International Procurement

Alan W.H. Gourley, Jean Heilman Grier, and Frederick F. Shaheen*

A number of developments in procurement law in the past year are of interest to the international procurement community. First, in the area of defense trade, the U.S. Defense Security Cooperation Agency (DSCA) announced new rules governing that portion of the $3.5 billion in annual Foreign Military Financing (FMF) aid used by certain friendly foreign governments—primarily Israel and Egypt—to finance the purchase of U.S. defense articles and services under direct commercial contracts with U.S. companies. Second, the United States also underscored its intent to use the civil False Claims Act[1] to enforce conditions that it places on foreign assistance funds by bringing a treble damage action against the President and Fellows of Harvard College for alleged violations in connection with a U.S. Agency for International Development (USAID) project to assist Russia in privatization of its capital markets.[2] Finally, a panel established under the World Trade Organization (WTO) dispute settlement procedures issued the first report addressing (and resolving) a dispute under the WTO Agreement on Government Procurement.[3]

I. Defense Trade

The most significant development in the area of defense trade is the change in the rules for the FMF program. In addition, the United States showed renewed interest in addressing the issues presented by countries requiring offsets as a condition of purchasing foreign military products.

*Alan W.H. Gourley is a partner in the Washington, D.C. office of Crowell & Moring LLP, Jean Heilman Grier is Senior Counsel for Trade Agreements at the U.S. Department of Commerce, and Frederick F. Shaheen is a partner in the Washington, D.C. office of Howrey Simon Arnold & White LLP. The views expressed are those of the authors and do not necessarily reflect those of any client, or of any department or agency of the U.S. Government.

1. False Claims Act, 31 U.S.C. § 3729 (1994).

2. United States v. President and Fellows of Harvard College, Civ. No. 00CV11977-DPW (D. Mass. Sept. 25, 2000).

3. *See* WTO Agreement on Government Procurement, Jan. 1, 1996, ***available at*** http://www.dofa.gov.au/ ctc/publications/internationl/wto/wto_agp_1.html [hereinafter GPA].

A. U.S. Foreign Military Financing Program

On June 6, 2000, the DSCA published new *Guidelines for Foreign Military Financing of Direct Commercial Contracts* (DSCA Guidelines)[4] accompanied by a new *Contractors Certification and Agreement with Defense Security Cooperation Agency* (DSCA Certification & Agreement).[5] The DSCA administers the FMF program under the authority of Section 23 of the Arms Export Control Act.[6] The FMF Program provides certain friendly foreign governments with annual assistance—originally loans, but now "non-repayable credits"—for the purchase of U.S. defense articles or services. A portion of this FMF funding is used by the foreign government recipients for the purchase of defense articles or services directly from U.S. companies—which DSCA refers to as direct commercial contracts.[7] The U.S. government is *not* a party to the contract, even though it provides the financing for the contract.

DSCA has never promulgated formal regulations establishing conditions on the use of FMF funds. Rather, DSCA has identified its general policies on the use of FMF funds in the DSCA Guidelines.[8] These policies include specific restrictions on how FMF funds may be spent and dictate specific terms foreign governments must include in the direct commercial contracts they seek to have funded with FMF. DSCA imposes its policies on the U.S. contractors by requiring execution of a DSCA Certification & Agreement as a condition of approval to use FMF funds to finance the contract.[9]

The most recent changes to the DSCA Guidelines and DSCA Certification & Agreement arose out of a Department of Defense (DoD) initiative to reinvent the Foreign Military Sales (FMS) program.[10] As it had with the FMS Program, DSCA sought to streamline the FMF requirements and processes where possible and to make it easier to procure commercial items. Although traditionally used for purchase of major weapons systems, FMF funds are now often used to purchase such commercial products as information technology and communications hardware for the foreign government's military. The most significant substantive changes in the DSCA Certification & Agreement and the DSCA Guidelines focus on the three most troublesome areas for U.S. industry—those that have resulted in the most enforcement actions: (1) payment of contingent marketing fees; (2) contractual flow-down of obligations to subcontractors; and (3) identification and financing of non-U.S. sourced goods and services.

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4. Department of Defense, Security Assistance Management Manual, DoD 5105.38-M, Ch. 9 FMS Direct Credit and Guaranteed Loan Financing, Table 902-6, Guidelines for Foreign Military Financing of Direct Commercial Contracts, (2000) [hereinafter DSCA Guidelines], *available at* http://web.deskbook.osd.mil/reflib/MDOD/004dm/001/004dm001doc.htm.

5. Department of Defense, Security Assistance Management Manual, DoD 5105.38-M, Ch. 9 FMS Direct Credit and Guaranteed Loan Financing, Table 902-7, Contractors Certification and Agreement with Defense Security Cooperation Agency, (2000) [hereinafter DSCA Certification & Agreement].

