity. Korea states that as with Amtrak, the factors mentioned with regard to Comsat – authority to appoint board members, reporting requirements, oversight and virtual direction of fiscal decision-making and oversight of the technical and procedural aspects of procurement – were specifically used by the United States to argue that KAA, KOACA and IIAC are subject to control by MOCT, and by virtue of that control should be considered covered entities. Korea argues that, in contrast to the FCC's control over Comsat, MOCT does not require KAA, KOACA or IIAC to award contracts in accordance with particular requirements.

[210] 47 U.S.C. § 731.
[211] 47 U.S.C. § 721(a)(2).
[212] 47 U.S.C. § 744.
[213] 47 U.S.C. § 721(c)(8).
[214] 47 U.S.C. § 721(c)(1).
[215] 47 U.S.C. § 721(c)(6).

(iii) Conclusions from Amtrak and Comsat Examples

4.142 **Korea argues** that it is clear from the Amtrak and Comsat examples that, were the United States' "control" test to be accepted, it would have broad, unintended and unpredictable effects upon signatories' express decisions to leave entities off their Appendix I lists of commitments.

4.143 Korea refers to the fact that in discussing the control exercised by central government entities over Amtrak and Comsat, the United States has noted that "the retained links with the Government may be seen as only those necessary to ensure that the interests of the public are reflected in the operations of each corporation."[216] Korea further notes that the United States has observed that a strong and logical argument against coverage of Amtrak and Comsat is that "the code is aimed at government ministries [sic] and their subdivisions – not the myriad organizations tangential to the essential function of government."[217] Korea states that it agrees with this observation and on the basis of these comments made by the United States, argues that the broad expansion of GPA signatories' commitments that would result from the imposition of the United States' "control" test should be rejected.

(g) Implications of a Control Test for Annex 3

4.144 **Korea notes** that every entity on Korea's Annex 3 is controlled by an Annex 1 entity in the same sense that KAA is "controlled" by MOCT. Korea refers to several examples discussed in paragraphs 4.262 - 4.269. Korea states that it believes that most, if not all, Annex 3 entities of other parties are also controlled by their Annex 1 entities. In support of this belief, Korea refers to the control exercised by Japan's Ministry of Transport, an Annex 1 entity, over the New Tokyo International Airport Authority, an Annex 3 entity. Korea refers to paragraph 4.250 where this example is further discussed.

4.145 Korea argues that, if control converts an entity not on Annex 1 into an Annex 1 entity, then Annex 3 would be greatly diminished, if not reduced to a nullity. First, Korea argues that under the US "control" test, entities listed on a Member's Annex 3 will be considered covered under Annex 1 by virtue of the "control" over them by Annex 1 entities. Korea cites Japan's New Tokyo International Airport Authority as an example. Second, Korea argues that separate and distinct entities, like the United States' Amtrak and Comsat, will be nonetheless subject to the same degree of control by Annex 1 entities as that allegedly exercised by MOCT over KAA despite their intentional exclusion from Annex 3.[218] Korea further argues that given the differences in thresholds between Annex 1 and Annex 3, this would have the effect of greatly changing the commitments of the parties to the GPA and this is a result to be avoided. Korea notes that all GPA signatories except Japan committed to substantially lower thresholds for goods and services procurements by Annex 1 entities than for such procurements by Annex 3 entities.

4.146 **In response, the United States argues** that a control analysis will not reduce Annex 3 to a nullity because, pursuant to Articles 31 and 32 of the *Vienna Convention*, an interpretation of the GPA will be first and foremost based on its text. The United States contends that, therefore, the text of Annex 3 will always take precedence over any control analysis. The United States reiterates that "control" is useful in determining whether non-listed entities should be covered under the GPA because they are "'attached/connected/affiliated' etc." to a listed entity. The United States argues that this in no way expands any GPA Party's obligations beyond what was agreed to at the close of negotiations on 15 April 1994. The United States asserts that, in fact, it ensures that the balance of

[216] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), p. 44.

[217] *Ibid.*

[218] Korea's Answer to Question 11 from the Panel, dated 29 November 1999.

rights and obligations and the comparable level of mutually agreed coverage among the Parties, as provided in the GPA, are preserved.[219]

(h) Article I:3

4.147 **Korea argues** that the "control" test proposed by the United States does not comport to the standard included in Article I:3. More specifically, Korea argues that none of the factors submitted by the United States as illustrative of the "control" exercised by MOCT over KAA, KOACA and IIAC suggests that MOCT requires those three entities to adhere to any particular requirements in awarding contracts for the IIA project.

4.148 Korea further argues that it has demonstrated that KAA, KOACA and IIAC are separate legal persons under Korean law, that each entity has adopted its own procurement regulations, and that each entity is, as a result of its status as a legal person, empowered to and has in fact conducted procurements and signed contracts on its own behalf.

4.149 Korea also reiterates that the United States has offered no evidence supporting a conclusion that MOCT or any other covered entity has ever "required" KAA (or KOACA or IIAC) "to award contracts in accordance with particular requirements." Korea states that it has, in fact, affirmatively demonstrated that no such requirements exist.[220]

(i) Relevance of Lists in Annexes

4.150 **Korea argues** that the control test cannot be sustained because, according to that test, entities need not be listed in Annex 1 or included via any notes thereto, for their procurements to be subject to the GPA. Rather, under the United States' test, if a central government entity listed on a signatory's Annex 1 "retain[s] control of the procurements by" another entity, or "remains in ultimate control" of "procurement authority," procurements are de facto made by that central government entity. In Korea's view, "de facto" coverage of unlisted entities would undermine the entire basis upon which signatories negotiated their GPA commitments – the specific enumeration of lists of entities to which the substantive obligations of the Agreement were to apply. It would, according to Korea, have broad, unintended effects upon signatories' express decisions to leave entities off their Appendix I lists of commitments. Korea also refers to its arguments in paragraphs 4.31, 4.117 and 4.142.

(j) Relevance of Note 1 to Annex 1

4.151 **Korea argues** that the US "control" test does not exist in the language of the GPA and that, instead, Note 1 to Korea's Annex 1 specifically, and exclusively, governs the means of identifying "covered entities," which, while not themselves listed on Annex 1, are nonetheless considered covered. Note 1 states that "subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the *Government Organization Act*" are such entities.

(k) Relevance of Domestic Practices and Laws

4.152 **Korea also argues** that the "control" test proposed by the United States in these proceedings is inconsistent with the test that would apply under US procurement law to determine whether a private entity undertaking procurement for a central government entity is effectively under the control of that central government entity, as an "agent" or "conduit."

4.153 Korea argues that even where a central government entity: (i) approved the private entity's decision to conduct the procurement; (ii) was the final selection authority for the procurement;

[219] US Response to Korea's Answer to Question 22 from the Panel, dated 29 November 1999.
[220] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.

(iii) would take title to the material procured; and (iv) would pay for the system procured with government funds, US courts have held that the private procurement entity was not sufficiently controlled by the central government entity to confer jurisdiction over challenges to allegedly unlawful procurement practices undertaken by the private procurement entity.[221] Korea further argues that for jurisdiction to attach, the private procurement entity would have to have been identified contractually as an "agent" for the central government entity.

4.154 Korea argues that under this standard, KAA, KOACA and IIAC could not be considered "stand-ins" for MOCT, and considered covered entities by virtue of their relationship thereto. Korea contends that IIA procurements by KAA, KOACA and IIAC are not nearly as closely tied to MOCT as are procurements by the US private procurement entities to US central government entities in the cases described above, under factors (i) – (iv).

4.155 In support of its argument, Korea notes that it has demonstrated that KAA, KOACA and IIAC are the "final selection authorities" for IIA procurements rather than MOCT. Moreover, MOCT does not finance all of the procurements related to the Inchon project. Korea states that, moreover, and most importantly, the authorizing statutes for KAA, KOACA and IIAC – like a contract governing the relationship between a private US procurement entity and a US central government entity – expressly state that those three entities are legal persons under Korean law.[222] For all of these reasons, Korea asserts that they are not agents for MOCT or any other Korean central government entity. Korea concludes that under the test imposed under US law, KAA, KOACA and IIAC could not be considered covered entities *via* MOCT.

4.156 **In response to Korea's argument** that US courts have held that one cannot challenge a "central government entity" over "unlawful procurement practices undertaken by a private entity" under its control, the **United States notes** that Korea's argument merely confirms that control is unrelated to an entity's legal status. According to the United States, no matter how much the control, an entity's separate legal status cannot be pierced, unless for non-control reasons. Thus, the United States argues that not only is US case law irrelevant to the interpretation of the GPA, this particular case does not even support Korea's position in this dispute. The United States also responds by noting that the relationship between a listed and non-listed entity is a legitimate factor to consider in determining whether certain procurements are covered under the GPA. According to the United States, Korea itself uses this factor when, in discussing its position regarding Note 1, it mentions Note 1 to Korea's Annex 1 provides the exclusive means by which to identify as Annex 1 covered entities those entities that, while not literally listed on Annex 1, are nonetheless considered Annex 1 covered entities by virtue of their relationship with entities listed on Annex 1.

4. Appendix I, Annex 1: Note 1

(a) Interpretation of Note 1

4.157 **Korea argues** that the *Vienna Convention on the Law of Treaties* contains customary rules of interpretation that should be used in interpreting Korea's Note 1 to Annex 1. Korea further argues that pursuant to Article 31 of the *Vienna Convention on the Law of Treaties*, the first step is to consult the ordinary meaning of Note 1.[223]

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[221] *US West Communications Services, Inc. v. United States*, 940 F.2d 622, 629-630 (Fed. Cir. 1991). See also *Phoenix Engineering, Inc. v. M-K Ferguson of Oak Ridge Co.*, 966 F.2d 1513, 1526 (6th Cir. 1992), *cert. denied*, 507 US 984 (1993).

[222] *Korean Airport Corporation Act*, Article 3; *Korea Airport Construction Authority Act*, Article 3; *Law on Inchon International Airport Corporation*, Article 2.

[223] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted on 6 November 1998), paragraph 114 ("A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted").

4.158 **The United States argues** that the fundamental principle of *effet utile* ("principle of effectiveness") applies to the interpretation of Note 1. The United States claims that, according to this principle, "a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility."[224] The United States further argues that this principle must apply to any interpretation of Note 1.

(b) Expansive or Restrictive Interpretation of Note 1 to Annex 1?

4.159 **The United States further states** that it is arguable that Note 1 serves both to clarify that Annex 1 covers all possible categories of subordinate units of "central government entities," particularly given Korea's exclusive terminology of certain subordinate units and also to expand Korea's Annex 1 coverage to include those entities that may not be subordinate units, but may nevertheless be considered "subordinate linear organizations," "special local administrative organs," or "attached organs."

4.160 **On the other hand, Korea argues** that Note 1 to Korea's Annex 1 specifically, and exclusively, governs the means of identifying "covered entities," which while not themselves listed on Annex 1, are nonetheless considered covered. Korea notes in this respect that Note 1 states that "subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the *Government Organization Act*" are such entities.

4.161 **The United States notes in response** that Annex 1 cannot contain the universe of bodies internal to central government entities under Korean law because it does not contain the New Airport Development Group. The United States argues that this is obvious since Korea acknowledges that the New Airport Development Group is internal to MOCT. However, the New Airport Development Group is not included within Annex 1. The United States argues that, similarly, the entirety of the Korean central government structure cannot be embodied in the *Government Organization Act* because Korea further admits that the New Airport Development Group is neither a "subordinate linear organization," a "special local administrative organ," or an "attached organ" of MOCT. The United States asserts that these statements are inconsistent with each other.

4.162 The United States further argues that Note 1 cannot define "central government entity" by giving the term a special meaning, unique only to Korea thus displacing the ordinary meaning of "central government entity." In support of its argument, the United States notes that nowhere in this provision is there any indication, explicit or implicit, that Note 1 is meant to define "central government entity."

4.163 The United States additionally argues that the verb "includes" in Note 1 makes clear that Korea's Annex 1 entities cover more than just the three categories of sub-entities referred to in the Note. The United States argues that Korea's interpretation, therefore, suggests that every single party to the GPA has agreed to provide Korea with its own unique definition of "central government entity", different from the common definition of "central government entity" they use. The United States questions whether the European Communities, Hong Kong, Japan, Liechtenstein, Norway and Switzerland agreed to this and notes that the United States did not. The United States argues that Korea offered no supplementary means of interpretation to back this claim up. Further, the United States argues that Note 1 does not define the scope of "central government entity."

[224] Appellate Body report on *Canada - Dairy*, WT/DS103/AB/R, WT/DS113/AB/R, paragraph 133; Appellate Body report on *United States - Reformulated Gas* (adopted on 20 May 1996), WT/DS2/AB/R, p. 23; and Appellate Body report on *Japan - Alcoholic Beverages* (adopted on 1 November 1996), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12.

(c) Ordinary Meaning of "Prescribed in the Government Organization Act"

(i) Status of Government Organization Act in the context of Note 1 to Annex 1

4.164 **The United States argues** that KAA, KOACA and IIAC are covered under Annex 1 on the ground that they are "subordinate linear organizations" within the meaning of Korea's Note 1 to Annex 1 of the GPA.

4.165 In support of its argument, the United States contends that Note 1 explains that the term, "subordinate linear organization," is "prescribed in the *Government Organization Act* of the Republic of Korea." According to the United States, the ordinary meaning of "prescribe" is conveyed by the definition of "prescriptive," which means "giving definite precise directions or instructions . . . laying down rules of usage ... ."[225] The United States argues that, therefore, the *Government Organization Act* in Note 1 merely lays down the rules of usage for "subordinate linear organization."

4.166 The United States argues that Article 1 of the *Government Organization Act* confirms the interpretation that the *Government Organization Act* merely lays down the rules of usage for "subordinate linear organizations" by stating that its aim is to provide "guidelines for the establishment, organization and the scope of function of national administrative organs for the systematic and efficient execution of national administrative affairs."[226] The United States contends that, further, Article 2 of the *Government Organization Act* does not define "subordinate linear organization," but instead offers a list of what "subordinate linear organizations" "shall be" for all "central government entities." According to the United States, Korea itself admits that the Act does not provide a definition for "subordinate linear organizations" but instead offers a list that "identifies not entities but officials within a ministry's hierarchy". Article 2 of the Act states 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).[227]

4.167 The United States argues that Note 1 of Korea's Annex 1 of the GPA expands Korea's Annex 1 coverage by including "subordinate linear organizations," a category of subdivisions in Korea. The United States argues that according to the *Vienna Convention* rules of interpretation, "subordinate linear organization" is virtually synonymous with subsidiary organization. Therefore, as subsidiary organizations of MOCT, KAA, KOACA and IIAC are also "subordinate linear organizations" of MOCT.

4.168 **In response, Korea argues** that the ordinary meaning of Note 1 is such that the *Government Organization Act* "limits," "restricts," "imposes authoritatively," "appoints," "dictates" and "directs" the identification of those entities that constitute subordinate linear organizations, special local administrative organs and attached organs. Korea further argues that the *Government Organization Act* does not have mere suggestive force. Korea states that, rather, it carries "imperative force," and offers "definite precise directions or instructions" regarding the identification of subordinate linear organizations, special local administrative organs and attached organs. The ordinary meaning of

[225] The New Shorter Oxford English Dictionary (1993 ed.), p. 2339.
[226] *Government Organization Act*, Article 1.
[227] Article 2(3) of the *Government Organization Act* of the Republic of Korea (version submitted by Korea in 1991, official English translation).

"subordinate linear organizations, special local administrative organs and attached organs" is irrelevant; the only relevant meaning is that prescribed by the *Government Organization Act*.

4.169 In support of its argument, Korea notes that the verb "prescribe" means to "[l]imit, restrict; confine within bounds," or to "[w]rite or lay down as a rule or direction; impose authoritatively; appoint, dictate, direct."[228] Korea argues that, similarly, something that is "prescriptive" is something that "giv[es] definite precise directions or instructions," or "ha[s] or impl[ies] an imperative force."[229]

(ii) "Prescribe" versus "Define"

4.170 **The United States argues** that Korea is essentially arguing that the term "subordinate linear organizations" is defined by the *Government Organization Act*. However, according to the United States "prescribe" and "define" are not synonyms. In support of this argument, the United States refers to The New Shorter Oxford English Dictionary for the ordinary meanings of "prescribe" and "prescriptive" none of which, according to the United States, define "prescribe" as "define." According to the United States, the ordinary meaning of "prescribe" means "giving definite precise directions or instructions" and "laying down rules of usage."

4.171 The United States argues that it is clear from considering the text of the *Government Organization Act* itself that the Act does not provide a definition for "subordinate linear organization." The United States notes that all the Act does is, in Korea's words, to identify "officials within a ministry's hierarchy."

4.172 The United States further argues that the textual interpretation that "prescribed in" is not the same as "defined by" is further supported by Note 1 of Korea's Annex 2, which states, "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 United States argues that, analogous to Note 1 of Korea's Annex 1, the two terms used in Korea's Note 1 of Annex 2 are "subordinate organizations under direct control" and "offices." The United States notes that these terms are found in Articles 104 and 105 of the *Local Autonomy Law*, respectively.[230] The United States further notes that, like the *Government Organization Act*, the *Local Autonomy Law* does not define the two terms. In the view of the United States, these terms are not terms of art and should, therefore, be interpreted according to their ordinary meanings.

4.173 **In response, Korea states** that the United States makes too much of the minor difference between the verbs "prescribe" and "define." Korea notes that, in fact, the definition of the verbs "prescribe" and "define" employ many of the same terms, challenging the argument that they are not synonymous. Korea further notes that both definitions refer to the drawing of "bounds" or "boundaries," both make ample use of the term "precise" or "precisely," and both contain the term "restrict."[231] Korea finally notes that the definition of "define" includes the verb "prescribe," and the definition of "prescriptive" includes the term "definitive."[232]

4.174 Second, Korea asserts that the fact that Article 2(3) of the *Government Organization Act* lists officials within a ministry's hierarchy, does not mean that Article 2(3) fails to provide a definition for the term "subordinate linear organizations." Korea argues that the Act does provide a definition of the term "subordinate linear organization" and that Article 2(3) of the Act is that definition.

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[228] The New Shorter Oxford English Dictionary (1993 ed.), p. 2339.
[229] *Ibid.*
[230] *Local Autonomy Law* Act. No. 4004.
[231] The New Shorter Oxford English Dictionary (1993 ed.), pp. 618 and 2339.
[232] *Ibid.*

4.175 Korea further argues that it had every right to define a term in its GPA commitments by reference to domestic law. Korea notes in this respect that it has been joined in so doing by the European Communities, Hong Kong, Japan, Liechtenstein, Norway, Switzerland and the United States, which, according to Korea, confirms the legitimacy of this practice. More specifically, Korea notes that within the context of the GPA, Annex 1 to the United States' GPA Appendix I defines certain excepted Department of Energy procurements with reference to the *Atomic Energy Act*. Korea further notes that, similarly, US Annex 2 commitments regarding the state of Oklahoma likewise identify covered entities as those "state agencies and departments subject of the *Oklahoma Central Purchasing Act.*"[233]

[233] See also European Communities' GPA Appendix I, General Note 11 (refers to the Public Procurement Act for the meaning and identification of entities which are themselves contracting authorities); Hong Kong, China's GPA Appendix I, General Note 2 ("Hong Kong's commitments on telecommunications services are subject to the terms of the licence held by Hong Kong Telecommunications International Ltd. ... ."); Japan's GPA Appendix I, Annex 1, Note 1 ("Entities covered by the Accounts Law include all their internal sub-divisions, independent organs, attached organizations and other organizations and local branch offices provided for in the National Government Organization Law."); Japan's GPA Appendix I, Annex 2, Note 1 ("'To', 'Do', 'Fu', 'Ken' and 'Shitei-toshi' covered by the Local Autonomy Law include all internal sub-divisions, attached organizations and branch offices of all their governors or mayors, committees and other organizations provided for in the Local Autonomy Law."); Liechtenstein's GPA Appendix I, Annex 3, Title II (Defines Annex 3 covered entities associated with the provision of electricity as those "[p]ublic authorities and public undertakings . . . operating on the basis of authorizations for expropriation pursuant to the Gesetz vom 16.Juni 1947 betreffend die 'Liechtensteinischen Kraftwerke' (LKWG)."); Liechtenstein's GPA Appendix I, Annex 3, Title III (Defines certain Annex 3 covered entities in the field of transport services with reference to "Vertrag vom 9.Januar 1978 zwischen dem Fürstentum Liechtenstein und der Schweizerischen Eidgenossenschaft über die Besorgung der Post- und Fernmeldedienste im Fürstentum Liechtenstein durch die Schweizerischen Post-, Telefon- und Telegrafenbetriebe (PTT)."); Norway's GPA Appendix I, Annex 3, Number 1 (Defines Annex 3 covered entities in the electricity sector as those "[p]ublic entities producing, transporting or distributing electricity pursuant to Lov om Bygging og drift av elektriske anlegg (LOV 1969-06-19), Lov om erverv av vannfall, bergverk og annen fast wiendom m.v., Kap. I, jf. Kap. V (LOV 19-17-24 16, kap. I), or Vassdragsreguleringsloven (LOV 1917-12-14 17) or Energiloven (LOV 1990-06-29 50)."); Norway's GPA Appendix I, Annex 3, Number 2 (Defines Annex 3 covered entities in the urban transport sector as those public entities "providing a service to the public in the field of transport . . . according to Lov om anlegg og drift av jernbane, herunder sporvei, tunellbane og forstadsbane m.m. (LOV 1993-06-11 100), or Lov om samferdsel (LOV 1976-06-04 63) or Lov om anlegg av taugbaner og løipestrenger (LOV 1912-06-14 1)."); Norway's GPA Appendix I, Annex 3, Number 3 (Defines Annex 3 covered entities as those "[p]ublic entities providing airport facilities pursuant to Lov om luftfart (LOV 1960-12-16 1)."); Norway's GPA Appendix I, Annex 3, Number 4 (Defines Annex 3 covered entities providing port services as those "[p]ublic entities operating pursuant to Havneloven (LOV 1984-06-08 51)."); Norway's GPA Appendix I, Annex 3, Number 5 (Defines Annex 3 covered entities as those "[p]ublic entities producing or distributing water pursuant to Forskrift om Drikkevann og Vannforsyning (FOR 1951-09-28)."); Norway's GPA Appendix I, General Note 6 (States that with regard to Annex 4, the GPA is not applicable to "contracts awarded to an entity which is itself a contracting authority within the meaning of the Public Procurement Act: 'Lov om offentlige anskaffelser m.v.' (LOV 1992-11-27 116) on the basis of an exclusive right which it enjoys pursuant to a published law, regulation or administrative provision."); Switzerland's GPA Appendix I, Annex 3, Title II (Defines Annex 3 covered entities in the electricity sector as those "[p]ouvoirs publics ou entreprises publiques" operating "conformément à la 'loi fédérale du 24 juin 1902 concernant les installations électriques à faible et à fort courant'" or "conformément à la 'loi fédérale du 22 décembre 1916 sur l'utilisation des forces hydrauliques' et á la 'loi fédérale du 23 décembre 1959 sur l'utilisation pacifique de l'énergie atomique et la protection contre les radiations'."); Switzerland's GPA Appendix I, Annex 3, Title III (Defines Annex 3 covered entities in the transport as those entities operating "au sens de l'article 2, 1er alinéa, de la 'loi fédérale du 20 décembre 1957 sur les chemins de fer,'" "au sens de l'article 4, 1er alinéa, de la 'loi fédérale du 29 mars 1950 sur les entreprises de trolleybus,'" "au sens de l'article 2 de la 'loi fédérale du 18 juin 1993 sur le transport de voyageurs et les entreprises de transport par route,'" and "au sens de l'article 4 de la 'loi fédérale du 18 juin 1993 sur le transport de voyageurs et les entreprises de transport par route.'"); Switzerland's GPA Appendix I, Annex 3, Title IV (Defines Annex 3 covered entities providing airport services as those "[p]ouvoirs publics ou entreprises publiques exploitant des

4.176 Korea states that in proposing and accepting the incorporation by reference of provisions of domestic law in each of these instances, GPA signatories agreed to the meaning ascribed to a particular term in domestic law. Korea states that this was also the case with the signatories' acceptance of the meaning accorded by Korea's circumscription of the term "central government entity" to include listed entities and their subordinate linear organizations, special local administrative organs and attached organs, "as prescribed in the Government Organization Act of the Republic of Korea."

4.177 Korea finally argues that it has the right to define "subordinate linear organization" in the way that it has in Article 2(3) of the *Government Organization Act*. Nothing in the GPA requires that Korea define the term "subordinate linear organization" in its domestic law in any particular way.

(d) Ordinary Meaning of "Subsidiary Linear Organizations"

4.178 **The United States argues** that the interpretation of Note 1 to Korea's Annex 1, based on Articles 31 and 32 of the *Vienna Convention*, confirms that in "prescribing" the terms "subordinate linear organization," "special local administrative organ," and "attached organ," the *Government Organization Act* does not define these terms. Hence, according to the United States, a textual interpretation is to be applied. The United States argues that in doing so, "subordinate linear organization" is found to be synonymous with subsidiary organization.

4.179 The United States argues that the ordinary meaning of "subordinate," according to The New Shorter Oxford English Dictionary, is "of inferior rank; dependent upon the authority or power of another . . . dependent on or subservient to a chief or principle thing of the same kind . . . submissive . . . of inferior importance; secondary, minor ... ."[234] The United States further argues that the ordinary meaning of "linear" is, *inter alia*, "progressing in a single direction by regular steps or stages, sequential."[235] Finally, the United States argues that the ordinary meaning of "organization" is "an organized structure, body, or being."[236] The United States asserts that, taken together, the term "subordinate linear organization" suggests an organization that is directly controlled by, dependent upon, and secondary to another organization – that is, it is a subsidiary organization.

4.180 **In response, Korea argues** that to suggest that the term "subordinate linear organization" is synonymous with the terms "subsidiary organizations" or "subsidiary or subordinate body" is not possible given the ordinary meaning of Note 1 which states that the term "subordinate linear organization" is "prescribed in the Government Organization Act of the Republic of Korea." Korea also questions the United States' use of the principles of interpretation of the *Vienna Convention of the Law of Treaties* to determine the ordinary meaning of a term such as "subsidiary organization," which is not in fact found in the GPA.

4.181 In support of its argument that the term, "subordinate linear organization," is synonymous with "subsidiary organization," **the United States refers** to the fact that Korea re-translated "subordinate linear organization" as "subsidiary organs." The United States quotes Korea: "The re-translation did not, however, alter the substantive effect of Note 1 to Annex 1." The United States argues that by amending its English translation, Korea determined that the English phrase, "subsidiary organs," is not only synonymous with "subordinate linear organizations," but is probably a better representation of what "subordinate linear organizations" was originally intended to mean. The United States also refers to its arguments in paragraph 4.435.

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aéroports en vertu d'une concession au sens de l'article 37 de la 'loi fédérale du 21 décembre 1948 sur la navigation aérienne.'").

[234] The New Shorter Oxford English Dictionary (1993 ed.), p. 3121.

[235] *Ibid.* p. 1596.

[236] *Ibid.* p. 2020.

4.182 The United States concludes that given that KAA, KOACA and IIAC are subsidiary organizations of MOCT then they are also "subordinate linear organizations" of MOCT and are, therefore, covered under Annex 1 of the GPA.

4.183 **In response, Korea argues** that KAA, KOACA and IIAC were not converted to GPA covered entities when the term "subordinate linear organizations" was re-translated in English to "subsidiary organs" in Article 2(3) of the *Government Organization Act*. Korea notes in this respect that the term "subordinate linear organization" was re-translated by the Korean Legislation Institute as "subsidiary organs" by an amendment to the *Government Organization Act* that was enacted on 28 February 1998. Korea notes that the Korean version of the term remained the same, as did, the Korean and English versions of the enumerated list of "subordinate linear organizations" included in Article 2(3) of the Act.

(e) Subordinate Linear Organizations: Officials or Entities?

4.184 **In response to a question from the Panel, Korea notes** that it is Korean practice to refer to an organization through its head. For example, rather than say that a particular "Ministry" has authority to take certain action, Korea notes that it would say that a particular "Minister" has the authority.[237] Korea further notes that, in Korean law as embodied in the *Government Organization Act*, authority is delegated from the chief of a government agency to individual officials in the vertical chain of command, who are in some instances, in turn, authorized to delegate to other individual officials further down the chain of command. Korea notes that, in addition to the Minister and Vice-Minister, all divisions, offices and bureaus are led by "Division Directors," "Office Directors" or "Bureau Directors" listed in Article 2(3) of the *Government Organization Act* as "subordinate linear organizations."[238] Korea further notes that all legislation envisions government activity in terms of the people undertaking that activity and the chain of command under which decisions regarding that activity is made. Korea finally notes that this system may be divergent from western legal systems, but nothing in the WTO Agreements, including the GPA, prohibits it. Korea also refers to its arguments in paragraphs 4.175, 4.177 and 4.376.

4.185 **In response to Korea's argument, the United States asserts** that Korea's description of the relationship between the chief of a government agency and subsidiary linear organizations is precisely what "control" is all about. The United States argues that control exists when one entity's power to act is delegated to it by another entity, and when these acts are done on behalf of this other entity. The United States notes that this analysis was affirmed by the Appellate Body in the recent *Canada - Dairy* dispute.[239] The United States contends that KAA, KOACA and IIAC are mere project operators of the IIA project whose authorities are delegated from MOCT, and whose acts are only done on behalf of MOCT, for the benefit of MOCT. The United States further states that if "subordinate linear organizations" also act in this manner, then KAA, KOACA and IIAC must be "subordinate linear organizations" of MOCT.

4.186 **In response to a question from the Panel regarding MOCT's organization chart, Korea notes** that all of the "organs" or "organizations" included on the chart are in fact prescribed in the *Government Organization Act*. The listed "divisions, offices and bureaus" are according to Korea covered under the GPA because they are led by "Division Directors," "Office Directors" or "Bureau Directors," which are listed in Article 2(3) of the *Government Organization Act* as "subordinate linear organizations" and therefore covered by virtue of Note 1 to Korea's Annex 1. The other organizations

[237] Korea's Answer to Question 11(b) from the Panel, dated 3 November 1999.

[238] Korea's Answer to Question 11 from the Panel, dated 29 November 1999, citing the *Government Organization Act.*

[239] Appellate Body report on *Canada - Dairy*, WT/DS103/AB/R, WT/DS113/AB/R (issued on 13 October 1999) paragraphs 96-102. Also see panel report on *Canada - Dairy*, WT/DS103/R, WT/DS113/R (issued on 17 March 1999) paragraph 7.78.

listed on page 2 of the chart are MOCT's "special local administrative organs" and "attached organs" under the *Government Organization Act*.[240]

4.187 **The United States argues** that Korea's argument that the divisions, offices, and bureaus of MOCT are covered under Annex 1 of the GPA because they are "subordinate linear organizations" of MOCT is flawed. The United States notes that MOCT's divisions, offices, and bureaus are already covered under Annex 1 of the GPA because they are "'attached/connected/affiliated' etc. to MOCT." According to the United States, for Korea to now interpret the term, "subordinate linear organizations," as encompassing these entities would make this term redundant, because "subordinate linear organization" would merely provide for the coverage of entities that are already covered. According to the United States, such an interpretation is contrary to the "principle of effectiveness."[241]

4.188 **In response to a question from the Panel, Korea also notes** that the reference to individuals in Article 2(3) of the *Government Organization Act* is not a reference to these people as natural persons, but as titles of officials who head an office or bureau in the line of command within a government agency.[242] Further, in response to a question from the United States, Korea states that in Korea's terminology, reference to an "official" within the hierarchy is a reference to the position and the office itself.[243] Korea notes that the officials listed as "subordinate linear organizations" in Article 2(3) of the *Government Organization Act* are those authorized to act on behalf of the chief of the government agency concerned. Korea further states that the "subordinate linear organizations" are not the "organizations" that report to a listed individual but, rather, they are the titles of officers who report on behalf of the division or bureau. Thus, in interpreting the term "subordinate linear organization" Korea suggests that the organizational unit (ministry, bureau, division, etc.) represented by the title should be considered.[244] Korea also argues that the structure of Article 2(3) does not mean that only procurements undertaken personally by an official in Article 2(3) are covered under Annex 1. Korea argues that, rather, the entirety of that official's office is considered covered. Finally, Korea notes that all central government entities may not necessarily have each of the listed subordinate linear organizations provided for in Article 2(3) of the *Government Organization Act*.[245]

4.189 **In response, the United States argues** that the organizational units that represent the titles referred to in Article 2(3) of the *Government Organization Act* are merely branch offices of "central government entities," and are already covered pursuant to the ordinary meaning of "central government entity."

(f) Are KAA, KOACA and IIAC "Subordinate Linear Organizations"?

4.190 **In response to the argument by the United States** that KAA, KOACA and IIAC are "subordinate linear organizations" of MOCT under Note 1 to Korea's Annex 1 in paragraph 4.164, **Korea notes** that KAA, KOACA and IIAC are not identified as "subordinate linear organizations" (or the re-translated term, "subsidiary organs") in Article 2(3) of the *Government Organization Act*. Note 1 to Korea's Annex 1 states that Korea's Annex 1 includes those "subordinate linear organizations . . . prescribed in the Government Organization Act of the Republic of Korea." Korea further notes that both in its current form and as it existed during the negotiations leading up to the

[240] Korea's Answer to Question 11 from the Panel, dated 29 November 1999.
[241] US Response to Korea's Answer to Question 11 from the Panel, dated 29 November 1999, citing Appellate Body report on *Canada - Dairy* (issued on 13 October 1999), WT/DS103/AB/R, WT/DS113/AB/R, paragraph 133; Appellate Body report on *United States - Reformulated Gas* (adopted on 20 May 1996) WT/DS2/AB/R, p. 23; and Appellate Body report on *Japan - Alcoholic Beverages* (adopted on 1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12.
[242] Korea's Answer to Question 11(b) from the Panel, dated 3 November 1999.
[243] Korea's Answer to Question 3 from the US, dated 3 November 1999.
[244] Korea's Answer to Question 11(b) from the Panel, dated 3 November 1999.
[245] Korea's Answer to Question 6 from the US, dated 3 November 1999.

submission by Korea of its final offer list for accession to the GPA, Article 2(3) identifies not entities, but officials within a ministry's hierarchy.

4.191 **In response, the United States argues** that it is illogical for Korea to make the claim that KAA, KOACA and IIAC are not identified as "subordinate linear organizations," given the structure of and information in the *Government Organization Act*. Specifically, the United States refers to the fact that that the *Government Organization Act* does not identify entities as "subordinate linear organizations," but only as "officials within a ministry's hierarchy." The United States additionally notes that the *Government Organization Act* does not specifically name any entities as "special local administrative organs" or "attached organs."

(g) Is NADG a "**Subordinate** Linear Organization"?

4.192 **In response to a question from the United States, Korea states** that the New Airport Development Group was established within the Ministry of Transportation. Korea further states that it drew personnel from several subordinate linear organizations, as defined in the *Government Organization Act*, within the Ministry. Korea notes that NADG is not a separate legal person but, rather, it is an ad hoc group within the Ministry. Korea concludes that NADG is not a subordinate linear organization as defined in Article 2(3) of the Act.[246]

(h) Ordinary Meaning of "Special Local Administrative Organs"

4.193 **Korea discusses** those entities identified as MOCT's "special local administrative organs," which are by virtue of Note 1 to Korea's Annex 1 considered covered entities. Korea states that among MOCT's special local administrative organs are its two Regional Aviation Offices – the Seoul Regional Aviation Office and the Pusan Regional Aviation Office.[247] Korea notes that these regional aviation offices conduct procurement for existing airports in their regions. Korea further notes that where not otherwise provided by special law, as in the case of the legal authority for the construction of IIA[248], these Offices are responsible for construction and maintenance of Korean airports, including Yangyang, Yeosoo, Muan, Daegu, Pohang, Yecheoon and Uljin Airports.

4.194 **The United States argues** that Korea, by implication, uses the ordinary meaning to interpret "special local administrative organ," and that, therefore, it is not a term of art. The United States points out that in defining "special local administrative organs", Korea chooses to use the ordinary meaning by stating, "As the term suggests, special local administrative organs carry regional portfolios". By doing so, according to the United States, Korea essentially confirms that Note 1 does not require "subordinate linear organizations", "special local administrative organs" or "affiliate organs" to be defined by the *Government Organization Act*. The United States further asserts that, indeed, "subordinate linear organization," "special local administrative organs," and "attached organs" are used uniquely by Korea to categorize the subordinate units of its "central government entities." However, according to the United States, since they are not unique terms of art and they are not defined by the *Government Organization Act*, their ordinary meaning should apply. Further, the United States notes that the *Government Organization Act* does not identify the Seoul Regional Aviation Office and the Pusan Regional Aviation Office as "special local administrative organs."

[246] Korea's Answer to Question 7 from the US, dated 3 November 1999.

[247] Korea states that, as the term suggests, special local administrative organs carry regional portfolios. MOCT maintains other special local administrative organs, including five National Territory Management Offices (Seoul, Wonju, Taejon, Iksan and Pusan) and five River Flood Control Offices (Han River, Nakdong River, Keum River, Sumjin River and Yeongsan River).

[248] See, e.g., the *Seoul Airport Act*, Article 7(5-2) of the *Korea Airport Corporation Act*, Article 7 of the *Korea Airport Construction Authority Act*, or Article 10 of the *Law on Inchon International Airport Corporation.*

4.195 **Korea argues** that the terms "subordinate linear organization," "special local administrative organ" and "attached organ" are in fact "unique terms of art" found in the *Government Organization Act*.

4.196 In response to a question from the United States requesting Korea to reconcile its statement that the Seoul Regional Aviation Office and the Pusan Regional Aviation office are special local administrative organs although they are not identified in the *Government Organization Act* and its statement that Note 1 to Korea's Annex 1 provides the exclusive means by which to identify as Annex 1 covered entities those entities, Korea makes the following argument. First, Korea argues that Article I:1 of the GPA limits coverage to "entities." Korea states that one of the "entities" covered by Korea's commitment is MOCT, which is a central government entity within the meaning of Annex 1 to Appendix I of Korea's GPA Schedule. Korea further states that the Seoul Regional Aviation Office and the Pusan Regional Aviation Office, which conduct the implementation of the affairs of MOCT in their respective regions, are special local administrative organs of MOCT. Korea asserts that, unlike, for example, KAA, KOACA and IIAC, they are not separate legal entities in their own right. According to Korea, MOCT has determined that its aviation responsibilities in those regions will be most efficiently administered by the use of these regional offices, as provided for in Article 3(2) of the *Government Organization Act*. Korea concludes that any body identified as a special local administrative organ pursuant to Article 3(2) of the *Government Organization Act* is an Annex 1 covered entity by virtue of Note 1.[249]

5. Responses to Panel Question Regarding KAA

(a) Arguments by the United States

4.197 The Panel asked both Parties to explain why KAA should or should not be considered as "'attached/connected/affiliated' etc." to MOCT and, therefore, a covered entity for the purposes of the GPA.[250]

4.198 **In response to the Panel's question, the United States argues** that KAA should be considered "'attached/connected/affiliated' etc." to MOCT because of MOCT's pervasive links to, authority over, and control of KAA.[251]

4.199 In support of its argument, the United States notes that KAA, formerly known as the "International Airport Management Committee," was created in 1979 "under the Construction and Transportation Ministry . . . to bring about efficiency of International Airport management ... ."[252]

4.200 The United States refers to the composition of the KAA and the projects for which KAA is responsible.[253] The United States notes that KAA may "establish a branch office,"[254] "lend or sublease any property contributed or leased,"[255] "collect rents or charges for use from those who use or utilize airport facilities managed and operated by it,"[256] "borrow funds[257], "have beneficiaries of its

[249] Korea's Answer to Question 1 from the US, dated 3 November 1999.
[250] Question 20 from the Panel, dated 15 November 1999.
[251] US Answer to Question 22 from the Panel, dated 29 November 1999.
[252] US Answer to Question 22 from the Panel, dated 29 November 1999, citing Article 1 of the *International Airport Management Act*, Presidential Decree 9549.
[253] US Answer to Question 22 from the Panel, dated 29 November 1999.
[254] *International Airport Management Act* Article 5.
[255] *Ibid.* Article 17.
[256] *Ibid.* Article 18.
[257] *Ibid.* Article 23.

projects bear expenses required for the projects,"[258] and "dispose of important property,"[259] but only with the approval of MOCT.[260]

4.201 The United States also notes that KAA must: [261]

> prepare a business plan and budget bill for each business year . . . and submit them to the Minister of Construction and Transportation to obtain his approval. The same shall also apply, if it wishes to modify them . . .[262]
>
> [and] prepare a settlement of accounts on revenues and expenditures for each business year . . . and submit it to the Minister of Construction and Transportation after undergoing an audit by a certified public accountant designated by the Minister of Construction and Transportation . . .[263]
>
> [and] make rules relating to organization, accounting, personnel affairs, remuneration, etc. and obtain the approval of the Minister of Construction and Transportation. The same shall also apply, if [KAA] wishes to modify such rules.[264]

4.202 The United States refers to Article 28 of the *Korea Airport Corporation Act* which states:

> "The Minister of Construction and Transportation shall direct and control [KAA], and if it is deemed necessary to do so, he may have [KAA] report matters concerning its affairs, accounting and property, or have a public official under his control inspect books, documents, facilities and other things of [KAA]."[265]

4.203 The United States notes that the Civil Aviation Bureau within MOCT provides "guidance and supervision" for KAA[266], that KAA is listed on MOCT's Internet website as a "subsidiary organization" of MOCT[267] and that during the time-period KAA supposedly had procurement authority for the IIA project, procurements related to the project were announced as MOCT procurements.[268] The United States contends that, moreover, during the period KAA was involved in the IIA project, MOCT retained ultimate authority and control over the project. According to the United States, this further confirms that KAA is "'attached/connected/affiliated' etc." to MOCT. The United States notes that during the period KAA was involved in the IIA project the United States argues that MOCT retained jurisdiction "over the affairs relating to land, air and marine transportation, and tourism,"[269] pursuant to the *Government Organization Act of the Republic of*

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[258] *Ibid.* Article 24.
[259] *Ibid.* Article 26.
[260] US Answer to Question 22 from the Panel, dated 29 November 1999.
[261] US Answer to Question 22 from the Panel, dated 29 November 1999.
[262] *International Airport Management Act*, Article 20.
[263] *Ibid.* Article 20.
[264] *Ibid.* Article 22.
[265] US Answer to Question 22 from the Panel, dated 29 November 1999.
[266] See Duties of Civil Aviation Bureau, *in* MOCT Internet website document, http://www.moct.go.kr/mcte/ mct_about/aboutml/mcthpg_air.htm.
[267] See MOCT List of Subsidiary Organizations, from the MOCT Internet website, http://www.moct.go.kr/ ours/e-o023.html. MOCT's website is also discussed at paragraph 4.432 *et seq.*
[268] See, e.g., *Transportation Department Announcement 1993-33*, from MOCT for a procurement relating to railway connection from the Inchon Airport.
[269] *Government Organization Act*, Article 40. The most recent version of the *Government Organization Act* states in its Article 42:

> "The Minister of Construction and Transportation shall take charge of the affairs relating to the establishment and adjustment of comprehensive plans for construction in national territory, the

Korea and that it was the responsibility of MOCT to *inter alia* "designate" and "publicly announce" the Inchon Airport construction project[270] to "designate an area necessary for the execution of the new airport construction project as the project area for the construction of the new airport"[271] and to "draw up a master plan relating to the new airport construction."[272] The United States notes that the "master plan" shall include the following matters: General direction of construction; outline of the construction plan; construction period; financing plan; and such other matters as the Minister of Construction and Transportation deems necessary.[273] The United States also notes that MOCT could "change the master plan formulated pursuant to the provisions [of the *Act on the Promotion of a New Airport for the Seoul Metropolitan Area Construction*, and] make alterations therein."[274]

4.204 The United States contends that Korea's *Aviation Act* confirmed that:

> "The airport development projects shall be carried out by the Minister of Construction and Transportation . . . 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 ... ."[275]

4.205 The United States argues that MOCT has ultimate authority to carry out the IIA project.[276] KAA was merely a project operator, designated and used by MOCT to construct the Inchon International Airport.[277]

4.206 The United States also notes that the New Airport Construction Deliberation Commission under MOCT was established:

> "to deliberate on important issues relating to building techniques, construction technology and traffic impact, etc. of the new airport construction project . . .[278]
>
> [The Commission] comprised of members, including Chairman, not exceeding one hundred persons who shall be appointed or commissioned by the Minister of Construction and Transportation from among persons coming under one of the following subparagraphs:
>
> 1. Public officials in the fourth grade or above serving at a central or local administrative organ or a local government concerned with the affairs of the new airport construction project;
>
> 2. Members on the board of directors of public entities or research institutions; and

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conservation, utilization, and development of national territory and water resources, the construction of cities, roads, and housing, coasts, rivers, and reclamation, land transportation, and air services."

[270] *Seoul Airport Act*, Article 2(1).

[271] *Ibid.* Article 3(1).

[272] *Ibid.* Article 4(1).

[273] *Ibid.* Article 4(2).

[274] US Answer to Question 22 from the Panel, dated 29 November 1999, citing *Seoul Airport Act* Article 4-2(1).

[275] US Answer to Question 22 from the Panel, dated 29 November 1999, citing *Aviation Act* Article 94.

[276] See Articles 94 and 2(8) of the *Aviation Act.*

[277] US Answer to Question 22 from the Panel, dated 29 November 1999, referring to, e.g., Articles 95, 96, 103, and 104 of the *Aviation Act*. The United States contends that these and other provisions confirm the subordinate nature of project operators.

[278] *Seoul Airport Act*, Article 7-3(1).

3. Persons of such professional learning and experience in airport, building, civil engineering, fire fighting and the environment, etc. as determined by the Minister of Construction and Transportation."[279]

4.207 According to the United States, many of the exhibits provided by Korea corroborate the United States argument that regardless of KAA, KOACA and IIAC's status as subsidiary organizations of MOCT, they nevertheless remain covered under the GPA because procurements by KAA, KOACA and IIAC are, in fact, procurements by MOCT. The United States notes that MOCT not only controls procurements by KAA, KOACA and IIAC, but it also funds, owns and benefits from these procurements.

4.208 The United States refers also to the *Rules of the New Airport Development Group* which state in Article 5 that the "head of the Aviation Office shall assume the overall authority to supervise and control the construction and operation of the New International Airport."[280] The United States notes that the New Airport Development Group under MOCT retained the following responsibilities: establishing and coordinating basic plans for the airport; budget and funding matters related to the airport; researching and developing "systems and regulations" concerning the airport; planning, designing and overseeing "actual works of [the airport's] civil engineering facilities, site preparation, supporting complex construction supporting facilities and accessible transport facilities"; analysing and controlling "all [airport] work processes;" planning, designing and overseeing "actual works of the [airport's] structural, mechanical, communication electronics and power facilities; supervising the operation of the "[t]he New Airport Construction Deliberation Commission;" and establishing "financial plans for repayment of debt incurred from the construction [of the airport] and securing . . . funds for operation" of the airport.

4.209 The United States notes that a Korean business guide touted MOCT as the entity controlling the IIA project[281], that KAA utilized the Office of Supply and its regulations for procurement purposes, just as MOCT would and that employees of KAA in certain circumstances were "treated as public officials."[282]

4.210 **In response to this argument, Korea states** that there is no evidence that even remotely suggests that KAA has, as the United States argues, "utilised the Office of Supply and its regulations for procurement purposes, just as MOCT would."[283] Korea states that the procurements referred to by the United States for which KAA requested Office of Supply assistance, were not for the IIA – which is, exclusively, the subject of the Panel's terms of reference in this case. In any event, Korea notes that Korea's Annex 1 specifically states that Office of Supply coverage is "limited to purchases for entities in this [Annex 1] list only." Korea further notes that KAA is not listed on Annex 1.[284]

4.211 Korea argues that a publication by the US Foreign Commercial Service of the American Embassy, Seoul, produced in conjunction with a Korean trade association (the Association of Foreign Trading Agents) can scarcely be considered to bind the Korean Government to GPA obligations,

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[279] US Answer to Question 22 from the Panel, dated 29 November 1999, citing the *Seoul Airport Act*, Article 7-3(3).

[280] US Answer to Question 22 from the Panel, dated 29 November 1999.

[281] American Business in Korea: Guide & Directory 1992-93, p. 126. This guide was published by the Association of Foreign Trading Agents of Korea, a Korean business association, in conjunction with the Foreign Commercial Service of the American Embassy, Seoul. The United States notes that the Inchon International Airport is also known as the "Youngjong-do" project, as it is being constructed on Youngjong Island near Inchon.

[282] US Answer to Question 22 from the Panel, dated 29 November 1999. Further arguments regarding publications that the US argues evidence MOCT's control over the IIA project are contained in paragraph 4.420.

[283] Korea's Response to the US Answer to Question 22 from the Panel, dated 29 November 1999, quoting US Answer to Question 22.

[284] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.

including the proposition offered by the United States that this joint US-private sector publication proves MOCT's role "as the entity controlling the IIA project."[285]

4.212 **The United States concludes** that, therefore, due to the fact that KAA is "'attached/connected/affiliated' etc." to MOCT, KAA should be considered a covered entity for the purposes of the GPA because:

> (1) Annex 1 of the GPA, which covers MOCT as a "central government entity," also covers the subdivisions of MOCT. KAA is a subdivision of MOCT because it is "'attached/connected/affiliated' etc." to MOCT.
>
> (2) Article I:1 of the GPA, which states that the GPA "applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement," applies to KAA because, as an entity "'attached/connected/affiliated' etc." to MOCT, any procurement by KAA is in fact a procurement by MOCT.
>
> (3) Note 1 of Korea's Annex 1 of the GPA, which states that coverage of the listed "central government entities" "include[s] their subordinate linear organizations, special local administrative organs, and attached organs as prescribed in the Government Organization Act of the Republic of Korea," also covers KAA because – as an entity "'attached/connected/affiliated' etc." to MOCT – KAA is a "subordinate linear organization" of MOCT.[286]

4.213 The United States argues that KAA is covered pursuant to: Korea's Annex 1 of the GPA, which lists MOCT as a covered "central government entity;" Note 1 to Korea's Annex 1 of the GPA, which states that "subordinate linear organizations" of MOCT are also covered; and Article I:1 of the GPA. The United States further argues that given that KAA is a covered entity, as a factual matter, any procurement conducted by KAA that is within the scope of the GPA (*i.e.*, above the Agreement's thresholds and not subject to any of the exceptions enumerated in the Agreement's text) is covered. This includes procurements related to the other regional airports for which KAA is responsible.[287]

4.214 The United States notes that KAA was involved in the IIA airport development project from 1992 until KOACA's creation in 1994. The United States contends that, apparently, this was the only "new airport construction" which KAA participated in. With regard to the procurement for this "new airport construction," the United States contends that it expected KAA to be covered, given its May 1991 question[288] to Korea. The United States also notes that as for the rest of KAA's work, which according to Korea, "has traditionally been limited to the management and maintenance of [existing] Korean airports," the US May 1991 question did not focus on these procurements. However, the United States argues that they are nevertheless covered by the GPA because of the coverage of KAA as a subdivision of MOCT.

4.215 **In response, Korea argues** that the US May 1991 question was not about just any generic airport procurement. Korea notes that the actual text of the United States' question was:

> "How does the Airport Development Group relate to the Ministry of Communication? 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

[285] *Ibid.*
[286] US Answer to Question 22 from the Panel, dated 29 November 1999.
[287] US Answer to Question 16 from the Panel, dated 29 November 1999.
[288] The US May 1991 question is discussed further below at paragraph 4.328 *et seq.*

responsible for the procurement of goods and services related to new airport construction."

4.216 Korea states that its reasonable interpretation of this question was that the United States was interested in the NADG – the New Airport Development Group.[289] Korea states that, therefore, its response dealt with NADG and its relationship with MOCT, and the Office of Supply, as the entity that would in principle be responsible for procurement for the IIA under the terms of the *Government Procurement Fund Act*, had there even been any procurements for IIA construction at the time. Korea states that it reasonably considered that the United States was not asking a question about airport procurement in general.

4.217 **The United States further argues** that the coverage of procurement resulting from KAA's management and maintenance of Korea's regional airports is similar to the coverage of procurement by the Seoul and Pusan Regional Aviation offices which are covered under Korea's GPA obligations. The United States contends that these regional offices conduct procurement for new airport construction of certain airports other than the IIA. In addition, they also conduct procurement for the maintenance of these airports. The United States argues that regardless of whether the Seoul and Pusan Regional Aviation offices are procuring for the construction or the maintenance of these airports, their procurements are covered under the GPA because they, as subdivisions of MOCT, are covered under the GPA.[290]

4.218 The United States notes that it has not uncovered any additional documentation not already provided that demonstrates the contemplation of the coverage of KAA over the "management and maintenance" of these other regional airports. However, it notes that it is not unheard of for a country to find that it has "GPA benefits" that "it had not anticipated," due to the coverage of an entity that, although originally covered for a particular purpose, engages in the procurement of other projects or sectors that were not explicitly excluded from GPA coverage.[291]

4.219 In response to a question from the Panel regarding evaluation of the Korean accession offer by the United States, the United States notes that throughout the GPA accession process, it has analysed the offers of countries acceding to the GPA on an ongoing basis but does not routinely prepare formal "studies". With regard to assessment of the value of Korea's accession offer, the United States notes that the potential monetary value of a country's GPA accession offer is often not as important to the United States as the quality of the overall package (including coverage of key entities and projects/sectors of interest). The United States recognizes that the US procurement market is substantially larger than that of most of its trading partners and that the monetary value of the opportunities offered by an acceding country is unlikely to be equivalent to the monetary value of opportunities offered by the United States. Therefore, the United States notes that its acceptance of another country's accession package is often based on the extent to which the offer includes coverage of areas of key interest to US suppliers and services providers, i.e., the coverage of key entities, projects and sectors of interest to the United States. The United States argues that airport was such a priority.[292]

[289] Further discussion of Korea's interpretation of the US May 1991 question is contained below at paragraph 4.343.

[290] US Answer to Question 16 from the Panel, dated 29 November 1999.

[291] *Ibid.*

[292] US Answer to Question 24 from the Panel, dated 29 November 1999.

(b) Arguments by Korea

4.220 **In response to the Panel's question referred to above in paragraph 4.197 Korea, on the other hand, argues** that KAA should not be considered as "'attached/connected/affiliated' etc. to MOCT" for the purposes of determining GPA coverage, for the following reasons.[293]

4.221 First, Korea states that Note 1 to its Annex 1 governs the determination of which non-listed entities are covered by virtue of their relationship with entities listed on Annex 1. Korea states that, specifically, Note 1 refers to the *Government Organization Act of the Republic of Korea*, which "prescribes" those entities that, as "subordinate linear organizations," "special local administrative organs" or "attached organs," are considered covered despite their absence from Annex 1.[294]

4.222 Korea notes that Note 1, with its incorporation by reference of the *Government Organization Act*, evidences and itself provides a "special meaning," under Article 31(4) of the *Vienna Convention on the Law of Treaties*. According to Korea, Note 1 provides specific, textual evidence of the intent and the agreement of the parties to the GPA, and as an "integral part" of the GPA, under Article XXIV:12 thereto, must be accorded both its ordinary meaning, and the "special meaning" it imposes upon the term "central government entity" for the purposes of Korea's Annex 1.[295]

4.223 Korea argues that KAA is not considered a covered entity by virtue of Note 1. Specifically, Korea argues that KAA is not a "subordinate linear organization," "special local administrative organ" or "attached organ," within the meaning of the *Government Organization Act*, and its status as a separate legal person with the authority to conduct its own procurements distinguishes it from a body such as NADG, which is effectively MOCT itself.[296]

4.224 Korea also notes that unlike the entities prescribed by the *Government Organization Act*, KAA has the following characteristics[297]: KAA was established by an act of the National Assembly as a separate legal person[298]; KAA authored and adopted its own by-laws[299]; KAA is governed by its own board of directors that controls all matters related to major corporate investments and all other major corporate issues of any significance[300]; KAA hires and fires its own workforce that is not in the government's employ[301]; KAA authored and adopted its own Contract Administration Regulations[302] distinct from the government procurement rules included in the *Korean Budget and Accounting Act* and used those Regulations for IIA procurements; KAA published bid announcements and requests for proposals of its own accord[303]; and, KAA concluded contracts with successful bidders on its own behalf.[304]

4.225 Korea argues that each of these factors demonstrates that KAA is an entity in its own right, separate and distinct from MOCT. Korea also argues, in response to a question from the Panel, that all of the "organs" or "organizations" included on the MOCT organization chart are in fact prescribed

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[293] Korea's Answer to Question 22 from the Panel, dated 29 November 1999.
[294] *Ibid.*
[295] *Ibid.*
[296] Korea's Answer to Question 22 from the Panel, dated 29 November 1999.
[297] Korea's Answer to Question 11 from the Panel, dated 29 November 1999.
[298] *Korea Airport Corporation Act*, Article 3. See also Notification of Act No. 3219, *Official Gazette*, 28 December 1979, p. 5892.
[299] KAA By-laws.
[300] *Ibid*. Articles 4(3), 4(1)(6), 14, 25.
[301] *Korea Airport Corporation Act*, Article 13.
[302] KAA Contract Administration Regulations, Article 90.
[303] Exhibits Kor-19A through Kor-19D.
[304] *Ibid*.

by the *Government Organization Act*, and covered under the GPA, as subordinate linear organizations, special local administrative organs or attached organs.[305]

4.226 Second, Korea argues that even if Note 1 is not controlling, the "control" test proposed by the United States enjoys no support in the GPA. Although Article I:1(c) of the Tokyo Round GPA[306] included what the United States has styled a "normative" control test[307] this test was not included in the Uruguay Round GPA[308], in either a normative or a binding form. Korea argues that according to the Appellate Body, the disappearance of a provision during negotiations "strongly reinforces the presumption" that prior practice has changed.[309] Quoting the Appellate Body, Korea states that rejecting prior practice in these circumstances "is the commonplace inference that is properly drawn from such disappearance," and an interpreter is "not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen."[310]

4.227 Korea states that the United States itself agrees that the "control" test included in Article I:1(3) of the Tokyo Round GPA was "excluded" from the Uruguay Round GPA, but argues that rather than rejecting the "'control' concept, . . . Annex 3 made it unnecessary." Korea states that this argument does not explain why the United States argues in these proceedings for importation of the "control" test into *Annex 1*, which is the locus of its claim for KAA coverage. Korea states that, more importantly, if Annex 3 made the Tokyo Round "control" test unnecessary, then reference to Annex 3 for evidence of KAA coverage is appropriate. Korea notes that KAA is not included on Korea's Annex 3.[311]

4.228 Korea argues that in either case, whether the Tokyo Round "control" test was rejected altogether by the Uruguay Round GPA negotiators, or whether the negotiators intended Annex 3 to encompass the concept of "control," the importation by the United States of a "control" test into Annex 1, and its claim that KAA is an Annex 1 covered entity by virtue of the control allegedly exercised over it by MOCT, must be rejected.[312]

4.229 Third, Korea argues that the test included in the Uruguay Round GPA to extend coverage beyond the list of entities included in a signatory's Appendix I – Article I:3 – is not met in the circumstances of this case. Korea argues that the United States' "control" test, either as drafted or as applied by the United States, does not comport to the requirements of Article I:3, and that there is no evidence that suggests that KAA was even asked by MOCT or any other covered entity, let alone required, to award contracts for IIA procurements in accordance with particular requirements. Korea states that the United States' list of "control" factors speaks largely to the statutory requirement that KAA request approval for and report on certain of its actions. Korea argues that neither of these

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[305] Korea Answer to Question 11 from the Panel, dated 29 November 1999.

