

MAJOR WTO DISPUTE CASES CONCERNING GOVERNMENT PROCUREMENT

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ABSTRACT

The Government Procurement Agreement (“GPA”), the successor of the Tokyo Round Government Procurement Code, is one of the Plurilateral Agreements (Annex 4) in the WTO. The contents of the GPA have been incorporated into domestic procurement legislation in the participating Members including the United States, the European Communities and Japan. There are relatively few GATT/WTO cases that arose under this Agreement. However, there are two outstanding cases, e.g., the Trodheim Case and the Korean Inchon Airport Case. In the former, the Panel held that the single tendering of the contract by the Norwegian Public Roads Administration did not meet the requirements of Article V:16(e) of the Tokyo Round Procurement Code. In the latter, the United States took Korea to the WTO dispute settlement procedure and argued that the Korea failed to comply with the requirements of the GPA by imposing bid deadlines and domestic partnerships and by awarding the contract to the Korea Airport Authority. The Panel found that the Korean Airport Authority was not included in the concession of Korea for the entities subject to the GPA and therefore was outside the scope of the GPA.

In the United States, state Buy America and Buy State laws preclude public procurement entities of States from procurement of foreign goods. In the State of Massachusetts Case, the State of

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Massachusetts enacted a law prohibiting state entities from procurement of goods from countries engaged in trade with Burma. The European Communities and Japan petitioned to the WTO. While the Panel process was going, a United States trade association brought a suit in U.S. federal courts against the States of Massachusetts for the reason that this state law infringed the Constitution of the United States. The Supreme Court of the United States decided that it infringed the authority of the President of the United States and struck down the law. The WTO Panel was disbanded.

The GPA provides that Members establish challenge procedures in their domestic jurisdictions in which foreign enterprises can bring a complaint against the procurement entity on the ground that its procurement practice is inconsistent with provisions of the GPA. In Japan, Motorola, a U.S. company, brought a complaint in the Japanese challenge procedure (CHANS) against the Japan Railway (the JR) for the reason, inter alia, that the JR did not base its standards on an ISO standard whose enactment was imminent. CHANS decided that the GPA required only that international standards that existed need to be based on but not those whose enactment was imminent and rejected the claim of Motorola.

KEYWORDS: *Government Procurement; The Agreement on Government Procurement; public procurement; open tendering; selective tendering; individually negotiated contract; Buy American Laws; domestic challenge system regarding public procurement; the Trohdhaim Case; the Massachusetts Myanmar Case; the Japan Railway/Motorola Case*

I. OUTLINE OF THE GOVERNMENT PROCUREMENT AGREEMENT

The Government Procurement Agreement (“the GPA”), one of the Plurilateral Agreement (Annex 4 of the Marrakesh Agreement), deals with procurement by public entities of WTO Members of this agreement.¹

¹ For details of government procurement issues, *see generally* LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT (Bernard M. Hoekman & Petros C. Mavroidis eds., The University of Michigan Press 1997). For a recent literature, *see* Peter