6. Arms Export Control Act, 22 U.S.C. § 2763 (1994).

7. FMF funds may also be used to finance the traditional government-to-government sales under the Foreign Military Sales program administered under the authority of 22 U.S.C. § 2762.

8. *See* DSCA Guidelines, *supra* note 4; DSCA Certification & Agreement, *supra* note 5.

9. *See* DSCA Certification & Agreement, *supra* note 5.

10. *See* 22 U.S.C. § 2262. Section 22 of the Arms Control Export Act authorizes the FMS program and involves procurements of U.S. defense articles and services by DoD on behalf of friendly foreign governments and allies.

1. *Contingent Fees*

The new DSCA Certification & Agreement and the new DSCA Guidelines have once again modified the language used to implement DSCA's longstanding policy against financing payment of contingent fees to solicit or secure contracts funded with FMF. While DSCA does not expressly prohibit the payment of a contingent fee, it does require contractors to demonstrate "that commissions or contingent fees are not funded by the [U.S. government]."[11] And, since 1995, the DSCA Guidelines have required that U.S. companies disclose all contingent fees paid in connection with an FMF-funded contract, although the 1995 DSCA Certification & Agreement remained silent on the subject of disclosure.[12] DSCA's contingent fee policy has presented compliance difficulties for U.S. contractors because it essentially required the demonstration of a negative; that is, a paid commission was somehow not in the negotiated price. It was (and remains) the U.S. contractor's obligation to "maintain documents and records to demonstrate that commissions or contingent fees are not funded by the USG."[13]

The new DSCA Certification & Agreement now specifies precisely which contingent fee information must be reported (including the name, address, and nationality of the recipient).[14] It also clarifies that this reporting requirement extends to commissions paid to employees. Unfortunately, the revised language also introduces some new ambiguity. U.S. companies are to report "similar compensation . . . whether in cash or in kind, directly or indirectly related to the Purchase Agreement . . . ."[15] Neither the DSCA Guidelines nor the DSCA Certification & Agreement, however, provide any explanation for what this phrase was intended to reach beyond fees that were contingent on success in obtaining the contract.

2. *Subcontractor Obligations*

One of the most significant changes in the new DSCA Certification & Agreement is the relaxation of the obligation to flow-down the requirements of the DSCA Certification & Agreement to subcontractors. Prior to 1995, only certain designated paragraphs of the DSCA Certification & Agreement expressly required the prime contractor to include a similar certification or obligation in its subcontracts. In 1995, after a number of cases involving alleged fraud at the subcontract level, DSCA amended its Guidelines to provide that its restrictions applied to all subcontractors "at any tier." This flow-down obligation proved tremendously burdensome and largely impossible in practice, particularly in the commercial world. The new DSCA Guidelines and DSCA Certification & Agreement now limit the general flow-down requirement to first and second tier subcontractors. More importantly, DSCA has significantly expanded the categories of subcontractors that are exempt from all flow-down requirements.[16]

11. DSCA Guidelines (May 2000), *supra* note 4, ¶ 15.

12. On August 3, 2000, the Department of Justice announced that Telephonics Corp. had agreed to pay $800,000 to resolve charges under the civil False Claims Act for failing to disclose the amount of contingent fees paid in connection with two FMF-funded contracts.

13. DSCA Guidelines, *supra* note 4, ¶ 15 (May 2000); *see also* DSCA Guidelines, *supra* note 4, ¶ 8 (Jan. 1995).

14. *See* DSCA Certification & Agreement, *supra* note 5.

15. *Id.* ¶ 13.

16. *See id.* ¶ 5.

3. *Non-U.S. Content*

The last area where DSCA implemented noteworthy changes involves the financing of non-U.S. content to be furnished in performance of the FMF-funded contact. By statute, absent a waiver by the president, FMF funds may only be used to procure goods and services within the United States.[17] As a matter of policy, however, DSCA has traditionally refused to finance *any* non-U.S. content except in certain defined circumstances. In the past, DSCA has required contractors to identify non-U.S. content, but provided little guidance as to the extent of this obligation.

The new DSCA Guidelines more clearly define the circumstances under which DSCA will permit FMF to be used to finance such non-U.S. content.[18] It has also provided a potentially significant new exception to the general prohibition against financing non-U.S. content. Any component that qualifies as a commercial off-the-shelf item that is manufactured or finally assembled in the United States from at least 50 percent U.S. content may be financed with FMF funds.[19] DSCA, however, has retained the most burdensome aspect of the 1995 revisions to the DSCA Certification & Agreement. Contractors still must identify *all* non-U.S. content at any tier, even where the component would qualify for financing under the commercial item exception noted above.