[306] The Tokyo Round GPA and, more particularly, Article I:1(c) is discussed below at paragraph 4.291 *et seq.*

[307] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), pp. 26, 27-28, 38, 44.

[308] The removal of the control test from the Uruguay Round GPA is discussed below at paragraph 4.296 *et seq.*

[309] See paragraph 4.300 *et seq.*

[310] Korea's Answer to Question 22 from the Panel, dated 29 November 1999, quoting *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R (adopted on 25 February 1997), p. 17.

[311] Korea's Answer to Question 22 from the Panel, dated 29 November 1999. The Annex 3 issue is discussed further at paragraph 4.307 *et seq.*

[312] *Ibid.*

factors, nor any other evidence offered by the United States, demonstrate that KAA is required to apply particular requirements in awarding IIA procurements.[313]

4.230 Fourth, Korea argues that considering KAA to be a covered entity by virtue of a "control" test that (i) utilizes categories of "control" without textual basis in the GPA, and (ii) adopts an arbitrary degree of "control," also without any textual base, sufficient to deem an entity controlled and, therefore, covered, will seriously disrupt the delicate balance of rights and obligations agreed to by signatories to the GPA. Korea states that a decision that this non-textually-based test should trump the entire basis upon which signatories negotiated their GPA commitments – the positive enumeration of entities subject to the terms of the GPA – will have effects well beyond KAA.[314]

4.231 Korea states that each entity included on Korea's Annex 3 is controlled by an Annex 1 entity in the same sense that KAA is "controlled" by MOCT.[315] Korea states that whether discussing entities included on Annex 3, or entities excluded from but susceptible to inclusion on Annex 3 such as Amtrak, Comsat and KAA, the result of the United States' "control" test would be to subject those entities to coverage under Annex 1. Given the lower thresholds applicable to procurements by Annex 1 entities, the result of the United States' test would be not only to reduce Annex 3 to a nullity, but also to expand greatly signatories' GPA obligations.[316]

4.232 Korea argues that for the four reasons mentioned above, KAA should not be considered covered by virtue of its "attachment," "connection" or "affiliation" to MOCT. Korea states that there is no textual basis in the GPA to expand Korea's GPA commitments to KAA in the manner proposed by the United States, and the test provided by the GPA to secure coverage of non-listed entities – Article I:3 – is not satisfied under the factual circumstances of this case.[317]

4.233 **In response, the United States refers** to its arguments in paragraphs 4.118 and 4.146.

4.234 **Further, Korea argues** that it did not commit, or intend to commit, to GPA coverage for KAA, whether procurements were for the IIA or "other regional airports for which KAA is responsible." Korea reiterates that KAA is responsible for the management of existing regional airport operations, a task that may involve incidental repair and maintenance, and procurements therefor. Korea states that the only significant construction authority possessed by KAA was its responsibility for procurement for the IIA project, during the period December 1991 – August 1994. Korea argues that there is no evidence suggesting that Korea committed to coverage for KAA's procurements. Korea also argues that it did not commit to coverage for procurements undertaken on KAA's behalf by the Office of Supply since Korea's commitment to Annex 1 coverage for the Office of Supply is limited to purchases for entities on Annex 1 only and KAA is not on Annex 1.[318]

6. Appendix I: General Note 1(b)

(a) Ordinary Meaning of Note 1(b)

4.235 **The United States argues** that General Note 1(b) confirms that there are in fact "entities listed in Annex 1" responsible for "procurement of airports." The United States asserts that the reference to airport procurement entities can only be a reference to MOCT given that it is the only enumerated entity under Korea's Annex 1 with a mandate to oversee "all matters concerning public roads, railways, air and maritime transport . . . [such as the] construction and administration of roads

[313] *Ibid.*
[314] *Ibid.*
[315] *Ibid.*
[316] *Ibid.*
[317] *Ibid.*
[318] Korea's Answer to Question 21 from the Panel, dated 29 November 1999.

and airports and all other matters concerning construction and transport safety affairs . . . [including] the construction of the . . . Inchon International Airport"[319] and MOCT, the NADG, KAA, KOACA, and IIAC are the only entities Korea has held out as being "responsible" for procurements of airports.

4.236 **In response, Korea argues** that General Note 1(b) to Korea's GPA Appendix I does not convert KAA, KOACA or IIAC into covered entities. Korea notes in this respect that since December 1991, KAA, KOACA and IIAC have been the entities responsible for IIA procurement, and that KAA, KOACA and IIAC are not covered entities by virtue of Korea's Annex 1 or the Notes thereto. Korea argues that even an *a contrario* reading of General Note 1(b) does not imply that IIA procurement is extended to US suppliers and service providers under the terms of the GPA since the Korean entities conducting such procurements are not "entities listed in Annex 1."

4.237 Korea further notes that as a matter of reciprocity, General Note 1(b) withholds GPA benefits for "procurement for airports by the entities listed in Annex 1" from suppliers and service providers of the member States of the European Communities, Norway and Switzerland.

(b) Entities to Which General Note 1(b) Refers

(i) Seoul and Pusan Regional Aviation Offices

4.238 **Korea states** that the reference to airport procuring authorities in General Note 1(b) is a reference to the Seoul and Pusan Regional Aviation Offices. Korea notes that these are MOCT's "special local administrative organs," and, therefore, as covered entities pursuant to Note 1 to Korea's Annex 1, are charged with procurement responsibility associated with construction and maintenance of Yangyang, Yeosoo, Muan, Daegu, Pohang, Yecheoon and Uljin Airports. Korea further notes that the Regional Aviation Offices may conduct such procurement or request that Office of Supply procure on their behalf. Korea asserts that, in either case, procurement for these airports is subject to the GPA.

4.239 In response to a question from the Panel, Korea provides details of the construction projects (including value) that have been undertaken by the Seoul and Pusan Regional Aviation Offices since 1990.[320] Further, Korea refers to examples of contracts awarded by the Office of Supply, in conjunction with MOCT's Seoul and Pusan Regional Aviation Offices.[321]

4.240 **In response, the United States refers** to its arguments in paragraphs 4.340, 4.402 and 4.403.

(ii) Covered and Uncovered Entities

4.241 **Korea explains** its rationale for dividing airport procurement between various entities and, for submitting some, rather than all, of those procurement entities to coverage under Annex 1 of the GPA. Korea states that there are differences between construction of and attendant procurement for a $6 billion off-shore airport on reclaimed land, and procurement for the considerably smaller projects.

4.242 Korea also states that it had a right to commit to coverage for certain entities, and to exclude others. Korea asserts that every single GPA signatory did likewise. Korea notes that the United States, for example, excluded the Federal Aviation Administration ("FAA") and its Office of Airports from coverage under Annex 1, but included other airport procurement authorities such as the Port Authority of New York and New Jersey under Annex 3. Korea further notes that although both the FAA's Office of Airports and entities like the Port Authority of New York and New Jersey each have

[319] "History of the Ministry of Construction and Transportation," found on MOCT's Internet website at http://www.moct.go.kr/mcte/mct_about/mctha2.htm.

[320] Korea's Answer to Question 17 from the Panel, dated 3 November 1999.

[321] Exhibits Kor-61A – Kor-61B.

airport procurement responsibilities, the United States considered it legitimate to exclude the FAA from coverage while including the Port Authority.

4.243 In response to a question from the Panel concerning the difference in categorization of the IIA authorities on the one hand and Seoul and Pusan Regional Airport Authorities on the other, Korea also states that the procurement responsibility associated with construction and maintenance of existing airports conducted by the Regional Aviation Offices is in the nature of routine maintenance and relatively minor construction, which is not on the scale of the construction of a new airport of the magnitude of IIA. Korea further states that since this construction and maintenance is well within the capabilities of the Regional Aviation Offices, Korea has lodged it there, along with the authority for any necessary procurement. Korea finally states that, because of the magnitude of the IIA project, Korea found that an entirely separate entity, devoted only to that task, was needed. Korea also refers to its arguments in paragraphs 4.443 - 4.445.

(c) Coverage of "New Airport Construction" under Korea's Annex 1

4.244 **In response to a question from the Panel, the United States says** that it interpreted the reciprocal derogations between the EC and Korea regarding airports as an indication that Korea and the EC could not agree that each was offering "comparable and effective access [to their] relevant markets."[322] The United States further states that, moreover, the United States interpreted these derogations as a confirmation that Korea's GPA offer indeed included coverage of "new airport construction" under its Annex 1, consistent with Korea's July 1991 statement regarding the coverage of MOCT and the Office of Supply – as entities responsible for the IIA project – under Annex 1. The United States contends that it was able to draw this conclusion because Korea's country-specific derogation, which listed the EC and others, did not include the United States when carving out "procurement for airports by the entities listed in Annex 1."[323]

4.245 **Korea argues that** it is not at all apparent why Korea's General Note 1(b) is confirmation that Korea's GPA offer indeed included coverage of "new airport construction" under its Annex 1 as postulated by the United States. Korea argues that if an *a contrario* interpretation of General Note 1(b) is adopted, one could presume that "procurement for airports by the entities listed in Annex 1" – the actual language of General Note 1(b) – would be subject to GPA-consistent terms for US suppliers and service providers. However, Korea states that there is no specification of "new airport construction," as asserted by the United States; rather, any "procurement for airports" by any Annex 1 entity is covered.[324]

7. Appendix I: Annex 3

(a) Procuring Entities under Annex 3

4.246 **Korea argues** that if, in fact, it had intended to cover KAA, KOACA and the IIAC under the GPA, it would have listed those entities under Annex 3 rather than Annex 1 of Appendix I to the GPA given their independent legal existence and their association with a public-purpose project.

(i) Independent Legal Persons

4.247 **Korea argues** that like KAA, KOACA and IIAC, each of the entities listed on Annex 3 of Korea's Appendix I were established by a special legislative act, rather than by an order or directive issued by an entity included on Annex 1 and were created to engage in particular public-purpose commercial or non-commercial tasks.

[322] See EC General Note 1 and Korea General Note 1 to Appendix I of the GPA.
[323] US Answer to Question 17 from the Panel, dated 29 November 1999.
[324] Korea's Response to the US Answer to Question 17 from the Panel, dated 29 November 1999.

4.248 Korea also argues that the entities listed on Annex 3 are, like KAA, KOACA and IIAC, independent legal or "juristic" persons under Korean law, as stated in their authorizing statutes. Korea states that this is not the case with an entity, such as NADG, established by an Annex 1 entity on its own authority.

4.249 Korea argues that as legal persons under Korean law, Annex 3 entities, like KAA, KOACA and IIAC, are able to enter into binding legal commitments on their own behalf. Each has its own officers and directors, and its employees are not government civil servants or employees.

4.250 In support of its argument, Korea notes that Japan's New Tokyo International Airport Authority ("NTIAA"), like KAA, KOACA and IIAC, is a "juridical person."[325] Korea notes that NTIAA is led by officers who are appointed and dismissed by, or subject to the approval of, the Japanese Minister of Transport.[326] Korea further notes that NTIAA employees are not government civil servants but, rather, are hired and fired by the president of NTIAA itself. Finally, Korea notes that despite their private sector status, NTIAA officers and employees are considered "employees engaged in public duties" for the purposes of the Japanese *Criminal Act*.[327]

4.251 **In response, the United States argues** that whether an entity is a separate legal entity or not is irrelevant. In support of its argument, the United States asserts that a GPA member can choose to put any of its entities in Annex 1 or Annex 3, provided that the other GPA members agree to this. Therefore, whether an entity is a separate legal entity or not is irrelevant.

4.252 Further, the United States argues that a separate legal entity is normally created for the purposes of limiting liability and providing continuity. The United States also argues that an organization need not possess this legal fiction to be considered an "entity." The United States refers to Black's Law Dictionary which defines a separate legal entity of a corporation as follows:

> "An artificial person or legal entity created by or under the authority of the laws of a state. An association of persons created by statute as a legal entity. The law treats the corporation itself as a person, which can sue and be sued. The corporation is distinct from the individuals who comprise it . . . [and it] survives the death of its investors, as the shares can usually be transferred."[328]

4.253 Accordingly, the United States argues that applying these notions to the facts of this case, subdivisions such as the New Airport Development Group are "entities," even though they are not separately legal. The United States additionally argues that, in fact, the New Airport Development Group has its own director and its own regulations. The United States asserts that an Annex 1 entity does not automatically become an Annex 3 entity because it becomes a separate legal entity. The United States asserts that Korea's own National Railway Administration confirms this principle. The United States concludes that, thus, the status of an entity is irrelevant to the determination of this dispute.

(ii) Specific Task or Purpose

4.254 **Korea argues** that like KAA, KOACA and IIAC, the entities included on Korea's Annex 3 list were established to engage in tasks that, while closely linked to the public interest, are for self-evident reasons generally considered better or more efficiently performed by an entity outside the traditional central government apparatus. Korea states that constructing or maintaining major utility or transportation projects is just such a task. Korea notes that Korea's Annex 3 list includes the Korea

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[325] *New Tokyo International Airport Authority Act*, Article 3.
[326] *Ibid*. Articles 11, 14.
[327] *Ibid*. Article 19.
[328] Black's Law Dictionary (6th ed., 1990), p. 340.

Highway Corporation and the Korea Gas Corporation. Korea also notes that, similarly, the United States' Annex 3 list includes the Port Authority of New York and New Jersey, which, among other things, oversees metropolitan New York's three major airports – JFK International, Newark International and LaGuardia. Korea asserts that building or maintaining an airport fits in this category.

4.255 To elaborate on this point, Korea also notes that each Annex 3 entity, as with KAA, KOACA and IIAC, is associated with a relatively narrow task or large-scale public project, rather than with the broad portfolio typically associated with a government ministry. Korea further notes that, like the IIA project, the tasks or projects with which Annex 3 entities are charged, while closely linked to the public interest, are still rather "tangential to the essential function of government," in the words of the United States itself.[329] Korea states that placing those tasks in the hands of entities isolated from the constraints of large government bureaucracy and structured to more readily attract private capital facilitates prompt completion of the project.

(iii) Subject to Central Government Oversight

4.256 **Korea argues** that its Annex 3 entities are, like KAA, KOACA and IIAC, subject to certain oversight by central government entities, despite their status as independent legal persons under Korean law. Korea further argues that given their key roles in major public purpose projects, and the implications of their actions on public safety and welfare, this oversight is necessary and justifiable to ensure that the public interests inextricably linked to the performance of their tasks are adequately protected and observed. Korea asserts that there is nothing inconsistent with government oversight of Annex 3 entities. Korea further asserts that MOCT oversight to which KAA, KOACA and IIAC are subject would not prevent Korea from placing those entities on its Annex 3 list, had it decided to do so or had its negotiating partners demanded that it do so. Korea notes that the IIA project and the projects with which Korea's Annex 3 entities are charged are linked closely enough to the public interest to require, as the United States itself has stated, "retained links with the Government" sufficient "to ensure that the interests of the public are reflected ... ."

4.257 In support of this argument, Korea notes that Japan's New Tokyo International Airport Authority (NTIAA), is included on Japan's Annex 3 despite the significant oversight by Japan's Ministry of Transport to which the Authority is subject. Korea states that reference to the *New Tokyo International Airport Authority Act*, which bears remarkable resemblance to the *Seoul Airport Act*, the *Korea Airport Corporation Act* and the *Korea Airport Construction Authority Act*, demonstrates this fact.

4.258 **In response, the United States argues** that, as a factual matter, KAA and KOACA are different in nature from the entities found in Korea's Annex 3. The United States notes that as the Panel itself noted in a question to the Parties, "[t]he entities listed in Annex 3 are all referred to as 'Corporations' while the KAA and [KOACA] is an 'Authority'." The United States refers to its arguments in paragraph 4.442.

4.259 **Korea further states** that while the Japanese Minister of Transportation is responsible for drawing up a "master plan" for the airport[330], NTIAA is charged with executing the plan[331], pursuant to a "Program of Duty" authored by NTIAA and subject to approval by the Minister.[332] Further,

[329] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), p. 44 (describing the activities of Amtrak, which is charged with development and maintenance of a national railway system, and Comsat, which is charged with the establishment of a commercial communications satellite system).

[330] *New Tokyo International Airport Authority Act*, Article 21.

[331] *Ibid*. Article 22.

[332] *Ibid*. Article 24.

Korea notes that similar to the entities responsible for IIA procurement, NTIAA is subject to the "supervision and inspection" of the Japanese Minister of Transportation.[333] Korea states that like KAA, KOACA and IIAC, NTIAA is required to observe significant reporting requirements, submitting for the Minister of Transportation's approval, prospectively, an annual business plan, budget plan and funding plan[334], and retrospectively, detailed financial statements and statements of accounts.[335] NTIAA may also be instructed by the Minister to submit reports on various financial matters, and must open its books for inspection by individuals sent by the Minister.[336] Finally, Korea states that, like the entities responsible for IIA procurement[337], NTIAA may obtain loans or issue airport bonds[338], after receiving approval from the appropriate Minister.

4.260 Korea argues that this example demonstrates that GPA signatories have included airport authorities on Annex 3 despite the subjection of those authorities to at least the degree of oversight by an Annex 1 entity as is maintained in the case of the Korean entities responsible for IIA procurement.

4.261 **In response, the United States argues** that Korea is one GPA signatory that included airport authorities in Annex 1 since it has repeatedly maintained that the Seoul and Pusan regional airport authorities are covered under Korea's Annex 1.[339]

4.262 **In further support of its argument, Korea refers** to the Act authorizing the activities of the Small and Medium Industry Bank, an entity listed on Korea's Annex 3.[340] Korea notes that despite the Bank's status as an independent legal person[341], oversight by the Minister of Finance and Economy, an Annex 1 entity, is noted in this Act in a number of provisions.[342]

4.263 Korea notes that, in a similar fashion to KAA and KOACA, officers and directors of the Small and Medium Industry Bank are appointed and dismissed by either the President of Korea or the Minister of Finance and Economy.[343] Like KAA, KOACA and IIAC, Bank employees are not government civil service employees, but are appointed and dismissed by the Bank itself.[344] Although not public officials, officers of the Bank, as in the case of the entities responsible for IIA procurement, are in the case of criminal acts treated as such and subject to the terms of the *Korean Criminal Act*.[345]

4.264 Korea notes that to engage in activities beyond those specifically enumerated by the *Industrial Bank of Korea Act*, the Small and Medium Industry Bank must obtain the approval of the Minister of Finance and Economy[346]; KAA, KOACA and IIAC must similarly receive MOCT approval to go beyond the scope of their specifically-enumerated portfolios.[347]

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[333] *Ibid*. Articles 36-37.
[334] *Ibid*. Article 26.
[335] *Ibid*. Article 27.
[336] *Ibid*. Article 37.
[337] *KAA By-laws*, Article 7(3); *Korea Airport Construction Authority Act*, Articles 16, 28, 25.
[338] *New Tokyo International Airport Authority Act*, Article 29.
[339] US Response to Korea's Answer to Question 11 from the Panel, dated 29 November 1999.
[340] *Industrial Bank of Korea Act* Act No. 641, 1 July 1961 (as amended by Act No. 5529, 28 February 1998).
[341] *Ibid*. Article 3(1).
[342] *Ibid.* Article 6(2), Article 26(1), Article 26(2), Article 26(3), Article 28, Article 33-2(1), Article 33(2-2), Article 33(9), Article 35(1), Article 35-2, Article 37(2), Article 37(3), Article 44(1), Article 44(2), Article 46(1), Article 46(2), Article 48(1) Article 48(3) Article 48(4) Article 49.
[343] *Industrial Bank of Korea Act*, Article 26.
[344] *Ibid*. Article 31.
[345] *Ibid*. Article 32.
[346] *Industrial Bank of Korea Act*, Article 33(9).
[347] *Korea Airport Corporation Act*, Article 7(7); *Korea Airport Construction Authority Act*, Article 7(4); *Law on Inchon International Airport Corporation*, Article 10(1)(6).

4.265 Korea further notes that the Bank, KAA, KOACA and IIAC all have provisions in their respective statutes subjecting them to the "supervision and management" or the "direction and supervision" of the relevant ministry.[348] Korea states that the Bank is also required to prepare for the Minister's review, and to obtain approval from the Minister for, its business plans, its operations manual and its annual budgets and reports.[349] Korea also states that the Bank may, moreover, be instructed by the Minister to submit reports on any matters "as may be deemed necessary," and must open its books to designated officials upon request by the Minister.[350] Korea asserts that the entities responsible for IIA procurement are subject to nearly identical reporting requirements.[351]

4.266 As yet another example, Korea refers to the Act authorizing the activities of the Korea Development Bank, another Annex 3 entity.[352] Korea states that despite the Bank's status as an independent legal person[353], oversight by the Minister of Finance and Economy, an Annex 1 entity, is noted in this Act in a number of provisions.[354]

4.267 Korea states that, like KAA and KOACA, officers and directors of the Korea Development Bank are appointed by either the President of Korea or the Minister of Finance and Economy.[355] Korea further states that like KAA, KOACA and IIAC, Bank employees are appointed and dismissed by the Bank itself, and therefore are not government employees.[356] Korea notes that Bank officers, while not public officials, are, like officers of the IIA procurement entities, treated as public officials and subjected to the terms of the *Korean Criminal Act* if criminal acts are committed.[357]

4.268 Further, Korea notes that if the Bank wishes to engage in activities beyond those specifically enumerated by the *Korea Development Bank Act*, it must obtain the approval of the Minister of Finance and Economy.[358] The entities responsible for IIA procurement would in this situation also need MOCT approval.

4.269 Korea states that the Bank is subject to overall supervision by the Minister of Finance and Economy.[359] Korea further states that the Bank must also prepare for the Minister's review, and obtain approval from the Minister for, its operational programme, its service manual and its annual budgets and reports.[360] Korea notes that the Minister may also instruct the Bank to submit reports on any matters "as he deems it necessary," and must open its books to designated officials upon request

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[348] *Industrial Bank of Korea Act*, Article 46; *Korea Airport Corporation Act*, Article 28; *Korea Airport Construction Authority Act*, Article 31; *Law on Inchon International Airport Corporation*, Article 16.

[349] *Industrial Bank of Korea Act*, Articles 35, 35-2, 37, 49.

[350] *Ibid*. Article 48.

[351] *Korea Airport Corporation Act*, Articles 19, 20; *Korea Airport Construction Authority Act*, Articles 21, 22; *Law on Inchon International Airport Corporation*, Article 17.

[352] *Korea Development Bank Act*, Act No. 302, 30 December 1953 (as amended by Act No. 5505, 13 January 1998).

[353] *Ibid*. Article 2(1).

[354] Article 5(2), Article 12(1), Article 12(2), Article 12(3), Article 14, Article 17, Article 18(8), Article 20(1), Article 21, Article 24, Article 37(2), Article 37(3), Article 37(6), Article 47(1), Article 47(2), Article 48(1), Article 48(2), Article 48(3), Article 49(1), Article 49(2), Article 54-3(2), Article 54-3(3), Article 54-3(4), Article 55(1), Article 55(2), Article 55(3), Article 57.

[355] *Ibid*. Article 12.

[356] *Ibid*. Article 16.

[357] *Ibid*. Article 17.

[358] *Ibid*. Article 18(8).

[359] *Ibid*. Article 47.

[360] *Ibid*. Articles 20, 21, 24, 37.

by the Minister.[361] Korea argues that the entities responsible for IIA procurement are subject to nearly identical reporting requirements.[362]

(iv) Choice between Annex 1 and Annex 3

4.270 **In response to a question from the United States** as to whether members of the GPA could choose to place any entity within Annex 1 or Annex 3, regardless of the project or sector that entity is procuring for, **Korea** confirms that this was its understanding.

4.271 Korea states that it is aware of nothing in the GPA that, in principle, would control the Annex in which a covered entity is placed. However, Korea notes that Annex 1 covers "central government entities" while Annex 3 covers "other entities." Korea notes further that Korea and other parties to the GPA have tended to put ministries and the like in Annex 1 and "other entities," such as Airport Authorities and government-invested corporations, in Annex 3.[363] Korea further notes that Annex 2, is reserved for specific kinds of entities, while Annexes 4 and 5 are reserved for specific kinds of procurements.

4.272 Korea argues that it would not have been alone in listing KAA, KOACA and the IIAC under Annex 3 rather than Annex 1 of Appendix I to the GPA. In support of this argument, Korea notes that on their respective Annex 3 lists, the United States has included the Port Authority of New York and New Jersey, which has jurisdiction over metropolitan New York's three major airports; Hong Kong has included its Airport Authority; and Japan has included the New Tokyo International Airport Authority. Similarly, on their Annex 3 lists, Israel has included its Airport Authority; Norway has included its National Civil Aviation Administration; Switzerland has included its various airport authorities; and Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom, as member States of the European Communities, have listed their airport authorities.

4.273 **In response, the United States argues** Korea's assertion that it and other parties to the GPA have tended to put ministries and the like in Annex 1 and "other entities," such as Airport Authorities and government-invested corporations, in Annex 3 is contradicted by the fact that Korea's Regional Aviation Authorities are placed in Annex 1. Further, the United States notes that Korea's attempt to define Annex 3's "other entity" is without textual support. The United States argues that it is clear that the text of the GPA does not define this term, and there is no basis to interpret the term by way of "trends" that Korea itself does not follow.

4.274 **In response to a question from the United States** as to why the Seoul and Pusan Regional Aviation Offices are covered under Annex 1 rather than Annex 3, **Korea states** that the procurement responsibility associated with construction and maintenance of airports conducted by the Regional Aviation Offices is in the nature of routine maintenance and relatively minor construction and not on the scale of the construction of a new airport of the magnitude of IIA. Korea states that since the task is well within the capabilities of those Offices, Korea chooses to assign it to them. Korea notes that because they are internal to MOCT, and not separate legal entities, they are covered by the GPA.[364]

4.275 **In response, the United States notes** that, on the one hand, Korea claims that the activities of building and maintaining an airport must be conducted by Annex 3-type entities and, on the other hand it represents that the Seoul and Pusan Regional Airport Offices, which are responsible for the construction and maintenance of airports, are covered under Annex 1. The United States contends

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[361] *Ibid*. Article 49.

[362] *Korea Airport Corporation Act*, Articles 19, 20; *Korea Airport Construction Authority Act*, Articles 21, 22; *Law on Inchon International Airport Corporation*, Article 17.

[363] Korea's Answer to Question 12 from the US, dated 3 November 1999.

[364] Korea's Answer to Question 11 from the US, dated 3 November 1999.

that a GPA Party can choose to place an entity under either Annex 1 or Annex 3, subject to agreement with other Parties, regardless of the procurement subject-matter or the type of entity. The United States notes that Korea has acknowledged this fact.

4.276 The United States argues that, moreover, as a factual matter, KAA and KOACA are different in nature from the entities found in Korea's Annex 3. Specifically, the entities listed in Annex 3 are all referred to as "Corporations" while the KAA (and KOACA) is an "Authority".

4.277 **In response to a question from the Panel, Korea notes** that there is no significance in the use of the term "authority" or "corporation" in the context of Korean Government entities. Korea states that the terms are used interchangeably. For example, the English translation of the *Korea Airport Corporation Act* of 14 December 1991 refers to the "Korea Airport Corporation" which in fact is KAA. Korea notes that KAA (or "KAC") is a separate juridical person, as are the other entities in its Annex 3. Under Korean law, both authorities and corporations must have by-laws and be registered.[365]

(b) Shifting of an Entity from Annex 1 to Annex 3

4.278 The Panel pointed out to the Parties that the Korean National Railway Administration is listed as an Annex 1 entity but with a note that it may be made into a public corporation and shifted to Annex 3 without further compensation. The Parties were asked to discuss the relevance of this, if any, to the interpretation of the Korean Schedule.[366] **In response, Korea notes** that the Korean National Railway Administration was placed in Annex 1 because it is a central government entity. With privatization (which has not yet occurred) it would become a separate legal person, and therefore, would be more appropriate for Korea's Annex 3, which consists of separate legal persons. Korea states that it is because KAA is a separate legal person that Korea would have placed it on its Annex 3 offer had Korea intended KAA to be a covered entity.[367]

4.279 **In response to Korea's answer, the United States notes** that the "privatization" of an entity has nothing to do with its becoming a "separate legal entity." In the view of the United States, these are two completely different concepts that have no relevance to each other.

4.280 In response to the Panel's question, the United States notes that Korea's explanatory note concerning the Korean National Railway Administration implicitly recognizes two legal points. First, shifting an entity from one Annex to another is a substantive alteration in a mutually agreed balance of concessions between Members. Second, if a GPA concession is unqualified, and does not provide explicitly for the possibility that an entity will be shifted to another Annex, then any such shift in coverage is inconsistent with the concession.[368]

4.281 The United States argues that this legal point can be understood all the more clearly by drawing an analogy to the law of tariff concessions. According to the United States, it is possible to make a tariff concession subject to a qualification regarding future changes in treatment. To illustrate, the United States considers the example of a US concession on Vitamin B12, which was made subject to a general note reserving the ability of the importing country to adjust the duty rate in the event that a particular customs valuation method was eliminated; because of this general note (and the factual circumstances of its application).[369] The United States notes that a panel found that conversion of the duty rate in question was not inconsistent with US obligations. The United States further states that where a tariff concession is unqualified, any excess of the duty rate over the bound rate or a switch in

[365] Korea's Answer to Question 8 from the Panel, dated 3 November 1999.
[366] Panel's Question 30 to the Parties, dated 20 October 1999.
[367] Korea's Answer to Question 30 from the Panel, dated 3 November 1999.
[368] US Answer to Question 30 from the Panel, dated 3 November 1999.
[369] Analytical Index notes at p. 71.

the basis for levying duties (*e.g.,* from specific to *ad valorem* or vice versa) is inconsistent with the legal obligations of that Member under Article II.[370]

8. Coverage of Entities versus Coverage of Projects

4.282 **The United States argues** that all airport construction in Korea should be covered by Korea's GPA commitments. The United States further argues that the GPA covers projects and sectors by way of entities and that all airport construction in Korea should be covered by Korea's GPA commitments. The United States asserts that this is apparent throughout the text of the GPA, where Members often refer to sectors rather than entities. The United States notes that, for instance, Korea's General Note 1(b) refers to "procurement for airports by the entities listed in Annex 1," Korea's General Note 1(c) refers to "procurement for urban transportation," and Korea's Annex 3 refers to "purchases of common telecommunication commodity products." The United States notes that in all three cases, entities are identified by what they procure, that is, their projects or sectors, and not by their names. The United States notes that, likewise, exceptions to coverage under the GPA are often expressed in terms of projects or sectors, rather than entity names. Finally, Annex 4 of the GPA does not even refer to entities, but solely to sectors.

4.283 **Korea argues** that the United States' claim that "all airport construction in Korea" should be covered by Korea's GPA commitments, regardless of which entity conducts procurement for such construction, must be rejected as anathematic to the underlying premises of the GPA. In Korea's view, the United States argues that it bargained for coverage of IIA procurement under Korea's Annex 1. However, Korea asserts that Korea's Annex 1 does not identify projects subject to the GPA. Korea further argues that the GPA does not identify "covered projects." Rather, according to Korea, Korea's Annex 1 and the Notes thereto identify "covered entities."

4.284 **The United States argues in response** that if the GPA merely covers particular entities and not particular projects, Members could then transfer procurement authority out of a covered entity without notification or compensation, and still claim to be acting consistently with the Agreement. According to the United States, this would render the GPA a nullity, because the GPA would only end up covering entities that lack procurement authority.

4.285 **In response, Korea refers** to its arguments in paragraph 4.26.

9. Amendments to Appendix under Article XXIV:6

4.286 **The United States argues** that Article XXIV:6 provides the only procedure within the GPA according to which a Party may alter its annexes. The United States contends that any changes to a Party's schedule of concessions, no matter how minor, must be notified to the WTO Committee on Government Procurement. This includes transfers of procurement authority from a covered entity to a non-covered entity, since such transfers will disrupt the balance of rights and obligations between the Parties to the GPA. The United States argues that Korea has never used Article XXIV:6 to notify the Committee of any of its transfers of procurement authority for the IIA construction project. The United States argues that, by not notifying the Committee (assuming Korea did not violate Article XXIV:6), Korea is in essence confirming that these transfers took place within one "central government entity" – namely, MOCT.

4.287 The United States further argues that any transfer of procurement authority from a branch office of a covered entity to a subsidiary organization of the same entity or from a subsidiary organization of a covered entity to another subsidiary organization of the same entity, need not be notified to the Committee, for the procurement authority remains within that covered entity. The schedule of concessions do not change and the "balance of rights and obligations" is not disrupted.

[370] US Answer to Question 30 from the Panel, dated 3 November 1999.

The United States concludes that Korea need not utilize the procedures of Article XXIV:6 for no changes were made to its schedule of concessions with regard to airport procurement for the IIA project.

4.288 **Korea argues** in response that Article XXIV:6 of the GPA does not apply given that authority had been transferred from a non-covered entity to other non-covered entities. It argues that Korea has not shifted procurement responsibilities from covered to non-covered entities in order to circumvent its obligations under the GPA. Rather, Korea asserts that those procurement responsibilities have, since December 1991, always rested with non-covered entities.[371]

4.289 Korea argues that neither the United States nor the European Communities claim that the transfer of responsibility for IIA procurement from KAA to KOACA, or from KOACA to IIAC, effected any change cognizable under the provisions of the GPA since, for the purposes of the United States' and the European Communities' claims, KAA, KOACA and IIAC are essentially the same. Korea states that it agrees with this position. Korea argues that, accordingly, the only remaining transfer of responsibilities about which the United States and the European Communities apparently complain is the "transfer" of responsibility for IIA procurement from MOCT to KAA. Korea reiterates that that event occurred in December 1991, five years before the effective date of the GPA for Korea, and two years before Korea submitted its final offer for accession to the GPA on 15 December 1993. Korea states that no GPA commitments were incumbent upon Korea at that time.

4.290 Finally, Korea notes that any alleged violation of Article XXIV:6 is not within the Panel's terms of reference.

B. PREPARATORY WORK AND OTHER EVIDENCE

1. Negotiation of the GPA

(a) Article I:1(c) of the Tokyo Round GPA and Annex 3 of the Uruguay Round GPA

4.291 **Korea notes** that like the Uruguay Round GPA, the Tokyo Round GPA applied only to procurements "by the entities subject to this Agreement."[372] Article I:1(c) of the Tokyo Round GPA, however, spoke directly to the issue of "control" raised by the United States' proposed "control" test:

> "1. This Agreement applies to:
>
> . . . .
>
> (c) procurement by the entities under the direct or substantial control of Parties and other designated entities, with respect to their procurement procedures and practices. Until the review and further negotiations referred to in the Final Provisions, the coverage of this Agreement is specified by the list of entities, and to the extent that rectifications, modifications or amendments may have been made, their successor entities, in Annex I."[373]

4.292 Korea states that the United States discussed the implications of Article I:1(c) extensively in a report issued by its International Trade Commission regarding the Tokyo Round GPA.[374] According

[371] Korea notes that since obligations under the GPA were not effective until 1 January 1997, it is more accurate to state that IIA procurement has since December 1991 rested with entities that would not have been covered entities, had the GPA been effective at the time.

[372] Tokyo Round GPA, Article I:1(a).

[373] *Ibid.* Article I:1(c).

[374] *Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva*, US International Trade Commission Investigation No. 332-101 (MTN Studies, August 1979), pp. 26-28, 38-46.

to Korea, in that report, the United States concludes that the "direct or substantial control" test included in Article I:1(c) was merely a "normative rule" and that "Annex I is clearly the sole determinant of entities covered."[375]

4.293 Korea states that, according to the United States, however, the "normative" control test in Article I:1(c) was important, as it was to be "the guide for future negotiations on expanded coverage."[376] Korea further quotes: "the code is aimed at government ministries [sic] and their subdivisions – not the myriad organizations tangential to the essential function of government."[377] Korea states that the United States cited in the USITC report examples including the United States' National Rail Passenger Corporation, known as "Amtrak," and the Communications Satellite Corporation, known as "Comsat."[378] Determining whether coverage should be extended to these types of "myriad organizations tangential to the essential function of government," the United States concluded, was to be left to future negotiations; "negotiations rather than normative rules will always be determinative."[379]

4.294 Korea states that, thus, while the control test included in Article I:1(c) of the Tokyo Round GPA was, according to the United States, not binding, the United States characterized it as "the guide for future negotiations" and "perhaps . . . the objective to which parties will refer when establishing the initial list and later in review and negotiation."[380]

4.295 **The United States notes** that Article I:1(c) did "serve as the starting point for future negotiations," for it was during the Uruguay Round that a new category of covered entities, Annex 3, was conceived. Article I:1(c) was excluded from the new GPA, not because the negotiators rejected the "control" concept, but because Annex 3 made it unnecessary.

(i) Deletion of Article I:1(c)

4.296 **Korea agrees that** while there was a control test in Article I:1(c) of the Tokyo Round GPA and despite the fact that the "control" concept was to serve as the starting point for future negotiations, the negotiators excluded such a test for the Uruguay Round GPA. Korea notes that, in other words, the Uruguay Round negotiators rejected the notion of covering unnamed entities based on their control by named entities.

4.297 Korea also argues that not even the "normative" version of the "control" test included in Article I:1(c) of the Tokyo Round GPA was retained in the Uruguay Round GPA and that no remnant of the "control" test remains. In Korea's view, if the negotiators of the Uruguay Round GPA had intended to take up the invitation from the Tokyo Round negotiators to change the merely "normative" version of the control test included in Article I:1(c) of the Tokyo Round GPA into a binding, determinative test in the Uruguay Round GPA, they would have made some indication that they so intended in the text of the Agreement. Instead, states Korea, they rejected even the Tokyo Round's "normative" control test.

4.298 Korea states that it is implausible to accept that the GPA negotiators, who thought the "control" test important enough even in its strictly "normative" form to include it in the text of the Tokyo Round GPA, would have eliminated any mention of such a test from the text of the Uruguay

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[375] *Ibid*. p. 26. See also *Ibid*. pp. 27-28 ("The Annex is in fact the exclusive rule for code application."); p. 28 ("The control test thus appears to impose no real obligation in implementation of the code . . ."); p. 38 (Covered entities "are only those found in Annex I."); p. 44 ("[T]he operations of entities not on Annex I will continue unaffected by the agreement.").

[376] *Ibid*. p. 26.

[377] *Ibid*. p. 44.

[378] *Ibid*.

[379] *Ibid*.

[380] *Ibid*. pp. 26, 28.

Round GPA while still intending to impose it as binding upon signatories to that Agreement. Korea states that in these circumstances, the United States' assertion that KAA, KOACA and IIAC should be subject to the GPA by virtue of a "control" test must be rejected.

4.299 **In response, the United States argues** that the language in Article I:1(c) of the Code is not found in the new GPA because it is no longer needed in the new Agreement. The United States reiterates that Article I:1(c) is merely a "guide for future negotiations on expanded coverage."[381] The United States contends that these "future negotiations" had already taken place in the Uruguay Round, during which time the goals that Article I:1(c) set forth were fulfilled when additional annexes to the GPA were agreed upon to cover "quasi-governmental purchasing agents" and other entities such as "political subdivisions" and "provincial governments." According to the United States, in other words, Article I:1(c) no longer exists in the new GPA, not because the Uruguay Round negotiators rejected the "control" concept, but because the additional annexes of the GPA made the provision redundant and unnecessary.[382]

4.300 **In response, Korea** refers to its arguments in paragraphs 4.310 and 4.311. Further, in support of its argument regarding the deletion of Article I:1(c) of the Tokyo round GPA, Korea notes that a similar situation was presented in *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*. Korea, noting that a provision of the prior *MFA* was not carried over into the *Agreement on Textiles and Clothing*, states that the Appellate Body said that the disappearance of the provision "strongly reinforces the presumption" that a prior practice no longer was permissible. "This is the commonplace inference that is properly drawn from such disappearance," the Appellate Body observed. "We are not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen."[383]

4.301 Korea argues that the disappearance of the control test was not accidental or inadvertent oversight either. Korea argues that it was tried and found wanting, and was not continued. In Korea's view, the message from its disappearance is that only named entities, not other entities over which they may exert some control, are covered.

4.302 **In response, the United States argues** that Korea wrongly suggests that, on the basis of the *United States - Underwear* Appellate Body decision, a "presumption" exists in this case that a control test is not included in the GPA. First, the United States argues that such presumptions cannot be independently derived from the disappearance of language but must, instead, come from a *Vienna Convention* interpretation of the GPA. With the disappearance of the language acting as mere "reinforcement" of the presumption[384] the above explanation regarding the fulfilment of the goals of Article I:1(c) in the new GPA can easily distinguish the present dispute from that of *United States - Underwear*.[385]

4.303 Secondly, the United States argues that the "presumption" identified by the Appellate Body in *United States - Underwear* resulted from the Appellate Body's interpretation of Article 6.10 of the ATC[386] and not from the absence of language on retroactive application that had been in the Multifiber Arrangement.[387] Thus, according to the United States, the issue is whether the absence of a

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[381] USITC Report, p. 26.
[382] US Answer to Question 20 from the Panel, dated 29 November 1999.
[383] WT/DS24/AB/R (adopted on 25 February 1997), p. 17.
[384] Appellate Body report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R (adopted on 25 February 1997) ("*US - Underwear*"), p. 17.
[385] US Answer to Question 20 from the Panel, dated 29 November 1999.
[386] Appellate Body report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, p. 14.
[387] *Ibid.* pp. 16-17.

provision in a new text is evidence (not a presumption) that the new text does not include the meaning or concepts in the old text.

4.304 The United States notes that it believes that the instant case is distinguishable from the *United States - Underwear* case for the reasons set forth in the 1979 USITC report and, more specifically, the explanation regarding the fulfilment of the goals of Article I:1(c) in the new GPA. The United States notes that in *United States - Underwear*, the Appellate Body stated that when:

> "The above underscored clause of Article 3(5)(i), MFA, . . . disappeared with the supersession of the MFA by the new ATC; no comparable clause was carried over into Article 6.10 of the ATC. [Also, t]he Panel did not draw any operable inference from the disappearance of the MFA clause."[388]

4.305 However, according to the United States, unlike *United States - Underwear*, Article I:1(c) of the Code was in fact replaced by the additional annexes in the new GPA. The United States asserts that these annexes are "comparable clauses" that allow for the coverage of "quasi-governmental purchasing agents" and "political subdivisions." The United States further states that, unlike *United States - Underwear*, an "operable inference" may be drawn from the disappearance of Article I:1(c) of the Code, for with the creation of the additional annexes in the new GPA, Article I:1(c) – if maintained – would be redundant.[389]

4.306 The United States contends that, in addition, in this case, the absence of direct references to control in the GPA that had existed in the Tokyo Round GPA does not mean that the notion of control cannot exist in determining the coverage of entities under the GPA. The United States further states that, indeed, if the notion of control did not exist in the GPA, such an interpretation would render the interpretation of the GPA a nullity in contravention of numerous Appellate Body decisions. The United States argues that the implication of Korea's "no control" interpretation would be to allow GPA members to create new entities with exactly the same functions, personnel, and operation as listed entities. The United States contends that by eliminating the old listed entities, and preventing the piercing of the legal fiction of the new entity, Members could effectively avoid GPA disciplines. According to the United States, such a result would be contrary to the object and purpose of the GPA as reflected in its text and context.

(ii) Annex 3

4.307 **Korea notes** that, in relation to the comment by the United States referred to above at paragraph 4.295, the reason the Uruguay Round negotiators rejected the control test is "because Annex 3 made it unnecessary," Korea submits that this can only mean that entities controlled by Annex 1 entities are not subject to GPA coverage by virtue of that control, but by virtue of their inclusion in Annex 3.

4.308 Korea states, in agreeing with this conclusion, that at least four entities, legal persons in their own right but subject to the same supervisory control by MOCT that KAA, KOACA and IIAC are subject, are on Korea's Annex 3. Korea notes that they are the National Housing Corporation, the Water Resources Corporation, the Land Corporation and the Highway Corporation. Korea further notes, however, that KAA, KOACA and IIAC are not on Annex 3 and never have been. Korea argues that, by the analysis proposed by the United States and agreed to by Korea, the only place they could be listed is Annex 3, and because they are not there, they are not and never have been covered entities.

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[388] US Answer to Question 20 from the Panel, dated 29 November 1999 citing Appellate Body report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, pp. 16-17.

[389] US Answer to Question 20 from the Panel, dated 29 November 1999.

4.309 **The United States argues** that a GPA Party can choose to place an entity under either Annex 1 or Annex 3, subject to agreement with other Parties, regardless of the procurement subject matter or the type of entity. According to the United States, the negotiating history of Annex 3 confirms this:

> "The definition of Group C entities is of interest. The heading of Group C (or Annex 3) entities in the new Agreement, reads: "Other entities which procure in accordance with the provisions of this Agreement." The title suggests problems in defining what Annex 3 (Group C) would eventually cover. In the end, this heading was chosen as a compromise to refrain from defining Group C (Annex 3) entities and to leave it up to each delegation to list in Annex 3 what is wished to list, subject of course, to acceptance by its negotiating parties."[390]

4.310 **Korea states** that the United States' assertion that the additional annexes of the Uruguay Round GPA made Article I:1(c) of the Tokyo Round GPA redundant and unnecessary are unsupported by any evidence. Korea states that the United States proposes to overturn the principles of treaty interpretation included in the *Vienna Convention*, and the Appellate Body's reasoning regarding "the commonplace inference that is properly drawn from [the] disappearance" of the "direct or substantial control" test from the GPA, on the basis of nothing more than its own unsupported assertion that the drafters of the Uruguay Round GPA theoretically could have meant for Annexes 2 or 3 to replace or encompass the "control" concept.[391]

4.311 Korea states that, assuming, however, that the United States is correct, it has not explained why the result of its analysis is not merely to refer the Panel to the lists of Korean entities included in Annexes 2 or 3 of the Uruguay Round GPA. Korea notes that KAA does not appear on either of these lists. Korea asks why the United States insists that KAA is included on Annex 1 by virtue of the "control" allegedly exercised over it by MOCT, an Annex 1 entity, if the negotiators of the Uruguay Round GPA intended, when they "excluded" the control test included in Article I:1(c) of the Tokyo Round GPA to incorporate the concept of "control" in Annexes 2 or 3. Korea asserts that the result of the United States' theory should rather be to direct an interpreter of the GPA, and Korea's Appendix I, to Korea's Annexes 2 and 3.[392]

4.312 **In response, the United States argues** that Korea's argument takes the United States' comments out of context, and attributes an incorrect conclusion to its analysis of Article I:1(c) of the Code.[393]

(b) Relevance of Control to 1991 Amendments to IIA Legislation

4.313 **In response to a question from the Panel, Korea argues** that the reference to control in the Tokyo Round GPA, and its absence from the Uruguay Round GPA, is fatal to the US claim that KAA, KOACA and IIAC are covered under the GPA by virtue of the "control" allegedly exercised over them by MOCT. In Korea's view, even if, when responsibility for the Inchon airport project was assigned to KAA in December 1991, the United States relied on the Tokyo Round "control" test to assume that MOCT "control" over KAA would subject KAA to GPA coverage, everything changed when the Uruguay Round negotiators subsequently dropped the "control" test from the GPA. From that point on, the United States could no longer have reasonably expected that unlisted entities, not

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[390] Blank and Marceau, "The History of the Government Procurement Negotiations Since 1945," p. 113.

[391] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.

[392] *Ibid.*

[393] US Response to Korea's Answer to Question 5 from the Panel, dated 29 November 1999. The United States refers to the US Answer to Question 20 from the Panel, dated 29 November 1999, for what it says is an accurate presentation of its views regarding the normative "control" test of Article I:1(c) of the Code.

themselves listed on an Annex, would be covered by virtue of the control exercised over them by listed entities. As a matter of law, according to Korea, entities controlled by named entities, but not themselves named, no longer would be covered. Korea argues that to the extent the United States relied on the Tokyo Round GPA's "control" test, it did so at its peril once that test was eliminated by the Uruguay Round GPA negotiators.[394]

4.314 **In response to the same question from the Panel, the United States argues** that the reference to control in the Tokyo Round Procurement Code is irrelevant to any analysis about the US response (or lack thereof) to the 1991 amendments made to the *Act on Promotion of a New Airport for Seoul Metropolitan Area Construction*, the *Korea Airport Corporation Act* and the *By-Laws of Korea Airport Corporation* since the reference to control, found in Article I:1(c) of the Tokyo Round Procurement Code ("Code"), is actually unrelated to "central government entities."[395]

4.315 The United States argues that according to the 1979 USITC report, Article I:1(c) is essentially a "guide for future negotiations" to expand the Code coverage in two directions.[396] First, it suggests expanding the Code to apply to procurement by the "entities under the direct or substantial control of Parties." Secondly, it also suggests expanding the Code to apply to procurement by "other designated entities."

4.316 The United States argues that with regard to the expansion of coverage to procurements by "entities under the direct or substantial control of Parties," the 1979 USITC report states that "[t]he broader language 'direct or substantial control' apparently is intended to encompass not only governmental units but quasi-governmental purchasing agents as well." In other words, this control reference is not related to the control of "central government entities" over their subdivisions. Instead, it is referring to the control of Code parties (*i.e.*, the governments themselves) over their "quasi-governmental purchasing agents."[397]

4.317 As for the expansion of coverage to procurements by "other designated entities," the United States argues that the USITC report makes clear that this reference is not related to the concept of control and in addition, this reference is unrelated to "central government entities." According to the United States, instead, it is referring to procurement by those entities that are not "specified by the lists" in the Code[398] and are not "under the direct or substantial control of Parties" to the Code[399] but would nevertheless fall under the rubric of "government" procurement. The United States further argues that, according to the USITC report, this reference encompasses such entities as "political subdivisions" and "provincial governments."[400]

4.318 The United States concludes that it did not respond to the 1991 amendments made to the *Act on Promotion of a New Airport for Seoul Metropolitan Area Construction*, the *Korea Airport Corporation Act* and the *By-Laws of Korea Airport Corporation* because these amendments came about merely as a result of MOCT's decision to designate KAA as a project operator of the IIA project, with MOCT itself retaining ultimate authority and control over the project and over KAA. The United States argues that this is an example of an entity being controlled by another entity, and is irrelevant to the control reference in the Code because Article I:1(c) of the Code has nothing to do with the control of entities by "other entities." Instead, according to the United States, Article I:1(c) is referring to the control of entities by "Parties" to the Agreement.[401] The United States further argues

[394] Korea's Answer to Question 20 from the Panel, dated 29 November 1999.
[395] US Answer to Question 20 from the Panel, dated 29 November 1999.
[396] USITC report, p. 26.
[397] US Answer to Question 20 from the Panel, dated 29 November 1999.
[398] Article I:1(c) of the Code, second sentence.
[399] *Ibid.* first sentence.
[400] US Answer to Question 20 from the Panel, dated 29 November 1999, citing USITC report, pp. 25-26.
[401] Article I:1(c) of the Code.

that it is alluding to the coverage under the GPA of what the USITC calls "quasi-governmental purchasing agents," i.e., entities that are controlled by the governments themselves, and not by other entities.[402]

4.319 **In response, Korea argues that**, the United States' assertion that the "control" test in Article I:1(c) of the Tokyo Round GPA "is not related to the control of 'central government entities' over their subdivisions," and instead refers to "the control of Code parties (*i.e.*, the governments themselves) over their 'quasi-governmental purchasing agents'" is not supported by the 1979 US International Trade Commission Report, as the United States claims.[403]

4.320 Korea states that the quote extracted by the United States from the Report confirms, first of all, that Article I:1(c) refers to "governmental units" as well as "quasi-governmental purchasing agents."[404] Korea states that, moreover, in discussing the impact of the "control" test in Article I:1(c), the Report specifically considers whether Amtrak and Comsat would be covered under "the normative 'direct substantial control' rule," and goes on to catalogue the control exercised over those entities by central government entities listed on the United States' Annex I.[405] Korea states that whether characterized as "governmental units" or "quasi-governmental purchasing agents," Korea had demonstrated that the MOCT "control" to which the United States alleges KAA is subject is remarkably similar to the control to which Amtrak and Comsat are subject by US Annex 1 entities. Korea states that if KAA is subject to GPA coverage by virtue of this "control" test, so are Amtrak, Comsat, and many other non-listed "myriad organizations tangential to the essential function of government."[406]

(c) Coverage of Entities or Sectors

4.321 **The United States asserts** that the GPA's negotiating history confirms the interpretation that the GPA provides for the coverage of sectors by way of entities. Specifically, the United States notes that in the 1979 independent USITC report, the Commission made clear that, with regard to coverage, "The code approach is to define coverage in terms of procuring entities . . . and value of contracts, together with numerous exceptions." However, the goal of "maximum coverage of procuring entities must be attained while achieving an agreeable balance of coverage in terms of quality (type) and quantity (value) of goods procured," which meant that coverage is actually:

> "a function of four factors: (1) types of procurement actions; (2) value of the procured product; (3) identity of procuring entity; and (4) specific exclusions from coverage. Each of these factors must be taken into account when determining the applicability of the code to any government contract action."

4.322 The United States argues that it is apparent from this excerpt that entities were covered based on the sectors and projects that they procure for, and not on the identities of the entities themselves. In other words, the sectors and projects that an entity was responsible for were the major factors for countries in considering which entities they would seek to be covered under the GPA. The United States contends that when a balance of rights and obligations was established between two of these negotiating countries, the balance was often considered not in terms of the number or the names of the entities, but in terms of total procurement value and/or the quality (for example, future procurement opportunities for domestic industry) of the concession packages. The United States asserts that, in short, GPA negotiators bargained for what the entities bought, not for who the entities were.

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[402] US Answer to Question 20 from the Panel, dated 29 November 1999.
[403] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999.
[404] USITC Report, p. 25.
[405] *Ibid*. pp. 41-44.
[406] Korea's Response to the US Answer to Question 20 from the Panel, dated 29 November 1999, citing USITC Report at p. 44.

(d) "The History of the Government Procurement Negotiations Since 1945"

4.323 **The United States argues** that when interpreted according to its ordinary meaning, in its context and in light of the object and purpose of the GPA, the scope of "central government entity" in Annex 1 of the GPA includes coverage of its branch offices and subsidiary organizations unless otherwise provided for in the GPA.

4.324 The United States contends that the negotiating history of the GPA confirms this interpretation. Specifically, the United States refers to an article entitled, "The History of the Government Procurement Negotiations Since 1945" which notes that "[i]t was necessary for the Agreement to have the widest possible coverage. This principle was agreed in the OECD."[407] The United States contends that, to now exclude coverage of a listed entity's subordinate units would not only be contrary to the above, but would also rid the GPA of most of its substantive coverage, for coverage of an entity that excludes its subordinate units actually amounts to no coverage at all.

2. History of Korea's Accession

(a) Bilateral Negotiations Prior to Korea's Accession

4.325 In order to confirm its interpretation of "central government entity" in Korea's Annex 1, **the United States** looks to the preparatory work of the GPA and the circumstances of its conclusion pursuant to Article 32 of the *Vienna Convention*. According to the United States, during Korea's accession negotiations, the United States explicitly bargained for and received coverage of all Korean Government entities responsible for the procurement of products and services related to new airport construction projects under Annex 1.

4.326 The United States submits that, from the outset of negotiations with Korea, it was made clear that the United States would only accept from the Government of Korea, a "credible offer with respect to ongoing negotiations to expand [the Procurement Code's] coverage,"[408] which included coverage of "all entities in the telecommunications, energy, transportation, and water sectors;" as well as "services and construction contracts."[409]

4.327 **Korea responds** that despite the United States' claim that it would have accepted nothing less, in negotiations with Korea, than coverage of "all entities in the . . . transportation . . . sector[]," it has acknowledged that it failed to achieve this goal.[410]

(i) The July 1991 Communication from Korea

Contents of the Communication

4.328 **The United States notes** that on 1 May 1991, pursuant to issues raised during the 22 April bilateral negotiations, the United States sent a list of follow-up questions to Korea regarding its accession package.[411] In it, the United States notes that it explicitly asked:

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[407] Annet Blank and Gabrielle Marceau, "The History of the Government Procurement Negotiations Since 1945," 5 *Public Procurement Law Review* 77, p. 99 (1996). The reference to the OECD alludes to "the research and negotiating work undertaken by the OECD from 1963 onwards" that attempted "to re-introduce government procurement into the general multilateral trade rules." *Ibid.* p. 77.

[408] US Department of Commerce Reporting Cable (Geneva 05022, May 91), paragraph 1. The "ongoing negotiations" is in reference to the Uruguay Round negotiations to expand coverage of the Procurement Code.

[409] *Ibid.* paragraph 5.

[410] Korea refers here to the US Department of Commerce Memorandum, referred to below in paragraph 4.388 *et seq.*

> "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."

4.329 In response to a question from the Panel as to what prompted these questions, the United States notes as follows. To assist US officials negotiating Korea's accession to the GPA following Korea's initial accession offer of 25 June 1990, the American Embassy in Seoul conducted a survey of US companies regarding areas of interest in the Korean procurement market. Specifically mentioned by American companies as priority areas of interest were coverage of the "Airport Development Group" with its responsibility over procurement for the new airport construction, as well as procurement of specific sectors including "airport systems," and "air and maritime communication and navigation equipment."[412]

4.330 The United States refers to Korea's response to the follow-up questions which was received in July 1991:

> "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."[413]

Procuring Entities Referred to in Communication

4.331 **The United States notes** that at the time the July 1991 response was received from Korea, the two entities Korea represented as being responsible for new airport construction projects in the response – the Ministry of Transportation and the Office of Supply – had already been listed in Korea's initial GPA offer. The United States further notes that coverage under Annex 1 of the same two entities was finalized on 15 April 1994 when Korea became a Party to the GPA.

4.332 The United States argues that following July 1991 when Korea represented that the Ministry of Transportation and the Office of Supply would be responsible for airport procurement, Korea did not broach the subject of airport procurement again. Further, the United States asserts that Korea did not attempt to amend the statements made in July 1991. According to the United States, given this series of communications and subsequent silence by Korean officials, it is reasonable for the United States to conclude that MOCT and the Office of Supply were indeed the only entities engaging in procurements for new airport construction projects. **Korea acknowledges** that its July 1991 response identified the Office of Supply as the "responsible organization" for IIA procurement. Korea states that pursuant to Article 2(5) of the *Government Procurement Fund Act*[414], the Korean Office of Supply would in principle have assumed procurement responsibility in respect of the IIA project.

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[411] US Questions Relating to Korea's Request to Accede to the Agreement on Government Procurement, May 1991.

[412] US Answer to Question 21 from the Panel, dated 3 November 1999.

[413] Korea's Answers to the Questions from USTR Relating to Korea's Request to Accede to the GPA, 1 July 1991, p. 6.

[414] Act No. 3580, 27 December 1982.

However, Korea argues that since the plan for the IIA project had not been completed and that site preparation for the project was not to commence for at least 16 months from the time Korea provided its response to the United States, Korea emphasized in its response that "the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage."[415] In response to a question from the United States, Korea states that these words should have served to alert any reasonable person that, at that point, nothing with regard to procurement was fixed. According to Korea, that would include the entity ultimately responsible for procurement.[416]

4.333 **In response, the United States notes** that with regard to the specifics of the 1991 Korean response, the United States does not consider the Korean statement "[b]ut at present, the concrete procurement plan has not been fixed…" as indicating a possible change in the entities responsible for procurement for the IIA project. According to the United States, Korea's response merely notes that the specifics of the procurement plan (i.e. the tendering schedule, estimated value of tenders etc.) have not yet been determined. The logical reading of Korea's statement is that the entities responsible for the procurement of the new airport construction are the New Airport Development Group under MOCT and the Office of Supply. However, exactly how these entities will construct the airport and what value of the associated procurements will be, has not yet been determined. The United States argues that had Korea intended to focus on which entities are responsible for airport procurement, it would have stated that the "procuring entities have not been fixed…" rather than the "procurement plan has not been fixed."

4.334 Moreover, the United States argues that Korea was clear and unequivocal regarding which entities were responsible for IIA procurement. The United States notes that in response to the United States question, the statement that the construction "is being conducted by the New Airport Development Group under the Ministry of Transportation," appears in an earlier paragraph before Korea's "qualification," and precedes a discussion of the possible timetable for the new project. Finally, the United States argues that by noting in its response that Bechtel was taking part in the basic plan project, Korea acknowledges that procurement had already begun for the airport project, with the assumption that the entities named were responsible for conducting this procurement.

4.335 **Further, in response to a question from the Panel, Korea notes** that the July 1991 communication should be put in context. Korea states that the inquiry from the United States was to Korea, largely academic when it was received. Korea states that its response was an accurate, good faith, honest response to an inquiry in another language. Korea further states that it was drafted – probably dictated to a stenographer in the drafter's second language – without reference to the New Shorter Oxford English Dictionary. Korea states that it believed it honestly and reasonably informed the United States that as of July 1991 the relevant entities were the Ministry of Transportation and the Office of Supply, but that nothing, as of that date, was fixed, and that a reasonable reader of that communication would have concluded that the existing situation was temporary.[417] Korea argues that this interpretation is warranted by the structure of the second paragraph of Korea's July 1991 response. Korea notes that immediately after the reference to the Office of Supply, Korea wrote, "But at present the concrete procurement plan … ." Korea argues that the reference to the entity in principle responsible for IIA procurement at that time, followed immediately by the statement that the "concrete procurement plan has not been fixed," coupled with the qualifier, "But at present," would lead any reasonable reader to conclude that the entire IIA project was in its infancy and undecided.[418]

4.336 **The United States responds by arguing** that Korea appears to suggest that it is exempt from the normal rules of treaty interpretation and of state responsibility with respect to its GPA schedules and other official documents merely because those documents were translated from Korean to

[415] Korea's Answers to Questions 15 & 16 from the US, dated 3 November 1999.
[416] Korea's Answer to Question 15 from the US, dated 3 November 1999.
[417] Korea's Answer to Question 16 from the Panel, dated 3 November 1999.
[418] *Ibid.*

English. The United States notes that Korea has already agreed that its schedule to the GPA be "[a]uthentic in the English language only." Indeed, the United States notes that all negotiating documents provided by Korea including the *Government Organization Act* were provided in English. Moreover, according to the United States, Korea has in many other instances argued for precise textual interpretations of translated Korean documents.

4.337 **In further support of its argument that it had not made any commitments regarding entities responsible for airport procurement, Korea refers** to a European Communities report regarding the progress of the Uruguay Round negotiations dated March 1993. Korea notes that the European Communities explicitly stated in the report that Korea had given "no offer regarding airports."

4.338 **In response, the United States notes** that Korea has not reconciled the statement in the EC report with its earlier statement that the Seoul and Pusan Regional Aviation Offices, responsible for airport projects "during the period 1992-1998," are covered under Annex 1 of the GPA. The United States argues that as "special local administrative organs" of MOCT, these Regional Aviation Offices should have been covered from the time MOCT was first placed on Korea's GPA accession offer in June of 1990.

4.339 The United States further notes that given the fact that Korea previously represented to the United States that IIA construction is the only airport project currently underway and that GPA Parties can choose to cover any entity under Annexes 1 or 3 regardless of the entity's procurement subject-matter or domestic legal status, Korea's position regarding the Regional Aviation Offices *vis-à-vis* General Note 1 remains highly problematic with respect to Korea's overall defense that KAA, KOACA and IIAC are not covered under Korea's GPA obligations.

Seoul and Pusan Regional Aviation Offices

4.340 **The United States argues** that in 1991, when the United States asked Korea for a list of entities responsible for new airport construction procurements, Korea made no mention of the Seoul and Pusan Regional Aviation Offices. The United States contends that this answer appears to contradict Korea's present argument that the Regional Aviation Offices have been awarding airport procurement contracts "during the period 1992-1998."

4.341 **Korea argues** that if the United States was intent on achieving GPA coverage for IIA procurement, it surely would have consulted industry regarding airport procurement. Korea asserts that, in that case, the United States would have been aware of the numerous examples of contracts awarded by the Regional Aviation Offices or the Office of Supply, during the period while the GPA negotiations were pending, for projects associated with the relevant airports. Korea refers to the evidence referred to in paragraph 4.239.

4.342 Korea further notes that in describing Korea's alleged failure in July 1991 to mention the Regional Aviation Offices in response to a question regarding the IIA project, the United States contends that its question "asked Korea for a list of entities responsible for new airport construction procurements." Korea states that this assertion is in error. Korea notes that the actual text of the United States' question was:

> "How does the *Airport Development Group* relate to the Ministry of Communication? 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."

4.343 Korea argues that its impression was that the United States was not asking about just any generic airport procurement. Given the United States' obvious emphasis on the Airport Development Group, NADG, Korea states that its response was entirely focused upon the airport with which NADG was associated – IIA. Korea states that its entirely reasonable assumption was that the United States' question was about the IIA project and that its response was to give as much information as was available about what was, at the time, a fledgling project.

Coverage of Entities or Projects

4.344 **The United States argues** that, in response to a direct question regarding the coverage of new airport construction from the United States, Korea explicitly represented that the New Airport Development Group of MOCT and the Office of Supply would be responsible for procurement of new airport construction. The United States asserts that by phrasing the question in sectoral terms, it is clear that the United States was interested in projects related to airport procurements. The United States further argues that Korea's response, in entity terms, created an expectation that airport procurements would be covered through the listing of MOCT and the Office of Supply. The United States concludes that it could reasonably expect airport procurement to be subject to the disciplines of the GPA through coverage of MOCT and the Office of Supply.

4.345 The United States further argues that the sectors and projects that an entity was responsible for were the major factors for countries in considering which entities they would seek coverage for under the GPA. In relation to this case, the United States contends that it sought to cover "new airport construction." The United States notes that Korea responded in July of 1991 that MOCT and the Office of Supply were responsible for "new airport construction."[419] The United States argues that, therefore, MOCT and the Office of Supply became covered, not just for procurements related to "new airport construction," but, pursuant to Article I:1 of the GPA for "any procurement by [these] entities," subject to explicit exceptions.[420]

4.346 **In response to a question from the Panel, Korea states** that its Annex 1 commitments were negotiated on the basis of entities, rather than projects. Korea notes that Annex 1 does list entities rather than projects. Korea states that it fails to see how this fact can be disputed. Korea further notes that neither Korea's initial offer nor its second offer nor its third and final offer, submitted in December 1993, include a list of projects for Annex 1.[421] In any event, Korea argues that since KAA was the entity responsible for IIA procurement from December 1991 through August 1994, if it was not covered, then the IIA was not covered.[422]

4.347 **The United States argues in response** that to accept Korea's position that the GPA provides pure entity coverage is to make the GPA a nullity. According to the United States, a Party could transfer procurement authority from listed entities to non-listed entities and not have to notify or compensate other Parties for such transfers because, as an agreement covering purely on the basis of entities, the listed entities are technically still "covered." The United States argues that, needless to say, the GPA would quickly be emptied of substance.

4.348 **Further, in response to the United States' argument, Korea reiterates** that procurements by MOCT and NADG (were any to exist) are indeed subject to the GPA, as are procurements by the Office of Supply for Annex 1 entities. However, according to Korea, this result does not flow from Korea's July 1991 response. Korea states that its July 1991 response was a reply to a factual question

[419] The United States notes that both these entities were already in Korea's GPA accession offer, and in fact MOCT was already responsible for awarding the first IIA procurement contracts for the basic plans.
[420] US Answer to Question 16 from the Panel, dated 29 November 1999.
[421] Korea's Answer to Question 4 from the Panel, dated 29 November 1999.
[422] Korea's Answer to Question 5 from the Panel, dated 29 November 1999.

from the United States about NADG, and did not speak in any way whatsoever to the question of GPA coverage.[423]

4.349 Korea states that, moreover, its July 1991 response did not speak to "new airport construction." Korea stresses that neither the question nor the answer spoke to a commitment to GPA coverage for anything at all – neither an entity, nor a sector called "new airport construction." Korea asserts that both the May 1991 question and the July 1991 answer were factual, and spoke to NADG and the IIA. Korea further states that the July 1991 response spoke to an entity that would in principle have been responsible for procurements for a particular airport, had there even been any at the time. Korea states that it is inaccurate to say that, in its July 1991 response, made two and one-half years before it signed the GPA, Korea committed to GPA coverage at all, much less GPA coverage for a sector called "new airport construction." Korea argues that the United States is using its own question, and not Korea's response, as evidence of Korea's commitments. This, states Korea, is no evidence at all.[424]

The February 1991 *Supplementary Explanation* of Korea's GPA Offer

4.350 Korea argues that during negotiations regarding Korea's accession to the GPA, the United States was aware of the existence and activities of Annex 1 entities undertaking "procurement for airports," whether related to new airport construction or work on existing airports. Korea further argues that the United States was aware that entities other than KAA – namely, the Regional Aviation Offices – existed, procured for Korean airports other than IIA and were included in Korea's offer.[425]

4.351 Korea notes that the Korean cable report[426], the questions put to Korea by the United States in May 1991[427] and a May 1991 US Department of Commerce cable report[428] all note the United States' receipt of a February 1991 document entitled "*Supplementary Explanation of the Note by the Republic of Korea, dated 29 June 1990, relating to the Agreement on Government Procurement*."[429] Korea further notes that page 11 of this *Supplementary Explanation*, explaining Korea's initial offer, lists the Regional Aviation Offices or Bureaus as included within Korea's commitment of the Ministry of Transportation. Korea notes that it does not list KAA.

The Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction

Reference to Act in 1991

4.352 **In response to a question from the Panel** requesting an explanation why Korea did not mention the 1991 *Seoul Airport Act* in its July 1991 response, **Korea notes** that the United States posed 17 questions, which deal with a wide variety of issues. Korea notes that only one question deals with the IIA. Korea asserts that an employee of the Ministry of Commerce provided good faith answers to all of these questions on 1 July 1991. Korea further states that the answers provided were, moreover, in depth and thorough.[430]

4.353 Korea argues that as is evident from Korea's July 1991 responses, it went to considerable lengths to answer the United States' questions, providing a 29-page response to two pages of questions from the United States. Korea states that it took the inquiries seriously, and provided thorough, detailed responses to anything that was asked of it. Korea states that it did not read into the United

[423] Korea's Response to US Answer to Question 17 from the Panel, dated 29 November 1999.
[424] Korea's Response to US Answer to Question 16 from the Panel, dated 29 November 1999.
[425] Korea's Response to US Answer to Question 17 from the Panel, dated 29 November 1999.
[426] Exhibit Kor-118.
[427] US Exhibit 4, Questions 9, 10, 11, 14, 15.
[428] US Exhibit 2, p. 2.
[429] Exhibit Kor-117.
[430] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.

States' inquiry, questions that were not posed, including questions about the *Seoul Airport Act* or any other legislation related to the IIA, such as the *Korea Airport Corporation Act*.[431]

4.354 Korea argues that given the diversity of topics raised by the United States, and the breadth of the answers given, it is not reasonable to expect Korea, or any Member, to go well beyond what was asked, and to provide information in each case about whatever it may have considered that the United States might possibly have considered interesting. Korea states that were it or any other Member to accept such a burden, the virtual impossibility of successfully addressing every possible issue would virtually guarantee failure, and subject it to certain liability in later disputes.[432]

4.355 In support of its position, Korea states that this undoubtedly is one reason why the Appellate Body, in the *Computer Equipment* case, rejected the notion that the "importing party" (here, Korea) bore the responsibility for the clarity of its tariff schedule. Korea states that according to the Appellate Body, "exporting Members" (here, the United States) have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed.[433] Korea notes that in July 1991, Korea offered 29 pages of good faith responses to 17 questions posed by the United States. Korea asserts that under the principles enunciated by the Appellate Body in the *Computer Equipment* case, it can be charged with nothing more, without forcing upon it a burden properly put upon the United States.[434]

Status of Act at Time of July 1991 Response

4.356 **In response to a question from the Panel** that requested details regarding the progress of the *Seoul Airport Act* from the policy phase to the legislation phase, **Korea argues** that, in the abstract, it is impossible to say with any precision how long it takes for legislation to run its course. Korea argues that as with most other Members with legislatures independent of the executive, the time required to pass legislation depends on many factors, including the degree and intensity of opposition.[435]

4.357 Korea states that the following timeline, applied to the December 1991 amendments to the *Seoul Airport Act*, by which KAA was nominated as the entity responsible for the IIA project:[436]

26 June 1991:	MOT makes an internal decision to recommend that KAA be assigned by the National Assembly as the entity responsible for the IIA project, in draft legislation proposed to amend the *Seoul Airport Act*
10 July 1991:	MOT publishes a public notice of draft legislation containing proposed amendments to the *Seoul Airport Act*
29 July 1991:	Vice-Ministers of concerned Ministries meet to discuss the draft legislation
6 August 1991:	Directors General of these same concerned ministries meet to discuss the draft legislation
14 August 1991:	The draft legislation is approved at a meeting of the Vice-Ministers of the Economic Ministries
8 October 1991:	The draft legislation is approved at a meeting of all Vice-Ministers
9 October 1991:	The draft legislation is approved at a Cabinet meeting of the all Ministers
16 October 1991:	The draft legislation is approved by the President of Korea

[431] *Ibid.*
[432] *Ibid.*
[433] *EC – LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted on 22 June 1998), paragraph 109.
[434] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[435] Korea's Answer to Question 3 from the Panel, dated 29 November 1999.
[436] *Ibid.*

21 October 1991:	The draft legislation is transferred to the National Assembly
12 November 1991:	The draft legislation is tabled with the National Assembly's Committee on Transport and Communication
19 November 1991:	The draft legislation is approved by the National Assembly's Committee on Transport and Communication
20 November 1991:	The legislation is adopted at a plenary session of the National Assembly
29 November 1991:	The legislation is transferred to the President of Korea
14 December 1991:	The legislation is signed by the President, promulgated as Law No. 4436 and published in the *Official Gazette*

4.358 Korea notes that the legislation in question was not particularly controversial, and, thus, was enacted in a comparatively short time. Korea states that, as is evident from this timeline, the Ministry of Transportation made an internal decision to recommend that the National Assembly appoint KAA as the entity responsible for the IIA project on 26 June 1991. Korea notes that a public notice was not issued by the Ministry of Transportation until 10 July, 10 days after the 1 July response from the Ministry of Commerce, an entirely different agency. The Ministry of Transportation's decision to recommend KAA was not discussed with other ministries until the 29 July and 6 August meetings of interested vice-ministers and directors general.[437]

4.359 Korea states that the Ministry of Commerce, which prepared Korea's responses to the United States' questions, was simply not aware of the Ministry of Transportation's internal decision when it provided those responses to the United States on 1 July 1991. Korea further states that, moreover, the employee of the Ministry of Commerce who drafted responses to the United States' questions would have completed a draft before 26 June 1991, to allow for review by his superiors in advance of the 1 July 1991 submission. Korea argues that for either or both of these reasons, the decision to recommend KAA's involvement in the IIA project would not have been known to the Ministry and individual preparing Korea's 1 July 1991 response.[438]

4.360 Korea argues that even if the individual preparing Korea's 1 July 1991 response had been aware of the Ministry of Transport's 26 June decision, it would have been highly presumptuous for an employee of the Ministry of Commerce to communicate to the United States the inclusion of KAA in draft legislation yet to be discussed, let alone approved, by the relevant directors general, vice-ministers and ministers, along with the President of Korea and the National Assembly. Korea states that on 1 July 1991, when Korea provided its response to the United States, the draft legislation with proposed amendments to the *Seoul Airport Act* was little more than a proposal.[439]

4.361 Korea offers a parallel example to illustrate its point. In Korea's view, it would be politically impossible for an employee of the Office of the United States Trade Representative to offer preliminary information or assurances to a foreign negotiating partner regarding specific terms of not-yet-introduced legislation before domestic approval of the legislation was secured from the Cabinet and the President, if not of the Congress. According to Korea, conduct by the USTR suggesting that any of these approvals was merely a technical formality would engender serious political ramifications, and would counsel against providing the information to the foreign negotiating partner in the first place. Korea states that it should not be held to a different standard.[440]

4.362 **In response, the United States notes** that Korea's responses themselves do not indicate on which day in July they were provided. The United States notes that these responses merely read,

[437] *Ibid.*
[438] *Ibid.*
[439] *Ibid.*
[440] *Ibid.*

"July 1991." The United States asserts that Korea offers no basis for its arbitrarily determined date of 1 July.[441]

4.363 The United States further notes that, in any case, it remains uncontested that the Ministry of Transportation's internal decision to recommend that KAA be assigned as the IIA project operator was made prior to the date on which Korea provided its responses to the United States, and that Korea did not inform the United States of MOT's internal decision in its July 1991 responses. The United States argues that because it remains unclear on what day in July 1991 Korea provided its responses, it is quite possible that MOT had already published the public notice of draft legislation containing proposed amendments to the *Seoul Airport Act*[442] and that the Vice-Ministers had already met to discuss this draft legislation[443] before Korea provided the United States with its July 1991 responses.[444]

4.364 The United States argues that, finally, it is important to keep the above discussion in perspective, and remember that the December 1991 amendment to the *Seoul Airport Act* did not alter MOCT's ultimate authority over the IIA project, and merely added KAA to the list of potential project operators.[445]

Completion Date of the Project

4.365 **In response to a question from the Panel, Korea notes** that its July 1991 response which states that the project would be completed by 1997, was provided six months before the basic plan was completed by a US company, Bechtel, in December 1991.[446] Korea notes that even though the statement in July 1991 regarding the 1997 completion date was apparently for the entire project, it was obviously based on very preliminary estimates by the Korean Government. Korea asserts that 1997 was simply a target time. Korea argues that while the schedule for the IIA project has, as with most large construction projects, been subject to considerable change over the years, the airport is currently scheduled to open in January 2001.[447]

4.366 The United States argues in response that although the airport is currently scheduled to open in January 2001, according to a 1998 revision to the airport plan, the Inchon airport development project will not be fully completed until 2020.[448] The United States asserts that, thus, Korea's discriminatory procurement practices have the potential of adversely affecting US companies for the next two decades.[449]

(ii) The May 1991 US Cable Report

Contents of the Cable Report

4.367 **The United States argues** that the arguments advanced by Korea would merely diminish Korea's obligations under Annex 1, which would then be in conflict with Korea's previous representations. Specifically, the United States refers to a May 1991 US Department of Commerce reporting cable, which, according to the United States, provides a factual account of the first round of GPA bilateral negotiations between the United States and Korea, held on 22 April 1991:

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[441] US Response to Korea's Answer to Question 3 from the Panel, dated 29 November 1999.
[442] Korea indicates that this took place on 10 July 1999.
[443] Korea indicates that this took place on 29 July 1991.
[444] US Response to Korea's Answer to Question 3 from the Panel, dated 29 November 1999.
[445] *Ibid.*
[446] Inchon International Airport: A Future-Oriented Airport, Increasing the Value of Time, p. 42. See also Exhibit Kor-11 (Contract for the basic plan).
[447] Korea's Answer to Question 13 from the Panel, dated 29 November 1999.
[448] US Exhibit 18.
[449] US Response to Korea's Answer to Question 13 from the Panel, dated 29 November 1999.

> "The Korean Del was asked to clarify Note 1 [of Korea's Annex 1]. The Korean Rep said that this Note was meant to "explain, not to derogate." The US Del noted that it seemed to be obvious that if an entity were covered, then all its subsidiary bodies would also be covered unless an explicit exception were stated [sic] in the offer. Therefore, it was unclear what the note was meant to add. The Korean Rep reiterated that the Note was not intended to limit their offer in any way and suggested that if it was causing concern they could consider dropping it."[450]

Meaning of the Cable Report

4.368 **According to the United States**, the May 1991 US Department of Commerce reporting cable summarizes the discussion between Korea and the United States as they tried to reach a mutual understanding regarding the meaning of Note 1.[451] The United States contends that the cable records the parties' agreement regarding Note 1's intent to cover all "subsidiary bodies" of "central government entities" under Korea's Annex 1, unless "an explicit exception were stated in the offer." The United States asserts that, as Korea represented, Note 1 was not meant to "derogate," nor to "limit [Korea's] offer in any way;" Note 1 was never intended to exclude subsidiary organs from Annex 1 coverage. The United States concludes that, therefore, as subsidiary organizations of MOCT, KAA, KOACA and IIAC are also covered under Korea's Annex 1 pursuant to Note 1.

4.369 The United States further argues that Note 1 does not embody the "universe of bodies internal to central government entities under Korean law" and the *Government Organization Act* does not encompass the "entirety of the Korean central government structure". The United States argues that Note 1 does not define the scope of "central government entity" but, rather, expands it. The United States asserts that this interpretation has been confirmed by Korea when it states that, "Note 1 was not meant to 'limit' its Annex 1 offer." The United States argues that such an interpretation is consistent with the principle of effectiveness. The United States further argues that it is also consistent with the reasoning that Note 1 cannot both define and expand the scope of "central government entity."

4.370 The United States notes that the negotiating history may be used as a supplementary means of interpretation pursuant to Article 32 of the *Vienna Convention* should there remain any uncertainty or ambiguity about the meaning of Note 1. For example, in its recent report on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the Appellate Body, after determining that "the language in the notation in Canada's Schedule is not clear on its face…the language is general and ambiguous and, therefore, requires special care on the part of the treaty interpreter," found it "necessary, in this case, to turn to 'supplementary means of interpretation' pursuant to Article 32 of the *Vienna Convention*."

4.371 According to the United States, in the May 1991 US Department of Commerce reporting cable, Korea agreed with the United States that, "if an entity were covered, then all its subsidiary bodies would also be covered unless an explicit exception" were stated otherwise, and then conceded that Note 1 "is not intended to limit their offer in any way." Thus, the United States maintains that it is clear that Note 1 does not diminish the scope of coverage of Korea's Annex 1, i.e., branch offices and subsidiary organizations are still covered. The United States argues that in order to avoid interpreting Note 1 as being redundant or useless then one must interpret it as expanding Korea's Annex 1 coverage to include entities that might not be branch offices or subsidiary organizations of

[450] Department of Commerce Reporting Cable (Geneva 05022, May 1991), paragraph 14.

[451] The United States notes that it is the common practice of US government officials to provide just such a factual report after each negotiating round. Although it might be argued that such a description is one-sided or capable of being inaccurate, the United States contends that it must be kept in mind that the US negotiator is under a duty to observe, report, and record these negotiations properly and factually, without any attempt at analysis. These reports are made in the "ordinary course" of a negotiator's business, and therefore should be considered reliable.

listed "central government entities" but are still a "subordinate linear organization," "special local administrative organ" or "attached organ" pursuant to Note 1.

4.372 **In response, Korea notes** that despite the fact that Note 1 to Korea's Annex 1 specifically and unambiguously defines the terms "subordinate linear organization," "special local administrative organ" and "attached organ" by reference to the *Government Organization Act*, and despite the fact that the *Government Organization Act* does not include KAA, KOACA or IIAC within the definition of "subordinate linear organization," "special local administrative organ" or "attached organ," the United States argues that this cable, alone, subjects procurement by KAA, KOACA and IIAC to the terms of the GPA. Korea states that this position cannot be accepted.

4.373 Korea argues that the cable does not state, and Korea did not agree, as the United States alleges, "to cover all 'subsidiary bodies' of 'central government entities' . . . unless 'an explicit exception were stated in the offer'." Korea states that Note 1 clarifies and defines the scope of those bodies internal to ministries listed on Annex 1. Korea further argues that Note 1 "excludes" or "excepts" nothing that would otherwise be included in these ministries under Korean law. Rather, in listing "subordinate linear organizations, special local administrative organs, and attached organs as prescribed by the *Government Organization Act* of the Republic of Korea," Korea argues that Note 1 includes the universe of bodies that are internal to an Annex 1 entity, and are, therefore, logically covered.

Status of the Cable Report

4.374 With respect to the status of the cable, **Korea argues** that this document cannot be considered "preparatory work," for two reasons. Korea argues that, first, it was not available to Korea before its accession to the GPA, and as a result cannot possibly be part of the commitments Korea accepted upon accession.[452] Korea states that had it seen the cable report prior to accession and therefore known the United States' view, it would have objected to or at least clarified the United States' interpretation of statements made by Korea at the 22 April 1991 meeting that the US cable purports to record. Korea states that, secondly, the cable report speaks only to the United States' expectations of what it had secured. Korea notes that the United States' expectations are relevant only in the context of its non-violation claim.[453]

4.375 Korea states that even if the cable report is considered "preparatory work," Article 32 of the *Vienna Convention* provides that "preparatory work" is relevant only where the ordinary meaning of an agreement is ambiguous, obscure, or leads to an absurd result. Alternatively, it may be used to "confirm" an interpretation derived through the application of Article 31.

4.376 Korea states that the circumstances surrounding the United States' reliance on the May 1991 cable do not satisfy the requirements of Article 32. According to Korea, the reference in Note 1 to the *Government Organization Act* as the source of the definition for the term "subordinate linear organizations" is anything but ambiguous. Further, Korea states that Article 2(3) of the Act is clear, even if it does not correspond to a list the United States might adopt in its own domestic law. Korea argues that, furthermore, the fact that the United States, the European Communities, Hong Kong, Japan, Liechtenstein, Norway and Switzerland all define terms in their respective GPA Appendix I by

[452] Sir Ian Sinclair, The Vienna Convention on the Law of Treaties (2nd Ed., 1984), p. 144. Korea notes that Professor Sinclair reasons that preparatory works must be "in the public domain" so that subsequently acceding States can know to what they are being bound. There is no logical reason why original signatory States should not also have the benefit of knowing about any documents that purport to bind them to something of which they were not aware.

[453] *EC - LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted on 22 June 1998), paragraph 80 (Reference to a complainant's reasonable expectations "in the context of a violation complaint 'melds the legally-distinct bases for violation and non-violation complaints . . . into one uniform cause of action,' and is not in accordance with established GATT practice.").

reference to provisions of their domestic law indicates that to do so is far from an obscure or an absurd practice. Korea also states that the fact that the United States had the *Government Organization Act* at its disposal during negotiations with Korea regarding its GPA commitments demonstrates that giving the reference in Note 1 to the *Government Organization Act* effect is far from absurd. Finally, Korea asserts that the United States is not relying on this so-called preparatory work to "confirm" an interpretation derived through the application of Article 31. According to Korea, it is, rather, using the cable in an attempt to overturn the ordinary meaning of Korea's Note 1.

4.377 Korea states that, at most, the cable constitutes one party's record of discussions regarding the GPA. Korea argues that this type of evidence is self-serving. Korea states that it does not accept the unilateral characterization of the April 1991 meeting made by the United States. Korea further argues that Article 32 of the *Vienna Convention* does not, for good reason, permit the notes of a party with a vested interest in a particular interpretation to trump the unambiguous ordinary meaning of the terms included in an agreement, particularly where both the accuracy and the interpretation of those notes is disputed, as it is in this case.

4.378 **In response, the United States argues** that the cable report should be taken into account because Article 32 of the *Vienna Convention* explicitly permits the use of "circumstances of [the GPA's] conclusion" as a supplementary means of interpretation.

4.379 The United States further argues that the *Vienna Convention* rightly accords only a subordinate role to "supplementary means of interpretation" precisely because the documentary record of preparatory work or the circumstances of a treaty's conclusion may be incomplete, one-sided, or inconclusive. The United States argues that the Panel can and should determine through an interpretation under Article 31 that airport procurement is covered within the scope of Korea's GPA commitments. According to the United States, this interpretation is neither ambiguous nor obscure and does not lead to an absurd or unreasonable result. The United States asserts that, to the contrary, an interpretation that this procurement is not covered would be absurd and unreasonable. The United States argues that it is not necessary for the Panel to have recourse to any supplementary means to confirm the reading that the United States has given to Korea's Schedule under Article 31.

Accuracy of the Cable Report

4.380 Regarding the accuracy of the US cable, **Korea notes** that the document discussed at the meeting to which the cable relates was Korea's 25 June 1990 offer, which contained both notes and footnotes. Korea states that its notes of the April 1991 meeting, which are included in a Korean reporting memorandum written the day after the meeting, confirm that the United States indeed asked a question regarding whether attached organs, supporting organs and offices were included in Korea's offer.[454] Korea states that the notes also confirm that the United States asked a question about "the reason for setting up 'Footnote 1', 'Footnote 3', and 'Note 1', 'Note 2', 'Note 3', 'Note 4' and 'Note 5'; and the possibility of removing these 'Footnotes' and 'Notes'." The specific offer under consideration was Korea's first offer, dated 25 June 1990. Korea notes that that offer included a list of "Purchasing Entities," along with four footnotes and five notes thereto.

4.381 Korea states that the accuracy of the United States' May 1991 cable, however, ends there. Korea states that it offered to drop footnote 1 and not Note 1. Korea states that, indeed, footnote 1 was dropped and Note 1 was not dropped. Korea states that the memorandum containing Korea's report of the meeting records no discussion about Note 1, and instead includes a conditional offer to delete Footnote 1, which exempted "purchases for the purpose of maintaining public order" from

[454] Memorandum from the Permanent Mission of the Republic of Korea, 23 April 1991, p. 2. Korea states that the notes contained in this memorandum report on 22 April 1991 bilateral GPA negotiations with both the European Communities and the United States.

Korea's offer to include procurements by the Ministry of Home Affairs. Specifically, the Korean memorandum states:

> "Regarding 'Footnote 1' and 'Note 2' and 'Note 3,' Korea stated that if Korea and US had a clear mutual understanding of the GPA and GATT agreements, it may be possible to delete these points."

4.382 Korea states that it did not, therefore, offer to delete Note 1 from its offer, that any discussion about the "explanatory" as opposed to the "limiting" effect of its offer was, like its conditional offer regarding deletion, relevant to Footnote 1, Note 2 and Note 3. Korea notes that while a slightly amended version of what was Note 3 to Korea's initial offer appears in Korea's Annex 1 as Note 2, Footnote 1 and Note 2 to Korea's initial offer were deleted, and do not appear in its Annex 1.

4.383 Korea states that, moreover, and assuming, *arguendo*, that Korea's offer was to delete Note 1 rather than Footnote 1, the Korean memorandum reporting on this same meeting stated that the offer to do so was conditional on reaching a "clear mutual understanding" with the United States regarding the GPA. Korea states that such an understanding would have to include an agreement of the whole point to Note 1 in the context of the Korean Government system.

4.384 Korea notes that it is true that Note 1 was not meant to "limit" its Annex 1 offer. Korea notes that when it committed to coverage for the entities listed on Annex 1, along with their "subordinate linear organizations, special local administrative organs, and attached organs as prescribed by the *Government Organization Act*," Korea committed the universe of bodies internal to central government entities under Korean law.

4.385 Korea notes that if, indeed, it stated that Note 1 was "meant to 'explain, not to derogate'" or "to limit," it said so with the knowledge that it was committing everything that belongs to any of the central government entities listed on Annex 1, under the Korea system of government represented in the *Government Organization Act*. The entirety of the Korean central government structure is embodied in the *Government Organization Act*, and all of it, with regard to the entities listed on Annex 1, is included in Korea's Annex 1 commitment.

4.386 Korea notes that according to the United States, the May 1991 US cable report indicates an "agreement" between the parties. Korea states that the cable report makes clear that Korea made no such commitment. Further, Korea states that it does not accept the unilateral characterization of the April 1991 meeting by the United States.

Timing of Cable Report

4.387 **Korea states** that even if it were assumed for the sake of analysis that the May 1991 US cable report is correct in its description of events, Korea submits that it establishes nothing in relation to Korea's GPA obligations. Korea notes in this respect that April 1991 was a full three years before the GPA was signed and July of 1991 was more than two and one-half years before the GPA was signed. Korea further notes that these events were some two years and two and one-half years, respectively, before Korea's final offer. Korea notes that it didn't have any GPA obligations at that time.

(iii) US Department of Commerce Memorandum

4.388 **Korea also states** that despite the United States' claim that it would have accepted nothing less, in negotiations with Korea, than coverage of "all entities in the telecommunications, energy, transportation, and water sectors," it has acknowledged that it did not achieve this goal. In a Department of Commerce memorandum regarding the GPA, the United States explains that "major purchasers of transportation and telecommunications equipment" are absent from its own GPA

commitments "because other GPA signatory countries were unwilling to offer these entities for coverage ... ."[455]

4.389 Korea notes that in similar circumstances, the International Court of Justice has attached particular significance to "statements against interest," such as these, placing them on equal footing with evidence offered by disinterested witnesses, and deeming them to be "of superior credibility."[456] Korea notes that, for example, in the Nicaragua case, the Court considered such statements tantamount to admissions:

> "The material before the Court . . . includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission."[457]

4.390 Korea submits that the statements by the United States and the European Communities (in the EC Commission report of March 1993), as "statements against interest," should be considered as admissions of the fact that the entities responsible for IIA procurement are not covered entities under the terms of the GPA.

4.391 **In response, the United States argues** that one glance at the Department of Commerce memorandum will tell the reader that the memorandum is not about what Korea excluded from its coverage. The United States asserts that, instead, it is about broader issues, such as the European Community's General Note 6, which explicitly states that "contracts awarded by entities in Annexes 1 and 2 in connection with activities in the fields of drinking water, energy, transport or telecommunications, are not included." In contrast, argues the United States, Korea's argument enjoys no such textual support.

(b) Communications Following Korea's Accession

(i) July 1998 Communication from the United States

Interpretation of Contents of Letter

4.392 **Korea refers** to a letter from the United States Embassy in Seoul to the Korean Ministry of Foreign Affairs and Trade, dated July 1998, in which the United States proposed that:

> "During the period before KOACA formally is brought under the GPA, . . . [KOACA] agree to measures that would bring its procurement policies and practices de facto into conformity with the internationally-acceptable provisions of the GPA ... ."

4.393 Korea argues that if the time at which the above letter was written, namely, July 1998, was "before" the entities responsible for IIA procurement were "formally" covered, then those entities

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[455] US Department of Commerce, International Trade Administration, Government Procurement Agreement, Publication No. 4019, undated, pp. 6 –7.

[456] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14, 42-43 (paragraph 69).

[457] *Ibid*. paragraph 64, p. 41.

were not covered at all at that time. Korea further argues that there is no such thing as informal coverage and that if the entities referred to in the United States were "formally" covered in July 1998, the United States would not have requested de facto compliance with the GPA. Rather, it would have demanded *de jure* compliance.

4.394 In response to a question from the Panel requesting clarification of the July 1998 letter, the **United States notes** that at all times, including in the July 1998 letter from the US Commercial Officer, the United States has maintained that procurement by entities responsible for the construction of the Inchon International Airport were covered under Korea's obligations under the WTO GPA. The United States asserts that its position that KOACA was a covered entity has never changed.[458]

4.395 Further, the United States argues that Korea's argument was based on a single sentence taken out of context. The United States notes that had Korea quoted the entire relevant paragraph, it would have included the sentence indicating that the United States, "hold[s] firm to our position that KOACA should be covered by GPA disciplines."[459]

4.396 The United States also notes that following this statement of the US position, the letter goes on to urge the Korean Government to ensure that KOACA bring its procurement policies and practices de facto into conformity with the GPA. The United States contends that this is entirely consistent with the US position that KOACA and other entities procuring for the Inchon International Airport, were, and, as far as is known, continue to be as a matter of fact, acting in violation of the GPA. The United States notes that in the letter, the United States urges Korea, as a factual matter, to discontinue these discriminatory practices.[460]

Interpretation in light of the *Vienna Convention on the Law of Treaties*

4.397 **In response to a question from the Panel, Korea argues** that while the July 1998 letter is not itself treaty language, Korea believes it has great relevance to the interpretation of Korea's obligations under the GPA in light of Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. Korea argues that, first, with regard to the good faith requirement of Article 31.1, the United States cannot now claim that KOACA is a covered entity when only last year the United States explicitly took the position that KOACA was not covered. Second, Korea argues that with regard to Article 31.2(a), the letter is evidence of an agreement (in the sense of a common understanding) between the parties that KOACA was not covered. In Korea's view, this letter, four years subsequent to the treaty, clearly shows that both parties agreed on an interpretation of the provisions of the GPA that do not cover KOACA. Third, Korea states that with regard to Article 31.3(a), the letter is evidence of subsequent agreement between the parties regarding the interpretation of the GPA or the application of Article I and Appendix I. Fourth, Korea states that with regard to Article 31.3(b), the letter is practice that establishes the agreement of the parties regarding the GPA's interpretation. Fifth, Korea states that with regard to Article 31.3(c), the principle of equitable estoppel is a rule of international law[461]; Korea states that it reasonably relied on the United States' letter as evidence of its position and argues that the United States should not now be permitted to change its position to the detriment of Korea. Sixth, Korea states that it does not believe resort to Article 32 is necessary, but if it were, the letter clearly is a "supplementary means of interpretation" that confirms Korea's reading of its GPA obligations. Finally, Korea states that while not directly relevant to Articles 31 and 32, the July 1998 letter, in the context of this dispute, constitutes a statement against interest, which, as the

[458] US Answer to Question 27 from the Panel, dated 3 November 1999.
[459] *Ibid.*
[460] *Ibid.*
[461] J.L. Brierly, The Law of Nations 63 (Oxford 1963); Ian Brownlie, Principles of Public International Law 18 (Oxford 1990).

International Court of Justice has noted, may be construed as a form of admission, as discussed in paragraph 4.389.[462]

4.398 **In response to the same question from the Panel, the United States argues** that in its view, its July 1998 letter does not fit within the customary rules of treaty interpretation, as set forth in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. Article 31 states that 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 the light of its object and purpose." The United States contends that as the letter in question post-dates the concession, it cannot be used to determine the object or purpose of Korea's concessions. In addition, the United States contends that this letter does not provide evidence of "any subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation" under Article 31.3(b). The United States contends that, indeed, the letter was drafted at a time when Korea and the United States were on a pre-litigation footing. The United States contends that, thus, it cannot be construed as evidencing any type of either agreement or practice between the United States and Korea. The United States further states that it does not suggest that there is any "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" as provided for in Article 31.3(a) of the *Vienna Convention*, particularly given the clear disagreement between the United States and Korea regarding what the letter says. The United States argues that, moreover, the meaning of Korea's concession in this case is not ambiguous or obscure, so an interpretation under Article 32 is inappropriate.[463]

Impact of Interpretation of Letter on other Arguments

4.399 In response to a question requesting clarification of how the fact that KOACA was not a covered entity would impact on the argument that KAA and IIAC are covered, **the United States argues** as follows. The United States asserts that if it is determined that KOACA was not a covered entity, there would be no impact on the US argument that KAA is covered because (1) KAA is still a subsidiary organization of MOCT, and all subsidiary organizations of "central government entities" are automatically covered under Annex 1 unless otherwise specified, and (2) KAA's procurements are in fact procurements by MOCT, pursuant to Article I of the GPA. The United States argues that as to the question of whether IIAC would be covered, that would depend on the reason why KOACA is not covered. In any case, if KOACA was determined not to be covered, the United States asserts that the result would be a shift in the mutually agreed balance of concession — MOCT responsibility for IIA procurement was transferred out of a covered entity. The United States argues that, therefore, Korea is obliged to make compensatory adjustment for its unilateral exclusion of airport procurement in order to re-balance the rights and obligations between the two countries.[464]

(ii) Letters from US Government Officials to Korean Government Officials

4.400 **The United States contends** that it has made its position undeniably clear on many occasions that KOACA is covered under Korea's GPA obligations and that KOACA's discrimination against US bidders on IIA projects is inconsistent with Korea's GPA obligations. In this respect, the United States refers to the fact that senior United States officials sent at least six letters to Korean Government officials unequivocally asserting the US position that KOACA was covered under Korea's GPA obligations, and that KOACA's procurement practices were in violation of Korea's obligations under the GPA.[465] These letters include: a letter dated 3 June 1997 from Charge d'Affaires Richard Christenson of the American Embassy in Seoul to KOACA Chairman Kang, Dong-Suk; a

[462] *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14, 42-43 (paragraph 69).
[463] US Answer to Question 31 from the Panel, dated 3 November 1999.
[464] US Answer to Question 28 from the Panel, dated 3 November 1999.
[465] US Answer to Question 27 from the Panel, dated 3 November 1999.

letter sent 17 August 1998 from United States Under Secretary of Commerce David Aaron to Korean Minister of State for Trade Han, Duck-Soo; a letter sent 17 August 1998 from United States Under Secretary of Commerce David Aaron to KOACA Chairman Kang, Dong-Suk; a letter dated 11 September 1998 from US Ambassador to the WTO Rita Hayes to Korean Ambassador to the WTO Man-Soon Chang; a letter dated 15 September 1998 from United States Under Secretary of Commerce David Aaron to Minister of Construction and Transportation Lee Jung; a joint letter dated 14 January 1999 from Secretary of Commerce William Daley and US Trade Representative Charlene Barshefsky to Korean Minister of Foreign Affairs and Trade Hong Soon-Young.

(iii) Memorandum from Korea's Ministry of Foreign Affairs and Trade to KOACA

4.401 **The United States also refers** to a memorandum from Korea's Ministry of Foreign Affairs and Trade (MOFAT) to KOACA, which it says reveals that Korea never had any misunderstanding regarding the US position that KOACA and IIA procurement are covered under Korea's GPA obligations. The United States notes that the memorandum was sent shortly after the July 1998 letter from the US Commercial Officer, Karen Ware. The United States further notes that the subject of the memorandum is "GPA application to KOACA," and states, in relevant part, "Ms. Karen Ware, Commercial attaché of US Embassy pointed out as per the attached letter that GPA should be applied by KOACA tender... ."[466]

(iv) Representations made in September 1998

4.402 **The United States argues** that in September 1998, in response to a question from the United States regarding the scope of KOACA's responsibility and whether KOACA was "responsible for all airport construction projects currently being planned or implemented by government entities in Korea," Korea did not mention procurements for other airports by the Office of Supply or the Regional Aviation Offices, and instead replied:

> "KOACA is responsible for the construction of the Inchon International Airport. At present, there are no other plans for airport construction."[467]

4.403 The United States argues that throughout Korea's GPA accession negotiation, and even after the GPA came into force for it, Korea never once referred to these Regional Aviation Offices in the context of Annex 1 coverage of airport procurement. Further, the United States contends that Korea's answer appears to contradict Korea's present argument that the Regional Aviation Offices have been awarding airport procurement contracts during the period 1992-1998.

4.404 The United States also notes that in the question immediately preceding the question posed by the United States mentioned above, the United States asked:

> "Please identify all government entities that were responsible for airport construction projects at [the time bilateral negotiations between the United States and Korea relating to Korea's participation in the GPA were concluded (1993)] and the relationship of those entities to KOACA, which was established subsequently."

4.405 The United States notes that Korea responded as follows:

> "No other institutions besides the New Airport Development Group was involved in the construction of the airport."[468]

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[466] *Ibid.*
[467] Korean response to US Question 7(a), dated September 1998, (GPA/W/76).
[468] Questions 6(a) and 6(b) (GPA/W/76).

4.406 The United States notes that, again, Korea neglected to mention the Seoul and Pusan Regional Aviation Offices. The United States state that, in fact, Korea even neglected to mention KAA, thus admitting that, as of 1993, the New Airport Development Group of MOCT was still responsible for IIA construction.

4.407 **Korea argues in response** that the United States neglects to mention that the entire backdrop to the series of 27 questions raised in the September 1998 questionnaire was a growing dispute with Korea regarding the applicability of the GPA to, specifically, KOACA, as an entity responsible, again specifically, for IIA procurement. Korea refers to the minutes of the 18 February 1998 and 25 June 1998 meetings of the Committee on Government Procurement, which record the disagreement and characterize it as one regarding the "*Korea Airport Construction Authority*" and the "*International Airport Construction Corporation*."[469] Korea also refers to a letter from Ambassador David Aaron of the US Department of Commerce, dated 17 August 1998, specifically discussing *KOACA's* procurement procedures for the IIA project.[470] Korea notes that the questionnaire was sent to Korea by the United States shortly after this letter, on 11 September 1998.[471]

4.408 Korea argues that the context and content of the questionnaire, therefore, was entirely focused on KOACA and its role in the IIA project. Korea states that it is understandable that Korea's response to the United States' questions would, therefore, focus on KOACA and the IIA project.

4.409 Korea argues that it is not incumbent upon Korea to mention something about which the United States did not ask, such as the Regional Aviation Offices. Korea states that for practical reasons alone, guessing what would have been important to the United States or any other negotiating partner would have been impossible. If any participant in a negotiation were to accept such a burden, the sheer impossibility of fulfilling it would subject it to almost certain liability. Korea questions whether any deleterious impact on the United States or any other signatory could be alleged with regard to the "failure" by Korea to raise the role of the Regional Airport Offices in procurement for airports have had on the United States or any other signatory, and what the effect it would it have on this dispute. In any event, Korea notes that if the United States consulted with US industry carefully and extensively with regard to airport procurement, it surely would have been aware of both the potential bidding opportunities available to and the contracts secured by US companies from the Office of Supply and the Regional Aviation Offices during the period while the GPA negotiations were pending.

4.410 Korea also notes that the United States was in fact aware of the Regional Aviation Offices during negotiations regarding Korea's accession to the GPA. Korea points to a February 1991 document, titled "*Supplementary Explanation of the Note by the Republic of Korea, dated 29 June 1990, relating to the Agreement on Government Procurement*," that lists the Regional Aviation Offices as included within Korea's offer by virtue of its inclusion of MOCT. Korea provides evidence demonstrating that the United States received this document in February 1991.[472]

4.411 **In response, the United States** notes that Korea argues that when the United States asked Korea to "identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction" in 1998, Korea neglected to mention the Regional Aviation Offices because the United States was focused only on the New Airport Development Group. However, the United States queries as to why it would ask about other entities if the United States was

[469] GPA/M/8, 24 May 1998, *Minutes of the Meeting Held on 18 February 1998*, pp. 1, 5; GPA/M/9, 1 September 1998, *Minutes of the Meeting Held on 25 June 1998*, pp. 1, 6.

[470] Letter from Ambassador David L. Aaron, Under Secretary for International Trade, US Department of Commerce (with cover letter from Karen L. Ware, Acting Minister Counsellor for Commercial Affairs, US Embassy Seoul), to Mr. Kang, Dong-Suk, Chairman and President, KOACA, dated 17 August 1998.

[471] GPA/W/76, 18 September 1998, *Request for Information Pursuant to Paragraphs 1 and 2 of Article XIX of the Agreement on Government Procurement, Communication from the United States.*

[472] Korea's Answer to Question 21 from the Panel, dated 29 November 1999.

focused only on the New Airport Development Group. The United States also notes that Korea argues that when the United States asked about "all airport construction projects currently being planned or implemented by government entities in Korea," Korea neglected to mention the projects by the Regional Aviation Offices because the United States was focused only on the IIA project. The United States again queries as to why it would ask about other projects if the United States was focused only on the IIA project. The United States contends that if Korea's responses to these questions are to be taken seriously, then Korea should be estopped from arguing that General Note 1 is not referring to the New Airport Development Group or the IIA project.

(c) Statements against Interest

4.412 **The United States notes** that Korea was the Party that initially raised the issue of "statements against interest". The United States then lists "statements against interest" made by Korea.[473] For example, the United States notes that when MOCT's website states that KAA, KOACA and IIAC are its "subsidiary linear organizations," this could be interpreted as a statement against interest and an admission that these entities are in fact MOCT's subsidiary organizations. The United States argues that, furthermore, Korea's 1991 statements that the New Airport Development Group under MOCT and the Office of Supply are responsible for IIA construction could also be interpreted as statements against interest and as government admissions of the coverage of airport construction under the GPA. According to the United States, throughout this dispute, Korea makes many statements against its interest.

4.413 **Korea refers** to the United States list of "statements against interest" and challenges the "inconsistencies" alleged by the United States. In each instance, Korea argues that "Korea" (not a monolith, but many individuals) was asked a question in a foreign language and answered, also in a foreign language. Korea states that, later the question was asked again, and a different set of words was used to convey the same meaning or two different statements were issued by different people at different times referring to the same subject, using different verbal formulas. Korea states that the list of statements against interest to which the US refers then takes these "different" responses and suggests that they constitute contradictions or statements against interest, and that the doctrine of estoppel is relevant. Korea states that, in any case, Korea made its best efforts to respond to questions that came from the United States. If the United States did not understand an answer, Korea tried a different verbal formula to convey the same meaning.

(d) Doctrine of Estoppel

4.414 **The United States refers** to the international law doctrine of estoppel and, more specifically, quotes from a decision of the International Court of Justice:

> "Estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and convincingly evinced acceptance by that State of a particular regime, but also had caused another State, in reliance on such conduct, detrimentally to change position or suffer some prejudice."[474]

4.415 The United States argues that Korea made repeated declarations concerning whether airport procurement would be within the scope of its GPA offer. The United States contends that it relied upon these declarations in agreeing to Korea's terms of accession. The United States argues that, therefore, Korea is now estopped from changing its position on the very facts it held out to be true during negotiations.

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[473] US Exhibit 79.

[474] Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment, *ICJ Reports 1984*, p. 415, paragraph 51.

3. Subsequent Practice

(a) Coverage of Entities or Projects

4.416 **The United States argues** that subsequent practice in the application of the GPA confirms that the GPA does not contemplate pure entity coverage. The United States notes that, for instance, in considering "the greatest possible extension of [GPA] coverage," pursuant to Article XXIV:7(b) of the Agreement, the Parties at informal consultations suggested:

> "Identification of potential sectors for extended coverage. Reference was made to the inclusion of the telecommunications, transportation and steel sectors. In response to this suggestion, the appropriateness of focusing work on the expansion of coverage in the telecommunications and transportation sectors has been questioned since many countries had made significant progress towards privatization in these sectors. It has been suggested that the review relating to this element should focus on the elimination of the derogations from coverage in some other sectors existing in Appendix I of Parties."[475]

(b) Discussion in relation to GPA Requirements

4.417 **The United States argues** that it first became aware that Korea was not conducting procurement for the IIA project in a manner consistent with its GPA obligations approximately two years ago in 1997, when US companies began informing the United States Government that they were being treated unfairly and in a manner that was inconsistent with GPA requirements when bidding for contracts relating to the Inchon International Airport construction project. At that time, the United States began looking into these practices, and when the United States contacted Korea to discuss the situation, Korea informed the United States that it did not consider the IIA project to be covered by the GPA.[476]

4.418 The United States contends that it continued to discuss this issue with Korean Government officials in Seoul and on the margins of meetings of the WTO Committee on Government Procurement. The United States contends that when it became clear that this matter was not going to be quickly resolved by informing Korean trade officials of KOACA's discriminatory procurement practices and reminding Korea of its obligations under the GPA, the United States began raising this issue formally in the WTO Committee on Government Procurement, sending letters to the Korean Government, and raising this matter in bilateral negotiating fora.[477]

4.419 The United States notes that prior to initial complaints from US companies in mid-1997, the United States continued to believe that it was undisputed that IIA procurement was covered under the Ministry of Transportation, and was part of Korea's GPA commitments. The United States notes, for example, that a 1992-1993 publication jointly produced by Commercial Service Seoul and the Association of Foreign Trading Agents of Korea (AFTAK)[478], listing major projects in Korea, indicates that the new international airport project as being conducted by the Ministry of Transportation.[479] The United States notes that, in addition, a United States Government reporting

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[475] Committee on Government Procurement, "Checklist of Issues Raised in Informal Consultations Regarding Modalities for the Review of the Agreement on Government procurement," (7th revision) Job No. 369, 25 January 1999, p. 29.

[476] US Answer to Question 29 from the Panel, dated 3 November 1999.

[477] US Answers to Questions 27 and 29 from the Panel, dated 3 November 1999.

[478] The United States notes that AFTAK is a private trade association of over 10,000 Korean agents and distributors.

[479] *American Business in Korea, Guide & Directory 1992-93*, the Association of Foreign Trading Agents of Korea in cooperation with the Foreign Commercial Service, American Embassy, Seoul. The United States notes that while many projects contained in the chart of "Major Projects Status as of October 1992" list

cable describing Korea's new GPA obligations, sent on 1 May 1997, specifically notes that infrastructure projects such as the new Inchon Airport are subject to the new conditions of the GPA.[480]

4. Press Releases and Other Publications

(a) Procurements Announced as MOCT Procurements

4.420 **The United States argues** that MOCT's control is so prevalent that, at times, procurements for the IIA construction project are announced as "MOCT" procurements. The United States further argues that such thorough control of these entities has led the public to view MOCT as being responsible for making the award determinations for IIA procurements.

4.421 In support, the United States refers to a 1996 article in the Korea-Herald, which notes that "The tender contract for the project to build and operate refuelling facilities at the Inchon International Airport in South Korea, has been awarded to a consortium led by Hanjin Group. The decision by MOCT to select the Hanjin-led consortium ended the month-long squabble for the project between Hanjin and Kumho Group ... ."[481] The United States asserts that even awardees of Inchon International Airport contracts considered their awards to have been made by MOCT: A press release on the PR Newswire specifies that the "Korean Ministry of Construction and Transportation awarded a Samsung and Lockheed Martin team a contract for the Korean Area Control Center (KACC) system to be installed at the new airport and facility in Inchon, Korea."[482] The United States argues that there is no indication that Korean officials ever disputed or sought to change these characterizations of the role of MOCT.

4.422 **In response, Korea notes** that the selection of a consortium to build and operate the refuelling facility was not a "procurement." Korea states that, to the contrary, it was the award of a franchise or concession to build and operate the refuelling facility. Korea further states that such arrangements are common at airports. As to the KACC system, Korea notes that this was not a procurement for the IIA, but for a replacement for the nationwide air traffic control system presently located at Taegu. Korea states that the new system will indeed be located at Inchon, rather than Taegu, but it will direct air traffic on a national basis, not for the airport. The air traffic control systems for the airport are being procured by KOACA and IIAC. Korea further notes that the award regarding refuelling predated the effective date of GPA obligations for Korea.[483]

4.423 The United States also notes that in an article that appeared in the February 1998 edition of the magazine, "Air Transport World" it was stated that:

> "Since the national government controls both the airport construction authority and the Korea Airports Authority – which operates South Korea's major airports and is expected to manage IIA – it will set the fees."[484]

4.424 **The United States also refers** to press clippings and publications in support of its assertion that MOCT maintains managerial responsibility (including the approval of budgets and implementation plans) over the IIA project as a whole. Specifically, the United States refers to publications, which it says, establish that: (a) primary facilities of the IIA, such as the passenger

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the entity responsible for the project as a government invested corporation (*i.e*. Korea Gas Corp.), and not a central government entity, the Ministry of Transportation is listed with regard to the new international airport.

[480] US Answer to Question 29 from the Panel, dated 3 November 1999, citing US Department of State Reporting Cable, (prepared 1 May 1997), paragraph 10.

[481] "Hanjin-Led Consortium Wins Deal," *Korea-Herald*, 28 August 1996, p. 8.

[482] "Korean Ministry of Construction and Transportation Awards Air Traffic Center Contract to Samsung/Lockheed Martin," *PR Newswire,* 26 May 1998.

[483] Korea's Answer to Question 1 from the Panel, dated 3 November 1999.

[484] Adele C. Schwartz, "Return to Inchon," Air Transport World (February 1998), p. 89.

terminals, the concourses, and the runways, must by law be paid for by the government, controlled by the government, and owned by the government[485]; (b) although "[p]rivate investment for the construction of certain IIA facilities [called 'secondary facilities,' which include cargo terminals, refuelling facilities, and catering facilities] is also actively solicited by IIAC, and is authorized by the *Private Capital Inducement Act for the Expansion of Social Overhead Capital*," these facilities must nevertheless "be turned over to the government after a certain period of time"[486]; (c) during the period that KAA, KOACA and IIAC were responsible for IIA construction, MOCT was issuing its own bid announcements related to IIA construction, while other bid announcements noted MOCT's "control" over KOACA.[487]

4.425 With respect to the bid announcements to which the United States refers to illustrate MOCT's "control" over KOACA, **Korea states** that they both pre-date Korea's GPA obligations and they are not Korean documents. Korea states that, rather, they are reports from the US Embassy in Seoul.

4.426 Specifically, Korea notes that one of the examples referred to by the United States begins, in its substantive part, with the statement, "The Korea Airport Construction Authority (KOACA), under the control of the Ministry of Construction and Transportation … ." Korea states that it appears that this is a statement from KOACA or MOCT, but Korea states that this is not the case. Korea notes that the original bid announcement states simply, "The Korea Airport Construction Authority (KOACA) invites bids for the procurement of the Soil and Concrete Testing Equipments on the following conditions." Korea further notes that there is no mention of MOCT or control in this bid announcement.

4.427 Korea further notes that another example to which the United States refers concerns a co-generation power plant. Korea states that this is not a procurement but the award of a franchise or concession to build and operate a power plant.

4.428 Korea provides press materials which it says challenges the United States' argument that press clippings and publications support the view that MOCT controls the IIA project. Korea provides press releases by US companies identifying KOACA as the contracting entity for IIA projects during its tenure in that role[488], and news articles identifying KAA as the entity in charge of IIA procurement while it held that responsibility.[489]

(b) MOCT Officials Take Credit

4.429 **The United States also states** that MOCT officials themselves have also taken credit for major decisions related to the construction of the Inchon International Airport. The United States refers, for instance, to a March 1996 article in the Korea-Economic Daily in which an MOCT spokesman announcing the decision by MOCT to formally name the Inchon International Airport the "Seoul-Inchon International Airport."[490] In addition, the United States notes that the Korea-Herald quotes an MOCT official declaring that MOCT had re-estimated the cost for the Inchon International

[485] "SOC Project in 1996," Business Korea, March 1996, Vol. 13, Issue 2, p. 3. Also see section 22 of the Private Capital Inducement Act for the Expansion of Social Overhead Capital.

[486] Inchon International Airport brochure, p. 41.

[487] "Korea: Invitation to Bids for New Seoul Int'l Airport Soil and Concrete Testing Equipment" (6 June 1995), paragraph 1. For more evidence of MOCT's control over KOACA, also see "Korea: Yongjongdo Airport Co-Gen Power Plant Proj: Opp'ties" (25 January 1996), which states in its paragraph 1 that "With the approval of the Ministry of Construction and Transportation (MOCT), the Korea Airport Construction Authority (KOACA) recently held an orientation and question/answer session regarding Request For Proposal (RFP) for the Yongjongdo co-generation project on 12 January 1996."

[488] Exhibits Kor-50 and Kor-51.

[489] Exhibits Kor-102 and Kor-103.

[490] "New Airport to be Called Seoul-Inchon International Airport," *Korea-Economic Daily*, 25 March 1996.

Airport from W 5.7 trillion to W 7.48 trillion (US$5.8 billion), that MOCT did not see any problem in meeting the planned date for opening, and that MOCT would complete the first phase of the construction by mid-2000.[491] This official was identified as MOCT's "director general who is in charge of the new airport construction."[492]

(c) Publications Concerning Airport Projects

4.430 **The United States argues** that the airport procurements referred to in General Note 1(b) can only mean those of the IIA construction project. The United States contends that from the time Korea tabled its GPA commitment offer on 29 June 1990, to the present, the United States knows of no new major airport construction projects in Korea, other than the Inchon project. According to the United States, this is the understanding, not only of the United States, but also of other countries interested in the Korean procurement market.

4.431 In support of its argument, the United States notes that, for example, in a 1998 publication by the European Communities ("EC"), entitled "Business Opportunities and the Government Procurement Agreement: A Handbook for EU Companies," a list of "major construction and transportation projects" in Korea is provided, in which the IIA is the only airport procurement project enumerated. Furthermore, the publication offers a list of "major purchasing entities in Korea." The United States contends that the publication also identifies "MOCT, Korea Airport Authority Corp." as the "competent ministry" for the IIA project.[493] The United States asserts that if, in fact, another entity was responsible for procurements for the Inchon project, or other airport procurements, surely it would have been included on this list. The United States contends that, moreover, if the "Korea Airport Authority Corp." is an entity independent of MOCT, it would have been listed separately. The United States notes that, however, MOCT is the only entity listed as being responsible for airport procurement, and "Korea Airport Authority Corp." is not listed separately.

5. MOCT's Website and Other Entities' Websites

4.432 **The United States argues** that in interpreting Annex 1 of the GPA reliance must be placed on the "ordinary meaning" of its text, in its context and in light of the object and purpose of the GPA, in accordance with Article 31 of the *Vienna Convention*.[494] The United States notes that it then looks to MOCT's website to confirm this interpretation. The United States asserts that this is a proper use of the information on MOCT's website and, therefore, should be fully considered in this dispute.

4.433 The United States argues that throughout the Inchon International Airport construction process, MOCT let it be known that it is the entity responsible for the construction of the new Inchon International Airport.

4.434 In support of this argument, the United States refers to the Internet website of MOCT, which proclaims, "In preparation for the 21st century, this ministry is . . . dedicated to the construction of the Seoul-Pusan high-speed rail and the Inchon International Airport." The United States contends that the website also declares that "As of today, MOCT's organization consists of 3 offices, 5 bureaus and 47 divisions which overlook the affairs on national development planning, housing, city planning,

[491] "Inchon Airport Cost Balloons 31 Percent to W 7.5 Trillion," *The Korea Herald*, 22 July 1998.

[492] *Ibid.*

[493] The United States asserts that although it appears unclear as to whether "Korea Airport Authority Corp." is referring to KAA or KOACA, either way, it is evident that "Korea Airport Authority Corp." is considered by the European Communities to be a subordinate organization of MOCT.

[494] Article 31 of the *Vienna Convention*. In addition, Article 32 permits the use of supplementary means to either confirm an Article 31 interpretation, or to interpret the treaty when an Article 31 interpretation "leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."

land policy, water resources policy, construction and administration of roads and airports and all other matters concerning construction and transport safety affairs."[495]

4.435 The United States also asserts that national-level entities in Korea have subsidiary organizations, and unless otherwise specified, a listing of a "central government entity" under Annex 1 also embodies its subsidiary organizations. In support of this argument, the United States refers to the fact that Korea specifically uses the term, "subsidiary organization," on MOCT's website to describe KAA, KOACA and IIAC.

4.436 The United States also argues that the New Airport Development Group which, Korea represented in July of 1991 as the entity responsible for IIA construction and which exists to this day as the "New Airport Construction Planning Team" is a branch office of MOCT. The United States notes that MOCT lists the New Airport Construction Planning Team on the organizational chart located on its webpage.

4.437 **In response, Korea argues** that it is irrelevant for the purposes of interpreting Korea's Annex 1 and Note 1 that MOCT's website (which has been prepared by MOCT's public affairs office) refers to KAA, IIAC and eight other entities as "subsidiary organizations." Korea notes in this respect that Note 1 to Annex 1 states that the term "subordinate linear organizations" is to be interpreted "as prescribed in the *Government Organization Act*," and not as referred to on MOCT's website.

4.438 Korea also notes that in other parts of the organizational chart included on the MOCT website, KAA is described, along with 47 other entities, as a "Related Organization" to MOCT, rather than a "subsidiary organization." Korea further states that the relevant excerpt of the MOCT website, while a useful informational guide, is, for purposes of interpreting legal terms of art, imprecise. Korea states that it is for this reason, undoubtedly, that Note 1 does not state that the central government entities listed on Annex 1 include their subordinate linear organizations "as prescribed by the website of the Ministry of Construction and Transportation of the Republic of Korea."

4.439 Further, in response to a question from the United States, Korea argues that the organizational chart included on the MOCT website is an unofficial "Organizations Chart" printed out from MOCT's website, which post-dates the 15 April 1994 signing of the GPA, which explicitly references the *Government Organization Act*. Korea notes that the website, which was first put online in 1997, could not have contributed to the United States' expectations concerning coverage of KAA at the time the GPA was signed.[496]

4.440 **In response, the United States contends** that the excerpt of the MOCT webpage to which Korea refers that categorizes KAA as a "related organization" instead of a "subsidiary organization" is simply a more recent version of the website that categorized KAA and KOACA as "subsidiary organizations." The United States asserts that it was only after the consultations with the United States in March of 1999 that Korea replaced the term, "subsidiary organization," with "related organization," on every page of MOCT's website. However, the United States asserts that there is still one page that labels KAA and IIAC as "subsidiary organizations."

4.441 **Korea states in response** that it does not see how a website put up in 1997 could have influenced a Member's attitude when it signed the GPA in 1994. Korea also has noted that KAA and KOACA are not the only entities that appear on that website as somehow related or subordinate to MOCT. At least four of Korea's Annex 3 entities also are listed: Korea National Housing

[495] The United States contends that, in addition, Article 16(34) of the *Presidential Order on the Organization of the Ministry of Construction and Transportation* provides that the Civil Aviation Bureau within MOCT is responsible for "[a]ffairs relevant to construction, maintenance, improvement and operation of airport facilities."

[496] Korea's Answer to Question 10 from the US, dated 3 November 1999.

Corporation; Korea Water Resources Corporation; Korea Land Corporation; and Korea Highway Corporation. Korea submits that if "control" by an Annex 1 entity subjects another entity, not on Annex 1, to GPA coverage under that Annex, then it does so to these four entities as well as to those responsible for Inchon Airport procurement. Korea asserts that the "control" is the same in all instances. Korea argues that, however, if "control" subjects these entities to Annex 1 coverage, it is unclear what the consequences are given their placement on Annex 3 and the higher thresholds that apply.

4.442 **The United States also states** that, in fact, on MOCT's webpage, subsidiary organizations are separated into three distinct and separate categories: "Government Investment Corporations," "Government Contribution Authorities," and "Government Contribution Research Institutes." The United States contends that the subsidiary organizations cited under "Government Investment Corporations" are all listed in Korea's Annex 3, while the "Government Contribution Authorities" (which include KAA and KOACA) and the "Government Contribution Research Institutes" are not. The United States argues that this is consistent with the textual interpretation that all subsidiary organizations are covered within the scope of "central government entity" under Annex 1, unless otherwise specified (as in the case of "Government Investment Corporations"). The United States argues that, moreover, only the "Government Investment Corporations" are subject to a special legislative act, the *Framework Act on the Management of Government-Invested Corporations*; there is no analogous legislation for "Government Contribution Authorities" or "Government Contribution Research Institutes."

4.443 **In support of its arguments made in paragraph 4.243** regarding the categorization of IIA entities on the one hand and the Seoul and Pusan Aviation Authorities on the other hand**, Korea refers** to a list of "Airport Profiles" from the Japanese Ministry of Transportation website.[497] Korea notes that while the "founder" and "administrator" for many Japanese airports is the Japanese Ministry of Transportation itself, the New Tokyo International Airport Authority is listed as the founder and administrator of the New Tokyo International (Narita) Airport.

4.444 Korea refers to another extract, from the New Tokyo International Airport's website, which it says explains that although "[i]n the past, the national government has directly administered the establishment and management of international airports in Japan . . . it was decided that the New Tokyo International Airport Authority would perform the construction, management, and operation of [the New Tokyo International Airport] ... ."[498] Korea notes that Japan offers several reasons for this decision, including the need to attract "massive amounts" of private capital to fund such a large project[499], the need for greater flexibility than a traditional government bureaucracy could offer[500], and the need for greater efficiency, demanded by the complex operating demands of the project, than could be generated through a traditional government bureaucracy.[501]

4.445 Korea's asserts that its decision to separate the implementation of the IIA project from other airport construction was motivated by similar reasons, and was entirely legitimate.

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[497] Japanese Ministry of Transportation website, *Airport Profiles*, http://www.motnet.go.jp/info/kuko03.htm.

[498] New Tokyo International (Narita) Airport website, *Adoption of Airport Authority Format and the First Step Toward Construction of New Airport*, http://www.narita-airport.or.jp/airport-e/prpf_e/keii_e/koudan1_e.html.

[499] *Ibid*. ("[B]ecause the construction of a new airport requires massive amounts of capital, it would be necessary to obtain some project funds from the private sector.").

[500] *Ibid*. ("[F]lexibility would be needed in the areas of organization, personnel, and accounting.").

[501] *Ibid*. ("[T]he complexity of airport operation would require an efficient, self-supporting system.").

C. PRACTICES IN VIOLATION OF THE GPA

1. Bid Deadlines

4.446 **The United States argues** that Korea routinely imposes inadequate bid deadlines that are shorter than the durations required by the GPA. The United States provides the following examples in support of its claim:

- Korea announced the procurement of a radar and communication system on 13 June 1998, then required tenders to be received less than 26 days later on 8 July 1998.[502]
- Korea announced the procurement of a contract for the ventilation systems on 9 November 1998, then required tenders to be received less than 23 days later on 1 December 1998.[503]
- Korea announced the procurement of a 22.9 KV electrical cable on 23 November 1998, then required tenders for Part I of the procurement to be received less than 17 days later on 9 December 1998, with tenders for Part II to be received less than 29 days later on 21 December 1998.[504]
- Korea announced the procurement of electrical wire facilities on 23 November 1998, then required tenders to be received less than 25 days later on 17 December 1998.[505]
- Korea announced the procurement of outdoor lighting equipment on 24 November 1998, then required tenders for Part I of the procurement to be received less than 15 days later on 11 December 1998, with tenders for Part II to be received less than 28 days later on 22 December 1998.[506]

4.447 The United States contends that the imposition by Korea of deadlines of less than 40 days for receiving tenders from the date of publication of the procurement announcements was inconsistent with the requirements of Article XI:1(a) and XI:2(a).

2. Qualification requirements

4.448 **The United States argues** that Korea imposes qualification requirements that require domestic investment while favouring domestic bidders. The United States contends that, for example, in the procurement of vertical transportation equipment – that is, elevators and escalators - Korea limited participation of parties as prime contractors to those that "completed the registration for manufacturing business of [elevators and escalators] under the laws of lift manufacturing and management and [to those that possess] both the licence of lift installation business under *Construction Industry Basic Act* and the licence of the first class electrical construction business under *Electricity Work Business Act*."[507] The United States argues that, in other words, this condition required firms bidding as prime contractor to have four Korean-issued licences: an elevator manufacturing licence, an escalator manufacturing licence, an elevator installation licence, and an electrical construction licence. The United States contends that two of these licences could only be

[502] Announcement of Bid for Radars and ATC Communication System for Inchon International Airport (IAA), KOACA Publication 98-39 (18 June 1998).

[503] Passenger Terminal and Attached Building Machine Installation and TAB Operation, New Airport Construction Corporation Announcement No. 98-69 (9 November 1998).

[504] 22.9 KV Electrical Cable Manufacture/Purchase Project (I) and (II), New Airport Construction Corporation Announcement No. 98-70 (23 November 1998).

[505] 22.9 KV Electrical Wire Facilities Construction, New Airport Construction Corporation Announcement No. 98-71 (23 November 1998).

[506] Inchon International Airport Outside Lighting Fixtures Manufacture Purchase Project (I) and (II), New Airport Construction Corporation Announcement No. 98-72 (24 November 1998).

[507] Announcement for the Procurement of the Manufacture and Installation of Vertical Transportation Equipment (15 May 1998), Item 2.1 of Information for Proposal.

obtained by firms that had committed substantial investment in Korea by either building or purchasing local manufacturing facilities. The United States argues that one can see the difficulties faced by foreign suppliers in becoming prime contractors as compared to domestic suppliers who no doubt already have manufacturing facilities in their home country. The United States argues that the discriminatory nature of this condition is further highlighted by the fact that the actual equipment used to satisfy the requirements of this specific contract need not be produced in the local manufacturing facilities in Korea.[508]

(a) Article III:1(a) of the GPA

4.449 **The United States argues** that Article III:1(a) requires non-discriminatory treatment between foreign and domestic products, services, and suppliers in government procurement. According to the United States, the standard of this non-discrimination obligation in the GPA is expressed in terms of "treatment no less favourable." The United States notes that similar, though not identical, language is found in Article III:4 of the General Agreement on Tariffs and Trade (GATT 1994).

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use ... ."

4.450 The United States contends that there are strong similarities between Article III:4 of the GATT 1994 and Article III:1 of the GPA that should guide the interpretation of the GPA. The United States argues that, for example, both provisions prohibit discriminatory treatment based on product origin. Further, according to the United States, both utilize the "treatment no less favourable" standard. Under Article III:4 of the GATT 1994, this standard requires "equal treatment with respect to competitive opportunities."

4.451 The United States notes that, as first articulated by the panel in Section 337 of the *Tariff Act* of 1930:

> "These words ["treatment no less favourable,"] are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III . . . The Panel therefore considered that, in order to establish whether the "no less favourable" treatment standard of Article III:4 is met, it had to assess whether or not Section 337 in itself may lead to the application to imported products of treatment less favourable than that accorded to products of United States origin. It noted that this approach is in accordance with previous practice of the Contracting Parties in applying Article III, which has been to base their decisions on the distinctions made by the laws, regulations or requirements themselves and on their potential impact, rather than on the actual consequences for specific imported products."[509]

[508] *Ibid.*
[509] Panel report on *United States - Section 337*, paragraphs 5.11 and 5.13.

4.452 The United States contends that this interpretation of "no less favourable treatment" in Article III of GATT 1994 as requiring equality in terms of competitive opportunities has been followed consistently in subsequent panel and Appellate Body reports.[510]

4.453 The United States argues that Korea's qualification requirements are inconsistent with the GPA's national treatment requirements in Article III:1(a) because they unfairly discriminate against foreign suppliers in favour of domestic suppliers.

4.454 The United States further argues that by using "treatment no less favourable" in the GPA, the Parties to the GPA obviously intended to create a standard that also refers to less favourable competitive opportunities. The United States argues that, thus, if Korea's procurement practices have modified the competitive opportunities against foreign suppliers in favour of domestic suppliers, Korea should be deemed to have provided "less favourable treatment" to foreign suppliers, in violation of Article III:1(a) of the GPA.

4.455 The United States further argues that, in fact, the qualification requirements imposed by Korea in the vertical transportation equipment procurement accorded less favourable competitive opportunities for foreign firms than for domestic firms. According to the United States, in that procedure, a firm could not bid as a prime contractor unless it possessed by building or purchasing certain manufacturing facilities in Korea. The United States further states that foreign suppliers (who more often than not do not maintain manufacturing facilities in Korea) could, therefore, only bid as prime contractors if they invested considerable resources towards building or purchasing these local manufacturing facilities. The United States argues that this requirement provides less favourable conditions to foreign suppliers, since competing Korean suppliers need not expend the same amounts of additional resources in order to submit bids as prime contractors. The United States argues that, as such, this measure constitutes "less favourable treatment" within the meaning of GPA Article III:1(a).

(b) Article VIII first sentence of the GPA

4.456 **The United States contends** that qualification procedures set forth by Parties to the GPA must be consistent with the provisions of Article VIII. The United States further states that Korea's qualification requirements are all requirements within qualification procedures for procurements related to the IIA project. However, the United States argues that since it has already established that these requirements discriminate against foreign suppliers generally within the meaning of Article III:1(a) of the GPA, *a fortiori*, they also discriminate against foreign suppliers in violation of Article VIII, first sentence.

(c) Article VIII(b) of the GPA

4.457 **The United States argues** that Article VIII(b) establishes that any qualification requirements must be "essential" in order to ensure the "capability" of the firm to fulfill the contract. The United States argues that in applying Article 31 of the *Vienna Convention on the Law of Treaties*, one finds that the ordinary meaning of the term "essential," is "absolutely indispensable or necessary."[511] The United States argues that under Article VIII(b), such conditions for participation may include "financial guarantees, technical qualifications and information necessary for establishing the financial commercial and technical capacity of suppliers, as well as the verification of qualifications." Bearing

[510] See, e.g., *Japan - Measures Affecting Consumer Photographic Film and Paper*, 31 March 1998, WT/DS44/R, paragraph 10.379 ("*Japan - Film*"); *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* (adopted on 18 February 1992), BISD 39S/27, paragraphs 5.12-5.14 and 5.30-5.31; *US - Malt Beverages*, BISD 39S/206, paragraph 5.30; *US - Gasoline*, WT/DS2/R, paragraph 6.10; *Canada - Periodicals* (adopted on 30 July 1997), WT/DS31/R, p. 75; *Bananas III*, WT/DS27/R, paragraphs 7.179-7.180.

[511] The New Shorter Oxford English Dictionary (1993 ed.), p. 852.

in mind that, under the first sentence of Article VIII, the qualification process must not be discriminatory, the United States asserts that the question is whether a qualification requirement is really necessary to guarantee that a winning bidder will in fact be able to perform the very contract it has been awarded. The United States contends that it can thus be determined that Korea's qualification requirements are not "essential" in the sense of Article VIII(b).

4.458 The United States further argues that Korea's qualification requirements are inconsistent with Article VIII(b) of the GPA because, as conditions for participating in the tender procedures, they are not "essential" to a firm's "capability to fulfill the contract." Rather, it appears that these conditions were put in place to ensure that Korean suppliers would be able to benefit from and better participate in these valuable procurements.

4.459 Additionally, the United States argues that Korea's requirement for a firm to maintain elevator or escalator manufacturing facilities in Korea, just so the firm can participate in a tender proceeding for vertical transportation equipment, is clearly not "essential to ensure the firm's capability to fulfill the contract." The United States contends that the elements that make it possible for a firm to supply and install an elevator or escalator – reliability, technical expertise, solvency – have no necessary relation to whether the firm owns a manufacturing facility located in Korea (as opposed to some other country), nor to whether the firm owns any factories at all. In fact, the factory requirement at best imposes a buy-national or local-content requirement. The United States asserts that if such a requirement is "essential to ensure the firm's capability to fulfill the contract," then any other GPA Party could exclude from its tender proceedings any bidder that does not have a factory in that country. In the view of the United States, this would eliminate any possibility that a bidder located wholly abroad could bid on a GPA-covered tender and supply the product from a foreign factory. The United States concludes that a key objective of the drafters of the GPA, to ensure that procurement rules and practices are not applied "so as to afford protection to domestic products or services or domestic suppliers,"[512] would be defeated.

3. Domestic Partnering Requirements

4.460 **The United States argues** that Korea has conducted procurements under bidding rules specifying that foreign suppliers can participate only if they partner with or act as a subcontractor to domestic suppliers. The United States notes that, for example, in a procurement for "site preparation and weak foundation enforcement," Korea established the requirement that any "company that has its base outside the Inchon Metropolitan Area must enter into a joint venture for at least 10 per cent of the contract with an Inchon-based company that possesses a Civil Engineering and Construction Licence (including Civil Engineering) issued in the Inchon Metropolitan Area."[513] The United States asserts that, in other words, foreign companies, since they are obviously based outside of the Inchon Metropolitan Area, must enter into joint ventures with local companies in order to even participate in the tendering process. The United States asserts that Korea used similar language to limit the participation of foreign firms in a procurement for electrical wire facilities.[514]

4.461 The United States further argues that in a procurement for a movement area management system, Korea specified that "[f]oreign firms should participate in a bid with local firms (leading or prime company) as consortium members or subcontractors."[515] The United States notes that Korea used this same language to limit the participation of foreign suppliers as prime contractors in

[512] Second paragraph of the preamble to the GPA.

[513] Facilities Infrastructure Construction, New Airport Construction Corporation Announcement No. 98-68.

[514] 22.9 KV Electrical Wire Facilities Construction, New Airport Construction Corporation Announcement No. 98-71 (3 November 1998).

[515] Announcement of Bid for Movement Area Management System (MAMS) for Inchon International Airport (IIA), KOACA Publication 98-37 (16 June 1998).

procurements for radar and communication systems[516], as well as for weather radar systems.[517] Finally, the United States argues that Korea prohibited foreign firms from bidding in a procurement unless they participated in a consortium with no less than two Korean firms.[518]

(a) Article III:1(a) of the GPA

4.462 **The United States argues** that Korea's domestic partnering requirements are inconsistent with the GPA's national treatment requirements contained in Article III:1(a) because they unfairly discriminate against foreign suppliers in favour of domestic suppliers.

4.463 The United States argues that Korea's domestic partnering requirements have provided less favourable competitive opportunities for foreign firms, in comparison with domestic firms. The United States contends, for instance, that in the procedures for "site preparation" and "electrical wire facilities," foreign suppliers were required to participate as joint bidders with local suppliers based in the Inchon area. The United States argues that this requirement accorded less favourable conditions to foreign firms in the procurement, since it became necessary for foreign firms to expend additional resources just to find and obtain partnering contracts with local suppliers. The United States contends that, moreover, for the foreign supplier, the potential profits from winning the tender were substantially reduced, since the foreign supplier would be obligated to share these profits and/or other benefits of the award with the local supplier. The United States further notes that, in contrast, local firms could bid alone, without being subjected to additional costs. The United States asserts that, as such, these requirements provide foreign suppliers with "less favourable treatment" than local suppliers within the meaning of GPA Article III:1(a).

4.464 The United States further argues that other domestic partnering requirements also provided less favourable competitive opportunities as between foreign and domestic suppliers. In the tendering procedures for "movement area systems," "radar and communications systems" and "weather radar systems," the United States asserts that Korea prohibited foreign suppliers from bidding as prime contractors, and further specified that local firms should be the "prime or leading company," with foreign suppliers permitted only to act as subcontractors or consortium members. The United States argues that this measure discriminated against foreign suppliers, because they could only participate if they were able to enter into a "partnership" arrangement with a domestic firm, not only to bid jointly, but to bid in a subordinate position. The United States argues that any potential profits for the foreign supplier must be shared with the domestic supplier (who, in this case as the prime contractor, would most likely exercise its control over the sharing of the profits). According to the United States, domestic suppliers, in contrast, could bid alone if they so choose, again without being subjected to additional costs or other disadvantages.

4.465 As a final example, the United States refers to another domestic partnering scheme in which foreign suppliers were obligated to bid with two or more domestic suppliers. The United States contends that domestic suppliers, on the other hand, were not forced to bid with foreign suppliers, let alone other domestic suppliers. The United States argues that this requirement again singled out foreign suppliers for less favourable competitive opportunities.

4.466 The United States argues that, for the foregoing reasons, it is clear that Korea's domestic partnering practices and procedures provide less favourable treatment to foreign suppliers than that accorded to domestic suppliers within the meaning of Article III:1(a) of the GPA.

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[516] Announcement of Bid for radars and ATC Communication System for Inchon International Airport, KOACA Publication 98-39 (18 June 1998).

[517] Announcement of Bid for Terminal Doppler Weather Radar for Inchon International Airport, KOACA Publication 98-66 (23 October 1998).

[518] Manufacture and Installation of IIA Passenger Boarding Bridge System, Project No. PMD1 (12 March 1998).

(b) Article VIII first sentence of the GPA

4.467 **The United States argues** that qualification procedures set forth by Parties to the GPA must be consistent with the provisions of Article VIII and that Korea's domestic partnering requirements are all requirements within qualification procedures for procurements related to the IIA project. The United States contends that, however, since it has already been established that these requirements discriminate against foreign suppliers generally within the meaning of Article III:1(a) of the GPA, *a fortiori,* they also discriminate against foreign suppliers in violation of Article VIII, first sentence.

(c) Article VIII(b) of the GPA

4.468 **The United States argues** that Korea's domestic partnering requirements are inconsistent with Article VIII(b) of the GPA because, as conditions for participating in the tender procedures, they are not "essential" to a firm's "capability to fulfill the contract." The United States argues that, rather, it appears that these conditions were put in place to ensure that Korean suppliers would be able to benefit from and better participate in these valuable procurements.

4.469 The United States further argues that Korea's requirement that a foreign supplier bid as a joint contractor with a domestic supplier also cannot be deemed as "essential to ensure the firm's capability to fulfill the contract." The United States asserts that there is no legitimate rationale for concluding that all foreign suppliers would be incapable of performing the contract on their own. In the view of the United States, this too is simple protectionism. The United States asserts that if this were permitted, all GPA-covered procurements might eventually be subjected to such domestic partnering requirements, nullifying much of the benefit of the GPA.

4.470 The United States argues that, similarly, Korea in some procurements has permitted foreign suppliers to bid not as prime contractors, but only as subcontractors or consortium members (with a Korean supplier as the prime contractor). The United States further argues that there is no necessary basis for concluding that all foreign suppliers would be incapable of performing the contract as prime contractors. The United States contends that, therefore, it cannot legitimately be argued that these conditions are "essential to ensure the firm's capability to fulfill the contract."

4.471 Finally, the United States argues that Korea's requirement that foreign suppliers bid with two Korean suppliers is again simply protectionism. The United States contends that it cannot legitimately be argued that all foreign suppliers are incapable (acting individually or jointly) of fulfilling a contract, and that one Korean partner is not enough (i.e., for a foreign firm to fulfil the contract, the firm will need to partner with two Korean suppliers). The United States argues that as with the other requirements previously identified, this qualification requirement is imposed for the mere purpose of ensuring maximum domestic participation in procurements for the IIA project.

4. Absence Of Access To Challenge Procedures

4.472 **The United States notes** that in 1995, Korea passed the *Act Relating to Contracts to Which the State is a Party*.[519] This Act established the "International Contract Dispute Mediation Committee" as the impartial and independent body that reviews domestic challenges to the procurement practices of GPA-covered entities.[520] The United States notes that Korea has indicated officially that this Committee is the impartial and independent body that will review challenges to the

[519] Law No. 4868, 5 January 1995.
[520] *Ibid.* Articles 28 and 29.

procurement practices of GPA-covered entities, which is meant to satisfy Korea's obligations under Article XX of the GPA.[521]

4.473 However, the United States argues that when suppliers and service providers protested certain procurement practices by KOACA, alleging inconsistencies with the GPA, the International Contract Dispute Mediation Committee has refused to consider such challenges on the grounds that KOACA is not "recognized as an entity covered by the government [sic] procurement agreement."[522]

4.474 The United States contends that, to date, Korea has yet to grant suppliers and service providers participating in procurements for the IIA construction project with access to non-discriminatory, timely, transparent, and effective domestic challenge procedures. Korea has failed to provide aggrieved foreign suppliers with access to the appropriate challenge procedures under Article XX.

4.475 Further, the United States argues that Korea has not otherwise provided suppliers and service providers of these procurements access to non-discriminatory, timely, transparent and effective domestic challenge procedures. In fact, KOACA's internal rules do not even contain dispute resolution procedures. Accordingly, no relief is allotted to foreign suppliers and service providers when an Inchon Airport procurement is conducted in a GPA-inconsistent manner. Thus, Korea is in violation of Article XX of the GPA.

5. Korea's Response to the Violation Claim

4.476 The Panel asked Korea whether it agreed with the United States' assertion that if the entities engaging in procurement for the IIA are "covered entities," such entities' IIA procurement practices would not be consistent with the Agreement on Government Procurement.[523] **In response, Korea states** that it has not taken a position on the assertions of the United States with regard to the consistency of Korea's procurement practices with the GPA, other than to note that the entities responsible for IIA procurement are not covered entities.[524]

D. NON-VIOLATION CLAIM: NULLIFICATION OR IMPAIRMENT OF BENEFITS

1. Details of the Non-Violation Claim

4.477 The **United States** argues that regardless of whether or not the measures referred to above violate the various articles of the GPA, they nevertheless nullify and impair any benefits accruing to the United States under the Agreement.

4.478 The United States argues that a successful determination of a non-violation nullification and impairment in the GPA requires the finding of three elements: (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.[525]

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[521] GPA/12/Rev.1, Notification of National Implementing Legislation of the Republic of Korea, 9 June 1997.

[522] Report to Karen Ware, US Deputy Senior Foreign Commercial Service Officer to the Republic of Korea, containing remarks by Dr. Kim Jung-Min, Deputy Director, Government Procurement & Accounting Policy Division of MOFE on 18 November 1998.

[523] Panel's Question 20 following the First Substantive Meeting.

[524] Korea's Answer to Question 20 from the Panel, dated 3 November 1999.

[525] Report of the Working Party on *The Australian Subsidy on Ammonium Sulphate* (adopted on 3 April 1950), BISD II/188-196, paragraph 12; Panel Report on *Treatment by Germany of Imports of Sardines* (adopted on 31 October 1952), G/26, BISD 1S/53-59, paragraph 16; Panel Report on *European Economic Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried*

4.479 The United States argues that given the inconsistency with the GPA of the procurement practices engaged in by the IIA authorities, elements (2) and (3) of the non-violation claim have already been met. The United States asserts that the only outstanding issue is the first element – that is, whether or not there is a concession.

4.480 The United States contends that, as a matter of judicial economy, it does not request a ruling on the non-violation claim if it is established that Korea has violated its obligations under the GPA. The United States also notes that a finding of non-violation nullification or impairment leads in the first instance to compensation and not necessarily to compliance. The United States contends that its interest in the dispute is first and foremost to assure Korea's compliance with its GPA obligations through the elimination of its GPA-inconsistent procurement practices.

4.481 **In response, Korea argues** that the burden placed upon the United States to support its non-violation claim under Article XXII:2 of the GPA is substantial. Korea notes that under Article 26:1(a) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, "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."[526]

4.482 Korea refers to the Panel in *Japan – Film*[527] which noted three elements of a non-violation complaint incumbent upon the complainant to prove. Korea states that these elements are evident in the terms of Article XXII:2 of the GPA; namely, "(1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification of the benefit as the result of the application of the measure."[528]

4.483 Korea argues that the United States must demonstrate, by virtue of the requirement in Article XXII:2 that it identify a "benefit accruing" to it under the GPA, that it "reasonably expected" to obtain the benefit of GPA coverage for IIA procurement.[529] Korea further argues that "for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated."[530] Korea asserts that this requirement is self-evident and quotes for support: "If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures."[531]

4.484 Korea also notes that the United States is correct that the first requirement referred to above in paragraph 4.478 - a concession - is very much at issue. Korea asserts that just what "concession" the United States made in exchange for the alleged inclusion of KAA among Korea's commitments is not clear. Korea states that it is aware of no evidence from the United States on this point. Korea also notes, as item (2) on the US list implies, that an "agreement" is necessary. Korea states that it

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Grapes, 20 February 1985 (unadopted), L/5778, paragraph 51; and Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* (adopted on 25 January 1990), L/6627, BISD 37S/86, paragraphs 142-152.

[526] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 26:1(a).

[527] Although the Panel in *Japan – Film* addressed a non-violation claim under Article XXIII:1(b) of the GATT 1994, there is no material difference between the language used in Article XXIII:1(b) of the GATT 1994 and Article XXII:2 of the GPA to enumerate the requirements for a non-violation complaint. The Panel's legal reasoning is, therefore, applicable in its entirety.

[528] *Japan - Film*, paragraph 10.41.

[529] *Ibid.* paragraph 10.72. As further support for this principle, see *EEC - Oilseeds*, BISD 37S/86, 128-129 (paragraphs 147-148); *Operation of the Provisions of Article XVI*, BISD 10S/201, 209 (paragraph 28) (adopted on 21 November 1961); *Other Barriers to Trade*, BISD 3S/222, 224 (paragraph 13) (adopted on 3 March 1955); *Germany - Sardines*, BISD 1S/53, 58-59 (paragraph 16) (adopted on 31 October 1952); *Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39, BISD II/188, 193-194 (adopted on 3 April 1950).

[530] *Japan - Film*, paragraph 10.76.

[531] *Ibid.*

understands that the essence of a non-violation is that some action of a party, after an agreement is concluded, which could not have been reasonably anticipated at the time of the agreement, nullifies or impairs a concession made by another party. According to Korea, the United States has not specified what agreement was made by the parties that was nullified or impaired by action taken by Korea after that agreement was entered into. Korea argues that it could not have been an agreement to include KAA (and KOACA and IIAC) in Korea's GPA coverage, for Korea never agreed to include KAA in any of its offers. Korea also states that in addition to the first point, the third is also very much in contention. Korea questions how the United States could reasonably anticipate that Korea would apply the GPA to procurements for the new airport without an agreement and a concession. In Korea's view, the whole premise of the United States' non-violation case rests on the elements it needs to prove for its violation claim: an agreement between the parties, which included a concession by the United States.

2. Concession

(a) 1991 Negotiations

4.485 **The United States argues** that during 1991 negotiations with Korea, the United States specifically accrued the benefit of all new airport construction projects under the coverage of the GPA. Further, the United States contends that even if the transfer of procurement authority as between the various IIA entities was reasonably anticipated by the United States, this fact is irrelevant to a determination of whether a concession was made.

4.486 For support of its argument that a concession was made, the United States notes that in July of 1991, Korea stated that the "New Airport Development Group under" MOCT and the "Office of Supply" are responsible for new airport construction projects. The United States further notes that in relation to the IIA project, Korea stated that the "basic plan" will be completed "by 1992 and the working plan by 1993," that Bechtel "is taking part in the basic plan project," and that the "procurement plan" is not yet "fixed because now the whole airport construction project is only in a basic planning stage." The United States notes that Korea is now arguing that when it said the "procurement plan has not been fixed," it actually meant "nothing concrete was fixed,"[532] or "nothing with regard to procurement was fixed."[533] The United States argues that, however, an entity is not a plan; the Office of Supply is not a procurement plan, it is a procuring entity.

4.487 Further, the United States argues that Korea has always made a distinction between an entity and a plan. The United States notes that Korea made such a distinction in attempting to explain what "procurement plan" meant. The United States quotes: "This included both the entities that might ultimately be responsible for procurement as well as the procurement plan itself."[534] The United States argues that if Korea had meant the "procurement plan" and the "entities that might ultimately be responsible for procurement," it would have said so in its July 1991 response. The United States notes that, instead, Korea only stated that the "procurement plan has not been fixed." The United States argues that Korea's plain language speaks for itself and questions how Korea's mention of "procurement plan" can refer to both the "procurement plan" and the "entities that might ultimately be responsible for procurement."

4.488 The United States also argues that Korea's claim that it had made no decision regarding "which entity would be responsible for IIA construction"[535] in July 1991 is inconsistent with Korea's actions in 1991. In support of this argument, the United States notes that it expressly held out MOCT and the Office of Supply as the responsible airport procurement entities, it included MOCT and the

[532] Korea's Answer to Question 16 from the Panel, dated 3 November 1999.
[533] Korea's Answer to Question 15 from the US, dated 3 November.
[534] Korea's Answer to Question 16 from the Panel, dated 3 November 1999.
[535] Korea's Answer to Question 3 from the Panel, dated 3 November 1999.

Office of Supply in its GPA schedule offer, and it conducted the procurement of IIA's basic plan through MOCT.[536]

4.489 Regarding the United States' interpretation of its July 1991 response, **Korea notes** that, in fact, the July 1991 response does not state that either MOCT or NADG were to be involved in procurement.[537] Moreover, Korea states that its July 1991 response was not a concessions offer, but merely a response to an inquiry. Even if it were such an offer, Korea argues, action by the Korean National Assembly in December 1991, designating KAA as the responsible entity for the IIA project, notified the United States of its position. The United States, moreover, admits that it had actual notice, and was even "surprised" by it.

4.490 **In response, the United States asserts** that this new argument by Korea is totally without basis. Korea's July 1991 response states that, "the new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation." The United States submits that any reasonable interpretation of "conducting the new airport construction" suggests "involvement" in the procurement process by MOCT. The United States further submits that, in fact, Korea itself admitted that MOCT solicited and awarded the first IIA procurement for the 1990-1991 basic plan.

4.491 With regard to the Office of Supply, **Korea states** that it does not consider that the interpretation suggested by the United States is reasonable and, therefore, does not consider that Korea's July 1991 response is reasonably susceptible to the interpretation suggested by the United States. Korea states that the qualification ("But at present . . .") offered immediately after identification of the Office of Supply as the entity that would in principle, under the *Government Procurement Fund Act*, have undertaken IIA procurement had there even been any at the time, over 16 months before site preparation for the airport was to begin, made it unreasonable for any negotiator to conclude that the Office of Supply would, forever after, be the entity responsible for IIA procurement.[538]

4.492 **In response, the United States reiterates** that the phrase "But at present, the concrete procurement plan has not been fixed . . ." refers only to the procurement plan and not the procurement entity.[539] The United States argues that, in addition, because MOCT was responsible for the first IIA procurement, *i.e.*, the 1990-1991 basic plan "by virtue of the *Government Procurement Fund Act*," the Office of Supply should also have been responsible for that procurement.[540]

4.493 The United States argues that, furthermore, it is wrong to imply that, based on its July 1991 representation, the United States concluded that "the Office of Supply would, forever after, be the entity responsible for IIA procurement." The United States contends that, rather, the United States reasonably expected that if Korea were to alter its position regarding an explicit representation made on paper during formal GPA negotiations, it would have explicitly informed the US trade negotiators of such change. The United States contends that, moreover, a decision was taken by the Committee on Government Procurement that each signatory would notify changes to its annexes taking place between the signing of the GPA at Marrakesh and its entering into force.[541] The United States further states that if Korea were to change its position after the GPA came into force for it, Korea would be

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[536] Korea's Answer to Question 16 from the Panel, dated 3 November 1999, and Korea's Answer to Question 5 from the US, dated 3 November 1999.

[537] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[538] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[539] Second Written Submission of the United States, paragraph 61.

[540] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[541] See GPA/IC/M/2 at Annex 2, "Administration of Modifications to the Appendices to the Agreement on Government Procurement (1994) Prior to its Entry into Force, Other Than Rectifications of a Purely Formal Nature or Those Resulting from Negotiations Aimed at Expanding Coverage."

obligated to utilize Article XXIV:6 of the Agreement, the sole GPA provision that permits rectifications or modifications to a Party's annexes.[542]

4.494 **Korea states** that it has demonstrated that KAA, KOACA and IIAC, rather than the Office of Supply, have conducted the procurements for IIA.[543] Korea argues that since the Office of Supply has not in fact procured for the IIA, Korea's July 1991 response can speak only to the United States' expectations regarding the entities responsible for IIA procurement, purportedly held prior to the conclusion of negotiations for Korea's accession to the GPA.[544] Korea argues that to serve as the basis for a non-violation complaint, those expectations "must not have been reasonably anticipated at the time the tariff concession was negotiated."[545] Given the qualified nature of Korea's July 1991 response, followed by: the December 1991 amendments to the *Seoul Airport Act* appointing KAA as the entity responsible for the IIA project; correspondence between the United States and Korea regarding KAA's role in the IIA project[546]; and between Korea and major US airport authorities regarding KAA's role in the IIA project[547]; the successful participation of numerous US companies, closely consulted by the United States regarding Korea's offer[548] in KAA procurements for the IIA[549]; KAA's role as a separate "juristic" person[550]; the inclusion of airport authorities on Annex 3 rather than Annex 1 by the United States itself, Hong Kong, Israel, Japan, Aruba, Norway, Singapore, Switzerland and every member State of the European Communities; and the absence of KAA from any of the Annexes included in Korea's Appendix I, Korea argues that the United States' purported interpretation, even if reasonable in July 1991, was no longer reasonable after these developments, well in advance of the conclusion of negotiations regarding Korea's concession, in December 1993.[551]

(b) Ambiguity associated with July 1991 Response

4.495 **In response to a question from the Panel, Korea argues** that if Korea's July 1991 response is open to the interpretation the US now claims, Korea submits that the US interpretation is not the only possible interpretation, nor even the best possible interpretation. Korea further argues that the fact that the US interpretation is not the only possible interpretation is fatal to the US case.[552]

4.496 The **United States argues in response** that Korea newly attributes a "claim" to the United States that Korea's July 1991 response is open to more than one interpretation. The United States contends that Korea does not provide any citation as to where the United States allegedly made such a claim. The United States notes that, in fact, the United States has made statements directly to the

[542] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.
[543] Exhibits Kor-19A through Kor-19D, Kor-48A through Kor-48N, Kor-57A through Kor-57E.
[544] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.
[545] *Japan - Film*, paragraph 10.76.
[546] Letter from US Senator Slade Gorton to Mr. Wan-Sik Yook, Chairman, KAA, 6 October 1992; Letter from Council member of Seattle City Council to Mr. Wan-Sik Yook, Chairman, KAA, 22 September 1992; Letter from the Vice Chairman of KAA to Sung Yong Kim and J.A. Corbett, staff secretaries in the Economic Section of the US Embassy Seoul, 8 August 1992.
[547] Exhibit Kor-34 (Port Authority of New York and New Jersey); Exhibit Kor-35 (Los Angeles Department of Airports); Exhibit Kor-36 (Denver (Stapleton) International Airport); Exhibit Kor-37 (Dallas/Fort Worth International Airport).
[548] US First Written Submission, paragraph 92.
[549] Exhibit Kor-23.
[550] Notification of Act No. 3219, *Official Gazette*, 28 December 1979, p. 5892. Korea reiterates that KAA was established by the National Assembly pursuant to this Act. Article 3 states that KAA is a "juristic person."
[551] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.
[552] *Ibid.*

contrary, which is consistent with the US view that Korea's July 1991 response to US questions concerning new airport construction projects was unequivocal and unambiguous.[553]

4.497 **Korea notes** that while the US was asking questions in its native language, Korea was responding in a foreign language. Korea notes further that ambiguity generally is in the eye of the reader or listener, not the writer or speaker. Korea states that those who communicate do not normally aim at ambiguity, and Korea certainly did not do so in this instance. Korea states that this July 1991 communication, which the US now finds is subject to more than one interpretation, concerned a subject that was apparently of crucial importance to the United States: the extent of Korea's GPA offer in relation to the new airport.[554]

4.498 **In response, the United States argues** that in making its argument, Korea appears to suggest that Korea is exempt from the normal rules of treaty interpretation, and of state responsibility, with respect to its GPA schedules and other official documents merely because those documents were translated from Korean to English. The United States asserts that this argument is specious and states that Korea has already agreed that its schedule to the GPA be "[a]uthentic in the English language only."[555] Indeed, all negotiating documents provided by Korea, including the *Government Organization Act of the Republic of Korea*, were provided in English. The United States contends that, moreover, when it has suited Korea, Korea has in many other instances argued for precise textual interpretations of translated Korean documents.[556]

4.499 **In response to a question from the Panel, Korea submits** that if the subject of Korea's GPA coverage was as important as the US suggests, and if the July 1991 communication was as imprecise as the US argues (in that it would support the US interpretation as well as Korea's) then Korea states that it is puzzling that the US did nothing to clear up the matter. Korea argues that a reasonable US reader of an allegedly imprecise communication concerning a crucial matter would have sought clarification, particularly when it knew that the language of the response was not the first language of the person who prepared it. Korea reiterates that no clarification was sought, and the US has submitted no evidence to the contrary.[557]

(c) Burden of Proof

4.500 **Korea refers** to the views of the Appellate Body in the *EC - LAN* case. Korea states that in that case, the panel concluded that it was the importing party – in the context of this case, Korea – that bore the responsibility for the clarity of its tariff schedule. Korea states that the Appellate Body disagreed. The Appellate Body said: "It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs." "On the other hand," it continued, "exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed."[558] In other words, exporting Members have an obligation to ensure that their interests are guaranteed.[559]

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[553] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.
[554] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.
[555] US Exhibit 45.
[556] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999, referring to Korea's Answer to Questions from the Panel, dated 29 November 1999, at p. 21 in which Korea argues that "Article 6 of the 1997 *Seoul Airport Act*, however, [was] not coincidentally titled 'Operator of New Airport Construction Project'."
[557] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.
[558] *EC – LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, AB-1998-2 (adopted on 22 June 1998) paragraph 109.
[559] Korea's Answer to Question 2 of the Panel, dated 29 November 1999.

4.501 Korea argues that the reasoning of the Appellate Body is equally applicable to this case. Korea states that it was entitled to define its GPA offer, and its ensuing obligations, in terms that suited its own needs. Korea further states that it was up to the United States to ensure that its interests were protected in this process; it was not up to Korea to do so.

4.502 Korea further argues that just what "concession" the United States made in exchange for the alleged inclusion of KAA among Korea's commitments is not clear. Korea asserts that there is no evidence on this point.

4.503 **In response, the United States argues that** Korea appears to suggest that it has no responsibility for the clarity of its GPA schedule. However, the United States argues that what the Appellate Body in *EC - LAN* made clear was that "[t]ariff negotiations are a process of reciprocal demands and concessions, of 'give and take'."[560]

4.504 The United States argues that, in addition, the *EC - LAN* dispute involved a situation in which "the detailed product composition of tariff commitments was never discussed in detail during the tariff negotiations" and the negotiators "relied on a continuation of the status quo."[561] The United States contends that, indeed, the factual record in *EC - LAN* confirms that the "detailed product composition of the tariff category" in question in that dispute was not discussed at all. The United States argues that, in contrast in this case, the United States specifically asked Korea during negotiations to "identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction." The United States notes that believing that the United States' question was emphasizing the IIA project, Korea responded that "[t]he new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation . . . The responsible organization for procurement of goods and services relating to the new airport construction is the Office of Supply." The United States argues that, thus, it was through this question and response that the United States made sure "that [its] corresponding rights [were] described in such a manner in the Schedules of [Korea] that [its] interests, as agreed in the negotiations, [were] guaranteed."[562]

3. Measure

(a) Application of a Measure

4.505 **Korea argues** that the United States must demonstrate that the assignment to KAA of the responsibility for IIA procurement is a "measure" within the meaning of Article XXII:2 of the GPA. Korea argues that Article XXII:2 is written in the present tense. Korea notes that the Panel in *Japan – Film* stated that Article XXII:2, therefore, "contemplates nullification or impairment in the present tense," and "limits the non-violation remedy to measures that are currently being applied."[563]

4.506 Korea argues that since the measure granting KAA authority to undertake IIA procurement is no longer in effect, the United States' non-violation claim under Article XXII:2 must be rejected. Korea notes in this respect that the *Seoul Airport Act* was amended in August 1994 to shift responsibility for implementation of the IIA project from KAA to KOACA. Korea further notes that, similarly, Article 7(5-2) of the *Korea Airport Corporation Act*, which previously vested KAA with the authority to implement the IIA project, was deleted in August 1994.

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[560] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999, referring to Appellate Body report on *EC - LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted on 22 June 1998), paragraph 109.

[561] *EC - LAN*, paragraph 91.

[562] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999, referring to *EC - LAN*, paragraph 109.

[563] *Japan - Film*, paragraph 10.57.

4.507 Korea also argues that the transferral of responsibility from MOCT or Office of Supply in December 1991 to KAA which the United States claims undermined its legitimate expectations, occurred two years before the conclusion of the GPA negotiations, in December 1993, when Korea and other signatories submitted their final offers. Korea asserts that, as such, it must be presumed that the United States anticipated and in fact had knowledge of the event. It is the United States that bears the very significant burden of rebutting that presumption.

4.508 **In response, the United States argues** that the measures at issue in this dispute are the procurement practices and not, the United States argues as asserted by Korea, the transfer of procurement authority.

4.509 **Further, in response to a question from the Panel, Korea states** that KAA's authority over the IIA project was transferred to KOACA because it was determined that KAA's responsibilities for existing airports did not permit it to conduct the construction of the IIA efficiently. Korea notes in this respect that KAA is primarily focused upon the management of existing airport operations. Korea states that this may involve incidental repair and maintenance. Korea further notes that the only significant construction authority possessed by KAA was its responsibility, from December 1991 to August 1994, for the IIA. Korea states that it believed that an entity devoted solely to the project was necessary given that KAA's existing portfolio made it difficult to balance its construction responsibilities for the IIA. As a result, responsibility for implementation of the basic plan for the IIA project and IIA procurement was transferred by the National Assembly to KOACA in August 1994. Korea notes that KAA continues to supervise the operation of existing airports, including construction and maintenance at those airports.[564]

(b) Measure Upsets Competitive Relationship

4.510 **The United States notes** that the situation in this dispute is analogous to a 1952 dispute, Treatment by Germany of Imports of Sardines, in which tariff reductions negotiated by Norway with Germany were later not honoured by Germany. The United States refers to the relevant panel report, which explains:

> "a nullification or an impairment of a benefit accruing to Norway directly or indirectly under the [GATT] . . . would exist if the action of the German Government, which resulted in upsetting the competitive relationship between [products from Norway and other directly competitive products] could not reasonably have been anticipated by the Norwegian Government at the time it negotiated for tariff reductions on [its products]. The Panel concluded that the Government of Norway had reason to assume, during these negotiations that [the products from Norway] would not be less favourably treated than [other directly competitive products] and that this situation would not be modified by unilateral action of the German Government . . .
>
> As the measures taken by the German Government have nullified the validity of the assumptions which governed the attitude of the Norwegian delegation [during negotiations] and substantially reduced the value of the concessions obtained by Norway, the Panel found that the Norwegian Government is justified in claiming that it had suffered an impairment of a benefit accruing to it under the General Agreement."[565]

[564] Korea's Answer to Question 18 from the Panel, dated 3 November 1999.

[565] Panel report on *Treatment by Germany of Imports of Sardines* (adopted on 31 October 1952,) G/26, paragraphs 16-17.

4.511 The United States contends that, similarly, 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. According to the United States, Korea subsequently engaged in, and continues to engage in, measures in procurement that could not have reasonably been anticipated by the United States at the time the coverage of new airport construction was negotiated. More specifically, the United States argues that by applying GPA-inconsistent practices in the procurement of new airport construction projects, Korea upsets the established competitive relationship between US products, services and suppliers and Korean products, services and suppliers. The United States argues that these measures result in the upsetting of the established competitive relationship between US products, services and suppliers and Korean products, services and suppliers in the IIA construction project, a competitive relationship worth potentially US$6 billion. On this basis, the United States argues that Korea is nullifying or impairing benefits accruing to the United States under the GPA.

4.512 **Korea argues** that the requirement that the measure at issue upset the competitive relationship created by the Agreement implies, that an "agreement" is necessary. Korea further argues that the essence of a non-violation claim is that some action of a party, after an agreement is concluded, which could not have been reasonably anticipated at the time of the agreement, nullifies or impairs a concession made by another party. Korea asserts that the United States has not specified what agreement was made by the parties that was nullified or impaired by action taken by Korea after that agreement was entered into. Korea further asserts that it could not have been an agreement to include KAA, KOACA and IIAC in Korea's GPA coverage given that Korea never agreed to include KAA in any of its offers.

4. Reasonable Expectation of a Benefit

(a) Relevance of "Reasonable Expectation of Benefit"

4.513 **Korea emphasizes** that whether or not the United States' expectations regarding Korea's GPA commitments are "reasonable" is entirely irrelevant to a "violation" complaint under the GPA. Korea notes that reference to a complainant's reasonable expectations in the context of a violation complaint "melds the legally-distinct bases for violation and non-violation complaints . . . into one uniform cause of action, and is not in accordance with established GATT practice."[566] Korea asserts that the question whether expectations are reasonable or not is, therefore, relevant only in the context of a "non-violation" complaint, raised by the United States pursuant to Article XXII:2 of the GPA.

(b) Has there been a Reasonable Expectation of Benefit in this Case?

4.514 **Korea argues** that during the negotiation of the GPA, and specifically, during the period leading up to the submission by Korea of its final offer list for accession to the GPA, the United States was very much aware that KAA, rather than MOCT, Office of Supply or any other covered entity, was in fact responsible for IIA procurement. Korea further argues that the United States was aware of KAA's role as the entity responsible for IIA procurement years before Korea submitted its final offer for accession to the GPA, in December 1993. Korea notes in this respect that responsibility for IIA procurement was assigned to KAA two years before Korea's submission of its final offer for accession to the GPA on 15 December 1993, nearly two and one-half years before the conclusion of the Marrakesh Agreement on 15 April 1994, and six years before the effective date of the GPA, which for Korea was 1 January 1997.

4.515 Korea further argues that during negotiations regarding Korea's accession to the GPA, the United States was aware of the existence and activities of Annex 1 entities undertaking "procurement

[566] *EC - LAN*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (adopted on 22 June 1998), paragraph 80.

for airports," whether related to new airport construction or work on existing airports. Specifically, Korea argues that the United States was aware that entities other than KAA – namely, the Regional Aviation Offices – existed, procured for Korean airports other than IIA and were included in Korea's offer.[567]

4.516 Korea states in this respect that the Korean cable report[568], the questions put to Korea by the United States in May 1991[569] and the May 1991 US Department of Commerce cable report[570] all note the United States' receipt of a February 1991 document titled "*Supplementary Explanation of the Note by the Republic of Korea dated 29 June 1990 relating to the Agreement on Government Procurement*." Korea further notes that page 11 of this *Supplementary Explanation*, explaining Korea's initial offer, lists the Regional Aviation Offices or Bureaus as included within Korea's commitment of the Ministry of Transportation. Korea notes that it does not list KAA.[571]

4.517 Furthermore, Korea states that it has furnished proof of procurements undertaken by the Regional Aviation Offices both during the negotiations and up to the present.[572] Korea argues that it is not credible for the United States to claim, on the one hand, that it consulted carefully and extensively with US industry regarding Korean airport procurement and yet, on the other hand, that it had no idea about the entities undertaking that procurement.[573]

4.518 Korea also states that Korea's General Note 1(b) meant (and means), and what the United States reasonably expected it to mean at the conclusion of GPA negotiations with Korea, was that Annex 1 entities conducting procurements for airports existed (and exist) and that they are MOCT's Regional Aviation Offices. Korea states that during negotiations with Korea, the United States was aware of their existence, their identity, their procurement activity and their inclusion in Korea's offer. It was also aware that Korea did not include KAA in the February 1991 *Supplementary Explanation* as a procuring entity considered covered under Korea's offer by virtue of a relationship with the Ministry of Transportation.[574]

4.519 **In response, the United States** argues that Korea's GPA-inconsistent practices in the procurement of new airport construction projects could not have been reasonably anticipated by the United States at the time of the 1991 negotiations.

4.520 Further, the United States argues that it is completely irrelevant whether the United States knew that KAA was responsible for airport procurement or not. The United States argues that, rather, what is relevant is the fact that KAA is a subsidiary organization of MOCT. Given that it is a subsidiary organization of MOCT, and thus covered under Annex 1 of the GPA, the United States could, therefore, not have reasonably anticipated the lack of GPA coverage for any of KAA's procurements.

4.521 Additionally, in response to a question from the Panel, the United States notes that its reasonable expectation relates not to KAA's status as a project operator, nor to the fact that KAA was operating under its own procurement regulations, but instead it relates to whether the United States reasonably expected new airport construction to be covered under Annex 1 of the GPA. The United States contends that this reasonable expectation did not change despite the shift of procurement authority to KAA, because KAA was (and is) a subordinate unit of MOCT, and a shift of procurement authority within MOCT was of no consequence, for Korea had already assured the United States that

[567] Korea's Response to the US Answer to Question 17 from the Panel, dated 29 November 1999.
[568] Exhibit Kor-118.
[569] US Exhibit 4, Questions 9, 10, 11, 14, 15.
[570] US Exhibit 2, p. 2.
[571] Korea's Response to the US Answer to Question 17 from the Panel, dated 29 November 1999.
[572] Exhibits Kor-61A through Kor-61J.
[573] Korea's Response to the US Answer to Question 17 from the Panel, dated 29 November 1999.
[574] *Ibid.*

all of MOCT would be covered under Annex 1. The United States asserts that a transfer from one subordinate unit of MOCT to another subordinate unit of MOCT is no transfer at all. According to the United States, the procurement authority remained within MOCT.[575]

4.522 The United States contends that, moreover, the US reasonable expectation did not change because KAA was using different procurement regulations at the time. The United States further states that central government entities (including their subordinate units) are only required to come in line with GPA requirements after the GPA enters into force. According to the United States, it was reasonable to expect that Korea would bring KAA's practices into line with the GPA by the time the GPA entered into force for Korea, in January 1997.[576]

(c) Relevant Evidence Before Korea's Accession

(i) Negotiations and Communications

Korea's July 1991 Communication

4.523 **Korea argues** that assignment of responsibility for IIA procurement to what would become a non-covered entity should have been, and in fact was, reasonably anticipated by the United States during negotiations with Korea regarding its GPA commitments. In support of its argument, Korea states that in a 1 July 1991 response to a question from the United States regarding the IIA project, Korea stated that Office of Supply was to be the "responsible organization for procurement" for the IIA project. Immediately following that sentence, however, Korea expressly stated: "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." Korea asserts that it could not have made this qualification with greater clarity.

4.524 According to Korea, Korea argues that, furthermore, there would in July 1991 have existed some uncertainty concerning the entity responsible for IIA procurement was entirely reasonable. Korea notes in this respect that its response to the United States' inquiry was offered six months before the basic plan for IIA was completed, 16 months before site preparation for the IIA project was to begin, two and one-half years before Korea's submission of its final offer list, and nearly five years before ground-breaking for the IIA passenger terminal took place, on 23 May 1996. Korea states that given the express reservation in Korea's July 1991 response, and given that the IIA project was in the infancy of its planning stage when that response was given as stated in the July 1991 response, the United States was on notice that plans regarding the entities responsible for IIA procurement were not yet set. Procurement plans for the IIA project were simply not ready in July 1991, and Korea fully disclosed this fact to the United States.

4.525 **The United States contends in response** that Korea's argument is not persuasive because it fails to explain how the phrase, "procurement plan," can specifically be referring to "plans regarding the entities responsible for IIA procurement." The United States argues that "procurement plan," by its ordinary meaning, could only be referring to "the basic plan for the construction of IIA," which, consistent with Korea's own representation, was not yet fixed at the time of Korea's 1991 response. The United States contends that this basic plan provided for the "general direction of IIA construction, an outline of the construction plan, an estimated duration for the construction, and a financing plan for the project." The United States asserts that it did not provide for any change in entity coverage and it was not announced until 16 June 1992, whereas KAA became responsible for the procurement of airport construction in December 1991. The United States further asserts that if Korea had really wanted to provide "greater clarity," it would have said, "But at present, the procurement entity has not been fixed."

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[575] US Answer to Question 25(b) from the Panel, dated 3 November 1999.
[576] *Ibid.*

4.526 Further, the United States argues that, as for Korea's argument that the United States was placed on notice that "the entities responsible for IIA procurement were not yet set," the United States contends that Korea's representation that "the concrete procurement plan has not been fixed because now the whole airport construction project is only in a basic planning stage," referred only to the procurement "plan" and not to the procuring "entity." The United States notes that, furthermore, this condition directly followed plain statements referencing a "basic plan" and a "working plan" to be completed by 1992 and 1993, respectively, as well as a definitive representation regarding the role of MOCT and the Office of Supply as entities responsible for IIA construction. The United States concludes that, therefore, Korea's conditional statement could only be referring to the basic plan or the working plan, and not to the entities conducting the procurement.

4.527 The United States also states that it relied on Korea's representations in 1991, when Korea explicitly stated that the New Airport Development Group of MOCT and the Office of Supply are the only two entities responsible for procurements of new airport construction. The United States also states that it relied on Korea in subsequent years when Korea never again raised the issue of airport procurement.

4.528 **Korea responds** by arguing that even if Korea's July 1991 response did not alone effectively alert the United States to the possibility that IIA procurement responsibility might eventually fall to an entity other than the Office of Supply, there are numerous examples of constructive and actual notice that demonstrate that the United States was very much aware of KAA's role years before the conclusion of the GPA negotiations.

4.529 Korea states that those examples of constructive and actual notice include the following: In December 1991, Korea published in its *Official Gazette* notification of KAA's appointment to implement the IIA project, and the United States is charged with knowledge of this notice; during 1992, Korea and the United States exchanged correspondence regarding KAA's role as the entity responsible for the IIA project; during the period 1992-1994, numerous US companies bid for and secured procurements conducted by KAA for the IIA project; during 1992, KAA broadcast its procurement role in the IIA project to airport and airport construction experts worldwide, including the Port Authority of New York and New Jersey, the Los Angles Department of Airports, the Denver (Stapleton) International Airport, and the Dallas/Fort Worth International Airport; press reports demonstrate that KAA was the entity in charge of IIA procurement; the United States was aware, by virtue of the publication in the *Official Gazette* of the *Korea Airport Corporation Act*, that KAA, like Korea's Annex 3 entities, is a separate "juristic" person; the United States was aware that its own airport authorities, as well as the airport authorities of nearly every GPA signatory, were included on Annex 3 rather than on Annex 1; in July 1998, the United States acknowledged that KOACA, is not covered, and the European Communities stated, in March 1993, that Korea's GPA proposal contained "no offer regarding airports."

4.530 According to Korea, therefore, during the period leading up to its submission of its final GPA offer, the United States was aware that KAA, rather than MOCT or the Office of Supply, was the entity responsible for IIA procurement. At the same time, Korea asserts that the United States was also aware that KAA was not listed on Korea's Annex 1.[577]

Korea's February 1991 *Supplementary Explanation*

4.531 **Korea argues** that the United States was aware that KAA did not feature on the list of subordinate bodies covered by virtue of Korea's offer of the Ministry of Transportation and also was

[577] Korea's Second Written Submission, paragraphs 169-172.

well aware of the inclusion of other MOCT airport-procurement entities – that is, the Regional Aviation Offices - within Korea's offer of the Ministry of Transportation as an Annex 1 entity.[578]

4.532 Korea argues that procurements for construction at "other regional airports" are covered under Korea's Annex 1 not because they are covered projects, but because they are undertaken by covered entities – MOCT's Regional Aviation Offices or the Office of Supply on their behalf. Korea notes in this respect that responsibility for procurements for significant construction for these airports falls to the Regional Aviation Offices or the Office of Supply.[579]

4.533 Korea notes that the United States has claimed in these proceedings that it was not aware that entities other than KAA, KOACA and IIAC – namely, the Regional Aviation Offices and the Office of Supply – conduct procurements for "other regional airports" in Korea. Korea notes that the United States blames this lack of awareness on Korea, arguing that Korea should have disclosed the existence of the Regional Aviation Offices to the United States in its 1 July 1991 response and its response to other questions put to it by the United States in September 1998.[580]

4.534 Korea argues in response that the United States was in fact aware of the existence of the Regional Aviation Offices during negotiations with Korea regarding its accession to the GPA. Korea refers to a document, dated February 1991, and titled "*Supplementary Explanation of the Note by the Republic of Korea dated 29 June 1990 relating to the Agreement on Government Procurement*," which lists on pages 6-14 all 47 Korean central government entities, along with their subordinate linear organizations, special local administrative organs and attached organs. Korea states that page 5 of the *Supplementary Explanation* notes that 35 of those 47 central governments were covered under Korea's June 1990 offer. Korea further notes that page 26 of the document describes the point of what eventually became Note 1 to Korea's Annex 1 – "to clarify the coverage of central government organs which come under 35 of [4]7 purchasing entities."[581]

4.535 Korea notes as an example, page 11 of the *Supplementary Explanation*, lists five bodies as covered by the inclusion of the Korean Ministry of Transportation, including the Regional Aviation Offices or Bureaus. Korea argues that this document confirms that Korea did intend to commit to coverage of procurements by the Regional Aviation Offices. Korea states that it is also noteworthy that KAA is not on this list included at pages 6-14 of the *Supplementary Explanation*, either as a body under the Ministry of Transportation, or as a central government entity in its own right.[582]

4.536 Korea argues that the United States received this document. Korea notes that this is evident from a Korean 25 February 1991 cable report indicating that the *Supplementary Explanation* was in fact delivered to and acknowledged as received by the United States.[583] Korea notes that, moreover, the United States' May 1991 questions to Korea include five citations to Korea's February 1991 *Supplementary Explanation*.[584] Korea also notes that the May 1991 US Department of Commerce cable report includes at least two references to the "ROKG's 2/91 *Supplementary Explanation*" or "the February *Supplementary Explanation*."[585] Korea states that it is evident that the document was

[578] Korea's Answer to Question 21 from the Panel, dated 29 November 1999.
[579] *Ibid.*
[580] *Ibid.*
[581] Korea's Answer to Question 21 from the Panel, dated 29 November 1999. Korea notes that although p. 5 clearly states that 35 of the 47 total central government entities were covered by Korea's offer, p. 26 puts the number at "35 of 37"entities. The statement on p. 26 appears to be a typographical error, since the list on pp. 6-14 actually includes 47 entities.
[582] *Ibid.*
[583] *Ibid.*
[584] Questions 9, 10, 11, 14, 15.
[585] p. 2.

provided to the United States, scrutinized by the United States, and used as a starting point for questions put to Korea by the United States.[586]

4.537 Korea states that despite KAA's conspicuous absence from the list of MOCT airport-procurement entities included on page 11 of Korea's February 1991 *Supplementary Explanation*, despite the United States' purported interest in GPA negotiations with Korea, in the transportation sector generally and the "Airport Development Group" more specifically and despite the United States' awareness of KAA's role as the entity responsible for the IIA project, the United States never once, in the more than two and one-half years remaining in the GPA negotiations with Korea, asked where KAA fit into Korea's offer. Korea cannot be accorded responsibility for the United States' failure.[587]

4.538 In support of its argument, Korea refers to an internal EC Commission note, dated 3 December 1993.[588] Korea states that this document refers to Korea's offer of coverage for "a number of major cities (Seoul, Pusang) [sic]" that "control their airports in co-operation with the Ministry of Transportation." MOCT's two Regional Aviation Offices are, again, the Seoul and the Pusan Regional Aviation Offices. Those are the airport procurement entities included in Korea's offer for Annex 1 GPA coverage of MOCT.[589]

4.539 **In response, the United States argues** that even though the February 1991 document lists all of the "subordinate linear organizations," "special local administrative organs," and "attached organs" of the Ministry of Transportation and the Ministry of Construction, when this document is compared with the 1994 and 1999 MOCT organizational charts[590], there are numerous discrepancies.[591]

4.540 The United States notes, for instance, that the General Affairs Division, the Planning and Management Office, the Construction Affairs Office, the Transportation Policy Office, the National Territory Planning Bureau, the Land Bureau, the Housing and Urban Affairs Bureau, the Surface Transportation Bureau, the Transportation Safety Bureau, the Civil Aviation Bureau, the Waterway Bureau, the Air Traffic Control Center and the Central Land Tribunal from the 1994 MOCT organizational chart are not listed in the February 1991 document. The United States contends that, yet it is uncontested that these entities are covered under Annex 1 of the GPA. In addition, the Construction Economy Bureau, the Technology and Safety Bureau, the Road Bureau and the Water Resources Bureau (entities from the 1999 MOCT organizational chart not found in the 1994 chart) are also not listed in the February 1991 document.[592]

4.541 The United States argues that, moreover, according to this February 1991 document, there are 24 District Construction Offices, five VOR-TAC Stations, and a Flight Inspection Office under the Ministries of Construction and Transportation, yet these entities cannot be found in either the 1994 or 1999 MOCT organizational charts. Similarly, the February 1991 document lists three Flood Control Offices, a National Construction Research Institute, a Central Equipment Management Office, and five Marine Accident Inquiry Offices. However, the organizational charts list five Flood Control Offices, and the 1999 chart excludes the National Construction Research Institute, a Central Equipment Management Office, and five Marine Accident Inquiry Offices (four of which have the exact same name on the 1994 chart). Finally, the United States notes that, in addition to KAA, the

[586] Korea's Answer to Question 21 from the Panel, dated 29 November 1999.
[587] *Ibid.*
[588] Attached as Annex V to the EC's Answer to Questions from the Panel, dated 3 November 1999.
[589] Korea's Response to the EC's Answer to Question 1 from the Panel, dated 3 November 1999.
[590] Exhibit Kor-111.
[591] US Response to Korea's Answer to Question 21 from the Panel, dated 29 November 1999.
[592] *Ibid.*

New Airport Development Group is not listed in the February 1991 document. Thus, it is not surprising that KAA is not listed in this document.[593]

4.542 The United States argues that what is clear is that the February 1991 document does not represent Korea's GPA commitments; it is not even Korea's final offer. The United States contends that as Korea itself has noted, it is merely "a starting point for questions put to Korea by the United States." The United States contends that this makes sense, because subsequent to receiving this document, the United States in May 1991 asked Korea to "[p]lease identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction." The United States notes that Korea responded in July 1991, "The new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation . . . The responsible organization for procurement of goods and services relating to the new airport construction is the Office of Supply."[594]

4.543 The United States argues that it is also clear that whether a non-listed entity should be considered "attached/connected/affiliated" to a listed entity should not be determined by the listed entity's organizational chart, which is subject to unilateral alterations at any time, and was not considered as part of the GPA negotiations. The United States argues that following a textual analysis of the GPA, "control" is the only feasible, objective method in which one can determine whether a non-listed entity is "attached/connected/affiliated" to a listed entity, and therefore is covered under the GPA. The United States further argues that, in fact, at one point in its response, even Korea appears to embrace the "control" concept by claiming that it did not include KAA in the February 1991 document because it "did not consider KAA to be 'controlled' enough by MOCT to include it on the list of MOCT airport-procurement entities."[595]

Legislation

Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction

4.544 **In response to a question from the Panel** as to why Korea did not refer to the 1991 enactments and amendments to IIA legislation in its July 1991 response, **Korea states** that pursuant to *Japan - Film*[596], the United States is charged with knowledge of the enactment of the *Seoul Airport Act*, and the significance thereof, from the date of its publication in the Official Gazette, which came not weeks or months before the conclusion of negotiations regarding Korea's GPA commitments, but instead more than two and one-half years before the conclusion of those negotiations.[597] Korea argues that by virtue of either the publication of the *Act* or otherwise, the United States was aware of the *Act* and its significance. Korea argues that, therefore, it was not incumbent upon Korea to provide an answer to a question that was not even asked of it, in circumstances where the United States had constructive and actual knowledge of the Act.[598]

4.545 Korea also notes that with the enactment of amendments to the *Seoul Airport Act* in December 1991, the National Assembly stated that MOCT would not be responsible for the IIA project and that that job would go to KAA. Korea states that the GPA significance of this fact is not found in the *Act* itself, but instead stems from the fact that KAA is not now and never was listed on any of the Annexes included in Korea's Appendix I.[599]

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[593] *Ibid.*
[594] *Ibid.*
[595] *Ibid.*
[596] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[597] Korea's Answer to Question 1 from the Panel, dated 29 November 1999, referring to *Japan - Film*, WT/DS44/R (adopted on 22 April 1998), paragraph 10.80.
[598] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.
[599] Korea's Answer to Question 5 from the Panel, dated 29 November 1999.

4.546 **In response, the United States argues** that this assertion is contradicted by the fact that no version of the *Seoul Airport Act* has ever stated that MOCT would not be responsible for the IIA project. The United States contends that, on the contrary, the *Seoul Airport Act* is filled with references to MOCT authority over the project operator and MOCT's role in the IIA project. The United States notes that, significantly, the December 1991 *Seoul Airport Act* amendments did not state that the job of responsibility over the IIA project would go to KAA. The United States notes that the December 1991 amendments merely added KAA to the list of potential project operators of the IIA project. The United States further contends that the December 1991 amendments did not alter Article 6(2) in any way, the provision which bestows upon MOCT authority to designate any project operator for the IIA project.[600]

4.547 The United States contends that, moreover, Korea's statement gives the impression that the National Assembly was responsible for designating KAA as the IIA project operator. The United States notes that, however, according to Korea, MOCT made the sole "internal decision" to designate KAA as project operator for the 1991-1994 portion of the IIA project. The United States notes further that MOCT then drafted and published the "draft legislation containing proposed amendments to the *Seoul Airport Act*." The United States further states that Korea submitted this draft legislation to the National Assembly, not because the National Assembly "assigned" KAA to this task, but because only the National Assembly can pass laws in Korea. The United States concludes that, thus, the National Assembly merely codified a decision made by MOCT, pursuant to the authority granted to MOCT in the *Seoul Airport Act*.[601]

4.548 **Korea states** that the appointment of KAA, in December 1991, as the entity responsible for IIA procurement occurred "prior to the conclusion of the tariff negotiations at issue." Korea further argues that there is "a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption."[602]

4.549 Korea reiterates that it is the United States that bears the considerable burden of rebutting this presumption. Korea need not demonstrate that the United States did not anticipate to secure coverage of the entities responsible for IIA procurement. To effectively rebut the presumption, it is for the United States to demonstrate, affirmatively, that it "reasonably expected" to obtain the benefit of GPA coverage for IIA procurement by virtue of Korea's inclusion of MOCT and the Office of Supply on its Annex 1 list.[603]

4.550 **In response, the United States argues** that Korea's argument is irrelevant to this case. The United States argues that it does not matter whether the United States had constructive or actual notice of the enactment of the *Seoul Airport Act*, for the significance of the *Act* is simply that it confirms MOCT's statutory authority and control over the IIA project.[604]

4.551 The United States reiterates that the *Seoul Airport Act* is replete with references to MOCT authority over the IIA project. The United States notes that, for example, Article 6 of the *Seoul Airport Act*, while listing a range of possible "operators" (which incidentally includes "state" and "local" governments), grants MOCT ultimate authority to select any entity to be the project operator

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[600] US Response to Korea's Answer to Question 5 from the Panel, dated 29 November 1999.

[601] *Ibid.*

[602] *Japan - Film*, WT/DS44/R (adopted on 22 April 1998), paragraph 10.80.

[603] *Ibid*. paragraph 10.72. As further support for this principle, see *EEC - Oilseeds*, BISD 37S/86, 128-129 (paragraphs 147-148); *Operation of the Provisions of Article XVI*, BISD 10S/201, 209 (paragraph 28) (adopted on 21 November 1961); *Other Barriers to Trade*, BISD 3S/222, 224 (paragraph 13) (adopted on 3 March 1955); *Germany - Sardines*, BISD 1S/53, 58-59 (paragraph 16) (adopted on 31 October 1952); *Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39, BISD II/188, 193-194 (adopted on 3 April 1950).

[604] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999.

for the IIA project. This is entirely consistent with the rights granted to MOCT under Article 94(2) of the *Aviation Act*.[605]

4.552 The United States contends that it is important to keep in mind that a "project operator" is distinct and separate from the entity that has ultimate authority over the project. The United States also states that it is important to remember that Korea itself reconfirmed that the Office of Supply and the Ministry of Transportation were responsible for the IIA airport development project when it responded to US questions in July 1991, two months after the enactment of the *Seoul Airport Act*.[606]

Aviation Act

4.553 **The United States notes** that the version of the *Aviation Act* granting statutory authority over airport development projects to MOCT, came into effect as a wholly amended Act on 14 December 1991. Accordingly, the United States argues that it was on notice from December 1991 onwards that MOCT retained statutory authority and control over all airport development projects in Korea, including the IIA project. In light of this, argues the United States, it felt confident that, from 1991 to the time when Korea submitted its final offer in December 1993 and signed the revised GPA at Marrakesh in 1994, MOCT was the proper entity to be covered under the GPA in order for the US to obtain non-discriminatory access to Korea's airport procurement market. The United States notes that to this day, the *Aviation Act* remains unaltered in providing MOCT the statutory authority over the IIA airport development project. The United States argues that this was one of the reasons why it was essential for the United States to negotiate MOCT's coverage under the GPA, and why the United States was not concerned about explicitly covering IIA project operators, which MOCT could change at will at any time (as evidenced by the shift of IIA responsibility from KAA to KOACA and IIAC over a span of eight years), but which would nevertheless remain covered under the GPA because of MOCT's ultimate control over the IIA project.[607]

4.554 **Korea argues in response** that the *Seoul Airport Act* replaces the *Aviation Act* for the purposes of the construction of the IIA.[608] Korea states that the United States, well beyond constructive knowledge of the *Seoul Airport Act*, had actual knowledge of that Act throughout and subsequent to negotiations with Korea regarding accession to the GPA. Korea asserts that the United States' awareness of the passage of the *Seoul Airport Act* and its understanding that the *Seoul Airport Act* rather than the *Aviation Act* regulates IIA construction is illustrated in the United States' First Written Submission, in which it cites 17 Articles from the *Seoul Airport Act* in support of its claims, and no Articles from the *Aviation Act*.[609]

4.555 Korea also argues that the United States' apparent assertion that its expectations regarding which entity would be responsible for IIA construction were formed by the *Aviation Act* presumes ignorance of the *Seoul Airport Act*. Korea argues that it is virtually impossible for one with knowledge of both Acts to have concluded that the question of responsibility for construction of the IIA was and is governed by the *Aviation Act*, rather than the *Seoul Airport Act*.[610] Korea states the purpose of the *Seoul Airport Act* alone – to "specify…the matters necessary for the speedy construction of a new airport in the Seoul Metropolitan area" – should have been enough to signal to any remotely observant reader that the *Seoul Airport Act* would regulate the IIA project.[611]

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[605] *Ibid.*
[606] *Ibid.*
[607] US Answer to Question 18 from the Panel, dated 29 November 1999.
[608] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.
[609] *Ibid.*
[610] *Ibid.*
[611] *Ibid.*

4.556 Korea also argues that the *Seoul Airport Act*, the *Korea Airport Corporation Act*, the *Korea Airport Construction Authority Act* and the *Law on Inchon International Airport Corporation* are the "other Acts" and "other laws" referred to in the *proviso* in Article 94(1) of the *Aviation Act* which allows an entity other than MOCT to implement IIA construction. Korea argues that the *proviso* in Article 94(1) was triggered on a number of occasions. Specifically, Korea notes that December 1991 amendments to the *Seoul Airport Act* and the *Korea Airport Corporation Act* appointed KAA as the entity responsible for the IIA project[612], August 1994 amendments to the *Seoul Airport Act* and the September 1994 enactment of the *Korea Airport Construction Authority Act* appointed KOACA to that role[613] and February 1999 amendments to the *Seoul Airport Act*, together with passage of the *Law on Inchon International Airport Corporation*, similarly appointed IIAC to perform this task.[614] Korea argues that the United States is charged with constructive knowledge – and indeed has demonstrated actual knowledge – of the legislative events triggering the *proviso* of Article 94(1).[615]

4.557 **In response, the United States refers** to its arguments in paragraphs 4.111 and 4.114.

4.558 **Korea also submits** that it is not the *Seoul Airport Act* about which the United States was unaware at the time of Korea's 1991 response. Rather, Korea asserts that until its Second Written Submission in these proceedings, it was the *Aviation Act* about which the United States was unaware. Korea argues that any claim by the United States that the *Aviation Act* rather than the *Seoul Airport Act* formed the basis for its expectations regarding coverage of the entities responsible for IIA procurement is nothing more than a convenient post hoc rationalization. Korea states that this is totally apart from the fact that the *Aviation Act* was pre-empted by the *Seoul Airport Act*.[616]

Amendment of the GPA

4.559 Korea argues that the US and all of the Parties to the GPA negotiations knew that the Uruguay Round negotiators had dropped the control test and agreed to that. According to Korea, whatever their expectations might have been prior to rejection of the control test, reality changed in two crucial ways. First, as a matter of law, entities controlled by named entities, but not themselves named, no longer could be covered. Second, from that point forward it was no longer reasonable to believe that controlled entities, not themselves named, would in any way be covered. Korea argues that, thus, a non-violation claim based on control must fail.[617]

4.560 In response to the United States' control arguments, Korea also asserts that the "control" test was, according to the United States, "excluded" from the Uruguay Round GPA, and to the extent it was reinserted elsewhere, can be found in Annex 3. Korea states that whether the "control" test was excluded altogether, or reborn in Annex 3, the United States' purported expectation of coverage for KAA could not reasonably have been expected on the basis of any alleged "control" over it by MOCT. Korea argues that if the "control" test was excluded, any expectation of coverage based on "control" cannot be reasonable. Further, Korea argues that if the "control" test was reborn in Annex 3,

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[612] 1991 *Seoul Airport Act*, Article 6(1). See also *Korea Airport Corporation Act*, Article 7(5-2) (assigning to KAA the task of "[n]ew airport construction projects as referred to subparagraph 2 of Article 2 of the Act on the Promotion of New Airport Construction in Seoul Metropolitan Area.").

[613] 1997 *Seoul Airport Act*, Article 6(1). See also *Korea Airport Construction Authority Act*, Article 2 (defining project with which KOACA was charged as encompassing activities "stipulated in the subparagraph 2, Article 2, '*Seoul Airport Act*'.").

[614] Korea's Answer to Question 9 from the Panel, dated 29 November 1999, referring to *Seoul Airport Act*, Article 6(1). See also *Law on Inchon International Airport Corporation*, Article 10(1)(1) (charging IIAC with responsibility for "[c]onstruction business of the Metropolitan New Airport (hereinafter referred to as Inchon International Airport) in accordance with the Article 2 of the promotional law on Metropolitan New Airport Construction.").

[615] Korea's Answer to Question 9 from the Panel, dated 29 November 1999.

[616] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.

[617] Korea's Answer to Question 20 from the Panel, dated 29 November 1999.

then the United States could not have reasonably expected coverage for KAA without inclusion of KAA on Korea's Annex 3.[618]

Communications with the US Government

4.561 **In support of its argument** that the United States was aware that KAA, rather than MOCT, Office of Supply or any other covered entity, was in fact responsible for IIA procurement, **Korea refers** to a letter, dated 6 October 1992, from a US Senator to the Chairman of KAA, requesting consideration of a constituent company's bid for work on the IIA project.[619] Korea also refers to a letter, dated 22 September 1992, from the Seattle City Council to the Chairman of KAA regarding that same bid.[620] Korea then refers to a letter, dated 8 August 1992, from the Vice Chairman of KAA to (among others) Sung Yong Kim and J.A. Corbett, staff secretaries in the Economic Section of the US Embassy, Seoul, inviting them to attend KAA's International Symposium on Building Metropolitan Airport on 25 August 1992.[621] Korea notes that this letter states that KAA "is designated to construct a metropolitan airport, which shall become hub center of air transportation in east Asia." Finally, Korea states that it had also confirmed that the then-US Ambassador to Korea, the Honorable Donald Gregg, visited KAA during this period, and with other US officials accompanying him on the visit was fully briefed by KAA on the IIA project.

4.562 **In response, the United argues** that nothing in the correspondence cited suggests in any way that KAA would not be a covered entity under the GPA, or that the IIA project would not be covered under the GPA. The United States argues that, furthermore, none of the letters in question were to or by US trade negotiators. The United States asserts that, for example, it is obvious that a US Senator writing on behalf of a company in his State interested in participating in an IIA procurement and a Seattle City Council member writing on behalf of the same company do not represent the United States Government in GPA negotiating matters. The United States contends that by contrast, "responses to the United States' questions" during GPA negotiations by an "employee of the Ministry of Commerce," which were "review[ed] by his superiors in advance of the [July 1991] submission" unquestionably represented Korea's official position in such negotiations and the United States' action in relying on these responses, and assuming that they were made in good faith, was entirely reasonable.[622]

4.563 **Korea also argues** that, as was the case with KAA, the United States was and is aware of KOACA's role in IIA procurement. For support of this argument, Korea refers to a letter from the US Ambassador to Korea, addressed to the Chairman and President of KOACA, requesting consideration of a US company's bid for work on the IIA project.[623]

Communications with US Companies

4.564 In further support of its argument that the United States was aware that KAA was the IIA procuring entity, **Korea also states** that during KAA's tenure as operator of the IIA project, numerous US companies participated in and, in fact, successfully secured procurements conducted by KAA. Korea refers to a list of successful bids submitted by US companies to KAA during the period

[618] Korea's Response to US Answer to Question 16 from the Panel, dated 29 November 1999.
[619] Letter from US Senator Slade Gorton to Mr. Wan-Sik Yook, Chairman, KAA, 6 October 1992.
[620] Letter from Council Member of Seattle City Council to Mr. Wan-Sik Yook, Chairman, KAA, 22 September 1992.
[621] Letter from the Vice Chairman of KAA to Sung Yong Kim and J.A. Corbett, staff secretaries in the Economic Section of the US Embassy Seoul, 8 August 1992.
[622] US Response to Korea's Answer to Question 2 from the Panel, dated 29 November 1999.
[623] Letter from US Ambassador Stephen Bosworth to Mr. Kang, Dong-Suk, Chairman & President, KOACA, dated 3 July 1998.

1992-1994 to support this statement.[624] Korea argues that even if the United States had not had direct knowledge of KAA's responsibility for the IIA project, were it intent on achieving coverage for IIA procurement it would have asked the numerous US firms actively and successfully bidding for the IIA project for some basic information regarding the entities that would need to be "covered" by Korea's GPA commitments to secure GPA coverage for the IIA project.

4.565 Korea also argues that, like the US Government, US firms[625] were aware that KOACA was the entity responsible for IIA procurement as was the case with KAA. For support of this argument, Korea refers to a list of successful bids submitted by US companies to KOACA during the period 1994-1998.[626]

Communications with Major Airports

4.566 **Korea also states** that, coincident with the negotiation of the GPA, KAA's responsibility for the IIA project was communicated to virtually every major airport construction expert and airport or aviation organization in the world. Korea refers to examples of correspondence, from the period 1991-1993, between KAA officials and the International Air Transport Association, the International Civil Aviation Organization, the International Union of Architects, the American Institute of Architects, the Airports Association Council International, the Civil Aviation Authority of Singapore, the Schiphol Airport Authority, the Frankfurt Airport Authority, the Port Authority of New York and New Jersey, the Los Angeles Department of Airports, the Denver (Stapleton) International Airport Office and the Dallas/Fort Worth International Airport. Correspondence between KAA and noted architects and architectural firms is also attached, including correspondence with I.M. Pei, Cesar Pelli & Associates, Richard Meier & Partners, Ricardo Bofill, Sir Norman Foster and Alco Rossi. Korea states that with all of these noted experts aware of KAA's role, it is difficult to imagine that the United States was not also itself aware of KAA's status as the entity responsible for IIA construction.[627]

EC's March 1993 Report and Other EC Communications

4.567 **Korea notes** that in March 1993, the European Communities stated that Korea's GPA proposal contained "no offer regarding airports."[628]

4.568 In response to a question from the Panel regarding a letter from the European Communities to the Korean Director of Multilateral Trade Affairs, dated 24 November 1993, which, according to Korea, allegedly indicates that Korea had offered to cover airports, Korea notes that although the letter presumes that a response was made by Korea, Korea has been unable to locate any reply to the European Communities' letter of 24 November 1993. Korea also notes that until Korea's

[624] The list includes successful bids made by US companies during the period 1992-1998. As will be addressed further below, another entity took over IIA procurement from KAA in August 1994. Korea has also attached correspondence between KAA and US firms Greiner International Ltd. and Bechtel Aviation Services.

[625] Korea refers to press releases by US firms, AT&T, dated 11 March 1997, and ARINC, dated 10 September 1998, announcing the conclusion of contracts with KOACA.

[626] The list includes successful bids made by US companies during the period 1992-1998. Korea notes that KAA was responsible for procurement during the period December 1991 to September 1994.

[627] Korea refers to KAA correspondence with the International Air Transport Association, the International Civil Aviation Organization, the International Union of Architects, the American Institute of Architects, the Airports Association Council International, the Civil Aviation Authority of Singapore, the Schiphol Airport Authority, the Frankfurt Airport Authority, the Port Authority of New York and New Jersey, the Los Angeles Department of Airports, the Denver (Stapleton) International Airport Office, the Dallas/Fort Worth International Airport, I.M. Pei, Cesar Pelli & Associates, Richard Meier & Partners, Ricardo Bofill, Sir Norman Foster and Alco Rossi.

[628] Report from the Commission Concerning Negotiations Regarding Access to Third Countries' Markets in the Fields Covered by Directive 90/531/EEC (the Utilities Directive), COM (93) 80 final, 3 March 1993, p. 7.

15 December 1993 final offer, which "for the first time" included General Note 1(b), the European Communities may have considered procurements by the Regional Aviation Offices to be part of Korea's offer. Korea notes these Offices are mentioned in Korea's February 1991 *Supplementary Explanation*.[629]

4.569 Korea notes that the November 1993 letter could of course mean that, in March 1993, the statement by a subdivision of the European Commission that Korea had made "no offer regarding airports" was inaccurate.[630] However, Korea argues that whatever its accuracy, this statement spoke to the European Communities' expectations at that time; it expected that Korea's offer would not include procurements by any entities responsible for airport procurement, including IIA procurement. Korea states that if those expectations changed with the European Communities' 24 November 1993 letter, available evidence, in the form of Korea's February 1991 *Supplementary Explanation*, suggest that the reference was to procurements by the Regional Aviation Offices. Korea states that no evidence provided by the European Communities suggests that the entities responsible for IIA procurement were to be included in Korea's Annex 1 offer.[631]

Reciprocal Derogations

4.570 **In response to a question from the Panel, the United States argues** that it interpreted the reciprocal airport derogations between the European Communities and Korea as an indication that Korea and the EC could not agree that each was offering "comparable and effective access [to their] relevant markets."[632] The United States further states that, moreover, it interpreted these derogations as a confirmation that Korea's GPA offer indeed included coverage of "new airport construction" under its Annex 1, consistent with Korea's July 1991 statement regarding the coverage of MOCT and the Office of Supply – as entities responsible for the IIA project under Annex 1. The United States contends that it was able to draw this conclusion because Korea's country-specific derogation, which listed the EC and others, did not include the United States when carving out "procurement for airports by the entities listed in Annex 1."[633]

4.571 **Korea responds** that the reciprocal airport derogations between the European Communities and Korea, recorded for Korea's part in General Note 1(b) to its Appendix I, did not as the United States argues serve as "confirmation that Korea's GPA offer indeed included coverage of 'new airport construction' under its Annex 1."[634] Korea quotes the actual language of its General Note 1(b), which suggests simply that "procurement for airports by the entities listed in Annex 1" would be subject to GPA-consistent terms for US suppliers and service suppliers. According to Korea, there is no specification in General Note 1(b) of Annex 1 procurement by entities engaging in "*new* airport construction."

4.572 Korea then states that the United States was aware of Annex 1 entities – specifically, MOCT's Regional Aviation Offices – undertaking "procurement for airports," whether related to new airport construction or work on existing airports. Korea argues that the United States, therefore, knew that what Korea's General Note 1(b) meant (and means) was that Annex 1 entities conducting procurements for airports exist, and that they are MOCT's Regional Aviation Offices.

(ii) Conduct And Events

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[629] Korea's Answer to Question 6 from the Panel, dated 29 November 1999.

[630] Report from the Commission Concerning Negotiations Regarding Access to Third Countries' Markets in the Fields Covered by Directive 90/531/EEC (The Utilities Directive), COM (93) 80 final, 3 March 1993, p. 7.

[631] Korea's Answer to Question 6 from the Panel, dated 29 November 1999.

[632] See EC General Note 1 and Korea General Note 1 to Appendix I of the GPA.

[633] US Answer to Question 17 from the Panel, dated 29 November 1999.

[634] Korea's Comments on the United States' Answer to Question 17 from the Panel, dated 29 November 1999, *quoting* the United States' Answer to Question 17.

Availability of Government Organization Act

4.573 **Korea argues** that the United States knew, or should have known, that KAA was not included on Korea's Annex 1 by virtue of Note 1 thereto - that is, it knew, or should have known, that KAA was not a "subordinate linear organization," as prescribed by the Korean *Government Organization Act*. Korea states that that Act, including the list of "subordinate linear organizations" identified at Article 2(3) therein[635], was at the United States' disposal during negotiations with Korea regarding its commitments to the GPA.[636] KAA is not included in the list provided in Article 2(3) to the Act.

Failure to Enquire

4.574 **The United States argues** that the designation of KAA as IIA procurement operator came as a surprise to the United States, which had not been informed by Korea of this action. The United States asserts that, however, even assuming the United States was aware that KAA had been designated the procurement operator at that time, there would have been no need for the United States to take any specific action in response. The United States argues that as a subsidiary organization of MOCT, KAA remains covered under Annex 1 of the GPA because under a reading of the plain text of Annex 1, (1) all subsidiary organizations of "central government entities" are automatically covered under Annex 1 unless otherwise specified and (2) KAA's procurements are, in fact, procurements by MOCT, pursuant to Article I of the GPA.

4.575 The United States argues that. moreover, the United States would not have taken any specific action in response to Korea's designation of KAA as project operator, because MOCT retains statutory authority under Korean law to carry out airport construction projects. The United States notes that the *Aviation Act* states that even though the Minister of Construction and Transportation can grant permission to another government entity to assume the role of project operator for a given project, "airport development projects shall be carried out by the Minister of Construction and Transportation.[637] The United States also notes that the *Aviation Act* defines "airport development projects" as "projects related to new construction, enlargement or improvement of airport facilities, executed under this Act."[638] The United States argues that, thus, because MOCT remained the entity responsible for carrying out airport development projects, there would be no reason for the United States to take any specific action following the designation of KAA as project operator.

4.576 Finally, the United States notes that documents provided by Korea indicate that even after KAA was designated by MOCT to be the project operator for the IIA project, KAA procurements were conducted by the Office of Supply – the entity responsible for procurement for Annex 1 entities and, as Korea's July 1991 responses indicate, the entity "responsible . . . for procurement of goods and services relating to new airport construction. The United States also refers to its arguments in paragraph 4.520.

4.577 **In response, Korea argues** that in the two-year period between December 1991 when KAA's role in the IIA project was publicly announced and December 1993 when Korea submitted its final GPA offer, the United States did not once inquire whether or not KAA was included in Korea's offer. Korea further notes that the United States expressed surprise at the designation of KAA as the responsible IIA entity. Korea states that what is particularly unusual, in view of this surprise, is that at

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[635] *Government Organization Act*, Article 2(3).

[636] Reference to the *Government Organization Act* was included in Note 1, Annex 1 to Korea's initial GPA offer. Korea's Initial Offer to Accede to the Tokyo Round Agreement on Government Procurement, 25 June 1990.

[637] *Aviation Act*, Article 1.

[638] *Ibid.* Article 2:8.

no time during the nearly two and one-half years between this designation and the signing of the GPA, did the United States ever note its surprise and ask where KAA appeared in Korea's Appendix I.

4.578 Korea further argues that even had the United States not been aware of the May 1991 enactment of the *Seoul Airport Act*, it has admitted that in December 1991, a full two years before the completion of negotiations for Korea's accession to the GPA, it was "surprised" at amendments to the *Seoul Airport Act* appointing KAA as the entity responsible for the IIA project.[639] Korea states that to be "surprised," it most certainly must actually have been aware of the *Act*, quite apart from the constructive knowledge with which it is charged. Korea argues that whether or not Korea expressly told the United States about the *Seoul Airport Act* in July 1991, therefore, the United States most certainly became aware of the *Act* and its implications in December 1991 - a full two years before the completion of negotiations for Korea's accession to the GPA.[640]

4.579 **In response, the United States argues** that it is clear from the US comment regarding being surprised that the United States never indicated that it was surprised by Korea's action in 1991. The United States contends that this is pure conjecture by Korea; a plain reading of the second sentence confirms this. Indeed, to be surprised by Korea's action, the United States must have been aware of it. Yet the second sentence above begins, "even assuming the United States were aware . . .," which indicates that the United States was not aware at the time, and therefore could not have been surprised at that time.[641]

4.580 **Korea also states** that given the massive effort to publicize KAA's role, no reasonable person would have supposed that a specific overture to the United States was necessary. Further, Korea asserts that given the apparent importance to the United States of attaining coverage for airport procurement entities, and given the absence of KAA from the terms of Korea's offer, the failure of the United States to seek clarification, at any time in the more than two-year period remaining in the GPA negotiations, is fatal to its claim.

4.581 Korea argues that, in these circumstances, the United States' failure to seek clarification can only mean one of two things: either it lost track of its objective, or it understood that it had not secured coverage of the entities responsible for IIA procurement.[642]

4.582 In either case, Korea states that it cannot be accorded responsibility for the United States' failure. Korea states that this does not indicate that Korea acted in bad faith and does not suggest that Korea employed a strategy of negotiation by stealth. Korea states that it is merely recognition that the United States' claim that it anticipated coverage of the entities responsible for IIA procurement was not reasonable.

4.583 Korea further argues that the United States cannot escape from this failure by arguing that it bargained in good faith for the coverage of the IIA project, without regard to which particular entity undertook procurements for the project. Korea observes in this respect that its Annex 1 commits "entities" rather than "projects." Korea argues that neither the United States nor any other party negotiated for coverage of projects under Korea's Annex 1. Korea notes that Annex 1, as opposed to other Korean Annexes, lists entities rather than projects.

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[639] US Answer to Question 23 from the Panel, dated 3 November 1999.

[640] Korea's Answer to Question 1 from the Panel, dated 29 November 1999.

[641] US Response to Korea's Answer to Question 1 from the Panel, dated 29 November 1999.

[642] Letter to Mr. Park, Sang-Kyun, Director, North American Trade Team, Korean Ministry of Foreign Affairs & Trade, from Karen Ware, Deputy Senior Commercial Officer, US Embassy Seoul, 6 July 1998, p. 2 ("During the period before KOACA formally is brought under the GPA, we propose that it agree to measures that would bring its procurement policies and practices de facto into conformity with the internationally-acceptable provisions of the GPA . . .").

4.584 **In response, the United States argues** that this assertion by Korea is contradicted by the very evidence provided in this dispute. The United States argues that during Korea's GPA accession negotiations, the United States specifically asked for "coverage of projects under Annex 1" by requesting Korea to identify "all Ministries that will be responsible for the procurement of goods and services related to new airport construction." The United States contends that Korea conceded that it understood "that the United States' question was about the IIA project," and responded by giving "as much information as was available about what was at the time a fledgling project." The United States concludes that, thus, it is reasonable for the United States to expect that the new airport construction, *i.e.*, the Inchon airport development project, is covered under Korea's Annex 1 of the GPA. Indeed, the EC also considered it reasonable to expect coverage for the IIA project under the GPA.[643]

4.585 The United States contends that it would not have taken any specific action in response to Korea's designation of KAA as project operator, because MOCT retains statutory authority under Korean law to carry out airport construction projects. The United States notes that the *Aviation Act* of the Republic of Korea states that even though the Minister of Construction and Transportation can grant permission to another government entity to assume the role of project operator for a given project, "airport development projects shall be carried out by the Minister of Construction and Transportation."[644] The United States further notes that the *Aviation Act* defines "airport development projects" as "projects related to new construction, enlargement or improvement of airport facilities, executed under this Act."[645] The United States contends that, thus, because MOCT remained the entity responsible for carrying out airport development projects, there would be no reason for the United States to take any specific action following the designation of KAA as project operator.[646] The United States also notes that this version of the *Aviation Act* includes amendments through December 1997, and, therefore, also applied when KOACA was designated as the operator of the IIA construction project.[647]

4.586 Further, the United States notes that documents provided by Korea indicate that even after KAA was designated by MOCT to be the project operator for the Inchon Airport project, KAA procurements were conducted by the Office of Supply - the entity responsible for procurement for Annex 1 entities, and, as Korea's July 1991 responses indicate, the entity "responsible . . . for procurement of goods and services relating to the new airport construction." The United States also asserts that Korea's exhibits show that the Office of Supply at times administered procurements for KAA and the Seoul and Pusan Regional Aviation Offices which Korea admits are covered under Korea's Annex 1 through MOCT's status as a central government entity, jointly on a single procurement notice. The United States asserts that this further reflects the fact that KAA procurement, like that of the Seoul and Pusan Regional Aviation Offices, is actually procurement by MOCT.[648] The United States also submits that if KAA had independent procurement authority, then presumably the Office of Supply would not have been issuing KAA procurement notices, let alone issuing them together with entities Korea agrees are covered under Annex 1 because of their relationship to MOCT.[649]

4.587 Further, in response to a question from the Panel, the United States notes that even assuming that US negotiators had been informed by private US companies or state and local aviation officials that KAA was now the operator of the project, it is unlikely that the United States would have requested clarification of the status of IIA procurements. In support of this argument, the United

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[643] US Response to Korea's Answer to Question 4 from the Panel, dated 29 November 1999, referring to the European Communities' Answer to Question 5 from the Panel, dated 3 November 1999.
[644] *Aviation Act*, Act. No. 4435, 14 December 1991, Articles 94-95.
[645] *Ibid.* Article 2:8.
[646] US Answer to Question 23 from the Panel, dated 3 November 1999.
[647] US Answer to Question 26 from the Panel, dated 3 November 1999.
[648] US Answer to Question 23 from the Panel, dated 3 November 1999.
[649] US Answer to Question 26 from the Panel, dated 3 November 1999.

States notes it was not relevant that KAA was operating under its own procurement regulations. The United States argues that within a given "central government entity," subordinate entities often issue their own internal regulations that apply only to that entity. The United States notes that, for example, there are separate regulations that relate solely to the New Airport Development Group. The United States further notes that, moreover, the regulations of KAA (like all other subordinate units of covered central government agencies) would be required to come into conformity with the GPA only after the Agreement entered into force for Korea.[650] More specifically, the United States notes that these central government regulations did not come into existence until 1997 when Korea implemented the GPA, so the fact that KAA did not utilize the central government regulations for IIA procurement would not be of concern to the United States in 1991-1993.[651]

4.588 **In response, Korea notes** that it is not true that KAA's use of its own Contract Administration Regulations for IIA procurements during the period 1991-1994 was merely a result of the fact that "central government [procurement] regulations did not come into existence until 1997." Korea states that the government procurement regulations in effect during this period were included in the *Korean Budget and Accounting Act*. Korea notes that rather than being required to follow those rules, KAA drafted and adopted its own regulations.

4.589 Korea also notes that although it is true that the Office of Supply has procured for KAA, this does not mean that those procurements are covered by the GPA since Office of Supply procurements are only covered when made for entities listed on Annex 1. KAA is not, Korea asserts, included on Annex 1.[652] Korea also states that the Office of Supply has not in fact procured for the IIA[653], and that the procurements cited by the United States[654], were not for the IIA, which is exclusively the subject of the Panel's terms of reference.[655]

Failure to Inform

4.590 **The United States contends** that despite Korea's claim that "virtually every major airport construction expert and airport or aviation organization in the world" was aware that MOCT shifted IIA procurement from the New Airport Development Group to KAA, Korea did not once inform its GPA negotiating partners of this supposed change in its negotiating position. The United States argues that Korea cannot expect to alter its concessions offer during international trade negotiations without directly and officially notifying the relevant government representatives involved.

4.591 The United States also states that it remains very concerned about Korea's assertions that if a country makes an express material representation to its negotiating partner, but then later it changes its mind, it is under no obligation to inform its negotiating partner, yet it can still expect its express representation to be no longer valid. The United States argues that by making express commitments which Korea should have expected its negotiating partners would rely on, and then refraining from informing them when it acted to change the status quo to which it had committed, Korea created a legitimate expectation among its GPA negotiating partners that its airport procurement was covered through its listing of MOCT and the Office of Supply.

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[650] US Answer to Question 25(a) from the Panel, dated 3 November 1999. The United States further notes that, in fact, the four primary enforcement decrees and regulations relating to the Act Relating to Contracts to Which a State is a Party—Korea's primary procurement law implementing its GPA commitments, entered into effect on 31 December 1996, one day before Korea's GPA commitments took effect.

[651] US Answer to Question 26 from the Panel, dated 3 November 1999.

[652] Korea's Statement for the Second Meeting of the Panel, paragraph 47.

[653] Korea's Answer to Question 2 from the Panel, dated 29 November 1999.

[654] Exhibits Kor-61D and Kor-61E.

[655] Korea's Comments on the United States' Answer to Question 22 from the Panel, dated 29 November 1999.

4.592 **Korea argues in response** that the United States implicitly asserts that Korea altered its offer during negotiations without directly and officially notifying the United States and other concerned governments. Korea states that there are a number of reasons why this assertion is not applicable. First, it assumes that Korea's "concessions offer" was altered during negotiations. Korea notes that the only "evidence" put forward by the United States to support this argument is Korea's July 1991 response to the US inquiry. Korea argues that this is hardly a "concessions offer." According to Korea, this was a response to an inquiry.

4.593 Korea states that, second, even if the July 1991 response is deemed to be a "concessions offer," and even if it is interpreted as the United States would interpret it, Korea, through the formal designation of KAA as the responsible entity, by action of the National Assembly in December 1991, did notify the United States of its position. This was more than constructive notice. Korea asserts that the United States had actual notice and that the United States was even "surprised" by it.

(d) Evidence Following Korea's Accession

(i) The US July 1998 Communications

4.594 **Korea argues** that the United States was also aware of KOACA's role in IIA procurement. Korea argues that in a July 1998 letter from the US Embassy in Seoul to the Korean Ministry of Foreign Affairs & Trade, the United States acknowledged that KAA's successor for the IIA project, KOACA, was not covered.[656]

4.595 Korea notes that in the July 1998 letter, the United States proposed that "[d]uring the period before KOACA formally is brought under the GPA," Korea "agrees to measures that would bring its procurement policies and practices de facto into conformity with the internationally-acceptable provisions of the GPA . . ."[657] Korea argues that if KOACA is not yet "formally brought under the GPA," it is not a covered entity, thus necessitating the US request that KOACA bring its practices "de facto into conformity with the . . . GPA." Korea further argues that had the United States considered that KOACA was a covered entity, it would surely not have requested de facto compliance with the GPA; it would have demanded *de jure* compliance.

(ii) MOCT's Website

4.596 **Korea notes** that the events to which the United States points to support its claimed expectations all date after the signing of the GPA. Korea states that this is particularly true of MOCT's website, which was not created until 1997. Korea argues that regardless of what claims MOCT makes on that website, those claims could in no way have influenced the United States three years earlier in April 1994, when the GPA was signed.

[656] Letter to Mr. Park, Sang-Kyun, Director, North American Trade Team, Korean Ministry of Foreign Affairs & Trade, from Karen Ware, Deputy Senior Commercial Officer, US Embassy Seoul, 6 July 1998, p. 2 ("During the period before KOACA formally is brought under the GPA, we propose that it agree to measures that would bring its procurement policies and practices de facto into conformity with the internationally-acceptable provisions of the GPA . . .").

[657] Letter to Mr. Park, Sang-Kyun, Director, North American Trade Team, Korean Ministry of Foreign Affairs & Trade, from Karen Ware, Deputy Senior Commercial Officer, US Embassy Seoul, 6 July 1998, p. 2.

V. ARGUMENTS OF THIRD PARTIES (EUROPEAN COMMUNITIES)[658]

A. ENTITIES COVERED UNDER KOREA'S APPENDIX I OF THE GPA

1. Interpretation of Appendix I and Notes

5.1 **The European Communities argues** that, in accordance with Article 18 of the *Vienna Convention on the Law of Treaties*, regard must be had to the common intentions of the Parties in determining the content and scope of their respective obligations under the GPA.

5.2 In support, the European Communities referred to the Appellate Body decision in the LAN case where it was stated that[659]:

> "The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of one of the parties to a treaty. 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."

5.3 The European Communities argues that the same reasoning, *mutatis mutandis*, should apply to this case.

5.4 The European Communities further argues that the issue of what was the intention of Korea during the negotiations is legally irrelevant. According to the European Communities, the only matter that counts is how the common intention of the GPA Contracting Parties were expressed in the actual text of the agreement, having regard to the ordinary meaning of its terms in their context and the object and purpose of the Agreement.[660]

2. Annex 1, Appendix I: The Scope of "Central Government Entities"

(a) <u>The Ordinary Meaning of "Central Government Entities"</u>

5.5 **The European Communities believes** that the definition in Korea's GPA concession which includes the Ministry of Transport and Construction implies the inclusion of all entities hierarchically under that Ministry. The European Communities argues that the entities responsible for IIA's construction remained hierarchically subject to MOCT after 1991, and, further, were so on 15 April 1994.[661]

(b) <u>The "Control" Test</u>

5.6 **The European Communities argues** that the "control" test proposed by the United States to determine whether certain entities are covered by Annex 1 of the GPA is an incorrect yardstick in order to measure the extent of Korea's obligations under the GPA.

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[658] While Japan also reserved its rights as a Third Party to this dispute, it did not make any submissions for this case.

[659] AB-1998-2, WT/DS62/AB/R-WT/DS67/AB/R-WT/DS68/AB/R of 5 June 1998, paragraph 84.

[660] EC's Answers to Panel's Questions, dated 29 November 1999, Preliminary Observations citing Article 31 of the *Vienna Convention.*

[661] EC's Answer to Question 5 from the Panel, dated 29 November 1999.

5.7 **The European Communities discusses**, by way of illustrative argument, the hypothetical case of procurement in the United States in similar circumstances to that which exist for the IIA project. Specifically, the European Communities considers, for example, the case of construction of a new North Dakota International Airport where the US Government transfers responsibility for the project to one of the authorities of a state which is not covered by the GPA. The European Communities states that, in such a case, the issue would not be, as the US suggests, whether that procurement is 'guided', 'supervised', 'inspected' or 'directed' by any covered entity. The European Communities further argues that, in fact, the relations between the federal government's covered entities and North Dakota's authorities would probably not correspond to those definitions.

5.8 The European Communities states that, in its view, the US would not be able to escape its obligations under the GPA which it undertook in 1994 by merely transferring responsibility to a non-covered entity in such a case. Rather, the United States would be obliged to duly notify the other GPA Contracting Parties of the transfer under Article XXIV:6 and to follow entirely the procedures laid down in that provision.

3. Annex 1, Appendix I: Note 1

(a) Ordinary Meaning of Note 1 to Annex 1

5.9 **The European Communities refers** to what it calls a "novel" interpretation by Korea of its Note 1 to Annex 1. The European Communities quotes the Korean argument as follows:

> "(...) Note 1 to Korea's Annex 1 provides the exclusive means by which to identify as Annex 1 covered entities those entities that, while not literally listed on Annex 1, are nonetheless considered Annex 1 covered entities by virtue of their relationships with entities listed on Annex 1. Under the ordinary meaning of Note 1 to Korea's Annex 1, the Panel is directed, exclusively, to the Government Organization Act of the Republic of Korea to determine whether particular entities not specifically included in Annex 1 are nonetheless considered covered entities by virtue of their status as subordinate linear organizations, special local administrative organs or attached organs."

5.10 The European Communities argues that the interpretation of Note 1 suggested by Korea does not correspond to its ordinary meaning. The European Communities asserts that according to the ordinary meaning and the syntax of the English language, the part of the sentence in Note 1 "as prescribed in the *Government Organization Act* of the Republic of Korea" can in fact only be a reference to the preceding words "attached organs" and not also to the earlier part – that is, "subordinate linear organizations" and to "local administrative organs." The European Communities further argues that, in fact, in order for this latter interpretation to apply, the text should have included a comma after the word "organ." However, the European Communities notes that the comma does not appear in the text.

5.11 The European Communities argues that the only correct reading of Note 1 is as follows: "The above central government entities include their subordinate linear organizations [like KAA, KOACA or IIAC]; special local administrative organs; and attached organs as prescribed in the *Government Organization Act* of the Republic of Korea."

5.12 The European Communities argues that this interpretation is confirmed by the text of Article 2(3) of the Korean *Government Organization Act* and by comments made by Korea:

> "(...) Article 2(3) [of the Government Organization Act of the Republic of Korea]– both in its current form and as it existed during the negotiations leading up to the

> submission by Korea of its final offer list for accession to the GPA – identifies not entities, but officials within a ministry's hierarchy."

5.13 The European Communities states that, thus, the words "as prescribed in the *Government Organization Act* of the Republic of Korea" logically cannot refer to "their subordinate linear organizations" since the Act identifies, according to Korea's own interpretation, officials, not organizations.

5.14 **In response, Korea states** that the European Communities arguments regarding interpretation of Article 2(3) of the *Government Organizations Act* are erroneous. Korea states that the modification of Note 1 offered by the European Communities, itself proves the point. Korea states that had it meant the reference to the *Government Organization Act* to modify only the term "attached organs," it would have used the semi-colons inserted by the European Communities after the terms "subordinate linear organizations" and "special local administrative organs." Korea notes that it did not do so.

5.15 Korea notes that, moreover, the fact that the rather unusual and unique English terms "subordinate linear organizations" and "special local administrative organs" are used and are specifically defined in the first three articles of the *Government Organization Act* is more than coincidence. Korea states that it confirms that the reference to the *Government Organization Act* in Note 1 is to modify those terms of art as well as the term "attached organs," defined in Article 4 of the *Government Organization Act*. Korea further states that all three of the terms in Note 1 to Korea's Annex 1 are defined "as prescribed in the *Government Organization Act* of the Republic of Korea." Korea concludes that no other reading of that language is sensible.

(b) Are the IIA Procuring Entities Subordinate Linear Organizations?

5.16 **The European Communities argues** that there is clear evidence indicating that KAA, KOACA and IIAC are "subsidiary organizations" within the meaning of the *Government Organization Act*.

5.17 The European Communities notes that at the time of the entry into force of the GPA, MOCT was in charge of aviation construction works.

5.18 The European Communities states that by Korea's own admission:

> KAA itself was established (under the name "Korea International Airports Authority") on 30 May 1980 as an independent public corporation pursuant to the International Airport Management Corporation Act, as enacted on 28 December 1979…[662]

> The chairman, deputy chairmen and auditor [of KAA] are [were] appointed by MOCT…[663] KAA is [was] subject to the 'direction and supervision' of the MOCT, which as stated in Article 28(1) of the Korea Airport Corporation Act permits MOCT to require KAA to submit to certain reporting and inspection requirements concerning activities of the Corporation. Specifically, pursuant to Article 28(2) of the Korea Airport Corporation Act, MOCT is to ensure that KAA officials do not commit 'unlawful or unreasonable acts.[664]

[662] Korea's First Written Submission, paragraph 23.
[663] *Ibid.* paragraph 24.
[664] *Ibid.* paragraph 25.

5.19 The European Communities argues that it follows that, at the time of the signature of the GPA, Korea itself admits that KAA was a "subordinate linear organization" within the meaning of the *Government Organization Act* (i.e., a subsidiary or subordinate body) of MOCT which had a very large degree of control over KAA. In the view of the European Communities, Korea's own statements confirms this. The European Communities also claim that the clear understanding of the entire business community and of all the other GPA Contracting Parties on 15 April 1994 was that MOCT was in fact running the entire Inchon Airport business and that KAA was nothing more than an articulation of such Ministries.

5.20 The European Communities concludes that KAA should be considered as "'attached/connected/affiliated' etc." to MOCT because of the control or decisive influence that the MOCT has over the KAA and, thus, over its procurement procedures. According to the European Communities, the KAA is, therefore, covered by the definition of "subordinate linear organizations" in Appendix I, Note 1 to Annex 1, of the Korean concession.[665]

4. Appendix I: Note 1(b)

5.21 The European Communities asserts that procurement for airports is covered by the original GPA Korean obligations. The European Communities argues that this is confirmed by the text of General Note 1(b) in Appendix I, which expressly subjects "procurement for airports by the entities listed in Annex 1" to a reciprocity clause *vis-à-vis* the European Communities and some other European Contracting Parties.

5.22 **In response, Korea notes** that in March 1993 the European Communities stated that Korea had made "no offer regarding airports." Korea states that the EC now asserts that this March 1993 statement was in reference to Korea's exclusion of the EC from airport procurement via General Note 1(b).[666] Korea further states that, however, this assertion follows acknowledgement by the European Communities that General Note 1(b) was added "for the first time" in Korea's third offer, dated 14 December 1993.[667] Korea argues that by its own chronology, the European Communities could not have known of Korea's General Note 1(b) until December 1993. In Korea's view, its statement concerning "no offer regarding airports" nine months earlier, in March, could not have referred to General Note 1(b). Korea states that, more importantly, the EC's statement in March 1993 that Korea made "no offer regarding airports" means all airports, which, according to Korea, includes the IIA. Korea argues that, whatever the accuracy of the EC statement in March 1993, it demonstrates that the EC did not expect coverage for all airports, including the IIA.

5.23 **In response to a question from the Panel, the European Communities argues** that during bilateral meetings between Korea and the European Communities in November and December 1993, Korea "declared" that airports were covered. In support of this argument, the European Communities produced a letter from the Commission of the European Communities to the Korean Ministry of Trade and Industry, dated 24 November 1993, which stated:

> "With regard to the inclusion of airports in your offer, you and your colleagues pointed out that generally they depend on the Ministry of Transportation, which is offered. I would be most grateful if you could provide me with some more detail about which airports are included in your offer by virtue of the inclusion of the Ministry of Transportation, or are otherwise included. Furthermore, if airports under the Ministry of Transportation are covered, does that imply that OSROK carries out

[665] EC's Answer to Question 7 from the Panel, dated 29 November 1999.
[666] EC Answer to Question 4 from the Panel, dated 3 November 1999.
[667] EC Answer to Question 3 (point 5) from the Panel, dated 3 November 1999.

> their procurement on their behalf? Does that also apply to ports which are under the authority of the Korea Maritime and Port Administration?"[668]

5.24 In responding to the Panel's question, the European Communities also refers to an internal Commission document, dated 3 December 1993, which stated:

> "Airports
>
> The Korean side has explained that a number of major cities (Seoul, Pusang), which are offered, control their airports in co-operation with the Ministry of Transportation. We have requested confirmation in writing."[669]

5.25 **Korea responds** that its February 1991 *Supplementary Explanation* indicates that the 24 November 1993 EC letter was referring to procurements by MOCT's Seoul and Pusan Regional Aviation Offices. Moreover, according to Korea, the 3 December 1993 internal EC note supports this conclusion. The 3 December 1993 note refers to Korea's offer of coverage for "a number of major cities (Seoul, Pusang) [sic]" that "control their airports in co-operation with the Ministry of Transportation." Korea notes that MOCT's two Regional Aviation Offices are in fact the Seoul and the Pusan Regional Aviation Offices, and that these two Offices are in fact covered under Korea's Annex 1 commitment to coverage of MOCT.[670]

5. Amendments to the Appendix under Article XXIV:6

(a) The Obligations Under Article XXIV:6

5.26 **The European Communities argues** that Korea attempted to modify its obligations under the GPA and in so doing, failed to comply with Article XXIV:6 of the GPA.

5.27 The European Communities argues that Article XXIV:6(a) of the GPA is expressly based on the principle of the maintenance of the balance of concessions. According to the European Communities, it corresponds, *mutatis mutandis*, to the fundamental provision of Article XXVIII GATT 1994[671] and is the expression in the GPA of the general principle of public international law codified in Article 26 of the *Vienna Convention on the Law of Treaties*.

5.28 The European Communities states that, according to Article XXIV:6 of the GPA, no GPA Contracting Party is allowed to alter in any way, either in form or in substance, its concessions as specified in the Appendices to the GPA, unless and until the procedures thereunder have been duly and entirely followed.

5.29 For support of its argument, the European Communities relies upon the following statement by the Appellate Body[672]:

> "The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties."

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[668] Annex IV to EC Answers to Question 3 from the Panel, dated 3 November 1999.

[669] Annex V to EC Answers to Question 3 from the Panel, dated 3 November 1999.

[670] Korea's Response to the European Communities' Answer to Question 1 from the Panel, dated 29 November 1999.

[671] The European Communities refers in particular to Article XXVIII.2.

[672] *European Communities - Measures Affecting The Importation Of Certain Poultry Products*, AB-1998-3, WT/DS69/AB/R of 13 July 1998 at § 165.

5.30 The European Communities states that in cases under both Article XXIV:6(a) and (b), a procedure is foreseen with ultimately the necessity of 'compensatory adjustments.' According to the European Communities, if the word 'shall' in either paragraph could be interpreted as anything less than a binding obligation, both paragraphs would become redundant. The European Communities states, in the words of the Appellate Body:

> "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[673]

(b) Application of Article XXIV:6 to the Present Case

5.31 **The European Communities argues** that, notwithstanding these clear and indisputable obligations, Korea did not follow the procedures under Article XXIV:6.

5.32 The European Communities argues that Korea failed to notify the creation of KOACA, the alleged transfer of the authority for airport construction procurement to that entity, the alleged separation of that entity from the Ministry of Transport, and the transformation of KOACA into IIAC under Article XXIV:6.

5.33 The European Communities argues that Korea cannot claim now that KOACA and/or IIAC are not covered alleging *ex post* that they are separate from those covered in the original concession because it will automatically admit that it did not offer to the other GPA Contracting Parties, as it was unconditionally compelled, compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage.

5.34 In the view of the European Communities, the only relevant date that determines the point of reference for the implementation of Article XXIV:6 procedures is 15 April 1994 being the date of the official conclusion of the Uruguay Round and of signature of the GPA by all Contracting Parties, including Korea.

5.35 In support of its argument, the European Communities refers to Article 18 of the *Vienna Convention on the Law of Treaties* which states as follows:

> "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

5.36 The European Communities refers to the Appellate Body decision in the LAN[674] case where it stated that:

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[673] *United States - Reformulated Gas*, WT/DS2/9, Appellate Body report, p. 23. See also Appellate Body report in *Japan - Alcohol*, WT/DS8/AB/R at section D.

[674] AB-1998-2, WT/DS62/AB/R-WT/DS67/AB/R-WT/DS68/AB/R of 5 June 1998, paragraph 84.

> "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."

5.37 The European Communities argues that the same conclusion must be drawn from Article XXIV:12 of the GPA.

5.38 The European Communities further argues that the relevant date for Korean legislation and practice to be in conformity with the 1994 GPA was the date of entry into force of the 1994 GPA (for Korea: 1 January 1997), and thereafter. The European Communities states that Korea was, in its view, entitled to change its legislation before its entry into force, as long as it ensured that it complied from 1 January 1997 onwards with its obligations as they were undertaken on 15 April 1994.[675]

5.39 The European Communities argues that, as from 1 January 1997[676], pursuant to Article XXIV:6(a) and (b), Korea is unconditionally obliged to notify any change of its concessions as specified in the Appendices to the GPA - in particular Appendix I - that may have taken place since 15 April 1994. The European Communities notes further that if the modifications go beyond a mere formal correction of the text, it is unconditionally obliged to offer compensatory adjustment for those changes, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in the GPA prior to the notification. The European Communities asserts that Korea clearly failed to do so.

5.40 **Korea responds** that its decision not to notify the "transfers of authority" for IIA procurement to and between KAA, KOACA and IIAC on the basis that those entities are not covered under the GPA does not constitute admission that "compensatory adjustments" were due to other GPA signatories. According to Korea, since neither KAA, KOACA nor IIAC are covered, "transfers" between them did not trigger the notification requirement of Article XXIV:6(a). Moreover, the "transfer" of IIA procurement authority to KAA took place in December 1991, at which time Korea was not bound by any GPA obligations, including those contained in Article XXIV:6(a).

(c) Shifting of an Entity from Annex 1 to Annex 3

5.41 **In response to a question from the Panel, the European Communities notes** that there is an explicit provision allowing for Korean National Railway Administration (NRA) to be moved from Annex 1 to Annex 3 (once that it adopts the form of a public corporation) without any consultation and/or compensation.

5.42 The European Communities argues that this implies, *a contrario*, that, in the absence of a similar provision, a Party to the GPA can not even move an entity from one GPA Appendix I annex to another without following the appropriate consultation procedure. The European Communities asserts that this also implies, *a fortiori*, that a Party of the GPA cannot unilaterally remove an entity from all the annexes of the GPA without following the appropriate procedures (and offering adequate compensation) under Article XXIV:6 of the GPA.[677]

5.43 The European Communities states that, as a matter of fact, NRA was in a situation similar to that of KOACA, i.e., it simply changed its legal form but remained under government control. However, the European Communities goes on to state that (a) contrary to NRA, the GPA does not provide for an explicit exception applying to KOACA and (b) in any event, the solution adopted for

[675] EC's Answer to Question 5 from the Panel, dated 29 November 1999.
[676] Date of application of the Agreement to Korea.
[677] EC's Answer to Question 1 from the Panel to Third Parties, dated 3 November 1999, p. 2.

NRA was not at all the exclusion of this entity from GPA coverage, but its transferral to another annex.[678]

VI. INTERIM REVIEW[679]

6.1 In letters dated 13 March 2000, the United States and Korea requested an interim review by the Panel of certain aspects of the Interim Report issued to the parties on 3 March 2000. The United States made several further comments regarding the Descriptive Part of the Report. Both parties requested review and amendments with respect to certain portions of the Findings. Neither party requested an Interim Review Meeting. On 24 March 2000, the United States requested that the Panel permit it to submit further comments regarding Korea's Interim Review comments. The Panel granted the request and, in the interests of fairness, also permitted Korea to make further comments, which Korea did on 29 March 2000.

6.2 Korea made several specific comments on a number of paragraphs which we will address below. However, Korea also submitted a covering letter noting that the Panel has appeared critical of Korea's actions with respect to events that occurred in mid to late-1991 regarding one of the questions submitted by the United States and Korea's response thereto. The facts are clear and we stand by our assessment of them.[680] We also find Korea's arguments in their covering letter misplaced. Korea appears to have mis-read the Findings.

6.3 First, we must note what we did not do in the Findings. We specifically did not make a finding that Korea acted in bad faith, or attempted to mislead or deceive the United States as Korea claims in its letter of 13 March 2000. We did not delve into the motivations of the Korean Government. We did not make a finding that the Korean Government was trying to conceal information from the United States. It is entirely possible that simple errors took place. We will add a footnote to paragraph 7.80 reiterating that we are not making a determination that Korea acted in bad faith. We will also make some minor modifications to the language in paragraphs 7.80 and 7.119 without altering the sense of our conclusions.

6.4 Second, we are concerned by the substantive comments made by Korea in this regard. The thrust of Korea's argument in their covering letter to their comments is that the answer provided to the United States in July 1991 was drafted by the Ministry of Commerce. Korea argues that the Korean Government is not a monolith and that the Ministry of Commerce should not be charged with knowledge about actions taken by the Ministry of Transportation when answering such questions. The impression given by Korea in its Interim Review comments is that the only piece of written and documented evidence before us of the negotiations between Korea and the United States[681] was the responsibility of a single individual in a single Ministry without actual or imputed knowledge of the

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[678] *Ibid.*

[679] Pursuant to Article 15.3 of the DSU, the findings of a panel report shall include a discussion of the arguments made at the interim review stage. Consequently, the following section entitled Interim Review is part of the Findings of this Panel Report.

[680] See, among others, paragraphs 7.76-7.81, 7.104-7.110 and 7.121-7.122 and cross-references contained therein.

[681] In its covering letter for its Interim Review comments, Korea stated that it took a series of public actions that would have contradicted any implication that the United States was misled. Korea cites, among other things, "the preparation of communications to the European Communities clear enough to convince the EC that the entity responsible for IIA procurement was not covered by Korea's offer." Aside from repeating that we made no findings regarding Korea's motivations or intent, we recall our statement in paragraph 7.116 of the Findings that the United States is not charged with knowledge of bilateral communications between Korea and the European Communities. Furthermore, while we note that Korea is drawing a conclusion from the EC's response to Korea's communication of November or December 1993 that such communication was clear and convincing, we will refrain from agreeing with that characterization ourselves because Korea was unable to produce the document when requested.

subject-matter of the questions put to the Korean Government by the US Government. We do not find this at all compelling.

6.5 We note that this argument was previously made by Korea during the course of the proceedings and was fully taken into account by us in coming to our Findings. Furthermore, in our view, Korea is simply wrong in making such an argument. The Parties to the GPA did not expect incomplete or even possibly inaccurate answers from one portion of the Korean Government speaking only for itself. The answers *must* be on behalf of the whole of the Korean Government. Negotiations would be impossible otherwise. The Korean Government chose who was tasked with answering the questions and the Korean Government cannot avoid responsibility for the result. It cannot be a justifiable excuse for incomplete answers that an applicant for accession to the GPA gave responsibility to Ministry A to answer questions, but the projects and procurement responsibilities were really the concern of Ministry B and Ministry A was ignorant of the true situation when it provided answers. In our view, and as we stated in the Findings, there is an affirmative duty on the part of a Party or prospective Party to the GPA to answer such questions fully, comprehensively and on behalf of the whole government.[682] This conclusion is supported by the long established international law principles of State responsibility. The actions and even omissions of State organs acting in that capacity are attributable to the State as such and engage its responsibility under international law.[683]

6.6 One further anomaly of Korea's position is that it implies that other GPA Parties are charged with a higher degree of knowledge of Korean legislation than the Korean Government itself. Korea argues that the United States was charged with knowledge of its laws, including the *Seoul Airport Act* which came into effect on 31 May 1991, at least one month prior to Korea's response to the US questions.[684] On the other hand, Korea now strenuously argues that another Ministry of the Korean Government should not also be charged with such knowledge. This is a double standard we clearly do not accept.

6.7 Finally, we must also note our doubts about the position taken by Korea on this issue for purposes of this dispute. Korea asserts that the official at the Ministry of Commerce who answered the questions simply did not know about the actions underway at the Ministry of Transportation regarding the IIA project. However, aside from the fact that this supposedly ill-informed official replied to the US questions with 29 pages of extensive answers, as stated by Korea in its Interim Review comments of 13 March 2000, we note that the answer on the particular question at issue did provide some specific details. For example, it was stated that the New Airport Development Group was conducting airport construction. Even more specifically, the answer identified by name a US company taking part in the basic plan projects. It is not clear how such details could be known to the Ministry of Commerce officials who Korea now says were ignorant of the actions of the Ministry of Transportation. Had an inquiry into the motivations or lack thereof on the part of the Korean Government regarding the answer provided to the United States been relevant or probative, we would have followed up this issue in detail. We did not and we decline to do so now.

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[682] The Panel never dealt with a question of attributing information from one official to another. This is a construct of Korea's later taken up by the United States in its second Interim Review comments. The Panel's point is much more straightforward. In the context of negotiations, a communication from a Member government is considered to be on behalf of the government as a whole and cannot later be disavowed as the actions of a mere individual or Ministry.

[683] See the draft articles on State Responsibility drafted by the International Law Commission, Articles 5 and 6 and Commentary, *Yearbook of the International Law Commission* (1973), Vol. II, p. 173 *et seq.* See also *Corfu Channel Case*, 1949 ICJ Reports, p. 23; *US Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, pp. 30-31 and 33. These principles of attributability of actions of organs of the State must also function where it concerns communications of a State organ, particularly in the context of negotiations of a plurilateral agreement such as the GPA. Otherwise Parties to the GPA could not rely upon each other's communications, which ultimately could result in the breakdown of the treaty system itself.

[684] Paragraph 4.544.

6.8 In making the above statements, we recall our determination that our inquiry in this matter could not stop with the events of 1991 and our Findings rest upon a weighing of all the facts of the dispute. Other than the addition noted in paragraph 6.3 above, we decline to make any of the changes requested by Korea in its covering letter to the Panel.

6.9 As noted, Korea made some specific technical comments on the Interim Report. We have made technical changes and corrections as requested in paragraphs 7.28, 7.33, 7.45, 7.66 (footnote 726), 7.110, 7.115, 7.120 and 7.125 (footnote 768).

6.10 With respect to paragraph 7.55, Korea states that it is its position that the "control" test contained in the Tokyo Round GPA was eliminated during the Uruguay Round and that it was the United States that argued that the new annexes to the GPA made the test redundant. However, Korea did make the following statement in its Second Submission to the Panel:

> "If the United States "control" test were to prevail, Annex 3 would in such instances become redundant; entities listed on Annex 3 are subject to a degree of control by Annex 1 entities that would subject them, under the United States' test, to coverage under Annex 1."[685]

This statement implies the argument that the Panel attributed to Korea. However, we do note that it was made in the context of a broader argument made to rebut the US position. Therefore, we will clarify the language in paragraph 7.55.

6.11 With respect to paragraph 7.125, Korea requests that we add an additional reference to the parenthetical reference to evidence that the US Government and industry was aware of KAA's role in IIA procurement. Korea argues that we made such a reference in paragraph 7.115. We note that there is already a cross-reference in the previous sentence (by way of footnote 767) to paragraphs 7.104-7.116. Also, the use of the term "such as" indicates that the parenthetical phrase is illustrative and not comprehensive. Therefore, we see no need to expand the parenthetical phrase further.

6.12 With respect to the Factual Aspects section of the Report, the United States requests that paragraph 2.64 be further clarified to remove any possible implication that any version of the *Seoul Airport Act* designated KAA or its successors as the operators of the IIA project. It is the case that other laws made the specific designations, so we will change paragraph 2.64 accordingly.

6.13 With respect to paragraph 2.87, the United States requests that it would be appropriate to refer to the language of the original version of the *Korea Airport Corporation Act* when discussing the constitution of KAA.[686] We have made a change to clarify that the quoted provision is from the 1994 version of the Act.

6.14 With respect to paragraphs 2.95 and 2.113, the United States objects to including in this section a statement to the effect that KAA and KOACA employees and directors are not government employees. The United States considers this an unsubstantiated assertion made by Korea. Aside from the point that we do not have any reason to doubt this representation, we also note that, for example, Article 30 of the *Korean Airport Corporation Act* provides that KAA employees shall be considered government employees for specific limited purposes relating to certain criminal acts. The clear implication of this is that they are not considered government employees for all other purposes. Further, we note that the footnotes to paragraphs 2.95 and 2.113 clearly indicate that Korea's submissions are the source for these paragraphs. Thus, we think it is appropriate to leave these

[685] Second Written Submission of Korea at paragraph 159.

[686] We note that the United States referred us to US Exhibit 20 for the 1979 version of the Act, but such version does not appear to be contained in that or any other exhibit.

paragraphs as part of the Factual Aspects of the Panel's Report and in relevant portions of the Findings.

6.15 With respect to the Arguments of the Parties section, the United States asserts that this section represents an incomplete summary of arguments presented by the parties. We cannot agree with this assertion. All the arguments and rebuttals are fully reflected in the Report in essentially their original form.[687] We also arranged the parties' arguments under headings and in a sequence such that the arguments raised by the parties were addressed in the most logical and coherent way. In so doing, the Panel did its utmost to ensure that the context in which the arguments and rebuttals were raised by the parties was preserved. Additionally, the Panel sought to avoid unnecessary duplication of arguments. Since the parties often repeated arguments in their submissions, sometimes verbatim, we considered that it was sufficient to state those arguments in the most relevant section or sections and to include cross-references to those arguments in other sections where necessary. For example, this approach was adopted in relation to the additions proposed by the United States to paragraphs 4.232 and 4.239. In summary, in our view, the Descriptive Part of the Report contains a fair and accurate presentation of the parties' arguments and we cannot agree with the assertion by the United States that the Descriptive Part of the Report is skewed.

6.16 A further comment made by the United States is that this section of the Report separates textual arguments from supporting evidence which, according to the United States, results in the removal of such evidence from its context and its logical order. Again, we cannot agree with this comment. The United States argued, and the Panel agrees, that Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* applies to this case. According to those Articles, regard must be had first to textual arguments in determining the meaning of Korea's Schedule. Supporting evidence in the form of preparatory work and the circumstances of the conclusion of the GPA should only be referred to in cases where a textual interpretation leads to a meaning that is ambiguous or obscure or would lead to a manifestly absurd result. Recourse also may be had to such materials to confirm the ordinary meaning of the text. Accordingly, the Panel believes that the separation of textual arguments from supporting non-textual evidence is appropriate. As an example, we note that this approach was adopted in relation to the addition proposed by the United States to paragraph 4.58. Finally, we note that we have made the amendments requested by the United States in relation to paragraph 4.45 but not in relation to paragraph 4.434 since the proposed amendment is already included in the next paragraph.

6.17 With respect to paragraph 7.17, the United States requests an amendment noting that control was but one aspect of the test it proposed. We recognize that the United States asserted more than just "control" and, indeed, we have throughout the Findings taken a very broad approach in our analysis as we explicitly stated in paragraph 7.57 and then followed-up fully in the subsections following that paragraph. What we are focusing on in paragraph 7.17 is the question of control which was the element most strongly emphasized by the United States. Then we proceeded to the broader examination. Thus, we think paragraph 7.17 is appropriate in context and decline to amend it.

6.18 With respect to paragraph 7.18, the United States requests that we eliminate the portion of the first sentence concerning transfer of authority to KAA because the United States does not agree that any such transfer took place. We agree that the sentence should be amended to remove any implication that the United States agreed with such an interpretation of the *Seoul Airport Act*. The United States also requested several additions to its arguments. We will expand the reference to the US position, but recall that the full explanation of the US position is found in its submissions which

[687] In this dispute, the United States recommended that the Panel dispense with the conventional Descriptive Part and append the parties' submissions to the Report. We indicated our willingness to adopt this approach as long as Korea agreed. In the event, Korea was unable to agree to such an approach and, therefore, we have undertaken the task to provide an extensive summary of the parties' arguments. It follows that we have not inserted the arguments verbatim in precisely the form originally submitted.

are reflected in the Descriptive Part of this Report. The Findings are not the place to re-introduce such arguments in extensive detail.

6.19 With respect to paragraph 7.29, the United States requests that we amend the paragraph to reflect that MOCT has been directly responsible. If the United States means that MOCT was directly responsible throughout the period in question, obviously we disagree and decline to make the requested change. However, we will amend the paragraph to reflect that KAA, KOACA and IIAC have been responsible for the IIA project subsequent to enactment of the *Seoul Airport Act*.

6.20 With respect to paragraph 7.47, the United States requests that we include a number of other bureaus that were not included in the list provided in the portion of the *Supplementary Explanation* quoted in paragraph 7.46. However, our observation in paragraph 7.47 is limited to the subject of aviation bureaus and offices. This was significant in light of the fact that KAA was responsible for 10 regional airports. Such a significant element of Korea's offer surely would have been referenced in the *Supplementary Explanation*. Furthermore, we note that there was no evidence presented indicating that any party to the negotiations considered the 10 KAA-administered regional airports as part of Korea's offer. The evidence was to the contrary. We will amend paragraph 7.47 to clarify this point. We also will add a footnote to paragraph 7.61 in this regard.

6.21 With respect to paragraph 7.50, the United States requests we amend the paragraph to reflect that its arguments were not limited to "control". As noted above, we deal with the broader issues elsewhere and therefore decline to make the change requested by the United States.

6.22 With respect to paragraph 7.53, the United States requests that we drop any reference to the employment status of employees of KAA, KOACA and IIAC. The statements in this paragraph reflect our conclusions in this regard and we, therefore, decline to make the requested change.

6.23 With respect to paragraphs 7.60 and 7.61, the United States argues that the Panel has ignored evidence presented by the United States. This statement by the United States, of course, is incorrect. We fully considered all evidence presented by the parties. When we state our conclusions in the Findings, we summarize the evidence we found most persuasive without each time repeating all of the counter-arguments made by the party that disagrees with the conclusion. To do otherwise would render the Findings opaque and unreadable. Specifically, with regard to paragraph 7.60, the United States argues that KAA's by-laws are implemented upon approval of MOCT and that senior management appointments also are subject to such approval. We considered these matters and found them part of the oversight functions of MOCT.

6.24 The United States also reiterates its arguments about whether KAA's employees are properly considered government employees or not. We have explained our position elsewhere in this regard. Further, the United States argues implicitly that the non-governmental funding is minimal. In some years, it has been. However, KAA and its successors have provided other funds. The reference in footnote 720 in this regard was inaccurate and we have corrected it accordingly.

6.25 With respect to paragraph 7.61, the United States highlights again elements of what it considers "control" of KAA by MOCT. On these issues, as with others, we took into consideration the various aspects of control or authority between MOCT and KAA and its successors. We do not wish to imply that this was an easy factual assessment by any means. We weighed these and the other facts and, on balance, made our assessments as stated in the Findings. We have made a minor clarification of the language in paragraph 7.61, but otherwise, we decline to make the changes requested by the United States in this regard.

6.26 With respect to paragraph 7.63, the United States argues that: "it is inaccurate to portray the United States as relying 'heavily' on the Korean *Aviation Act* alone." We did not say that the United States relied on the *Aviation Act* "alone." If we had, we would not have used the term "heavily;" we

would have used "exclusively" or a synonym for it. Our statement in paragraph 7.63 is accurate and we decline to change it.

6.27 We will change footnote 724 in paragraph 7.62 as requested by the United States to reflect the fact that Korea raised the question of the applicability of Article I:3 of the GPA.

6.28 With respect to paragraph 7.66, the United States argues that the Panel does not discuss the other cross-references between the *Aviation Act* and the *Seoul Airport Act*. We spent considerable time reviewing this question of cross-references and discussed in most detail the one that we felt of particular importance in light of the US arguments. We will amend the paragraph to note that we have taken into account the various cross-references before reaching our conclusions.

6.29 With respect to paragraph 7.67, the United States requests an amendment to reflect that the *Seoul Airport Act* does not relate to the relationship between KAA and MOCT but between MOCT and various other state, local or designated entities. KAA and its successors were designated later as entities to operate the project and, therefore, the Act does cover their relationship, even if it may cover others as well. We decline to make the change requested by the United States.

6.30 With respect to paragraphs 7.67 and 7.68, the United States requests that the Panel re-state further evidence that the United States argues that the relationship between MOCT and KAA beyond just oversight. As noted above, we have fully taken into account the references cited by the United States and have not found them, on balance, to be persuasive. We decline to make the changes requested by the United States in these paragraphs.

6.31 The United States requests several changes to paragraph 7.69. We agree that the reference to bid requests in the second sentence was more than a mere mention. We will amend the sentence accordingly. The United States requests we change the reference in the third sentence to the ratio of employees of KAA to MOCT rather than between IIAC and MOCT. We believe the reference to the current state of affairs is relevant and decline to change it. We requested information regarding the number of employees of IIAC but did not specifically request information on the number of employees of KAA in 1991. This is because KAA was an entity founded over 12 years earlier with responsibility for 10 regional airports. As such, it would have been impossible to separate the employees dedicated to the IIA project from those responsible for other activities of KAA. We also find it unlikely that KAA would have been an empty shell either given its other responsibilities. The US objects to our use of the term "empty shell" as a mis-characterization of its arguments concerning alleged Korean "shell games." The reference to an empty shell was ours and not related to the US point which was on another issue. We will make only the requested change to the first sentence of paragraph 7.69.

6.32 The United States objects to our reference to other bid documents in footnote 732 in paragraph 7.69 to the effect that they showed no relationship with MOCT. The United States argues that bid documents are not intended to show such relationships. However, that is precisely what the United States wished to establish with bid documents that indicated a role for MOCT or the Office of Supply. We were merely noting that of all the bid documents presented in evidence, the vast majority show no role for MOCT or the Office of Supply. We decline to make the change requested.

6.33 With respect to paragraph 7.70, the United States reminds the Panel of the references in the MOCT website to the role of NADG in the IIA project and argues that more than just oversight by MOCT was involved. We have acknowledged this evidence elsewhere and took it fully into consideration. We reiterate that it is not only not required, but would be counter-productive to recite every piece of evidence at every stage of the Findings.

6.34 With respect to paragraph 7.106, the United States argues that the date of the Korean response has not been established as 1 July 1991, only that Korea has asserted it. The relevance of the US

point has not been established. In light of our extensive discussion about Korea's response and our views about its inadequacy, we do not think it would change our conclusions if the actual date was a week or two later. Therefore, we see no need to change our reference.

6.35 With respect to paragraph 7.115, the United States notes its strong objection to Korea's claim that the United States Government knew that KAA was in charge of the IIA project. However, the statement that the United States objects to is one of a list of factors considered by us as evidence of the wide knowledge of the fact that KAA was operating the IIA project and this reference was already qualified by noting that it was evidence submitted by Korea. We have amended paragraphs 7.115 and 7.119 to clarify the point.

6.36 The United States also claims that the only legally relevant officials with respect to knowledge of relevant factors are those within a particular government entity in a position to decide whether to go forward with the negotiated result. The United States has provided no legal support for this sweeping assertion.[688] While the US comment was directed at the issue of actual notice, it is difficult to see how it could have any legal relevance in a setting where constructive notice is sufficient.

6.37 With respect to paragraph 7.125, the United States requests that we qualify the statement by noting that at least one month of the four-month period was for verification. We agree that this is more accurate and will make the requested change.

6.38 We have corrected grammatical and typographical errors in paragraphs 7.4, 7.34, 7.46, 7.48, 7.61, 7.93 (footnote 751) and 7.100 and made a minor clarification in paragraph 7.48.

VII. FINDINGS

A. CLAIMS OF THE PARTIES

7.1 The United States requested the Panel to make the following findings[689]:

> "That Ministry of Construction and Transportation ("MOCT") (including the New Airport Development Group ("NADG") under MOCT), the Korean Airport Authority ("KAA"), the Korean Airport Construction Authority ("KOACA"), and the Inchon International Airport Authority ("IIAC"), all of which are or have been in the past Korean Government entities involved in procurement for the Inchon International Airport ("IIA") project, are covered under Korea's Appendix I of the WTO Agreement on Government Procurement ("GPA") and:
>
> (a) That by imposing bid deadlines for the receipt of tenders that are shorter than the GPA-required 40 days, Korea is in violation of Article XI:1(a) and XI:2(a) of the GPA.
>
> (b) That by imposing qualification requirements specifying that an interested foreign supplier must have a licence that in turn requires that supplier to build or purchase manufacturing facilities in Korea, just so the supplier may be eligible to bid as a prime contractor, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.

[688] Indeed, the contrary would appear to be the case. See our discussion in paragraph 6.5 above, and the footnotes thereto.

[689] Paragraph 3.1.

(c) That by imposing domestic partnering requirements that force foreign firms to partner with, or act as subcontractors to, local Korean firms, just so the foreign firms may participate in tendering procedures, Korea is in violation of Articles III:1(a), VIII first sentence, and VIII(b) of the GPA.

(d) That by not establishing effective domestic procedures enabling foreign suppliers to challenge alleged breaches of the GPA for procurements related to the IIA project, Korea is in violation of Article XX of the GPA."

7.2 The United States also requested the Panel to make the following finding[690]:

"That should the Panel determine that the above measures do not violate the GPA, the measures nevertheless nullify or impair benefits accruing to the United States under the GPA, pursuant to Article XXII:2 of the GPA."

7.3 Korea requested the Panel to reject the complaints to the United States on the basis of the following finding[691]:

"That the entities conducting procurement for the IIA are not covered entities under Korea's Appendix I of the GPA."

B. GPA COVERAGE OF THE INCHON INTERNATIONAL AIRPORT PROJECT

1. General

7.4 As discussed above, the United States has claimed that the procurement practices with respect to the IIA are not consistent with the provisions of the GPA. Specifically, the United States argues that the bid deadlines have been too short, there are improper qualification and local partnering requirements and there are not adequate challenge procedures. Korea has taken no position with respect to these allegations; rather, Korea argues that the entities responsible for IIA procurement are not covered by Korea's GPA commitments contained in Appendix I to the GPA and that, therefore, Korea is under no obligation to conduct IIA procurement in a manner consistent with the provisions of the GPA.

7.5 The question that we must address at the outset, therefore, is whether procurement for the IIA is covered by Korea's GPA commitments. 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[692], three entities have been responsible for IIA procurement: KAA, KOACA and IIAC. It is undisputed between the parties that these three entities occupy similar situations, the transfer of authority between them being largely irrelevant to our analysis. Both parties agree that Korea has never utilized the procedures contained in GPA Article XXIV:6 for modification of its Schedules with respect to airport construction. The issue, therefore, is whether KAA was a covered entity[693] at the time that Korea concluded its accession negotiations. We will, however, also look at the activities of KOACA and IIAC, to the extent necessary, as well as the relationship of MOCT and the Office of Supply to the three entities, to see what impact, if any, that will have on our analysis.

7.6 Article I of the GPA provides as follows:

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[690] Paragraph 3.2.
[691] Paragraph 3.3.
[692] The effective date of Korea's accession was 1 January 1997.
[693] We note that the GPA does not use the term "covered entity" as such, rather it refers to entities covered by this Agreement. Both parties used the term "covered entity" as shorthand for this and we will continue in this manner as well.

> "This Agreement applies to any law, regulation, procedure or practice regarding any procurement by an entity covered by this Agreement, as specified in Appendix I."

A footnote to Article I further provides that for each Party to the GPA, its Schedule is divided into five annexes covering different types of procuring entities. For our purposes, 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.

7.7 The question arises as to how to interpret these Schedules in the event of a disagreement. In a recent dispute, the issue of the approach to take in interpreting Schedules under Article II of GATT 1994 was taken up by the Appellate Body. In particular, 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. In this dispute, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, WT/DS67, WT/DS68, ("*European Communities – Computer Equipment*"), the question involved the appropriate tariff treatment for certain electrical products such as local area network ("LAN") equipment. The United States claimed that the products should have been treated by the European Communities in its schedule as automatic data-processing machines. Some EC member States treated LAN equipment as telecommunications equipment. The panel found for the United States, among other things, on the basis that the United States had a legitimate expectation as to how the products would be treated.

7.8 The panel finding was reversed by the Appellate Body. In the Appellate Body's view, the panel had incorrectly based its findings on the unilateral and subjective expectations of the exporting party. Instead, 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*."[694]

7.9 Like GATT Article II:7 which refers to the tariff Schedules as "integral" 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." Thus, it follows that we should consider the Schedules appended to the GPA as treaty language. Accordingly, we will refer to the customary rules of interpretation of public international law as summarized in the *Vienna Convention* in order to interpret Korea's GPA Schedule.

7.10 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.

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[694] Appellate Body Report on *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62, WT/DS67, WT/DS68, adopted on 22 June 1998, at paragraph 84. See also 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 paragraph 131.

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."

7.11 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."

7.12 The first step of the analysis, therefore, will be to examine Korea's Schedule and determine whether, within the ordinary meaning of the terms therein, the entity responsible for IIA procurement is covered. This will include a review of all relevant Annexes and Notes.

7.13 If the meaning is ambiguous or obscure, or would lead to a result which is manifestly absurd, then, in accordance with Article 32, recourse may be had to the preparatory work and the circumstances of the conclusion of the treaty. Such recourse could include reference to matters such as the questions asked of Korea by GPA members during the accession process and Korea's responses thereto. Reference to the negotiating history is also appropriate to confirm the Panel's understanding of the ordinary meaning of the terms in the treaty.

2. Covered Entities under Korea's Annex 1

(a) Arguments of the Parties

7.14 Listed in Annex 1 of Korea's Appendix I Schedule are, *inter alia*, the MOCT[695] and the Office of Supply. The Office of Supply is covered with respect to procurements made for entities listed in Annex 1. An important element in construing the coverage of Annex 1 is Note 1 to that Annex. It reads as follows:

> "The above 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."

7.15 The United States has argued that the interpretation of "central government entity" in Annex 1 includes branch offices and subsidiary organizations. According to the United States, proper treaty interpretation of this term must result in the inclusion of the subdivisions of listed entities and such subdivisions could include branch offices and subsidiary organizations or other such entities. The United States argues that this interpretation is wholly consistent with Note 1 because that Note 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. These other organizations include branch and subsidiary organizations.

7.16 The United States argues that NADG is a part of MOCT, or at least a branch or subsidiary organization of MOCT.[696] The United States further argues that, 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. The United States argues that NADG is the organization responsible for IIA construction and that, therefore, the IIA is a project of a covered entity. Alternatively, the United States argues that KAA and its successors are branch offices or subsidiary organizations of MOCT and the IIA project would, therefore, also be covered under that line of analysis.

7.17 The United States urges the Panel to look closely at the element of "control" over the organizations in question, particularly in regard to the specific project in question and argues that given the degree of control exercised by MOCT over KAA and its successors, procurements by those entities are actually procurements by MOCT. The United States argues that, therefore, the GPA requirements apply to those procurements.

7.18 The United States points to the *Act on the Promotion of a New Airport for Seoul Metropolitan Area Construction* ("*Seoul Airport Act*") as evidence. Article 4(1) of that Act provides, among other things, that MOCT will establish a "master plan" for the IIA project. This plan is to include general direction of construction, outline of the construction plan, the construction period, a financing plan and other matters deemed necessary. The United States also refers 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. Article 13 permits MOCT to cancel permission to operate or suspend or alter the work. Article 14 requires that the project operator permit MOCT inspection of its office and workplace and other places relevant to the new airport development project.

7.19 The United States also argues that the Korean *Aviation Act* is the controlling statutory authority for airport construction. Under Article 95 of the *Aviation Act*, KAA would have been a "project operator". The United States then refers to the numerous provisions in the *Aviation Act* which require the project operator 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*.

7.20 The United States further notes that General Note 1of Korea's Appendix reads as follows:

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[695] MOCT was formed in December 1994 through the merger of the Ministries of Construction and Transportation. Generally we will refer to the covered entity as MOCT for simplicity, recognizing that this may be anachronistic at points.

[696] See paragraphs 4.13, 4.15 and 4.436.

"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."

7.21 The United States argues that the reference to "procurement for airports" in paragraph (b) of the General Note confirms that there are, in fact, entities listed in Annex 1 of Korea's Schedule that are responsible for procurement for airports. The United States further argues that 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.

7.22 The United States points 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. 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.

7.23 Korea responds that there is no textual basis for the US arguments about branch offices and subsidiary organizations. According to Korea, Note 1 to Annex 1 defines the scope of the coverage of central government entities under Annex 1. Korea argues that this is the most reasonable interpretation of the phrase "as prescribed in the *Government Organization Act*" that is contained in Note 1. In any event, Korea disagrees that KAA or its successors could be properly described as branch or subsidiary organizations of MOCT. While Korea disagrees that there was a "control" test contained in the WTO GPA, Korea also argues that KAA was independent both overall and with respect to the IIA project. This is because, among other things, 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.

7.24 Korea points out that Article 94(1) of the *Aviation Act* states that it is the controlling provision of law unless "otherwise provided by law." According to Korea, in this case, the *Seoul Airport Act* "otherwise provided by law." Therefore, 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. Korea acknowledges that there were elements of supervision by MOCT of the IIA project as it is an important national project. However, Korea argues, this sort of general oversight is very typical for projects that are closely linked to public welfare, safety and finance and ensures accountability. Korea argues that this sort of oversight does not involve the surrender of the supervised entity's status as a separate legal entity.

7.25 Korea further argues that the indicia of independence, as listed above, clearly indicated that KAA was an independent entity for purposes of coverage by the GPA. Korea notes that 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.

7.26 In regard to General Note 1(b), Korea responds that, in fact, procurement for some airports is 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.

7.27 With respect to MOCT's website, Korea argues that this was a product of MOCT's public relations department and was not a binding classification of responsibilities. Korea also argues that in July 1998, around the time the website evidence is cited, the US Commercial Officer in Seoul sent a letter to the Korean Government which implicitly acknowledged that KOACA was not a covered entity. The letter requested, among other things, that KOACA be considered de facto covered until actual GPA coverage took place.

7.28 The United States responds to this last point by providing a series of other US Government letters from this time-period, including some from more senior US officials, which the United States maintains made very clear the full and accurate position of the United States which was different from that of the above-mentioned Commercial Officer. In the US view, the July 1998 letter does not lead to the conclusion proposed by Korea, in any event, because in stating that there should be de facto coverage it did not imply that there was no *de jure* coverage.

(b) Evaluation of the Parties' Arguments

7.29 As noted in paragraph 7.5 above, three entities (KAA, KOACA and IIAC) have been directly responsible for IIA procurement following the designation of a project operator in December 1991.[697] In evaluating the parties arguments in regard to the claim of a violation of Korea's commitments under the GPA, there are two aspects which must be addressed. The first issue is the interpretation of Korea's Schedule of commitments. Is the entity conducting the procurement for the IIA project listed in the Annexes or the Notes thereto? This requires an interpretation of Annex 1 to Korea's Schedule and the Notes thereto, as well as other relevant portions of the Schedule.[698] The second issue is whether there is some other test that we should apply to determine if the entity in question is covered by Korea's GPA commitments even if not listed. The United States has generally argued in this regard that the proper test should be whether the procuring entity is "controlled" by a listed entity. Korea has contested the validity of that proposed test. The question becomes whether there are some criteria exogenous to the lists and Notes in the Schedules that, when applied to an entity, would lead to the conclusion that its procurement should be covered by a GPA signatory's commitments.[699]

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

7.30 A critical question we must first address is determining what is explicitly contained in Korea's Schedule. A preliminary issue is the status of Note 1 to Annex 1, in particular the extent to which Parties can qualify the coverage of listed entities through such Notes. In our view, Members determine, pursuant to negotiation, the scope of the coverage of their commitments as expressed in the Schedules. In this regard, we take note of the panel finding in *United States - Restrictions on Imports*

[697] *Seoul Airport Act* as amended by Act No. 4436 (14 December 1991) Exhibit Kor-12; *Korea Airport Corporation Act* as amended by Act Nos. 4435 and 4436 (14 December 1991) Exhibit Kor-14.

[698] See subsections (i) and (ii), below.

[699] See subsection (iii), below.

of Sugar ("*United States - Sugar*") wherein the panel observed that Headnotes could be used to qualify the tariff concessions themselves.[700]

7.31 The implication of the Findings in *United States - Sugar* for the present case would be that a GPA signatory could use Notes to its Schedules to qualify the entity coverage itself. However, as will be discussed in subsequent sections, questions have been raised as to whether an entity not mentioned in a Schedule, either through an affirmative listing or an explicit exclusion, may still be covered due to the nature of its relationship with another entity which is covered.

7.32 Our first step, therefore, is to examine what entities are actually listed in Korea's Schedule. We note that MOCT is included in the list of central government entities. KAA and its successors are not listed either there or elsewhere.

7.33 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." To begin with, we agree with Korea that the phrase "as prescribed in" means that the *Government Organization Act* defines the terms listed in the Note. The relevant definition of the verb prescribe is to: "limit, restrict, confine within bounds."[701] In our view, this concept of limiting or confining within bounds means that "prescribed" does provide definition to the preceding terms in Note 1. Indeed, one of the definitions of the verb "define" is to: "determine, *prescribe*, fix precisely, specify."[702] We think that the definitions of "prescribe" and "define" are so close as to make the words virtually synonymous. Thus, we will look to the cited Act for the definitions of the terms listed in Note 1.

7.34 Article 2(3) of the *Government Organization Act* states: "The subordinate linear organizations of the central administrative organs shall be Cha-Gwan (Vice-Minister), Cha-Jang (Deputy Administrator), Sil-Jang (Office Director) . . ."[703] Thus, the subordinate linear organizations are defined as individual offices rather than organizations as such. In response to a question from the Panel, Korea states that this means that coverage would be with respect to areas of responsibility of those officials. We accept the explanation by Korea and, therefore, cannot agree with the US assertion that Article 2(3) of the *Government Organization Act* does not really provide a definition of "subordinate linear organizations." In our view, there is no doubt that Article 2(3) defines "subordinate linear organizations" by reference to the entities (ministries, divisions, units, etc.) which fall under the responsibility of one of these offices. It has not been argued that KAA falls within any of these offices. Therefore, we shall proceed on the basis that KAA is not a subordinate linear organization.

7.35 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."[704] Examples of such organizations are the Seoul and Pusan Regional Airport Authorities. KAA and its successors are not considered local administrative organs.[705]

7.36 In addition, Article 4 of the Act provides as follows:

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[700] 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.

[701] *New Shorter Oxford English Dictionary*, (Clarendon Press, 1993) Vol. 2 at p. 2339.

[702] *Ibid.*, Vol. 1 at p. 618. (emphasis added)

[703] Exhibit Kor-58. All translations of legislative materials have been provided by Korea.

[704] *Ibid.*

[705] Korea states that this is the case. The United states merely notes in response that the *Government Organization Act* does not identify the Seoul and Pusan Regional Aviation Offices as "special local administrative organs."

> "(Establishment of Attached Organs) In an administrative organ, there may be established by the Presidential Decree organizations for experiment, research, education and training, culture, medicine, manufacturing or advice, respectively, if necessary for the fulfilment [of] duties under its jurisdiction."[706]

There is no dispute that KAA is not an "attached organ" within the meaning of this definition.

7.37 As demonstrated above, KAA does not fall within the terms of Articles 2(3), 3(1) or 4 of the *Government Organization Act*. We, therefore, conclude that prima facie KAA does not fall within the terms of Note 1 to Annex 1 of Korea's Schedule. We note, however, that there are diverging views on whether this should be the end of the analysis of Korea's Schedule. Korea is of the view that it should be, while the United States urges us to interpret Note 1 (and, in particular, the word "include") in such a way as to permit us to look beyond Annex 1 itself.

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

7.38 In effect, Korea argues for a narrow reading of the list in Annex 1 by using Note 1 as a definition. The implication of this is that because KAA and its successors are not prescribed in the *Government Organization Act*, they cannot be covered under Annex 1. On the other hand, the United States focuses on the term "include" and argues that Note 1 broadens the coverage beyond the central government entities listed in Annex 1 itself to also encompass additional entities described in the *Government Organization Act*.

7.39 A reference to Note 1 of Annex 2 (sub-central government entities) would tend to support the narrower interpretation. Note 1 to Annex 2 reads in relevant part as follows:

> "1. 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."

7.40 There are two important observations to make in regard to 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 (or, for that matter, "branch offices" or "subsidiary organizations"). Furthermore, it implies the negative that subordinate organizations in general are not meant to be included unless specifically stated as in Note 1 to Annex 2. We do note, however, that the translation from the original Korean may have added some ambiguity with respect to this issue.

7.41 The second observation is that 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 criteria there. This issue of control will be discussed further in subsection (iii), below.

7.42 However, we must note that the reading of Note 1 to Annex 1 as a definitional provision is that it implies a peculiar structure of the Annex 1 Schedule where one set of *organizations* is defined in terms of offices rather than entities. Another unusual aspect of Note 1 is 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 problem raised by this observation is that the Note states that the central government entities in Annex 1 **include** subordinate linear organizations, local administrative organs and attached organs. We agree with the United States that the term

[706] *Ibid.*

"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."[707]

7.43 In our view, this use of the term "include" along with the unusual use of a list of individuals to define subordinate linear organizations results in ambiguity regarding the interpretation of Note 1 and therefore the meaning of the whole of Annex 1 including the Notes. While we will examine further the other aspects of Korea's Schedule and the relevant Notes, we find it helpful in accordance with paragraph (a) of Article 32 of the *Vienna Convention* to examine at this point the negotiating history of Korea's GPA accession to provide some clarity to Note 1. In this particular case, there is some very specific evidence in this regard which will assist in interpretation.[708]

7.44 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*.[709] Section 3 of the *Supplementary Explanation* provided a "Clarification of Notes in Korea's Offer." Note 1 at that time was essentially the same as it appeared in Korea's Schedule. The clarification of Note 1 reads in relevant part:

> "o Note 1 is established to clarify the coverage of central government organs which come under 35 of 37[710] purchasing entities.
>
> o The meaning and categories of subordinate linear organizations, special local administrative organs and attached organs are prescribed in the Government Organization Act of the Republic of Korea as follows:
>
> - Subordinate linear organizations: office of the minister, vice-minister, assistant minister, director general, director, etc."[711]

7.45 This provides insight on two aspects of the interpretation of Note 1. First, the *Supplementary Explanation* by its terms was intended to *clarify* the coverage of central government organs. That is, it is a clarification of the scope of the list in Annex 1. Note 1 was not in itself intended as an extension of coverage to entities other than those listed in Annex 1. Secondly, the coverage based on offices is made explicit. This goes to the observation in paragraph 7.42 above, that Annex 1 is virtually without substance except as provided in the *Government Organization Act*. The answer is that this is precisely the case because, in fact, Note 1 defines the scope of the coverage by listing components of the central government entities themselves; it was not meant to denote something exterior to the central government entities as might be implied by the term "include."

7.46 The *Supplementary Explanation* also provided a list of central government entities which it described as the "total central government entities." With respect to the Ministry of Transportation, it provided as follows:

> "o Ministry of Transportation
>
> - Regional Aviation Bureaus (2)
>
> - CHEJU Regional Aviation Office

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[707] *New Shorter Oxford English Dictionary, supra.*, Vol. 1 at p. 1337.
[708] We will return to the overall negotiating history of Korea's Schedule below.
[709] Exhibit Kor-117.
[710] Elsewhere in the *Supplementary Explanation* the figure of 35 out of 47 is given. *Ibid.* at p. 5. This may be a typographical error, but is not of relevance to our discussion.
[711] *Ibid.* at p. 26.

- Flight Inspection Office of the Director-General – VOR-TAC Stations (5)

- Marine Accident Inquiry Offices"[712]

7.47 As noted above, Korea has maintained that the entities for which coverage is provided under Annex 1 of its Schedule are the Seoul and Pusan Regional Aviation offices. The reference to two Regional Aviation Bureaus in the *Supplementary Explanation* supports this assertion. This corresponds with the evidence arising later from the EC's inquiries of Korea in late 1993 which leads to the conclusion that the Regional Aviation Bureaus listed under the Ministry of Transport were the Seoul and Pusan Regional Airport Authorities which are included by Note 1 as local administrative organs. KAA is not included in the list contained in the *Supplementary Explanation*. We note that KAA was responsible for 10 regional airports (although apparently it was not itself localized in one region in its responsibilities and therefore was not "regional") and, as such, it would have been a major element of Korea's offer. In light of this, we find its omission from the list significant.

7.48 Thus, Note 1 provides a clarification of the scope of the coverage of the central government entities contained in the list in Annex 1. Obviously, even in light of this conclusion regarding the relationship between the list of entities in Annex 1 and the clarification in Note 1, the term "include" does nonetheless remain a part of Note 1. Also, while it is the case that the definitions of "subordinate linear organizations, local administrative organs, and attached organs" are virtually coterminous with the "central government entities" in Annex 1, there may be a gap. Based on the evidence before us, the office of the Minister is not included in the offices specified in the *Government Organization Act*, but it would evidently fall under the remit of the Ministry. This means, for example, that tasks or projects specifically designated by law or decree as the responsibility of the Minister are covered by the list in Annex 1, even though not "included" by virtue of the definition provided by the *Government Organization Act*. We note, in this regard, that NADG as an ad hoc task force is not contained in the definitions found in the *Government Organization Act*, but is assigned its tasks by regulations issued by the Minister of Construction and Transportation (paragraph 4.14). Thus, NADG would seem to be covered by the list in Annex 1 (as acknowledged by Korea), but not included by reason of Note 1. In contrast, KAA is not assigned its tasks by the Minister; is not listed in Annex 1; nor does Note 1 explicitly include KAA in coverage.

7.49 Therefore, we next will examine whether the relationship between MOCT and KAA was such that KAA's procurement is covered (at least with respect to the IIA, if not more broadly) even though KAA is not explicitly included. As noted in paragraph 7.29 above, there is a remaining question as to whether there exists the possibility of the inclusion of certain procurements of an entity which is not listed, due to its relationship with a listed entity. These arguably are general issues which arise with respect to any Member's Schedule regardless of the structure and content of the Schedule and any qualifying Notes.

(iii) Evaluation of the Parties Arguments: The Issue of "Control"

[712] *Ibid.* at p. 11. We also note that this piece of negotiating history also adds clarity to the meaning of General Note 1(b) and permits a consistent and coherent reading of Annex 1 in light of this General Note. We recall that the United States argued that General Note 1(b) did not make any sense if the IIA project was not covered because it would then refer to nothing at all and the treaty should not be read in a manner which renders any of it meaningless. However, the *Supplementary Explanation* confirms the meaning otherwise derived from a reading of the *Government Organization Act* as referred to in Note 1 to Annex 1. That is, Korea withheld coverage of airport procurement for the European Communities and certain other signatories, but this does not necessarily imply coverage of the IIA project under Note 1 of Annex 1. Rather, it implicitly refers to the regional airport authorities. We will discuss this further below in the context of the broader negotiating history of Korea's accession to the GPA.

7.50 The United States argues that KAA may be considered a part of MOCT because it is controlled, at least for the purposes of the IIA project, by MOCT. As noted in paragraph 7.29 above, a question is raised whether, regardless of what is specifically in a Schedule, an entity which is deemed "controlled" by a listed entity is also covered by the Member's GPA commitments?[713] If so, as a follow-on to this second question, does KAA fall within this category?

7.51 Korea has discussed this issue in a slightly different manner. Korea has argued that if we were to adopt the US proposed control test, it would cause a number of entities included within Korea's (and other Members') 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. This is important because it would change the threshold levels negotiated with respect to the Annex 3 entities.

"Control" Generally

7.52 First, we must recall our observation made earlier in regard to Note 1 to Annex 2 of Korea's Schedule. Among other things, we observed that the term "direct control" arose in that Note as a means of describing the scope of the concessions in Annex 2. Arguably, because Korea used the term explicitly with respect to Annex 2, its absence in Note 1 to Annex 1 implies that it has no applicability to Annex 1. While this negative implication cannot be overlooked, we also recall that we are reviewing in this section the question of whether GPA coverage can result from the control relationship between two entities regardless of the Schedules and the way in which Parties seek to define them. Obviously, however, the more explicit the Schedule, the narrower the scope for any such coverage to exist.

7.53 The United States has referred us 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. However, the focus of that dispute was whether or not the Canadian milk marketing boards were "government agencies."[714] In our view, that is a different question than we are facing in the present dispute. While the employees of KAA, KOACA and IIAC are not government employees (except for a "legal fiction" created by statute with respect to certain criminal actions), neither party has argued that these are not "government" agencies. We agree that they are. The question here is narrower. Are these "government" agencies actually a part of or an agent for *covered* government entities?

7.54 Indeed, the United States has acknowledged that there are different tests involved in answering these questions. There was considerable discussion regarding the implication we should draw, if any, from the exclusion in the current GPA of the relevant language contained in Article I of the Tokyo Round Agreement. That read:

"Article I

Scope and Coverage

1. This Agreement applies to:

[. . .]

[713] In our view, the US arguments regarding branch offices and subsidiary organizations, to the extent not already dealt with in the previous subsections, are subsumed within this general discussion regarding "control."

[714] 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.

> (c) procurement by the entities under the direct or substantial control of Parties and other designated entities, with respect to their procurement procedures and practices. Until the review and further negotiations referred to in the Final Provisions, the coverage of this Agreement is specified by the lists of entities, and to the extent that rectifications, modifications or amendments may have been made, their successor entities, in Annex I."

7.55 Korea argued that the coverage of the current GPA now is defined exclusively by the Schedules and did not even arguably include another normative rule relating to direct control.[715] In response to a question from the Panel regarding the implications of the existence of this language for understanding the negotiations between the parties in 1991-1993, the United States answered that this language was irrelevant to the Panel's analysis of the US response to Korean legislation implemented in 1991. The United States went on to make the following statement:

> "With regard to the expansion of coverage to procurements by "entities under the direct or substantial control of Parties", the 1979 USITC report states that "[t]he broader language 'direct or substantial control' apparently is intended to encompass not only governmental units but quasi-governmental purchasing agents as well". In other words, this control reference is not related to the control of "central government entities" over their subdivisions. Instead it is referring to the control of Code parties (*i.e.*, the governments themselves) over their "quasi-governmental purchasing agents"."[716]

7.56 We agree with this statement both as to the nature of the language in Article I:1(c) of the Tokyo Round Agreement and the distinction between the two types of "control" questions. Article I:1(c) was referring to the broader question of whether an entity was "governmental" or not rather than to the relationship between two "governmental" entities for purposes of the GPA. However, the panel and Appellate Body in *Canada – Dairy* also were referring to that broader question. Indeed, it seems to us that the GPA is virtually *sui generis* in this regard. It is an important question under the GATT/WTO Agreements as to whether an action is being taken by a "governmental" entity or a private person for the covered agreements are considered to apply to "governmental" action only. However, once it is determined that there are "governmental" measures at issue, it is not generally of legal relevance which "governmental" entity is applying the measures. But within the GPA this is a critical question. There are obligations on the part of certain government entities but not others.

7.57 There is no use of the term "direct control" or even "control" in the sense that the United States wishes to use it.[717] It has not been defined in this manner either in the context used in the Tokyo Round Agreement or elsewhere. We cannot agree with the overall US position that a "control" test should be read into the GPA. However, we also do not think that it is an entirely irrelevant question. We think the issue of "control" of one entity over another can be a relevant criterion among others for determining coverage of the GPA, as discussed below.

(iv) Evaluation of the Relationship of the Entities Concerned

7.58 As discussed above, we do believe that entities that are not listed in an Annex 1 to the GPA whether in the Annex list or through a Note to the Annex, can, nevertheless, be covered under the

[715] Korea referred to a United States International Trade Commission report with respect to the nature of the language in Article I:3 of the Tokyo Round Code. See Exhibit Kor-73.

[716] US Responses to Second Set of Panel Questions at p. 10.

[717] 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.

GPA. We believe that this flows from the fact that an overly narrow interpretation of "central government entity" may result in less coverage under Annex 1 than was intended by the signatories. On the other hand, an overly broad interpretation of the term may result in coverage of entities that were never intended to be covered by signatories.

7.59 In the present case, our view is that the relevant questions are: (1) 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 (2) Whether KAA and its successors have been acting on behalf of MOCT. The first test is appropriate because if entities that are essentially a part of, or legally unified with, listed central government entities are not considered covered, it could lead to great uncertainty as to what was actually covered because coverage would be dependent on the internal structure of an entity which may be unknown to the other negotiating parties. The second test is appropriate because procurements that are genuinely undertaken on behalf of a listed entity (as, for example, in the case where a principal/agent relationship[718] exists between the listed entity and another entity) should properly be covered under Annex 1 because they would be considered legally as procurements by MOCT. In our view, it would defeat the objectives of the GPA if an entity listed in a signatory's Schedule could escape the Agreement's disciplines by commissioning another agency of government, not itself listed in that signatory's Schedule, to procure on its behalf.

Are the Entities Legally Unified?

7.60 With respect to the first question, in our view, KAA is not legally unified with or a part of MOCT. There are a number of factors leading to this conclusion. Among them are: 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[719]; 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[720] of the IIA project with its own monies.[721]

7.61 There are, nonetheless, some indicia of a relationship between MOCT and KAA and its successors. The senior members of KAA's board of directors are appointed by MOCT and the rest of the directors are appointed by these senior members. There are indicia of control, at least with respect to the IIA project, that indicate some level of oversight or monitoring of KAA by MOCT. We will discuss this in more detail below with respect to the second question, but, in our view, these levels of "control" relate to oversight or monitoring and not to the common identity of the entities. These sorts of relationships exist throughout the public sector. Without them, it would be difficult for governmental functions to be coordinated effectively. But not all such relationships lead to a finding that one entity is, in effect, a part of another entity. Certainly for purposes of the GPA, such a result would lead to a great deal of uncertainty in the coverage of the Schedules. The GPA has always been based on what is affirmatively included in Schedules[722] and extending the coverage further without clear indicia of effective unity between entities is not warranted by the structure and purpose of the

[718] The parties at various times referred to a concept of "agency." The term "agency" does not appear in the GPA, but could be used in a very general sense of one entity legally acting on behalf of another.

[719] This, as noted above, is a different question from whether such employee status means KAA is not a "governmental" entity.

[720] See paragraphs 2.61, 2.101 and 2.130.

[721] Korea also argued that the fact that KAA authored and adopted its own procurement rules distinct from the general government rules indicated KAA's independence. We recognize that it is arguable that it is an indicia of independence that there was pre-existing authority for procurement regulations separate from the entity that KAA was asserted to be a part of. However, we also note that the question of separate and non-conforming procurement regulations is the core of the complaint in this regard and the inconsistency at issue should not generally be considered a justification for itself. Thus, this aspect of alleged independence is of sufficiently questionable probative value that we have not relied upon it.

[722] See USITC Report, Exhibit Kor-73.

GPA. On balance, we are persuaded by the indicia of independence of KAA and its successors and find that these entities are not a part of MOCT.[723]

Legal responsibility for the IIA project

7.62 The second question is whether or not KAA and its successors were acting on behalf of MOCT, at least with respect to the IIA project. That is, was the IIA project really the legal responsibility of MOCT. In answering these questions, we must review the laws governing construction of the IIA.[724]

7.63 The United States relies heavily on the Korean *Aviation Act* for support for its position that MOCT has 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. (*emphasis in original*)
>
> (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."[725]

7.64 Paragraph (3) of Article 94 provides that the land and airport facilities will revert to the State upon completion of the project. Article 95 then continues on with a statement of the requirements that the "project operator" as prescribed in Article 94 must fulfill regarding drawing up project plans and getting approval from the Minister before beginning work as provided in the Presidential Decree.

7.65 Korea has responded that the proviso in Article 94(1) means that the *Seoul Airport Act* is the ultimate controlling statute rather than the *Aviation Act*.

7.66 We agree with Korea's reading of these statutes. It seems clear to us that 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. A second is by other entities as provided otherwise by law. The *Seoul*

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[723] If KAA were to be considered a part of MOCT, then the 10 regional airports administered by KAA would also have been included in Annex 1 coverage. As noted in paragraph 7.47 above, even though the Panel requested that the parties (particularly the United States) address this issue, no evidence was presented that KAA's 10 regional airports were considered part of Korea's offer.

[724] We note that Korea raised the question of the applicability of GPA Article I:3 to the present situation. This provision reads as follows:

> "Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply mutatis mutandis to such requirements."

This provision applies "in the context of procurement covered by this Agreement." This implies that it is already agreed that there is a covered entity with procurement under its responsibility. Here the question is whether the entity in question, KAA, is covered. The provision also refers to a covered entity requiring a particular *enterprise* to award contracts for a project. It is unclear what guidance this provides when reviewing the relationship of two entities. Thus, we do not think this provision provides guidance in the present situation.

[725] Exhibit Kor-115. The version of the law in effect in 1991 is included in Exhibit Kor-114 where Article 94(1) is phrased somewhat differently from the later version. The difference is not material to our purposes and it is unclear whether the difference is merely one of translation.

Airport Act is such a law.[726] The United States argues[727] that the cross-reference to Article 95(1) of the *Aviation Act* in Article 8(1)16 of the *Seoul Airport Act* proves that the *Aviation Act* is still the controlling statutory authority. We do not think this aids the US case. Indeed, if anything, it would tend to support the opposite conclusion. Article 8(1)16 cross-references only the requirement in Article 95 of the *Aviation Act* regarding the submission of an operational plan by a project operator. Article 95(1) of the *Aviation Act* requires approval of an operational plan by MOCT; Article 7 of the *Seoul Airport Act* requires the project operator to draw up an "execution plan" for approval. Article 8(1)16 operates to create the presumption (legal fiction) that the Article 7(1) approval is equated with the approval given by Article 95(1) of the *Aviation Act*. One of the aspects that implies the contrary of the US assertion is the very limited cross-reference to Article 95(1) in the context of a series of cross-references in Article 96. These cross-references in Article 96 are made redundant by Article 8 of the *Seoul Airport Act*. As Korea has pointed out[728], the redundancies in these two Acts would not be necessary if, in fact, the *Aviation Act* were still the controlling statutory authority for the IIA project. Furthermore, we also note that Article 95(3) of the *Aviation Act* appears to make a distinction between operational plans made directly by MOCT and such plans merely approved by MOCT.[729]

7.67 The *Seoul Airport Act* has many provisions relating to the relationship between KAA and MOCT. These provisions, as noted in the previous paragraph, would be at the very least unnecessary if the *Aviation Act* were the controlling statutory authority. Moreover, Article 4 of the *Seoul Airport Act* provides for MOCT to draw up a master plan of the project including the *general direction* of construction, an *outline* of the construction plan, the construction period and a financing plan, as well as other matters deemed necessary by MOCT.[730] These issues of a general nature are not uncommon elements of a Ministry's oversight of a project but do not render the other entity its agent.

7.68 Article 6 of the *Seoul Airport Act* provides that the master plan shall be implemented by the state and local governments and by what was later designated as KAA. Article 7 then required KAA to develop an execution plan and have it approved by MOCT along with any alterations other than minor ones.[731] There obviously is a relationship of some degree between MOCT and KAA. MOCT has specific responsibilities of continued oversight. However, we are not persuaded that this oversight was such that KAA was acting as a mere agent of MOCT on a project that was still within the procurement responsibility of MOCT.

7.69 Importantly for purposes of analysis under the GPA, procurement appears to be the responsibility of KAA. The United States has provided examples of bid requests that identify MOCT or the Office of Supply, but we do not find these isolated instances that have been shown to us as sufficient evidence that MOCT is responsible for procurement for the IIA.[732] We note that the currently responsible entity, IIAC, has 557 employees and the NADG is staffed by 30 MOCT

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[726] *Seoul Airport Act*, Act No. 4383 (31 May 1991) as amended by Act No. 4436 (14 December 1991) Exhibit Kor-12; *Korea Airport Corporation Act* as amended by Act Nos. 4435 and 4436 (14 December 1991) Exhibit Kor-14.

[727] Paragraphs 4.90-4.94, 4.101-4.104 and 4.114-4.116.

[728] Paragraphs 4.95-4.100. See also paragraphs 4.86-4.89, 4.105-4.108 and 4.112-4.113.

[729] While we consider the cross-reference discussed in the text the most salient for purposes of our Findings, we do note that the United States cited other cross-references. For example, the United States cited cross-references in Articles 2:1 and 2:2(a) of the *Seoul Airport Act* to definitions contained in the *Aviation Act.* We find such citations unpersuasive in support of the US point. It only makes sense that two statutes referring to aviation matters should operate from common definitions.

[730] Exhibit Kor-12(a).

[731] *Ibid.*

[732] US Exhibits 25, 75 and 76. We also note that several examples of such documents submitted by the United States to support the allegations of procurements inconsistent with the requirements of the GPA show no relationship with MOCT. See US Exhibits 34-43. See also Exhibit Kor-48 (A-N).

officials.[733] While we recognize that a smaller entity can utilize a larger agent, it does not appear that IIAC is a mere empty shell. We also take note of Korea's statement that MOCT has no role in IIA procurements.[734] We see no evidence that would cast doubt on this statement.

7.70 The United States has pointed out that the MOCT website states that NADG has responsibility for the IIA project. As discussed previously, we also take note of Korea's caution that a Ministry's website is not a legal document and that in this case it was prepared by the public relations department of MOCT which might have other motivations in describing the Ministry's business other than technical accuracy. There certainly is a role under Korean law for MOCT in the IIA project. It appears to be a role of oversight. We do not think oversight by one governmental entity of a project which has been delegated by law to another entity (which we have already found to be independent and not covered by GPA commitments) results in a conclusion that there is an agency relationship between them.

Conclusion

7.71 In our view, after reviewing the issues raised in this subsection, we return to our previous conclusion that the answer must be that Members generally may, pursuant to negotiations, decide which entities (and procurement covered by those entities) are included in their Schedules and in which Annex they will be included. The question of "control" or other indicia of affiliation is not an explicit provision of the GPA. Rather, it is a matter of interpretation for the content of the Schedules themselves. Therefore, the issue of whether a Party can use a Note to exclude an entity which would otherwise appear to be covered within the concession contained in a particular Annex is precisely the sort of issue appropriate for qualifications through Notes as found by the panel in *United States – Sugar*, as discussed in paragraphs 7.30-7.31, above.

7.72 We must also note, however, that this ability to define the scope of commitments is not absolute. 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. Korea responded that NADG was merely an ad hoc task force within MOCT. But this response of Korea somewhat avoids the challenge of this example. There can be something else beyond the strict confines of the language of the Schedule which must be examined. If a Party explicitly excludes an entity in a Note, that is conclusive. A Member may also affirmatively put entities in another Annex from an affiliated entity. But 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.

7.73 In this dispute, we cannot so far conclude from the language of Korea's Appendix I and the Notes contained therein that KAA and its successors as entities are covered by Korea's Schedule commitments or that the IIA project is somehow otherwise included. We must still note, however, the ambiguities in the wording of Note 1 to Annex 1 which were not fully resolved by a textual analysis and led us to refer already to one piece of the negotiating history of Korea's accession to the GPA. We, therefore, will complete our examination of the scope of Korea's Annex 1 through a more thorough discussion of the relevant aspects of negotiating history of Korea's accession to the GPA.

3. Negotiations for Korea's GPA Accession

7.74 As we noted above, Korea's Note 1 to Annex 1 leaves room for ambiguity. As an aid in interpreting Note 1 and Annex 1 we reviewed one particularly relevant piece of negotiating history. At that point we did not undertake a broader review of the negotiating history because it was a limited

[733] Paragraph 2.82.
[734] Paragraphs 4.50, 4.69, 4.77 and 4.78. Exhibit Kor-116.

point we were examining and one piece of evidence was particularly relevant to its interpretation. Clearly, there are difficulties in interpreting the Schedule language, some aspects of which are ambiguous, and we wish to ensure that there are not other aspects of the negotiating history which might change the conclusions we reached with respect to Note 1. Also, the United States has specifically argued that the understanding of the parties at the time of the negotiations was that there was a concession with respect to the IIA project, regardless of which entity was responsible. Therefore, we consider it appropriate to engage in a further review of the overall negotiating history.

7.75 At the outset of our analysis of this issue, we must address some relevant issues relating to use of negotiating history which arose in the *European Communities – Computer Equipment* dispute. In that dispute, the Appellate Body specifically found that the standard of reasonable expectation or legitimate expectation existing with respect to non-violation cases had no role in reviewing negotiating history in order to aid in resolving the issues pertaining to a violation case. One of the reasons is that in a non-violation case the relevant question is what was the reasonable expectation of the complaining party. However, if it is necessary to go beyond the text in a violation case, the relevant question is to assess the objective evidence of the mutual understanding of the negotiating parties.[735] This involves not just the complaining and responding parties, but also involves possibly other parties to the negotiations. It is also important to note that there is a difference in perspectives of the reasonable expectations of one party as opposed to the mutual understanding of all the parties. The information available at the time of the negotiations may be available to some parties but not all. In other words, the evidence before the panel may be different in the two analyses and the weighting and probative value may also differ.

7.76 We start by noting again that Korea provided in February 1991 a *Supplementary Explanation* to its initial 1990 offer.[736] The United States then 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.[737] 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."

7.77 In response, Korea answered:

> "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."[738]

7.78 On 14 December 1993, Korea made its final offer. The final offer also introduced General Notes that applied to all the Annexes. General Note 1 provides:

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[735] *European Communities – Computer Equipment* at paragraphs 81-84, 93.
[736] See paragraph 7.44.
[737] Paragraphs 2.51 and 4.328.
[738] Paragraphs 2.52 and 4.330.

"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."

7.79 The European Communities had made an inquiry of Korea in late November 1993 as to the coverage of airports.[739] There apparently was no written response. However, an internal EC note does indicate that Korea responded that there was airport coverage, but in parenthesis noted "Seoul, Pusan" as examples of the airports that would be covered. This implies that they are therefore the airports covered by reason of Note 1 to Annex 1. That is, this evidence is consistent with our conclusion reached in paragraph 7.47. There was no mention of KAA or the IIA project in the EC internal note.[740] Then the European Communities and several other countries introduced reservations excluding coverage of airports for Korea. Apparently, this is what prompted Korea's derogation quoted above in General Note 1(b) to Appendix I.

7.80 As will be discussed more fully in the following two sections, the Korean answer to the US question clearly was not as full and thorough a response as would normally be appropriate for GPA negotiations.[741] At the time Korea provided its answer it had already enacted legislation designating another entity (other than MOCT) as responsible for the IIA project. Further legislation to designate KAA as that entity was already in the planning stages. Korea has stated that it knew that the IIA project was the subject of the US inquiry.[742] The Korean answer can, at best, be described as inadequate.

7.81 Nonetheless, we do note that Korea's July 1991 answer to the US question was qualified by the reference to the fact that the procurement plans were not finalized. And this qualification was preceded by the linking word "but" which clearly means the previous statement should not have been taken as an absolute. We recognize that the "but" qualification refers to the procurement plan while the question and the previous portion of the answer refer to the responsible procuring entities. However, the Korean answer was sufficiently qualified so that it should have raised questions. And, importantly, the United States (we have no evidence that any Parties other than the United States were aware of this particular Korean response) had over two and a half years before reaching a final agreement during which time this ambiguity could have been cleared up. The European Communities and other negotiating parties did act in 1993 to clarify the coverage of airports and received answers that contribute to the overall picture that there was no mutual understanding of the parties that a covered entity was procuring for the IIA project. In fact, it seems that negotiating parties other than the United States were clear that the IIA project was not covered.[743] In light of the lapse of time and

[739] EC Response to First set of Panel Questions, Annex IV.

[740] *Ibid.*, Annex V.

[741] The Panel notes that it has not made any finding at any point in this Report that Korea acted in bad faith during any portion of the negotiations for its accession to the GPA.

[742] Paragraph 4.343.

[743] The fact that the United States alone received an answer from Korea that may have resulted in a reasonable expectation on the US part of some different situation will be discussed below with respect to the non-violation claim.

the actions of other Members, the United States should not have rested upon the conclusions they now tell this Panel they reached based on this qualified response from Korea in 1991.

7.82 In summary, with respect to the interpretation of the negotiating history of Korea's accession to the GPA, we recall our conclusion that this information clarifies that Note 1 to Annex 1 was meant to be definitional in nature and that the text of Korea's Schedule does not include coverage of KAA and its successors. In our view, the full negotiating history reflecting what the several parties to the negotiations understood with respect to Korea's offer, confirms our conclusion that there was no mutual understanding on the coverage of KAA.

7.83 Therefore, we conclude that the IIA construction project was not covered as the entities engaged in procurement for the project are not covered entities within the meaning of Article I of the GPA. Furthermore, the kind of affiliation that we have concluded is necessary to render an unlisted entity subject to the GPA is not present in this case. Therefore, we do not need to proceed further and make specific findings with respect to the alleged inconsistencies of Korea's procurement practices in this regard.[744]

C. ALLEGATION OF NON-VIOLATION NULLIFICATION OR IMPAIRMENT

1. General

(a) Asserted Basis of the Claim

7.84 We note at the outset that the basis for the non-violation claim that the United States has made in the context of this case is different from the basis that usually exists in relation to such claims.[745] In order to explain this difference clearly, it is necessary first to note the bases of a traditional non-violation claim.

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

> "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."[746]

To this we would add the notion that has 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.

7.86 So, normal non-violation cases involve an examination as to whether there is: (1) an application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit due to the application of the measure that could not have been reasonably expected by the exporting Member.

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[744] We note that had such Findings been required, Korea took no position in response to the US allegations and offered no evidence to refute that provided by the United States.

[745] The allegations made by the United States are pursuant to a portion of GPA Article XXII:2 which is equivalent to Article XXIII:1(b) of GATT 1994.

[746] *Japan - Film*, at paragraph 10.41, citing, *EEC - Oilseeds*, BISD 37S/86, paragraphs 142-152; *Australian Subsidy on Ammonium Sulphate*, BISD II/188, 192-193.

7.87 In this case, the United States has asserted that measures it claimed violated the GPA (that is, the imposition of inadequate bid-deadlines; the imposition of certain qualification requirements; the imposition of certain domestic partnering requirements; and the failure to establish effective domestic challenge procedures engaged in by KAA and its successors in relation to the IIA project) nullify or impair benefits accruing to the United States under the GPA, pursuant to Article XXII:2 of the GPA. A key difference between a traditional non-violation case and the present one would seem to be that, normally, the question of "reasonable expectation" is whether or not it was reasonably to be expected that the benefit under an existing concession would be impaired by the measures. However here, if there is to be a non-violation case, 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*.

(b) Arguments of the Parties

7.88 The United States slightly re-arranges the test enunciated by the *Japan – Film* panel and proposes that a successful determination of a non-violation nullification and impairment in the GPA requires the finding of the following three elements: (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.[747] The United States argues that of the three elements of a non-violation claim, the only outstanding issue in this case is the first element – that is, whether or not there is a concession.

7.89 The United States contends that, similarly, 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. According to the United States, Korea subsequently engaged in, and continues to engage in, measures in procurement that could not have reasonably been anticipated by the United States at the time the coverage of new airport construction was negotiated. The United States argues that these measures result in the upsetting of the established competitive relationship between US products, services, and suppliers and Korean products, services, and suppliers in the IIA construction project, a competitive relationship worth potentially US$6 billion. On this basis, the United States argues that Korea is nullifying or impairing benefits accruing to the United States under the GPA.

7.90 In response, Korea argues that the burden placed upon the United States to support its non-violation claim under Article XXII:2 of the GPA is substantial. Korea notes 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."

7.91 Korea argues that the United States must demonstrate, by virtue of the requirement in Article XXII:2 that it identify a "benefit accruing" to it under the GPA, that it "reasonably expected" to obtain the benefit of GPA coverage for IIA procurement.[748] Korea further argues that "for

[747] The United States cites: Report of the Working Party on *The Australian Subsidy on Ammonium Sulphate* (adopted on 3 April 1950), BISD II/188-196, paragraph 12; Panel Report on *Treatment by Germany of Imports of Sardines* (adopted on 31 October 1952), G/26, BISD 1S/53-59, paragraph 16; Panel Report on *European Economic Community -Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes*, 20 February 1985 (unadopted), L/5778, paragraph 51; and Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* (adopted on 25 January 1990), L/6627, BISD 37S/86, paragraphs 142-152.

[748] *Japan - Film* at paragraph 10.72. As further support for this principle, Korea cites *EEC - Oilseeds*, BISD 37S/86, 128-129 (paragraphs 147-148); *Operation of the Provisions of Article XVI*, BISD 10S/201, 209 (paragraph 28) (adopted on 21 November 1961); *Other Barriers to Trade*, BISD 3S/222, 224 (paragraph 13) (adopted on 3 March 1955); *Germany - Sardines*, BISD 1S/53, 58-59 (paragraph 16) (adopted on 31 October 1952); *Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39, BISD II/188, 193-194 (adopted on 3 April 1950).

expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated."[749] Korea asserts that this requirement is self-evident and quotes for support: "If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures."[750]

7.92 Korea argues that the requirement that the measure at issue has upset the competitive relationship created by the Agreement implies that an "agreement" is necessary. Korea further argues that the essence of a non-violation claim is that some action of a party, after an agreement is concluded, which could not have been reasonably anticipated at the time of the agreement, nullifies or impairs a concession made by another party. Korea asserts that the United States has not specified what agreement was made by the parties that was nullified or impaired by action taken by Korea after that agreement was entered into. Korea further asserts that it could not have been an agreement to include KAA and KOACA and IIAC in Korea's GPA coverage given that Korea never agreed to include these entities in any of its offers.

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

7.93 In our view, the non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law. As noted above, 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. This has traditionally arisen in the context of actions which might undermine the value of negotiated tariff concessions. In our view, this is a further development of the principle of *pacta sunt servanda* in the context of Article XXIII:1(b) of the GATT 1947 and disputes that arose thereunder, and subsequently in the WTO Agreements, particularly in Article 26 of the DSU. The principle of *pacta sunt servanda* is expressed in Article 26 of the *Vienna Convention*[751] in the following manner:

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

7.94 It seems clear that good faith performance has been agreed by the WTO Members to include subsequent actions which might nullify or impair the benefits reasonably expected to accrue to other parties to the negotiations in question. The consistency of such an interpretation with the general principles of customary international law is confirmed by reference to the negotiating history of the *Vienna Convention*. According to the Report of the International Law Commission to the General Assembly, this issue was considered by the members negotiating the Convention in the following manner:

> "Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible."[752]

7.95 The non-violation doctrine goes further than just respect for the object and purpose of the treaty as expressed in its terminology. One must respect actual provisions (i.e., concessions) as far as

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[749] *Japan - Film* at paragraph 10.76.

[750] *Ibid.*

[751] A reference to the rule of *pacta sunt servanda* also appears in the preamble to the Vienna Convention.

[752] *Yearbook of the International Law Commission* (1966), Vol. II at p. 211.

their material effect on competitive opportunities is concerned. It is an extension of the good faith requirement in this sense.

7.96 We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law.[753] However, the relationship of the WTO Agreements to customary international law is broader than this. 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. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.

7.97 As Korea has argued, non-violation is an exceptional concept within the WTO dispute settlement system. 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."

7.98 As stated by the panel in *Japan – Film:*

> "Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been "on the books" for almost 50 years, we note that there have been only eight cases in which panels or working parties have substantially considered Article XXIII:1(b) claims. This suggests that both the GATT contracting parties and WTO Members have approached the remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC - Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept. The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."[754]

Despite this caution, however, the panel in *Japan – Film* was of the view that the non-violation remedy had an important role - that of protecting the reasonable expectations of competitive opportunities through negotiated concessions.

7.99 In our view, these observations by previous panels are entirely in line with the concept of *pacta sunt servanda*. The vast majority of actions taken by Members which are consistent with the letter of their treaty obligations will also be consistent with the spirit. However, upon occasion, it may be the case that some actions, while permissible under one set of rules (e.g., the Agreement on Subsidies and Countervailing Measures is a commonly referenced example of rules in this regard), are not consistent with the spirit of other commitments such as those in negotiated Schedules. That is, such actions deny the competitive opportunities which are the reasonably expected effect of such commitments. However, we must also note that, while the overall burden of proof is on the

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[753] We should also note that we can see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply. The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law.

[754] *Japan - Film* at paragraph 10.36.

complainant, we do not mean to introduce here a new requirement that a complainant affirmatively prove actual bad faith on the part of another Member. It is fairly clear from the history of disputes prior to the conclusion of the Uruguay Round that such a requirement was never established and there is no evidence in the current treaty text that such a requirement was newly imposed. Rather, the affirmative proof should be that measures have been taken that frustrate the object and purpose of the treaty and the reasonably expected benefits that flow therefrom.

7.100 One of the issues that arises in this dispute is whether the concept of non-violation can arise in contexts other than the traditional approach represented by *pacta sunt servanda.* Can, for instance the question of error in treaty negotiation be addressed under Article 26 of the DSU and Article XXII:2 of the GPA? We see no reason why it cannot. Parties have an obligation to negotiate in good faith just as they must implement the treaty in good faith. It is clear to us (as discussed in paragraphs 7.110 and 7.121 below) that it is necessary that negotiations in the Agreement before us (the GPA) be conducted on a particularly open and forthcoming basis.

7.101 Thus, on the basis of the ample evidence provided by both parties to the dispute, we will review the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treaties but also to treaty negotiation.[755] To do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes and we see no evidence in the language of the WTO Agreements that such a gap was intended. If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of GPA commitments (and one might add, in tariff and services commitments under other WTO Agreements), then nothing could be done about them within the framework of the WTO dispute settlement mechanism if general rules of customary international law on good faith and error in treaty negotiations were ruled not to be applicable. As was argued above, that would not be in conformity with the normal relationship between international law and treaty law or with the WTO Agreements.

7.102 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 we think it can, then the special remedies for non-violation contained in DSU Article 26 should also be applied rather than the traditional remedies of treaty law which are not apposite to the situation of the GPA (see the discussion in footnote 769, below).

(a) The Traditional Approach: Extended *pacta sunt servanda*

7.103 Because the United States raised the non-violation issue in this dispute at least nominally under the traditional approach, we will examine the facts of the dispute in that context first. In our view, there is a slightly different cast to traditional non-violation claims with respect to the GPA than under previous GATT non-violation cases. Here the analysis would run 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 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.

[755] We note that DSU Article 7.1 requires that the relevant covered agreement be cited in the request for a panel and reflected in the terms of reference of a panel. That is not a bar to a broader analysis of the type we are following here, for the GPA would be the referenced covered agreement and, in our view, we are merely fully examining the issue of non-violation raised by the United States. We are merely doing it within the broader context of customary international law rather than limiting it to the traditional analysis that accords with the extended concept of *pacta sunt servanda*. The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel's review. We do not see any basis for arguing that the terms of reference are meant to *exclude* reference to the broader rules of customary international law in interpreting a claim properly before the Panel.

7.104 In light of these elements, we will now turn to the facts of this case. In 1990, Korea made its initial offer of coverage when it requested accession to the Tokyo Round Agreement. In February 1991, Korea provided a *Supplementary Explanation*. As we discussed above, that February 1991 explanation noted airport coverage under the Ministry of Transportation.[756] It showed two unnamed regional airport authorities and one named airport entity. The IIA project was not mentioned nor was KAA. As we have also discussed above, 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.

7.105 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 has 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.

7.106 On 1 July 1991, Korea provided its response to the US questions. We will quote again at this point both the US question and Korea's answer because we think it is very important to review them in light of the facts described in the preceeding two paragraphs. The United States 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."

In response, Korea answered:

> "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."

7.107 Following this answer, on 10 July 1991, the MOT published a public notice of draft legislation containing proposed amendments to the *Seoul Airport Act.* Then extensive internal governmental consultations took place and, on 21 October 1991, the draft legislation was transferred to the National Assembly. It 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.

7.108 We find it very difficult to understand how Korea could have made the response that it did on 1 July 1991, state nothing else at that time or in the succeeding months and bring none of this to the attention of the United States. The enabling legislation was already passed on 31 May 1991 removing MOCT's direct authority for the project and this was at least one month before Korea provided its response to the question posed by the United States. Furthermore, at that time, plans were under way already to name a specific entity (KAA) as the entity responsible for the IIA. Yet Korea's response in

[756] See paragraph 7.44.

July 1991 was that MOCT (through NADG) was currently responsible for the IIA project. Korea's answer was qualified by stating that procurement plans were not fixed, but much more than this was known by Korea at the time and should have been reported to the United States in the answer. Korea has offered no valid reason for why it did not do so.

7.109 We do not agree with Korea's argument that there is nothing to the GPA but the question of whether entities are covered. It is true that the Schedules are structured in terms of entities, but that is not the basis for the negotiations. Members do not negotiate to get coverage of entities as such. They do not bargain for names on a list. Rather, they negotiate to achieve coverage of the procurements which are the responsibility of the covered entities. As previous panels have noted, the object of negotiations on Schedule commitments is to achieve competitive opportunities and, in the context of the GPA, that comes with access to projects, not just a list of names of government entities.

7.110 In our view, an agreement such as the GPA requires full, timely and complete responses to questions. Negotiations for coverage of government procurement markets are difficult. Each market has its own characteristics which are fully understood only by the responding party. We recall how difficult it is to understand fully the structure of the Korean Government coverage pursuant to the *Government Organization Act* as an illustration of the difficulties in this regard. Korea has stated that in its view it had no obligation to try to guess what the United States was interested in and supply further information. However, Korea also stated that it did not mention in its answer the regional airport authorities that it had offered to include because it knew the United States was really interested in the IIA. Clearly the latter answer was correct. It was objectively clear what the US question was about. And Korea, knowing that, then had an obligation to make a full and frank response. The integrity of the negotiating system requires no less. In our view, Korea's actions fell short of the conduct expected of parties negotiating accession to the GPA.

7.111 However, having stated that Korea's answer was not satisfactory in various ways, that is not the end of our review of the facts. The next issue which we must address is the fact that Korea's answer to the US question was provided about two and a half years before submission of Korea's final offer and that responsibility for the IIA project was assigned to KAA two years before that 14 December 1993 offer. Indeed, the Agreement was not actually finalized until 15 April 1994. We note that in a previous dispute involving a tariff Schedule where there was an agreed concession, it was found possible to base a non-violation claim on measures taken prior to the close of negotiations that later impaired the benefits reasonably expected to accrue from the concessions. The panel in *Japan – Film* stated:

> "In the case of measures shown by Japan to have been introduced prior to the conclusion of the tariff negotiations at issue, it is our view that Japan has raised a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption. In this connection, it is our view that the United States is charged with knowledge of Japanese Government measures as of the date of their publication. We realize that knowledge of a measure's existence is not equivalent to understanding the impact of the measure on a specific product market. For example, a vague measure could be given substance through enforcement policies that are initially unexpected or later changed significantly. However, where the United States claims that it did not know of a measure's relevance to market access conditions in respect of film or paper, we would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect . . . A simple statement that a Member's measures

> were so opaque and informal that their impact could not be assessed is not sufficient."[757]

7.112 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."[758]

7.113 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:

> "As we noted earlier, the United States is charged with knowledge of Japanese regulations on publication. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here."[759]

7.114 We recall that even though Korea's answer in July 1991 was almost two and a half years prior to Korea's final offer, it appears from evidence and statements from the parties that the Korean and US Governments had no further discussions on the subject. The United States has told us that they did not inquire further about that subject because they were reasonably convinced that they knew MOCT was covered and they believed that MOCT retained statutory authority under Korean law to carry out airport construction projects.

7.115 However, as pointed out by the panel in *Japan – Film* and quoted above, the United States is charged with knowledge of Korean legislation. The United States, therefore is presumed to have known of the *Seoul Airport Act* and the pieces of legislation enacted in December 1991 which actually put KAA in charge of the project. It is up to the United States to provide a persuasive explanation for why it did not know either about the legislation or the significance of it. Further, Korea has submitted evidence to show that US industry and Government had actual knowledge that KAA was in charge of the project.[760] Furthermore, while Korea's answer in July 1991 was not full and complete, it did contain a qualification. Over the course of about two and a half years, with knowledge that an entity other than MOCT was in charge of the project and in light of the qualification contained in the Korean answer upon which it was relying, at the very least, further inquiries should have been made by the United States.

7.116 Furthermore, the European Communities and several other Members did pursue the question of Korea's airport coverage. The United States is not charged with knowledge of the bilateral communications between these negotiating parties and Korea; however, more than that occurred here. The European Communities along with several other Members at some point in December 1993 added a derogation with respect to Korea's airport coverage in their GPA Schedules. Korea responded in kind with its derogation in its General Note 1(b). The United States certainly should have known

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[757] *Japan - Film*, *supra*., at paragraph 10.80.
[758] *Ibid.* at paragraph 10.103.
[759] *Ibid.* at paragraph 10.111.
[760] See paragraphs 4.561, 4.563-4.566.

from these circumstances that further clarifications from Korea were in order with respect to the US understanding of the Korean offer. We further note that the WTO GPA was not finalized until four months after Korea's final offer. At least one month of this period was to be used for verification with consultations to resolve the matter to follow if necessary.[761] We have seen no evidence that the United States made any effort to use this verification period to clarify the situation.

7.117 At this point, we will review the elements of a traditional non-violation case, applied in the context of the GPA, that we listed in paragraph 7.103 above, but we will do it in reverse order to illustrate a particular problem with this case. With respect to step four, the United States believes it has lost competitive opportunities on bidding for the IIA project. With respect to step three, the United States alleges that this is a result of actions taken by Korea. (However, these actions are identical to the actions alleged under the US violation complaint.) With respect to step two, the United States claims that it had reasonable expectations with respect to bidding opportunities on the IIA project (as discussed in paragraphs 7.104-7.107, above). But, with respect to step one, this was based on reasonable expectations derived from the negotiations, not from the concessions because we have found in section VII:B, above, that there were in fact no concessions given by Korea.

7.118 As discussed above, the United States bases its argument on the claim that it had a reasonable expectation that it had received a commitment with respect to a particular project, but the concessions themselves are based on covered entities. Thus, unlike traditional non-violation claims there is no actual Schedule commitment in this case.[762] If there were a commitment, the case would properly be a violation case because the measures cited by the United States as the basis for the non-violation nullification case (e.g., inadequate bid deadlines and insufficient challenge procedures) would, if they were substantiated, result in a violation. A traditional non-violation case could, therefore, not be sustained in this situation.

7.119 In sum, 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.

(b) Error in Treaty Formation

7.120 It is clear from the discussion above that 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 which allegedly gave rise to the reasonable expectations rather than any concessions.

7.121 Therefore, we will continue with our analysis and first recall our finding that there is a particular duty of transparency and openness on the "offering" party in negotiations on concessions under the GPA. The negotiations between the Parties under the GPA do not benefit from a generally

[761] Minutes of the Meeting of the Committee on Government Procurement Held on 15 December 1993, Annex 1, GPR/M/50, 21 January 1994. US Exhibit 65.

[762] At best, the United States could argue that the relevant commitment was the coverage of MOCT. However, this does not really change the analysis, for we have already found that KAA was the responsible entity for IIA procurement and KAA was independent. It comes back again to the fact that the United States is arguing that it thought it had a commitment which it did not.

accepted framework such as the Harmonized System with respect to goods or even the Central Product Classification in services. The Annexes to the GPA which contain the entities whose procurement is covered by the Agreement are basically self-styled Schedules whose interpretation may require extensive knowledge of another country's procurement systems and governmental organization. Therefore, we believe that transparency and forthright provision of all relevant information are of the essence in negotiations on GPA Schedules.[763]

7.122 In our view, as discussed fully in the previous section, Korea's response to the US question was not as forthright as it should have been. Indeed, the response could be characterized as at best incomplete in light of existing Korean legislation and ongoing plans for further legislation. However, when addressing this problem, rather than asking whether there was a nullification or impairment of expectations arising from a concession, it might be better to inquire as to whether the United 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 IIA project was covered by the GPA as a result of the entity coverage offered by Korea.

7.123 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[764] and of the International Court of Justice.[765] Although these cases are concerned primarily with the question in which circumstances of error *cannot* be advanced as a reason for invalidating a treaty, it is implicitly accepted that error can be a ground for invalidating (part) of a treaty. The elements developed by the case law mentioned above have been codified by the International Law Commission in what became the *Vienna Convention on the Law of Treaties of 1969*. The relevant parts of Article 48 of the Convention read as follows:

"Article 48

Error

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."

Since this article 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 we will apply it to the facts of this case.

7.124 As the Appellate Body has pointed out in *European Communities – Computer Equipment* and in *Canada - Dairy*, schedules are an integral part of a treaty. Hence negotiations about schedules, in this case GPA Annexes, are fundamentally treaty negotiations. In these treaty negotiations, we have noted that the United States believed that the IIA project was covered. As we have found in section VII:B of these Findings, that was not correct. The IIA project procurement was the

[763] We do not imply by this paragraph or other similar portions of our Findings that parties to negotiations in other areas do not owe each other an obligation of transparency and openness.

[764] *Legal Status of Eastern Greenland* (1933) PCIJ, series A/B, No. 53, p. 22, at p. 71 and dissenting opinion of Judge Anzilotti, at pp. 91-92.

[765] Case concerning the *Temple of Preah Vihear*, ICJ Reports 1962, p. 6, at pp. 26-27.

responsibility of a non-covered entity. Hence the US error related to a fact or situation which was assumed by the US to exist at the time when the treaty was concluded. In our view, it also appears from the behaviour 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.

7.125 This raises the question of whether the exclusionary clause of the second paragraph of Article 48 can be overcome. Although we have indicated above that 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.[766] Here again the facts already recounted in the previous sub-section[767] demonstrate that the United States has not properly discharged this burden. We do not think the evidence at all supports a finding that the United States has contributed by its own conduct to the error, but given the elements 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[768], the subsequent four-month period, of which at least one month was explicitly designated for verification, etc.), we conclude that the circumstances were such as to put the United States on notice of a possible error. Hence the error should not have subsisted at the end of the two and a half year gap, at the moment the accession of Korea was "concluded." Therefore, the error was no longer "excusable" and only an excusable error can qualify as an error which may vitiate the consent to be bound by the agreement.

7.126 For these reasons, on balance, we are of the view that the US has not demonstrated error successfully as a basis for a claim of non-violation nullification or impairment of benefits.[769]

VIII. CONCLUSIONS

8.1 In light of our findings in Section VII, above, we conclude that the entities which have been conducting procurement for the IIA project are not covered entities under Korea's Appendix I of the GPA and are not otherwise covered by Korea's obligations under the GPA.

8.2 In light of our findings in Section VII, above, we conclude that the United States has 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 (whether or not in conflict with the provisions of the GPA) within the meaning of Article XXII:2 of the GPA.

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[766] See Appellate Body report in *European Communities - Computer Equipment* at paragraphs 109-110.

[767] See Paragraphs 7.104-7.116, above.

[768] Note that the importance of the actions of a third State in avoiding error was already considered important in the case on the *Legal Status of Eastern Greenland*, loc. cit. PCIJ, p. 71 (the reaction of the US to the Danish request not to make any difficulties in the settlement of the Greenland question compared to the Norwegian reaction).

[769] A finding of justifiable error in treaty formation might normally be expected to lead to the application of Article 65 of the *Vienna Convention*. However, Article 65 on the specific procedure for invoking invalidity of a treaty does not seem to belong to the provisions of the *Vienna Convention* which have become customary international law. See also the European Court of Justice in Case C-162/69 (Racke v. Hauptzollampt Mainz), 1998 ECR, I-3655, at point 59. The Article on separability (Article 44) raises the possibility that provisions may be separated, such as e.g. separate reciprocal concessions in schedules, if they do not form an essential basis for the consent of the other party of the treaty as a whole (though the fact or the circumstance to which the error related was an essential factor in the consent to be bound by the treaty (Art. 48(1)). We do not think that any of these provisions would be required with respect to non-violation under the WTO Agreements because Article 26 of the DSU clearly provides for the appropriate remedy.

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS163/4
11 May 1999
(99-2009)

Original:

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Request for the Establishment of a Panel by the United States

The following communication, dated 11 May 1999, from the Permanent Mission of the United States to the Permanent Mission of the Republic of Korea and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 6.2 of the DSU.

The Government of Korea is engaging in government procurement practices, in the construction of the new Inchon International Airport, that are inconsistent with Korea's obligations under the WTO Agreement on Government Procurement (GPA). These practices include:

- Qualification requirements: In order to be eligible to bid as a prime contractor, an interested supplier must have a license that in turn requires the supplier to have manufacturing facilities in Korea.

- Domestic partnering requirements: Foreign firms must partner with or act as subcontractors to local Korean firms in order to participate in tendering procedures.

- Absence of access to challenge procedures: The GPA requires that member countries provide effective procedures enabling suppliers to challenge alleged breaches of the GPA arising in the context of procurements. However, such procedures do not exist for Inchon International Airport and other airport construction procurements.

- Inadequate bid deadlines: There are impositions of deadlines for the receipt of tenders that are shorter than the GPA-required 40 days, such as when tendering procedures are cancelled without explanation and immediate re-bidding takes place with a shortened deadline for tendering.

On 16 February 1999, the United States Government requested consultations with the Government of Korea pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the GPA with respect to the above measures. The United States and Korea held consultations in Geneva on 17 March 1999, but failed to settle the dispute.

During consultations, Korea asserted that the entities responsible for Inchon International Airport procurements are not within Korea's obligations under the GPA, and therefore not subject to the provisions of the GPA. The United States notes, however, that these entities are in fact within the

scope of Korea's list of central government entities, as specified in Annex 1 of Korea's coverage of obligations in Appendix I of the GPA. The United States bargained in good faith for the coverage of all airport construction in Korea during negotiations for Korea's accession to the GPA; the United States' GPA commitments with respect to Korea and its acceptance of Korea as a party to the Agreement were based on a balance of rights and obligations that included this coverage. Korea's subsequent assertion that the entities responsible for the procurement of the Inchon International Airport are not covered by the GPA seriously disrupts this mutually-agreed balance.

Pursuant to Article I.1 of the GPA, Korea's obligations under the GPA apply in full with respect to government procurements for the Inchon International Airport. Consequently, the above measures are inconsistent with Articles III, VIII, XI, XVI and XX of the GPA. In addition, pursuant to Article XXII:2 of the GPA, whether or not these measures conflict with the provisions of the GPA, they nullify or impair benefits accruing to the United States under the GPA.

The United States continues to be interested in settling this dispute. However, in the absence of a settlement at this time, the United States, in order to preserve its rights, respectfully requests the establishment of a panel pursuant to Article XXII of the GPA, with standard terms of reference as set out in Article XXII.4 of the GPA. The United States further asks that this request for a panel be placed on the agenda for the next meeting of the Dispute Settlement Body, to be held on 26 May 1999.

WORLD TRADE ORGANIZATION

WT/DS163/6
31 January 2000

(00-0359)

Original: English

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Communication from the Chairman of the Panel

The following communication, dated 25 January 2000, addressed to the Dispute Settlement Body, is circulated in accordance with Article 12.9 of the DSU.

Article XXII:6 of the Agreement on Government Procurement stipulates that, notwithstanding the provisions of paragraphs 8 and 9 of Article 12 of the DSU, the Panel shall attempt to provide its final report to the parties to the dispute not later than four months, and in case of delay not later than seven months, after the date on which the composition and terms of reference of the Panel are agreed.

The DSB established the Panel on *Korea – Measures Affecting Government Procurement* and determined its terms of reference on 16 June 1999. The Panel was composed on 30 August 1999. I wish to inform you that, in spite of the effort made to accelerate the proceedings to the greatest extent possible, the Panel has not been able to complete its work within the four months provided for in the Agreement. The complex nature of the matters as well as certain logistical and scheduling difficulties are responsible for the delay.

The Panel intends to circulate its final report by the end of April 2000.

WORLD TRADE ORGANIZATION

WT/DS163/5
3 September 1999

(99-3624)

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Constitution of the Panel Established at the Request of the United States

Communication from the DSB Chairman

1. At its meeting on 16 June 1999, the DSB established a panel pursuant to the request of the United States (WT/DS163/4), in accordance with Article 6 of the DSU (WT/DSB/M/64).

2. At that meeting, the DSB agreed that the Panel should have standard terms of reference pursuant to Article XXII:4 of the Agreement on Government Procurement. The terms of reference of the Panel are therefore the following:

> "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."

3. On 30 August 1999, the Panel was constituted with the following composition:

Chairman: Mr. Michael Cartland

Members: Mrs. Marie-Gabrielle Ineichen-Fleisch
Mr. Peter-Armin Trepte

4. The European Community and Japan have reserved their rights as third parties to participate in the panel proceedings in relation to the complaint raised by the United States.

WORLD TRADE ORGANIZATION

WT/DS163/4
11 May 1999

(99-2009)

Original: English

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Request for the Establishment of a Panel by the United States

The following communication, dated 11 May 1999, from the Permanent Mission of the United States to the Permanent Mission of the Republic of Korea and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 6.2 of the DSU.

The Government of Korea is engaging in government procurement practices, in the construction of the new Inchon International Airport, that are inconsistent with Korea's obligations under the WTO Agreement on Government Procurement (GPA). These practices include:

- Qualification requirements: In order to be eligible to bid as a prime contractor, an interested supplier must have a license that in turn requires the supplier to have manufacturing facilities in Korea.

- Domestic partnering requirements: Foreign firms must partner with or act as subcontractors to local Korean firms in order to participate in tendering procedures.

- Absence of access to challenge procedures: The GPA requires that member countries provide effective procedures enabling suppliers to challenge alleged breaches of the GPA arising in the context of procurements. However, such procedures do not exist for Inchon International Airport and other airport construction procurements.

- Inadequate bid deadlines: There are impositions of deadlines for the receipt of tenders that are shorter than the GPA-required 40 days, such as when tendering procedures are cancelled without explanation and immediate re-bidding takes place with a shortened deadline for tendering.

On 16 February 1999, the United States Government requested consultations with the Government of Korea pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the GPA with respect to the above measures. The United States and Korea held consultations in Geneva on 17 March 1999, but failed to settle the dispute.

During consultations, Korea asserted that the entities responsible for Inchon International Airport procurements are not within Korea's obligations under the GPA, and therefore not subject to the provisions of the GPA. The United States notes, however, that these entities are in fact within the scope of Korea's list of central government entities, as specified in Annex 1 of Korea's coverage of obligations in Appendix I of the GPA. The United States bargained in good faith for the coverage of all airport construction in Korea during negotiations for Korea's accession to the GPA; the United States' GPA commitments with respect to Korea and its acceptance of Korea as a party to the

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Agreement were based on a balance of rights and obligations that included this coverage. Korea's subsequent assertion that the entities responsible for the procurement of the Inchon International Airport are not covered by the GPA seriously disrupts this mutually-agreed balance.

Pursuant to Article I.1 of the GPA, Korea's obligations under the GPA apply in full with respect to government procurements for the Inchon International Airport. Consequently, the above measures are inconsistent with Articles III, VIII, XI, XVI and XX of the GPA. In addition, pursuant to Article XXII:2 of the GPA, whether or not these measures conflict with the provisions of the GPA, they nullify or impair benefits accruing to the United States under the GPA.

The United States continues to be interested in settling this dispute. However, in the absence of a settlement at this time, the United States, in order to preserve its rights, respectfully requests the establishment of a panel pursuant to Article XXII of the GPA, with standard terms of reference as set out in Article XXII.4 of the GPA. The United States further asks that this request for a panel be placed on the agenda for the next meeting of the Dispute Settlement Body, to be held on 26 May 1999.

WORLD TRADE ORGANIZATION

WT/DS163/3
9 March 1999

(99-0942)

Original: English

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Request to Join Consultations

Communication from Japan

The following communication, dated 4 March 1999, from the Permanent Mission of Japan to the Permanent Mission of Korea and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.11 of the DSU.

Pursuant to paragraph 11 of Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the Government of Japan hereby notifies the Government of the Republic of Korea that, in light of the substantial trade interest of Japan, it desires to be joined in the consultations requested by the United States in a communication circulated to WTO Members on 22 February 1999 (WT/DS163/1, GPA/D4/1) entitled "Korea – Measures Affecting Government Procurement".

WORLD TRADE ORGANIZATION

WT/DS163/2
8 March 1999

(99-0910)

Original: English

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Request to Join Consultations

Communication from the European Communities

The following communication, dated 3 March 1999, from the Permanent Delegation of the European Commission to the Permanent Mission of Korea and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.11 of the DSU.

Pursuant to Article XXII of the Government Procurement Agreement (GPA) and paragraph 11 of Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the European Communities request the Government of Korea, in light of the substantial trade interest of the EC, to be joined in the consultations requested by the United States in a communication circulated to the WTO Members on 22 February 1999 (WT/DS163/1, GPA/D4/1) entitled "Korea – Measures Affecting Government Procurement".

The European Communities have a substantial trade interest in the procurement practices that are the subject of the US request as EC construction firms are second only to the USA in the construction of airfields around the world.

WORLD TRADE ORGANIZATION

WT/DS163/1
GPA/D4/1
22 February 1999
(99-0676)

Original: English

KOREA – MEASURES AFFECTING GOVERNMENT PROCUREMENT

Request for Consultations by the United States

The following communication, dated 16 February 1999, from the Permanent Mission of the United States to the Permanent Mission of the Republic of Korea and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with Korea 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 (GPA) with respect to certain procurement practices of the Korean Airport Construction Authority (KOACA) and other entities concerned with the procurement of airport construction in Korea, which are inconsistent with Korea's obligations under the GPA. Procurement practices of which we are aware include:

- Qualification: Requirements that, in order to be eligible to bid as a prime contractor, an interested supplier must have a license which in turn requires that the supplier have manufacturing facilities in Korea. This requirement appears to be inconsistent with Article III(1), Article VIII and Article XVI of GPA.

- Domestic partnering: Requirements that foreign firms partner with local Korean firms in order to qualify to participate in tendering procedures. For example, one solicitation for bids states that: "Foreign firms should participate in a bid with local firms (leading or prime company) as consortium members or subcontractors." We are also aware of other examples of partnering requirements. Such requirements appear to be inconsistent with Article III(1), Article VIII, and Article XVI of the GPA.

- Absence of access to challenge procedures: The GPA requires that member countries provide effective procedures enabling suppliers to challenge alleged breaches of the GPA arising in the context of procurements. However, such procedures do not exist for airport construction procurements. This appears to be inconsistent with Article XX of the GPA.

- Inadequate bid deadlines: There are impositions of deadlines for the receipt of tenders that are shorter than 40 days. This appears to be inconsistent with Article XI of the GPA.

KOACA and other entities procuring airport construction are within the scope of Korea's list of central government entities, as specified in Annex 1 of Korea's coverage of obligations in Appendix I of the GPA. Consequently, pursuant to Article I(1) of the GPA, Korea's obligations under the GPA apply in full with respect to the procurement of airport construction. The above practices nullify or impair benefits accruing to the United States under the GPA, whether or not they violate Korea's GPA obligations.

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During negotiations with Korea for its membership into the GPA, the United States bargained in good faith for the coverage of airport construction. The United States' GPA commitments with respect to Korea and its acceptance of Korea as a party to the Agreement were based on a balance of opportunities and obligations which included Korea's coverage of airport construction. Korea's subsequent assertion that KOACA and other entities responsible for airport construction are not covered by the GPA seriously disrupts that mutually-agreed balance.

We look forward to receiving your reply to the present request, and propose that representatives of our governments meet for consultations during the week of 22 February 1999.

WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/84
24 July 2000

(00-3060)

Dispute Settlement Body
19 June 2000

MINUTES OF MEETING

Held in the Centre William Rappard
on 19 June 2000

Chairman: Mr. Stuart Harbinson (Hong Kong, China)

Prior to the adoption of the agenda, the item concerning the Panel Report on "Canada - Term of Patent Protection" (WT/DS170/R) was withdrawn from the agenda following Canada's appeal of the Report.

Subjects discussed — Page

1. Surveillance of implementation of recommendations adopted by the DSB

(a) European Communities - Regime for the importation, sales and distribution of bananas: Status report by the European Communities (WT/DS27/51/Add.9)

(b) Japan - Measures affecting agricultural products: Status report by Japan (WT/DS76/11/Add.5)

(c) Canada - Measures affecting the importation of milk and the exportation of dairy products (WT/DS103/12 - WT/DS113/12)

1. The Chairman recalled that Article 21.6 of the DSU required that "unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved". He proposed that the three sub-items be considered separately.

(a) European Communities - Regime for the importation, sales and distribution of bananas: Status report by the European Communities

2. The Chairman drew attention to document WT/DS27/51/Add.9 which contained the status report by the European Communities on its progress in the implementation of the DSB's recommendations concerning its banana import regime.

3. The representative of the European Communities said that, as it had already been reported to the DSB over the past couple of months, the EC had continued its ongoing bilateral discussions with the Members concerned. The EC had been criticised for the lack of progress in the consultations and for delaying the process of finding a mutually acceptable solution. It had therefore prepared a calendar of the main discussions carried out over the past twelve months. He highlighted that, during that period, 57 meetings had been held, which meant, on average, about one high-level meeting per week. Four commissioners and the EC President had been actively involved in the matter. It was therefore fair to state that the EC had made efforts at all levels, and had spent endless hours in search of an acceptable solution to this dispute. The EC had always wished to find a solution which could be accepted by all stakeholders on this issue. He regretted that it had not been possible to bridge the very divergent positions expressed by the main parties concerned. The EC would keep the DSB informed of further developments.

4. The representative of Ecuador said the EC had not yet complied with its WTO obligations despite the efforts made by the parties involved in the Bananas dispute. The EC's regime continued to cause serious economic and social damage to countries such as Ecuador, whose economy was dependent on the exports of bananas. Ecuador did not understand why the EC had circulated the list of consultations. That list only showed that Latin American countries, the United States and the ACP countries had made great efforts to ensure that the EC complied with the WTO rules. Far from demonstrating the EC's interest in resolving the problem, the list reflected the frustration of countries such as Ecuador. His country had sent to Brussels its ministers, secretaries of State, diplomats, representatives of exporting companies and producers of bananas and technical experts who in good faith had tried to resolve this dispute. In those meetings, Ecuador had put forward constructive proposals and had demonstrated its flexibility. However, no results had been produced.

5. Ecuador's position reflected the interest of its banana industry. However, it had also made great efforts towards bringing its position closer to that of other countries. The EC had disregarded those efforts and had not removed the protectionist elements of its banana import regime. The EC continued to reiterate its position which could only mean that it wished to maintain the current state of affairs since it was unable to resolve internal differences among its member States. Ecuador had not accepted the proposal on import licences because that proposal was not in line with the DSB's recommendations. Furthermore, the status reports provided by the EC did not contain any new information and the EC continued to disregard the efforts made by the parties concerned aimed at resolving the dispute. The EC had demonstrated its intransigence and its lack of willingness but had not referred to its internal problems. It had not informed the parties of the differences among its member States, the EC Commission and the European Parliament. It was not the absence of a joint position among the parties concerned that prevented the EC from finding a solution, but its insistence

on maintaining its protectionist banana regime and its disregard for the damage caused to exporting countries.

6. The representative of Panama said that, like Ecuador, his country believed that the EC was not interested in resolving the problem and was delaying implementation. The EC was not interested in constructive negotiations with Panama. He noted that meetings with Panama, with one or two exceptions, had been scheduled at the request of his country in an effort to move the process forward and to discuss constructive solutions. In meetings held at its initiative, the EC had only reported on consultations with other countries but had no intention to negotiate with Panama. He noted that the EC had referred in the title of its annex to "Calendar of Negotiations with Interested Third Countries". However, Panama believed that when the EC had referred to interested third countries it had only referred to those countries who had requested the DSB authorization to retaliate and had not taken into account other countries. The EC had also stated that it would continue to protect the ACP producers and considered its WTO obligations only in third place. The EC had failed to recognize that it was not the responsibility of the countries affected by its banana regime but its own responsibility to meet the WTO obligations. The EC had continued to claim that the differences among the complaining parties were preventing it from meeting its obligations. But in fact differences among its member States were preventing the EC from doing so. Panama hoped that the list of meetings to demonstrate the EC efforts to resolve the dispute quickly would not be used as an excuse to further delay implementation.

7. The representative of Honduras said that the EC's status report raised the same concerns as those indicated by her delegation in previous DSB meetings. The report contained merely a schedule of meetings and did not provide any information on the content of those meetings. In the meetings in which her country had participated no suitable solution had been proposed by the EC. On the contrary, rather than entering into a constructive dialogue, the EC had stated that Honduras did not understand the WTO rules. This was unacceptable because her country's conduct in this dispute was serious and technical. Honduras had won this case which constituted an important contribution to the system. Any sovereign State, whether a developing or vulnerable country, had the right to reject an attempt by any country to avoid compliance with the DSB rulings and had the right not to accept a regime which would only replace one illegality with another.

8. Similarly, Honduras had the right to propose solutions and the EC should hear the views of the complaining parties who, once the recommendations had been adopted by the DSB, spoke on behalf of all Members. Regrettably, the proposals made by some Latin American countries had not been taken into account by the EC. It did not matter how many meetings had been held because those meetings had not enabled the EC to bring its regime into conformity. It was unacceptable that, in the system which provided clear rules and binding decisions, 39 months after the adoption by the DSB of the recommendations of the Panel and the Appellate Body and 18 months after the expiry of the reasonable period of time for implementation, the EC continued to claim that the complaining parties were responsible for its failure to comply. His country was not satisfied only with a favourable ruling in this dispute. Honduras would not be satisfied with an academic victory since its banana industry had been severely damaged by the EC's regime and was prepared to use other means available to it under the dispute settlement mechanism. She noted that two complaining parties had already been granted authorization to do so. Honduras had decided to bide its time because it believed that the EC would change its attitude and that it would no longer be necessary to invest any more time and effort in order to restore its rights which had been violated for a long period of time.

9. The representative of Guatemala said that her delegation wished to make some comments on technical and systemic issues resulting from the status report. In accordance with Article 21.6 of the DSU, the EC had an obligation to submit a status report on progress in its implementation to resolve this long-standing dispute the deadlines for which had already expired. It was contrary to the spirit of the DSU that the Member at fault shifted responsibility for bringing its regime into conformity with

the WTO rules onto the complaining parties. The time-period within which a solution could be negotiated had lapsed several years ago and, pursuant to Article 3.7 of the DSU, the foremost objective of the dispute settlement mechanism was to remove inconsistent measures. That provision was also reinforced by Article 21 of the DSU, which referred to the prompt and complete compliance with the DSB rulings. It was unacceptable for a Member, which had to bring its regime into conformity with the WTO rules, to confine itself to holding negotiations in the legal framework which should provide security and predictability for the multilateral trading system, overcoming the inefficiency of the previous GATT system. On the contrary, like other Members, the complaining parties expected that disputes would be resolved promptly and in full compliance with the DSB rulings. Therefore, Guatemala objected to the content of the status report submitted at the present meeting since the meetings in which her country had participated were only limited to the provision of information on various options, which according to the EC public statements were designed to reproduce or replicate the effects of the WTO-inconsistent regime. Furthermore, Guatemala had not been able to establish a legitimate dialogue in order to address its legal objections and to examine proposals. In fact in those meetings, the EC had attempted to impose a regime as illegal, if not more so, as the one found to be WTO-inconsistent. Guatemala urged the EC member States to reject delaying tactics which did not help to maintain the credibility of the system.

10. The representative of the United States said that the EC's expanded status report was in essence no different from its previous reports. The EC was simply continuing to blame the complaining parties for its failure to come into compliance with its WTO obligations. Regrettably, the EC was attempting to substitute process for substance. Meetings might be held but the objective was to comply. While it was good that the EC was discussing with the parties concerned, the heart of the matter was its failure to comply, not the failure of the complaining parties to reach an agreement with the EC. The United States believed that the positions of most Members were quite close to the proposal made by the Caribbean countries. That proposal should be the basis for a settlement of the dispute.

11. The representative of Saint Lucia said that her delegation noted the record of quite extensive consultations which the EC had conducted with all interested parties. The appended list of meetings, video-conferences and other contacts provided some limited insight into the substantial effort which had been expended in the attempt to design a new banana regime which would "turn the page" on this long-standing dispute. This would be a new banana regime which would not be subject to further challenge under the DSU: i.e. one that was not only WTO-compatible but also acceptable to all parties. Some delegations had suggested that the WTO-compatibility was not an objective standard as evidenced in the differences between panel and Appellate Body rulings and the views of arbitrators in various dispute settlement cases, not least of all the Bananas III case. Moreover, unless the parties went beyond the repeated accusations and acrimony and exercised restraint in the use or abuse of trade sanctions, the prospects for an amicable and constructive compromise would continue to elude them. Those with the most to lose in this dispute were countries such as Saint Lucia and other ACP States which were heavily dependent on bananas and had no immediate alternative source of income. Although they did not meet the panel and Appellate Body's criteria of a "substantial supplier" defined in terms of EC market share in the context of Article XIII of GATT 1994, 50-60 per cent of their export earnings came from bananas. Moreover, given their particular vulnerabilities as a small island state, a bad result would not simply lead to a drop in the export tonnage of bananas but rather the loss of the banana export industry itself with calamitous consequences in the case of Saint Lucia. Her delegation continued to hope that the parties would adopt a positive and constructive approach in the search for, and the fashioning of, a new regime which would safeguard the legitimate trading interest of all suppliers.

12. The representative of Mexico said that his delegation noted that the status report submitted by the EC contained a list of meetings. As indicated in the list, the EC had only held two meetings with Mexico while about 20 meetings had been held with other Members. As his country had repeatedly

stated, the EC did not need to seek an agreement with all the parties, but to put in place a WTO-compatible banana regime. He recalled that Mexico preferred a tariff-only system with adequate access for its bananas to the EC's market.

13. The representative of the European Communities said that his delegation had circulated the list of meetings and contacts because Members had continued to complain in DSB meetings that they had not been informed and that the EC had not discussed with them. Statements made by delegations at the present meeting contained a selective version of events. For example, Honduras had stated that it did not matter how many meetings had been held because the EC had nothing to contribute. It was true that the parties maintained fairly intransigent positions, but at least four different and opposing interests were involved in the Bananas case: i.e. the interest of the Latin American countries which produced and exported bananas, the interest of the ACP countries which also produced and exported bananas, the interest of the EC and the interest of the United States as a supplier of services. It was not easy to deal with those different and conflicting interests. The EC was simply trying to square the circle. Honduras had also stated that 39 months had already lapsed since the DSB had adopted the Panel and the Appellate Body Reports. However, Honduras had not referred to developments in 1998 and in the beginning of 1999. Its statement was selective because the EC had made its first attempt to comply with the DSB's recommendations, which it believed was correct, but the new regime had been challenged. All were aware of subsequent developments until it had been found that the new banana regime was not satisfactory. The EC should not be accused of bad faith or inactivity and the record should not be quoted selectively.

14. Guatemala had referred to a removal of incompatible measures as if that was the only objective under the DSU provisions. He recognized that this was a fundamental objective for a country which was in violation of WTO rules. However, in situations in which implementation could not be done immediately, the DSU allowed other options such as compensation or retaliation. It was not always easy politically or legislatively to adopt required measures immediately, which was the case in the Bananas dispute. It was not easy for the EC to do so politically and legislatively. References had been made to the position of the European Parliament. This was a problem as the Parliament did not necessarily share the Commission's approach. The DSB allowed another option which, in a sense, could redress the situation. On one side, there was a violation and damage and, on the other, countermeasures and compensation. Unfortunately in this case, the main activity had been shown by services suppliers rather than goods suppliers. That had distorted the whole picture because more importance was given to services than to goods. This could be a potential issue for consideration in the DSU review. It was selective to refer to a removal of incompatible measures without referring to other options provided for in the DSU. The EC's approach was consistent with the DSU but was short of a long-term goal of coming into compliance. The EC was not trying to blame the complaining parties but the fact was that their positions were different. As indicated by the representative of Saint Lucia, her country had a strong interest in this case. However, Saint Lucia's interest was not the same as the interest of the Central and Latin American countries or the United States where multinational companies were servicing the exports from some of those countries.

15. Panama characterized the EC's position as its ACP obligation coming first with its WTO obligations in a distant third place. It had also stated that the EC would continue its current practice. That was not correct. The EC recognized its obligation to come into compliance and to remove any incompatible measure. That meant that the EC would either adjust its licencing system or remove it. A decision on this matter would be taken in the next few weeks. However, the EC would maintain preferential access for its ACP partners. If by stating that the EC would continue its current practice it was meant that the EC would have a tariff system with preferences for the ACP countries, that was correct. However, if it was meant that the EC would continue the current practice to do nothing then that was incorrect. The preferential system would not disappear as the EC had already explained in another context. Panama had also referred to discrimination. In this context, Panama could have only meant tariff preferences because the other form of discrimination in the area of services was not

Panama's main interest. Tariff preferences would continue to exist. Their scope would have to be defined and a WTO waiver would have to be secured.

16. Ecuador had expressed its frustration that its ministers and secretaries of State had to travel to Brussels frequently. On the list, Ecuador appeared as one of those countries which had taken advantage of the EC open door to all the parties with the main interest. It had been stated that the EC's position was intransigent, but four mutually exclusive sets of interests had to be reconciled. From the very beginning, the complaining parties were aware that this was not going to be an easy case. However to claim that the EC problems were not so much due to a lack of a joint position among its suppliers - Ecuador, United States, Panama and ACP countries - but a result of the EC's lack of interest in finding a solution was not exactly correct. The EC was doing its best and continued to make efforts in good faith at all levels. This was shown by the calendar of meetings and contacts that the EC had held thus far. Those who had been willing to discuss with the EC were better informed and more satisfied than those who had not or those who had sent ambassadors to Brussels. But the fact was that there were limitations. The EC could consult with the parties and could take into account their interests, but if those interests were mutually divergent then there was a limit to what extent one could satisfy all the parties.

17. Saint Lucia had made the point that sanctions changed subtly the interest of negotiations because the interest in finding an agreed solution was to remove sanctions which redressed the balance of rights and obligations temporarily until a permanent solution was in place. One would therefore wish to remove those measures, otherwise a balance would be completely skewed. This was an issue for consideration in the DSU review. It was true that in negotiations one would concentrate on those who imposed sanctions and, in this case, it was the services supplier rather than the goods supplier because, thus far, Ecuador had not taken any action. Saint Lucia had pointed out that in strict WTO terms it was not a substantial supplier. However, 80 per cent of the EC imports were from Latin and Central America and 20 per cent from the ACP countries. Therefore, the ACP countries collectively should enjoy a substantial supplier status. This was different from their bilateral and contractual obligations with the EC.

18. The United States had stated that the EC should concentrate on substance rather than on process. He believed that the EC was not out of line with the DSU because sanctions had been authorized to redress the balance of rights and obligations and the EC intended to do more. In the next six weeks some new proposals would be tabled which would probably be criticized because whatever the EC did in this area would always be criticized. However, if new proposals were made at least the parties could not complain that the EC was not doing anything. The calendar of meetings had been circulated because delegations had complained that they had not been informed by the EC. The United States had less to complain about than other delegations but it was true that the calendar was simply a factual record of what the EC had been trying to do. Almost 30 meetings had been held in Brussels and Geneva in the past six months: i.e. since the beginning of this year. As the EC had already stated at the outset of this item it had always been its wish to find a solution that could be accepted by all stakeholders on this issue. He reiterated that that was the EC's intention.

19. Finally he wished to mention one point relating to the fraudulent imports of bananas into the EC in order to demonstrate some of the difficulties the EC had to face and some of the pressures to which it was subject. On 9 June 2000, a joint team of Italian finance inspectors and investigators of the EC fraud branch had carried out on the spot checks in the port of Catania (Italy). A vessel transporting approximately 4,000 tonnes of bananas had been presented to customs for importation. Further to a verification of the import documents presented for customs clearance, the investigators had established that since March 1998 - over two years - 101 false import certificates had been presented in order to fraudulently import into the EC over 160,000 tonnes of bananas from Ecuador. In practice this meant that certificates for entry had been given under a tariff quota with reduced duty payments when the quota had been substantially exceeded. Neither the Panel nor the Appellate Body

had ever stated that the tariff quota system was illegal. He just wished to point out that the EC had other problems to deal with and the pressures of its market where the profits were very good and one could double the profit of exporting to the EC and to the United States, the two mass markets for bananas. The profits in the EC's market were very good and this generated its own sets of problems. Therefore, if a tariff-only system was introduced then much less profit would be made in the EC's market and that was one reason why the parties might be disappointed with new proposals.

20. The representative of Panama wished to refer to some points raised by the EC. The representative of the EC referred to the three priorities outlined by Panama in its initial statement. He said that the first priority of the EC was to protect the ACP producers and then to meet its WTO obligations. He reiterated that Panama had never objected to the ACP preferences. In fact, together with other countries, Panama had made a proposal in which the ACP preferences were recognized. The ACP countries had also put forward a similar proposal which had been supported by Panama but had been rejected by the EC.

21. With regard to the argument that sanctions changed the dynamics of negotiations in a subtle way, the EC had also stated that those who were involved in this dispute knew that the case was going to be difficult and that the process would be complicated. He had already made some comments on this subject at the DSB meeting on 18 May. The EC was not making things easy for the complaining parties but the process under the DSU was more difficult than negotiations. The longer one had to wait, the more retaliatory measures would be in place and this did not help the EC's position. Panama hoped that it would not continue to be told that those who suffered discrimination were the ones that were in disagreement. He recalled that in 1993, Panama, which was not yet a Member of the WTO, did not have a right to have recourse to the DSU provisions.

22. The representative of the United States said that her country was concerned that the EC had used the list of meetings to argue that it had been forthcoming to resolve the matter in substance. It did not matter how many meetings had been held. What was important was what had been discussed in those meetings. The list showed the level of frustration of the complaining parties. The United States wished to see an early progress so that its right to use sanctions would not be necessary. It did not wish to impose sanctions but had done so because of its earlier frustration. The good news was that in the next six weeks a proposal would be made but the bad news was that the EC already knew that the parties would not like such a proposal and that they would not be able to accept it. It was therefore difficult to see a constructive process.

23. To state that the EC had to work with one particular country over another was just another excuse. A group of countries was trying to find a way that the EC's regime was WTO-consistent. Different approaches could be taken instead of saying that the EC had to work with the United States because of services. The EC should not single out one country but should comply with its WTO obligations. At the present meeting, the EC had made a list of excuses along with a list of meetings.

24. The representative of Ecuador said that the EC had stated that it was trying to square the circle and that Ecuador's position was intransigent. The EC had also stated that in the next six weeks a proposal would be made which the complaining parties would not like. It had accused one of its member States - Italy - of fraud. Ecuador hoped that Italy would be able to defend itself adequately. He regretted that such fraud, which involved a product from Ecuador, had taken place. However, no Ecuadorian company had participated in that fraud. His country hoped that in the forthcoming weeks the EC would shed some light internally on this subject with Italy.

25. The representative of Honduras wished to highlight the fact that the efforts made by the EC in an effort to comply with its WTO obligations had not led to any progress in relation to the situation in Honduras. While the EC was seeking a solution for all parties and was trying to square the circle, Honduras' banana industry continued to lose.

26. The representative of the European Communities said that he was trying to provide a two-sided version of what appeared to be a one-sided discussion. As he had already stated, four different and mutually conflicting interests were involved in the Bananas case. For example, some ACP countries had traditional exports which were protected under the previous agreement, some had gone beyond that and some had never provided the same quantities as in the past due to climate or hurricane conditions which had spoiled plantations. In Latin America and Central America at least two different interests were involved. Some were selling bananas and reaped the profit and some were selling bananas through multinational companies in the United States. With regard to the United States as a services supplier, two sets of interests were also involved. Amongst the EC interests another set of double interests was involved. Some had little production in the EC, in the Caribbean or in the Southern part of Europe and some wished to have the cheapest possible bananas with the least possible duty on entry. It was therefore important not to underestimate the complexity of what the EC was trying to do. This was not an excuse but an explanation. He noted that sensitive issues such as changes of legislation in relation to US tax matters might be found to be very complex by the United States. Those countries who had not imposed sanctions should not do so in the interests of an early solution.

27. The representative of Panama said that with regard to the EC's suggestion that the countries who had not imposed sanctions should rather not do so, his country had already discussed this matter with the EC on many occasions. He said the complexity of the matter should not prevent the EC from finding a solution to the problem in order to bring its regime into line with the WTO rules.

28. The representative of the United States said that the EC's comment about US sanctions or legislation were inappropriate. The United States had always complied on time in some very difficult cases that it had lost. The only thing that the parties were asking was compliance by the EC. It would be good for the functioning of the WTO and its success if the EC complied with its obligations and put its dispute behind it.

29. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(b) Japan - Measures affecting agricultural products: Status report by Japan

30. The Chairman drew attention to document WT/DS76/11/Add.5 which contained the status report by Japan on its progress in the implementation of the DSB's recommendations with regard to its measures affecting agricultural products.

31. The representative of Japan said that, as indicated in the status report, his country had held consultations with the United States in a constructive and friendly manner. Although some technical issues still remained to be resolved, Japan expected that the parties would be able to reach a mutually satisfactory solution in the near future.

32. The representative of the United States said that her country continued to work with Japan on the few remaining technical issues and hoped to finish that work in the very near future.

33. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(c) Canada - Measures affecting the importation of milk and the exportation of dairy products: Status report by Canada

34. The Chairman drew attention to document WT/DS103/12 - WT/DS113/12 which contained the status report by Canada on its progress in the implementation of the DSB's recommendations with regard to its measures affecting the importation of milk and the exportation of dairy products.

35. The representative of Canada said that his country welcomed the opportunity to present its first status report on its implementation of the DSB's recommendations. He recalled that on 27 October 1999, the DSB had adopted the Panel and the Appellate Body Reports in this case under consideration. The Appellate Body had found that Canada's measures provided export subsidies in excess of the export subsidy commitment levels specified in its Schedule inconsistent with Canada's obligations under the Agreement on Agriculture. The Appellate Body had also found that by restricting access to the tariff-rate quota for fluid milk in its Schedule to entries valued at less than Can$20.00, Canada had acted inconsistently with its obligations under Article II:1(b)of GATT 1994. At the outset of its implementation process, Canada had stated its unqualified intent to fully implement the DSB's recommendations and rulings. In addition, Canada was implementing in an open and transparent manner.

36. Following consultations, and pursuant to Article 21.3(b) of the DSU, the United States and New Zealand, the parties to the dispute, had entered into an agreement on the reasonable period of time for implementation. This agreement had been reached on 22 December 1999 and had been circulated to Members in document WT/DS103/10-WT/DS113/10. The terms of the implementation agreement called for a staged implementation process to be concluded on 31 December 2000. Canada was pleased to report to the DSB that it was fully meeting the terms of that agreement. Canada had complied with each element of the staged implementation process to date and was well on course to implement fully all the terms of that implementation agreement by the conclusion of the implementation period at the end of 2000. The details of Canada's implementation had been set out in full in its written status report, he therefore did not wish to repeat them at the present meeting.

37. Canada had kept the United States and New Zealand fully informed on the progress of the development of possible new dairy export mechanisms that would be consistent with its WTO obligations. Furthermore, Canada had taken the step of calling for an additional meeting with the United States and New Zealand - a meeting which was not required under the terms of the implementation agreement - to keep them fully apprised of the most recent developments with respect to possible new mechanisms. That meeting was scheduled for later in the week in Geneva. Canada would continue to keep the parties fully informed of future developments and remained open to any additional meetings or consultations. Canada would continue to provide status reports to the DSB on a regular basis, pursuant to its obligations under Article 21.6 of the DSU.

38. The representative of the United States said that her country commended Canada for its prompt implementation of the DSB's recommendations on its milk tariff-rate quota as well as the progress to date on implementation related to the export subsidies on dairy products. However, the United States had grave reservations about Canada's commitment to completion of its implementation process. Canada could not continue to export dairy products at past levels with the benefit of export subsidies without violating its reduction commitments. Canada's subsidized exports of cheese remained at twice the level permitted under its commitments pursuant to the Agreement on Agriculture. The United States was concerned that Canada had embarked on a course that would result in the matter being brought back to the DSB. The concern was increased by the information that Canada had recently shared about new export schemes under discussion in Ontario, Quebec and other provinces. That information indicated that the proposed export regimes would provide milk at reduced export prices like the special milk classes that had been found to be export subsidies. Moreover, milk produced outside the domestic production quota would be required to be exported just

as it was required under the Special Class system. Only the form of the government's action and intervention would change; the nature of such involvement, however, would remain the same in substance. The United States considered that there was no need for such programmes. Indeed, elements of the Canadian dairy industry had severely been criticized the provincial proposals as being basically the same as the Special Class system, which the DSB had found to be an export subsidy. The United States urged Canada not to ignore these industry voices to the effect that the new proposals simply sought to change the form, but not the substance, of the export subsidies available to Canada's dairy processors. The export subsidy disciplines in the Agreement on Agriculture were far too important to allow them to be undermined by new provincial programmes that had the same legal and economic effects as the export subsidies that they were designed to replace.

39. Moreover, Canada had informed the United States that exports of cheese and products like evaporated milk under its Optional Export Programme, had significantly exceeded corresponding levels from 1999. In this programme, the government was involved in basically the same fashion to ensure that milk was provided at reduced prices for export as it was under the Special Class export subsidies. In the case of cheese, combined exports through the Special Classes and the Optional Export Programme were three times the level permitted by Canada's export subsidy obligations. There was every indication that Canada had not accepted the fact that programmes with the same economic effect and government role as the existing export subsidies were also export subsidy regardless of how they were disguised. The United States encouraged Canada which had always been at the forefront in developing multilateral disciplines on export subsidies, to fully comply with the DSB's recommendations and rulings. With discussions already beginning about further reform in agriculture, Members did not have the luxury of allowing the existing disciplines to go unheeded.

40. The representative of New Zealand thanked Canada for its status report on implementation in the case under consideration. It was now the approximate mid-point in the period provided for implementation of 22 December 1999 Agreement between Canada, the United States and New Zealand. Therefore, it was a timely opportunity to set out views on what had been done to date as well as to highlight New Zealand's concerns about the full and effective implementation of the DSB's rulings on Canada's agricultural export subsidy commitments. In this regard, New Zealand was pleased to note that to date, Canada had remained in compliance with its scheduled export subsidy commitment levels for the current marketing year for exports under Special Classes 5(d) and 5(e) for butter, skim milk powder and other milk products. New Zealand also noted that Canada had taken steps to limit its Special Class 5(d) and 5(e) cheese exports in the current marketing year, in accordance with the terms of the 22 December 1999 Agreement. New Zealand looked forward to Canada's full compliance with the DSB's recommendations and rulings by the end of the implementation period. In order to comply, Canada would need to ensure that its subsidized exports of dairy products were within its scheduled reduction commitments. This meant that for the next marketing year, as from 1 August 2000 and thereafter, Canada had to ensure that Special Class 5(d) and 5(e) volumes were within these commitment levels. Canada would also need to ensure that no new measures were introduced, which would provide export subsidies in excess of Canada's commitment levels. In this connection, New Zealand noted with concern reports on efforts made by Canada at the sub-federal level to develop new dairy export mechanisms and schemes, which would allow export volumes over and above Canada's subsidized export commitment levels. Like the United States, New Zealand also wished to emphasise that no new dairy export schemes were necessary for Canada to implement fully the DSB's recommendations and rulings. All Canada needed to do was to ensure that its subsidized exports, under the existing Special Classes 5(d) and 5(e), were maintained within its commitment levels. New Zealand looked forward to further consultations later in the week. New Zealand expected that such consultations would provide the opportunity to obtain additional information on how Canada intended to ensure that it remained within its reduction commitment levels for subsidized exports of dairy products.

41. The representative of Canada said that his country would comply fully with its WTO obligations. Any new measures would require a fundamental change in the manner in which export trade was conducted by Canada's dairy industry. Canada was working with its dairy industry to ensure that any new measures would be consistent with the DSB's rulings and recommendations. Canada would be pleased to discuss these questions with the United States and New Zealand at a meeting to be held later in the week.

42. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2. United States - Transitional safeguard measure on combed cotton yarn from Pakistan

(a) Request for the establishment of a panel by Pakistan (WT/DS192/1)

43. The Chairman recalled that the DSB had considered this matter at its meeting on 18 May 2000, and had agreed to revert to it. He drew attention to the communication from Pakistan contained in document WT/DS192/1.

44. The representative of Pakistan said that his country's request for a panel had been examined for the first time by the DSB at its meeting on 18 May 2000. At that time, however, the United States had opposed the establishment of such a panel. He did not wish to repeat the details of the case which were contained in document WT/DS192/1. At the present meeting, Pakistan's request was before the DSB for the second time and, therefore, pursuant to Article 6.1 of the DSU a panel would have to be established.

45. The representative of the United States said that her delegation accepted the establishment of the panel at the present meeting, but still hoped that the on-going consultations with Pakistan would lead to a mutually satisfactory solution.

46. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

47. The representatives of the EC and India reserved their third-party rights to participate in the Panel's proceeding.

3. India - Measures affecting trade and investment in the motor vehicle sector

(a) Request for the establishment of a panel by the United States (WT/DS175/4)

48. The Chairman drew attention to the communication from the United States contained in document WT/DS175/4.

49. The representative of the United States said that her country was requesting the establishment of a panel to examine India's trade-related investment measures (TRIMs) in the motor vehicle sector. Under India's TRIMs regime, manufacturers could not obtain import licenses for automobile components unless they agreed to a series of local content, trade and foreign-exchange balancing requirements. India intended to continue enforcing those TRIMs for several years, even after its removal of import licensing requirements for automobile components in April 2001. These measures denied India's trading partners the opportunity to supply India's markets and unfairly burdened manufacturers operating in India. The United States considered that India's restrictions were inconsistent with its obligations under Articles III:4 and XI:1 of GATT 1994 as well as Articles 2.1 and 2.2 of the TRIMs Agreement. The United States had held consultations with India on this matter in the beginning of 1999. Immediately thereafter the United States had requested clarification from

India with regard to a few points. The United States hoped to receive India's response shortly. The United States remained open to further discussions with India and hoped that consultations would lead to a mutually satisfactory solution. Recently, the United States had held useful discussions with India in Geneva and hoped that the parties would make some progress in this respect. However, since the matter remained unresolved, the United States was requesting that a panel be established to examine this matter.

50. The representative of India expressed his country's regret that the United States was seeking a panel on this matter. He pointed out that the measures referred to by the United States were not trade-related investment measures. He also emphasized that even the title given by the United States used the phrase: "measures affecting trade and investment". India believed that its measures were not inconsistent with its obligations under Article III:4 and XI:1 of GATT 1994 as well as Articles 2.1 and 2.2 of the TRIMs Agreement. Even if India accepted that the measures in question were TRIMs, as claimed by the United States, its obligations would have to be examined in light of Article 4 of the TRIMs Agreement. He also pointed out that one of the transition period issues, recently considered by Members, related to the extension of the transition period under the TRIMs Agreement. He recalled that the Chairman of the General Council, in his statement on 17 December 1999, had urged Members to exercise the necessary restraint on these matters.[1] At its resumed meeting on 8 May 2000[2], the General Council had taken a decision on the transition period issues in the TRIMs Agreement in light of the Chairman's statement of 17 December. That decision envisaged, *inter alia*, consultations as a matter of priority to be carried out by the Chairman of the Council for Trade in Goods, under the aegis of the General Council, on the means to address those TRIMs cases that had not yet been notified or those for which no extension had yet been requested. The United States should carefully reflect on the question of what impression its request for a panel would create on developing-country Members with regard to the 8 May 2000 decision, which was meant to be a confidence-building measure. A solution could be found through consultations. India was, therefore, glad to note that the United States was willing to hold further consultations on this matter. At the present meeting, India was not in a position to accept the establishment of a panel.

51. The representative of the Philippines said that his delegation was encouraged by the statements made by the United States and India. It seemed that the parties would consult further and that a mutually satisfactory solution might be possible. However, the Philippines wished to express its views on the US request for a panel. Although Members had the right to request a panel, the dispute under consideration was *sui generis*. India had pointed out that at its resumed meeting on 8 May 2000, the General Council had taken a decision that consultations to address the transition period issues under the TRIMs Agreement should be held, under the aegis of the General Council, by the Chairman of the Council for Trade in Goods. Therefore, the US request for a panel at this stage was premature, pending such consultations. The decision of the General Council was binding and was not inconsistent with procedural due process. Moreover, a dispute on TRIMs transition periods might raise other concerns with regard to implementation issues. Many developing countries, including the Philippines, had raised concerns about certain imbalances in some agreements. Therefore, if the dispute at hand were to be pursued, it might raise broader concerns with regard to the imbalance in the TRIMs Agreement in relation to GATT provisions concerning special and differential treatment.

52. The representative of the United States said that her country had always respected and had given positive consideration to the 8 May 2000 decision. The United States, together with other countries, had tried to work out problems related to the transition period issues, and in particular those under the TRIMs Agreement. She noted that both the Chairman's statement of 17 December 1999 and the 8 May 2000 General Council decision were without prejudice to Members' rights under the WTO

[1] WT/GC/M/52
[2] WT/GC/M/55

Agreement. The United States was willing to work with other countries to see whether an understanding on how to move forward could be reached. In this regard, her country had made considerable efforts in the past six months. However, the United States would not give up its WTO rights. She was surprised about the Philippines' reference that if the dispute at hand was to be pursued, that would create problems in other areas. This was not the right way to move forward. The United States and India had been working closely in an effort to find a mutually satisfactory solution. The issues raised by India at the present meeting as well as those discussed in the consultations had been taken into account by the United States. But India's measures had been put in place in December 1997, three years after the WTO Agreement had come into force, and had never been covered under Article 5.1 of the TRIMs Agreement. The United States had tried to solve this matter and was never keen on invoking dispute settlement procedure or requesting a panel. However, the matter had to be moved forward.

53. The representative of the Philippines said that the Chairman's statement of 17 December 1999 was without prejudice to the rights of Members under the WTO Agreement. But that statement, subject to the rights and obligations, was part of the context of the 8 May 2000 decision to exercise due restraint. The 8 May 2000 decision referred to consultations to be held in open sessions by the Chairman of the Council for Trade in Goods under the aegis of the General Council. As far as he was aware, such consultations had not yet been held. The Philippines' intention was only to ensure that the 8 May 2000 decision of the General Council be given due respect.

54. The representative of Cuba said that his delegation shared the views expressed by the Philippines. The transition period issues under the TRIMs Agreement were still on the table. As stated by other delegations, there was certain imbalance in some agreements, which had to be redressed. Therefore, a panel to examine TRIMs-related issues, without prior consultations on a new transition period, should not be established.

55. The DSB took note of the statements and agreed to revert to this matter.

4. Korea - Measures affecting government procurement

(a) Report of the Panel (WT/DS163/R)

56. The Chairman recalled that at its meeting on 16 June 1999, the DSB had agreed to establish a panel to examine the complaint by the United States. The Report of the Panel had been circulated on 1 May 2000 in document WT/DS163/R, and it was now before the DSB for adoption at the request of Korea. In accordance with Article 16.4 of the DSU, this adoption procedure was without prejudice to the right of Members to express their views on the Panel report.

57. The representative of Korea thanked the members of the Panel and the Secretariat for their efforts to prepare the Report. The Panel had found that the entities responsible for procurement for Korea's Inchon International Airport were not subject to the Agreement on Government Procurement (GPA), and therefore Korea had not violated that Agreement. Korea supported the adoption of this important Panel Report. This was the first time that a panel had to interpret the terms of the GPA. The Panel had correctly recognized that before reviewing the US allegations that Korea's procurement practices violated the GPA under Article 1 of the GPA, one was required first to determine whether the entities undertaking that procurement were covered by Korea's commitments. The Panel had correctly 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. Although Korea agreed with the Panel's conclusion, it had systemic concerns about its analysis.

58. In the Panel proceedings, the United States had 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 correctly noted that the first step in analysing 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 correctly noted that a non-violation case could not be sustained. In Korea's view, the Panel should have stopped its analysis at that point. Instead, 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.

59. Korea was not persuaded by the Panel's development of this alternative non-violation claim. In Korea's view, the duty of a panel was to interpret and apply the covered agreements, and, in doing so, to uphold and enforce the rights and obligations of Members under those agreements. 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. The Panel's analysis and conclusions with regard to the US violations claims as well as its final conclusion with respect to the US non-violation claim were both correct. Korea welcomed the Panel's conclusions which had fully rejected all the US claims that Korea violated the GPA. Korea would continue to vigilantly observe the terms of the GPA.

60. The representative of the United States said that her country had initiated this dispute because Korea's practices in the procurement for its Inchon airport project had favoured Korean firms over foreign firms. The United States had argued that Korea's practices, including the use of domestic partnering, short deadlines and certain licensing requirements were inconsistent with the GPA. Korea had not contested these claims but instead had argued that the entities procuring for the airport project were simply not covered under its GPA obligations. It was unfortunate that the Panel had accepted Korea's claims. While the United States did not wish to engage in a detailed critique of the Panel's reasoning, it wished to highlight certain aspects of the Panel's decision which raised broader concerns.

61. 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 - when necessary - to exempt from coverage subdivisions of a listed entity, which in essence constituted a "negative" listing for subdivisions: i.e. only subdivisions that were not covered were listed. Alternatively, if a party intended to limit the coverage of subdivisions, it would provide a "positive" listing of subdivisions, so that only the listed subdivisions would be covered. 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 and the EC who had participated as a third party to this dispute. It also called into question the balance of concessions achieved during the GPA negotiations.

62. 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 United States had initiated this case to ensure that foreign companies were able to compete on an equal basis with Korea's firms for procurement opportunities in the construction of the Inchon Airport. This would benefit not only the United States and other GPA suppliers but Korea as well. Korea would benefit because competition with world class companies from all around the world could only ensure that the Inchon airport was built using the highest quality products and services with the lowest possible cost. This would help the Inchon Airport to become the successful transportation hub of East Asia, as intended by Korea.

63. Despite its disagreement with the Panel's findings, the United States had decided not to appeal this case. In taking its decision, the United States had considered the following factors: (i) The Inchon project was moving forward. The first phase of construction was reported to be 90 per cent complete, with the overall start-up and commissioning expected to commence as early as beginning of July 2000, to prepare for the opening of the Airport in 2001; (ii) Korea had informed the United States that the entities procuring for the Airport would conduct tenders in line with principles of free competition and openness, allowing the participation of all qualified suppliers, and that these entities had been advised to open all remaining procurements to foreign bidders. In light of these assurances, and of the expertise of the US companies in this area, the United States expected that its companies would be able to fully participate in the remaining Inchon procurements; (iii) Korea had also indicated that the current entity procuring for the Inchon airport, the Inchon International Airport Corporation, would soon be privatized so procurement for the project should be conducted openly and free from government influence, in a manner that would ensure opportunities for competitive suppliers from any country. Finally, notwithstanding its disappointment with the outcome in this case, the United States expected that the Panel Report would have no impact on the application of the GPA beyond the specific facts of the case at hand since the Panel's findings were limited to one specific procurement project.

64. The representative of the Philippines drew attention to paragraph 7.93 of the Panel Report which read as follows: "the non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law". The Philippines were concerned about this statement because panels should interpret the rights and obligations of Members in a manner consistent with the covered agreements and in accordance with the general rules of interpretation of customary international law. There was a distinction between the rules of interpretation and the rights and obligations under customary international law. Members agreed to be subject to dispute settlement proceedings to deal with disputes which involved their rights and obligations under the covered agreements. Members did not intend the WTO to be the arbiter of their rights and obligations under customary international law.

65. The representative of India said that his delegation wished to know whether it could comment upon the Panel Report. India was not a party to the GPA, which was a plurilateral agreement. He understood that under Article 2.1 of the DSU, non-parties to the plurilateral agreements could not participate in any decision or action taken in respect of disputes involving those agreements.

66. The Chairman said that India had raised a valid point. He believed that, at the outset of this item, he should have drawn to Members' attention that this matter was for the parties to the GPA. In this regard, Article 2.1 of the DSU provided that: "Where the DSB administers the dispute settlement of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute". He did not know whether India could make a comment, but it was clear that it could not participate in any DSB's decision or action in this regard.

67. The representative of the Philippines said that his delegation did not intend to participate in any decision or action, but to make comments on the Panel Report.

68. The Chairman said that there seemed to be no objection to non-parties to the Plurilateral Trade Agreement expressing views, but it was clear that they could not participate in any decision or action by the DSB in this context.

69. The representative of India said that his country had a serious systemic concern about the Panel Report, especially with respect to its examination of non-violation claims raised by the United States. He drew attention to the last part of the Panel Report with regard to errors in treaty formation. Although the Panel had concluded that the complainant had failed to demonstrate an error in the GPA,

it seemed to have assumed that it had a right to correct errors in the WTO Agreement. This should be of serious concern to all Members. India considered that panels or Appellate Body were not competent to assume or arrive at a finding of error in the WTO Agreement. They were even less competent to correct errors, if any. It was for the Membership alone to arrive at any conclusion regarding treaty errors and means to correct them.

70. The representative of Hong Kong, China said that his delegation wished to reserve its position on the fact that two Members, non-parties to the GPA, had made comments on the Panel Report under this agenda item. Hong Kong was concerned whether such comments would have any effect on the operation of the GPA, and therefore wished to reserve its position on the interpretation of Article 2.1 of the DSU.

71. The Chairman proposed that the DSB take note of the statements and adopt the Panel Report contained in WT/DS163/R; it being noted that the adoption was being agreed only by the parties to the Plurilateral Trade Agreement at issue in this case.

72. The DSB so agreed.

5. Canada - Certain measures affecting the automotive industry

(a) Report of the Appellate Body (WT/DS138/AB/R - WT/DS142/AB/R) and Report of the Panel (WT/DS139/R - WT/DS142/R)

73. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS139/7 - WT/DS142/7 transmitting the Appellate Body Report on "Canada - Certain Measures Affecting the Automotive Industry", which had been circulated in document WT/DS139/AB/R-WT/DS142/AB/R in accordance with Article 17.5 of the DSU. He reminded delegations that in accordance with the Decision on Procedures for the Circulation and Derestriction of the WTO Documents contained in WT/L/160/Rev.1, both Reports had been circulated as unrestricted documents. He recalled that Article 17.4 of the DSU required that "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

74. The representative of the European Communities said that the EC welcomed the Reports of the Panel and the Appellate Body. The issues examined in this case were both various and complex. The EC was satisfied that Canada's discriminatory regime with respect to imported automotive components and finished vehicles had been condemned by the Panel and by the Appellate Body on several grounds. The quick removal by Canada of the WTO-incompatible measures would re-establish a level playing field in this sector, which was of considerable economic importance for the EC. He recalled that Canada's regime had been found to be a prohibited export subsidy with respect to the production-to-sales ratio. Canada was, therefore, under the obligation to remove the measure without delay as provided for under Article 4.7 of the SCM Agreement. At the present meeting, he wished to refer to certain important claims made by the EC, which had successfully been upheld by the Panel and the Appellate Body. He would then make additional comments on the Appellate Body's findings on the claims made under Article 3.1(b) of the SCM Agreement and Article II of GATS.

75. With regard to a violation of Article I:1 of GATT 1994, the Appellate Body had confirmed that although on its face the regime did not establish a discrimination based on the origin of the products, it necessarily implied that imports of particular sources would be favoured thereby entailing a *de facto* violation of the MFN clause of GATT 1994. The Panel had rightly found that the measure "granted the advantage of the import duty exemption only if it [i.e. the product] originates in one of

the small number of countries in which an exporter of motor vehicles is affiliated with a manufacturer". The Appellate Body had concluded from this observation that Canada had granted an advantage to some products from some Members that it had not "accorded immediately and unconditionally" to like products originating in or destined for the territories of all other Members. The regime was accordingly found in violation of Article I:1 GATT 1994. The EC considered that the Appellate Body had correctly interpreted the unconditionality clause of Article I:1 of GATT 1994 by making it clear that the MFN principle should apply to any products from any origin.

76. The EC noted with satisfaction the Appellate Body's correct interpretation of Article 3.1(a) of the SCM Agreement. The EC had argued that while the manufacturers could increase their duty exemption simply by increasing production, the amount of subsidy available absent exportation was less than that of the subsidy available upon exportation. Accordingly, there were bonuses or additional payments if exports had taken place. The Appellate Body had fully endorsed this reasoning and had confirmed that the duty exemption constituted a subsidy contingent in law upon export performance. The EC also contended that the standard for *de jure* inconsistency encompassed implicit export contingency: i.e. where the requirement to export was a necessary consequence arising from the operation of conditions stated in the law. The Appellate Body had also supported the EC views. It had stated that a subsidy was *de jure* export contingent where the condition to export was clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* export contingent, the underlying legal instrument did not always have to provide *expressis verbis* that the subsidy was available only upon fulfilment of the condition of export performance (paragraph 100). The Appellate Body had also underlined that these legal standards apply to "contingency" under Article 3.1(b) of the SCM Agreement (paragraph 123). The EC considered this as a very useful clarification by the Appellate Body.

77. With regard to the interpretation of Article 3.1(b) SCM Agreement, the Appellate Body had also supported the EC and Japan's claims that Article 3.1(b) applied to measures that were contingent "in fact" upon the use of domestic over imported good. It had properly found that there was nothing in the language of Article 3.1(b) which specifically excluded subsidies contingent in fact from the scope of the provision. The EC welcomed this finding which would restrict the scope for circumvention of Article 3.1(b). The EC wished to point out that on two very important issues, the application of the MFN clause of GATS to the duty exemption and the qualification of the Canadian Value Added requirement as an export subsidy under Article 3.1(b) of the SCM Agreement, the Appellate Body had dismissed the Panel's findings, but had been unable to come to a conclusion. He recalled that in the Salmon case (WT/DS18), the Appellate Body had properly ruled that: "where we have reversed a finding of a panel, we should attempt to complete a panel's legal analysis to the extent possible on the basis of the factual findings of the Panel and/or undisputed facts in the Panel record." He regretted that, in the case at hand, the substantial and undisputed evidence before the Appellate Body had been considered insufficient for it to adjudicate the claims brought by the parties to the dispute. The EC wished to express its disappointment with regard to the concluding remarks of the Appellate Body under Article II of GATS. In paragraph 184, the Appellate Body had stated that given the complexity of the subject-matter of trade in services, it believed that claims made under the GATS deserved close attention and serious analysis. It had finally concluded that it had left "interpretation of Article II of GATS to another case and another day". The EC regretted that these findings did not help the parties on the question of WTO consistency of the measure at issue. The EC would have preferred a ruling that would have brought further clarifications as to the applicability of Article 3.1(b) of the SCM Agreement and Article II of GATS to the Canadian measures.

78. The representative of Japan thanked the Panel, the Appellate Body and the Secretariat for their work. Japan welcomed the Appellate Body's conclusions, which had generally endorsed the Panel's conclusions that Canada's tariff measures under the Auto Pact were in violation of the WTO Agreement. Japan expected that Canada would implement the recommendations of the Panel and the Appellate Body in good faith. Prompt compliance with the DSB's recommendations and rulings was

essential in order to ensure effective resolution of disputes to the benefit of all Members. In this regard, he recalled that the Panel had recommended that Canada withdraw its prohibited subsidies, the production-to-sales ratio requirements, within 90 days.

79. The representative of Canada thanked the members of the Panel, the Appellate Body and the Secretariat for their work in this case. Canada was pleased with some aspects of these Reports, but quite disappointed with others. It was pleased with the Appellate Body's conclusions on the GATS. In particular, that the Appellate Body had agreed that the Panel had erred by finding Canada's measure to be inconsistent with Article II:1 of GATS without first examining whether the measure - a duty exemption for imported goods - fell within the scope of GATS as a measure "affecting trade in services" under Article I:1. It was now clear that a goods measure such as a duty or duty exemption did not affect trade in services merely because service suppliers, such as importers or wholesalers, might deal in the dutiable or exempt goods. In order for a measure to be one "affecting trade in services" it had to affect service suppliers in their capacity as service suppliers.

80. Canada was similarly pleased that the Appellate Body had reversed both the Panel's conclusion that the measure was inconsistent with Article II:1 of GATS and the findings leading to that conclusion. The Appellate Body had confirmed that one could not simply extrapolate from how a measure affected goods or their manufacturers to how it affected service suppliers who dealt in those goods and their services. Although Canada would have preferred the Appellate Body to be more forthcoming in interpreting the outer limits of the scope of GATS, its findings were an important step toward that end. At the same time, Canada had to express its disappointment with the analyses of the Panel and Appellate Body with respect to the MFN obligation under Article I:1 of GATT 1994. The Appellate Body had acknowledged its "daunting task of interpreting certain aspects of MFN principle that had long been a cornerstone of GATT and was one of the pillars of the WTO trading system". Nevertheless, the Appellate Body had failed to address important arguments regarding the proper interpretation of Article I:1 of GATT 1994, and had failed to provide guidance regarding Members' obligations not to discriminate "in fact" in according advantages to like products based on their origin. In particular, Canada regretted that the Appellate Body had failed to address the fact, acknowledged by the Panel, that the Government of Canada had no role in the sourcing decisions made by private companies. Moreover, it was important to note that the Appellate Body had attributed to Canada a position that Canada did not espouse. In paragraph 78 of its Report, the Appellate Body had stated that "we cannot accept Canada's argument that Article I:1 does not apply to measures which, on their face, are 'origin-neutral'." Canada had not taken that position before the Panel or the Appellate Body. Canada was also disappointed with the analyses in the Reports with respect to the SCM Agreement. It was important that the Panel and Appellate Body reports contributed to Members' understanding of the proper interpretation of "export contingency" under Article 3 of the SCM Agreement. Both the Panel and Appellate Body decisions in this case had failed to do so. Export contingency had been found to exist even in those instances where the Panel and the Appellate Body acknowledged that there was no obligation to export in order to receive the subsidy found to exist under Canada's measures. Despite its reservations, Canada accepted the Panel and Appellate Body decisions, and joined the consensus to adopt these Reports. Pursuant to Article 21.3 of the DSU, Canada would inform the DSB of its intentions with respect to implementation within the next 30 days.

81. The representative of Hong Kong, China said that the part of the Appellate Body Report on services had given some pause for thought and his delegation wished to set out some misgivings relating to the approach taken by the Appellate Body. This could have serious consequences for future cases. He wished to comment on three aspects of the Appellate Body's decision. The first related to its decision in paragraph 151 that "… the fundamental structure and logic of Article I:1, in relation to the rest of GATS, require that determination of whether a measure is, in fact, covered by the GATS must be made before the consistency of that measure with any substantive obligation of GATS can be assessed". In paragraph 152, it had further stated that "This explicit reference to the scope of the GATS confirms that the measure at issue must be found to be a measure 'affecting trade

in services' within the meaning of Article I:1, and thus covered by the GATS, before any further examination of consistency with Article II can logically be made." However, in the Bananas case, the Appellate Body had found that "the term 'affecting' in Article I of GATS has a broad scope of application and that accordingly no measures are a priori excluded from the scope of application of the GATS". But it was hard to see how there could be no a priori exclusion if it was first necessary to establish that a measure fell within the GATS. Whether a measure fell within the GATS would require an assessment as to whether it affected aspects of GATS - in this case the conditions of competition.

82. Second, in paragraph 155 of its Report, the Appellate Body had stated that "at least two key legal issues must be examined to determine whether a measure is one 'affecting trade in services': first, whether there is 'trade in services' in the sense of Article I:2; and second, whether the measure in issue 'affects' such trade in services within the meaning of Article I:1." The approach to see first whether "there was trade in services" could have serious implications. If for example, one were to assume that a Member had decided not to allow any commercial presence of a foreign services provider in Sector "A" and had placed a valid limitation in the market access (MA) column as a result, there was no trade in services in that sector. If one were to assume that the Member forgot to place a valid restriction in the MA column (i.e. entered "none") but still prohibited commercial presence, again no trade in services would take place. The latter case would be a clear violation of the GATS. But according to the Appellate Body since no trade in services was taking place, it would seem that the measure was not one affecting trade in services under the GATS. This was clearly not a viable proposition.

83. Third, with regard to the issue of "affects", the Appellate Body had decided that it was necessary to examine the conditions on the ground. In paragraph 165, it had stated: "Having interpreted Article I:1, the Panel should then have examined all the relevant facts, including who supplies wholesale trade services of motor vehicles through commercial presence in Canada, and how such services are supplied". But it was quite possible that the conditions on the ground had already been distorted by the measure in place and thus examining them might well lead to the wrong conclusion. It should be the "conditions of competition" that should be examined. Hong Kong, China believed that these decisions could have far-reaching and detrimental results to the intended scope and application of GATS. One could only take comfort from paragraph 184 where the Appellate Body stated that "Given the complexity of the subject-matter of trade in services, as well as the newness of the obligations under GATS, we believe that claims made under GATS deserve close attention and serious analysis. We leave interpretation of Article II of GATS to another case and another day" Hong Kong, China hoped that the Appellate Body would also leave interpretation of Article I:1 to another case and another day.

84. The representative of the Philippines said that he only wished to refer to the GATS aspect. The Appellate Body had not made any findings on whether Canada was in violation with Article II:1 of GATS because there were not enough findings of facts and analysis conducted at the Panel stage. In this regard, it was important to note that this particular aspect could be taken up in to a future DSU review. With regard to the analysis as to which should come first; a determination on trade in services or a determination on whether any measure affected trade in services, the Philippines believed that there was nothing wrong that before one tested whether or not a measure was consistent with GATS it was necessary to first determine whether, as a matter of fact, there was trade in services. Only then one could determine whether the measure affected trade in services. There was nothing wrong with this approach. In any event, the Appellate Body had not made any finding on Article II:1. The Philippines hoped that one day that Article would be interpreted properly but, at this stage, it wished to endorse the approach of the Appellate Body.

85. The DSB took note of the statements and adopted the Appellate Body Report in WT/DS139/AB/R-WT/DS142/AB/R and the Panel Report in WT/DS139/R-WT/DS142/R, as modified by the Appellate Body Report.

6. Questions addressed by delegations to the Chairman of the DSB upon the adoption of the Reports of the Appellate Body and the Panel on "United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom" at the DSB meeting on 7 June 2000.

(a) Statement by the Chairman

86. The Chairman, speaking under "Other Business", made the following statement[3]:

"In the DSB meeting on 7 June 2000 during the discussion under the agenda item concerning the adoption of the Panel and Appellate Body Reports on *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, several delegations put the question to me whether the Appellate Body during the time it was drawing up its report in this case consulted with me, as Chairman of the DSB, and with the Director-General under the provisions of Article 17.9 of the DSU. As you will recall this provision prescribes that the Appellate Body consult with me and with the Director-General, when drawing up its Working Procedures.

"The answer to this question is in the negative. The Appellate Body did not consult with me or with the Director-General. This was because the Appellate Body was not drawing up new Working Procedures for Appellate Review. The Appellate Body had merely been asked in this specific case by the European Communities as appellee in the case to rule on whether it could accept and consider two unsolicited briefs which had been presented by two US steel industry associations to the division hearing this appeal.

"I would like to point out that paragraph 39 of the Appellate Body report merely notes that nothing in the DSU or in the Working Procedures for Appellate Review provides for acceptance of *amicus curiae* briefs or for prohibition thereof. It then goes on to say that "the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements." This statement is underpinned by a quotation from Article 17.9 of the DSU and further completed by an important footnote reference to Rule 16(1) of the Working Procedures, which allows a division hearing an appeal to develop an appropriate procedure in certain specified circumstances where a procedural question arises that is not covered by the Working Procedures. Rule 16(1) of the Working Procedures also makes it clear that any such ruling is for the purposes of that appeal only. This reasoning of the Appellate Body finally leads to the concluding sentence of paragraph 39, which I will quote in full:

> "Therefore we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."

"To recapitulate, the Appellate Body was merely ruling on a specific procedural objection made by one of the parties to the dispute concerning these two unsolicited briefs. It was not and I emphasize that it was not drawing up new Working Procedures and therefore was not under an obligation to consult me, as Chairman of the DSB, or the Director-General. Indeed, I have to say that in the context of deciding issues raised in a particular appeal, in fact, it would seem to me to be highly

[3] The Chairman's statement was subsequently circulated in document WT/DSB/W/137.

inappropriate for the Appellate Body to consult either with the Chairman of the DSB or with the Director-General in that specific context".

87. The DSB took note of the statement.