B. National Commission on the Use of Offsets in Defense Trade

With Executive Order 13,177,[20] President Clinton established the National Commission on the Use of Offsets in Defense Trade (Commission) mandated by Section 1247 of the Defense Offsets Disclosure Act of 1999.[21] The Commission's charter is to study the effects of defense offsets and to make recommendations to Congress concerning multilateral or unilateral measures to reduce the detrimental effects of such offsets. Defense offsets comprise a range of industrial and commercial benefits that sellers provide to foreign governments as inducements or conditions for the purchase of military goods and services. They may include co-production arrangements or subcontracting, technology transfers, in-country procurement or investment, marketing or financial assistance, and joint ventures.

The first meeting of the Commission was held December 4, 2000, and, by statute, it has twelve months to report its findings and recommendations to Congress. Specifically, the Commission is to analyze (a) the collateral impact of offsets on other U.S. industries, (b) the importance of offsets to the competitiveness of the U.S. defense industry in international trade, and (c) the impact of offsets (particularly technology transfers) on U.S. national security and its industrial base. The Commission's work is not generally expected

17. *See* 22 U.S.C. § 2791 (1994). DSCA has interpreted this provision to mean that U.S. components must comprise more than 50 percent of the end item's value and the end items must be manufactured or finally assembled in the United States.

18. *See* DSCA Guidelines, *supra* note 4, ¶ 6.

19. As defined by Section 4203 of the Clinger-Cohen Act, Div. D of Pub. L. No. 104-106, 110 Stat. at 654 (1996) (*codified at* 41 U.S.C. § 431). This definition is much more restrictive than the "commercial item" definition generally used in the federal procurement system. *See* 48 C.F.R. § 2.101 (2000).

20. Exec. Order No. 13,177, 65 Fed. Reg. 76,558 (Dec. 4, 2000) [hereinafter Executive Order].

21. Defense Offsets Disclosure Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-502 (1999). The Executive Order also created a parallel President's Council on the Use of Offsets in Commercial Trade with membership identical to the Commission. *See* Executive Order, *supra* note 20.

to result in major U.S. policy changes.[22] In 1990, after a similar statutorily mandated interagency review, the president issued a policy statement recognizing the market distorting effects of offsets, but continuing the U.S. government's traditional policy of noninvolvement and noninterference with foreign country demands for offsets.

II. USAID Procurements

In *United States v. President and Fellows of Harvard College*,[23] the United States served notice that it intends vigorously to enforce the restrictions it places on the use of foreign assistance funds. This case involves two Cooperative Agreements under which Harvard allegedly agreed to provide impartial and unbiased advice with respect to USAID projects in Russia. Under the first agreement, Harvard was to provide advisory teams to assist Russian efforts to privatize assets and to support legal reform and capital market initiatives. Under the second agreement, Harvard was to provide strategic guidance to the capital market development effort including supervision of other USAID contractors assisting Russian regulatory institutions.

In an eleven-count complaint, the United States sued Harvard and four individuals (including the tenured Harvard economics professor who had acted as the Project Director) alleging violations of both the civil False Claims Act[24] and common law causes of action. The United States alleges that in order to ensure impartial advice, the Cooperative Agreement prohibited Harvard employees working on the project from making investments in Russia. According to the complaint, the Harvard professor and the Moscow-based Harvard representative for the project made numerous investments in Russia, including participation in the first licensed mutual fund depository under rules drafted by others working on the project. The United States asserts that it was defrauded of the $40 million paid to Harvard under the agreements—an amount that could be trebled under the False Claims Act.[25]

III. Government Procurement Cases Before the WTO

In 2000, the WTO concluded two disputes under the WTO Agreement on Government Procurement (GPA) that had been pending before the WTO's Dispute Settlement Body (DSB).[26] The first of these involved the U.S. complaint that Korea had violated the GPA in its procurements for the multibillion-dollar Inchon International Airport project (IIA Project).[27] The second dispute involved the European Community's (EC) and Japan's complaints that a 1996 Massachusetts statute violated the GPA by restricting state contracts with companies doing business with Burma (Myanmar). The complaining GPA signatories allowed that dispute to lapse after the statute was initially held unconstitutional; a result affirmed by the U.S. Supreme Court in a decision handed down June 19, 2000.[28]

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22. On February 15, 2001, the Commission released a Status Report that included potential recommendations, none of which suggested unilateral U.S. government action to restrict or prohibit offsets. The final report is anticipated by October 2001.

23. *See* United States v. President and Fellows of Harvard College, Civ. No. 00CV11977-DPW (D. Mass Sept. 25, 2000).

24. False Claims Act, 31 U.S.C. § 3729.

25. *See id.*

26. *See* GPA, *supra* note 3.

27. Korea—Measures Affecting Government Procurement, WT/DS163/R (May 1, 2000), *available at* http://www.wto.org/English/tratop_e/dispu_e/distab_e.htm [hereinafter WTO Panel Report].

28. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

A. The WTO Agreement on Government Procurement

The GPA was signed in Marrakesh on April 15, 1994, and is included in Annex 4 of the Agreement Establishing the World Trade Organization.[29] As a plurilateral agreement, the GPA applies only to the twenty-seven WTO members that have become signatories to it, and the concessions reflected in the agreement were negotiated bilaterally between the various signatories. The GPA became effective on January 1, 1996.

The GPA establishes a framework of rights and obligations with respect to the laws, regulations, procedures, and practices of its signatories with respect to government procurement. The cornerstone of the GPA is non-discrimination; it incorporates both most-favored-nation and national treatment obligations. In order to ensure that the basic principle of non-discrimination is followed and that access to procurement is available to foreign goods, services, and suppliers the GPA prescribes procedures for providing transparency of laws, regulations, procedures, and practices regarding government procurement. The provisions cover, inter alia, tendering procedures, qualification of suppliers, technical specifications, tender documentation, award of contracts, and bid challenge procedures. In order for a particular procurement to be covered by the GPA, it must be undertaken by an entity covered by the GPA and have a value above the threshold set for that type of procurement. Under the GPA, coverage is based on the entities that each signatory has listed in Appendix I, which itself is divided into multiple annexes.[30] These annexes also set out the thresholds for coverage.

Under the GPA, disputes between signatories are subject to the provisions of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes,[31] except as otherwise stated in Article XXII of the GPA. Generally, the disputing parties must first consult with each other. If that is unsuccessful, the complaining party may request the DSB to establish a panel that will make an objective assessment of the case. Panel decisions may be appealed to the standing Appellate Body, with the ultimate authority to adopt reports resting with the DSB. Article XXII of the GPA requires panelists in such disputes to include persons qualified in government procurement, and provides that only the WTO members who are signatories to the GPA may participate in decisions or actions taken by the DSB with respect to disputes under the GPA.

B. The Korean Airport Case

On June 19, 2000, the DSB adopted the Panel Report[32] rejecting the United States' complaints concerning the procurement practices applied in connection with the IIA Project in Korea. This report was the first by a WTO Panel regarding a dispute brought under the GPA. The Panel concluded that the entities conducting the IIA Project procurements were not covered by Korea's Appendix I to the GPA. The Panel also concluded that the

29. *See* Agreement Establishing World Trade Organization, Apr. 15, 1994, *available at* http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter WTO Agreement]. The GPA is the successor to the GATT Government Procurement Code that had been negotiated in 1979 as part of the Tokyo Round of Multilateral Trade Negotiations.

30. *See* GPA, *supra* note 3. Annex 1 covers central government entities; Annex 2 covers sub-central government entities [hereinafter Annex 2]; and Annex 3 covers quasi-governmental entities.

31. WTO Agreement, *supra* note 29, at Annex 2.

32. WTO Panel Report, *supra* note 27.

Korean procurement practices did not result in the nullification or impairment of a benefit that the United States reasonably expected to accrue under the GPA. The United States elected not to appeal the Panel decision.

1. *Background*

At the time Korea submitted its first offer in the negotiations for accession to the GPA, it had conceived the IIA Project and was then planning to develop a new airport at Seoul. This activity and related procurement were then the responsibility of the Ministry of Transportation (MOT), which was later merged into the Ministry of Construction and Transportation (MOCT). In its GPA accession offer, Korea included the MOT (and later the MOCT) in the list of entities covered by Annex 1 to its Appendix I.

Korea's market for airport construction and development was very important to the United States' consideration of the Korean offer. Accordingly, on May 1, 1991, the United States submitted a series of questions to Korea including a request that Korea "identify all Ministries that will be responsible for the procurement of goods and services related to new airport construction."[33] Korea understood that the United States' question related specifically to the IIA Project, which was the only major airport development project being considered by Korea at that time. Korea responded in July 1991 that:

> The new airport construction is being conducted by the New Airport Development Group under the Ministry of Transportation.
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> . . .
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> 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.[34]

The United States understood this response to mean that the IIA Project would be covered by the GPA because the MOT was already listed on Korea's Annex 1. Over the course of the next two and one-half years of negotiations, the United States inquired no further concerning the status of the airport project procurements.

In fact, even before its July 1991 response to the United States, Korea had initiated steps to transfer responsibility for the IIA Project to a new organization, with the enactment on May 31, 1999 of the Seoul Airport Act, which contemplated the appointment of an operator for the IIA Project. This transfer was accomplished in December 1991, when the Korean Airports Authority (KAA) was designated as the operator of the IIA Project. The KAA was a separate legal entity and remained in control of the IIA Project at the time the GPA was signed in 1994.[35] Korea did not inform the United States of these developments nor was the KAA (or the subsequent entities) ever listed on Korea's Annexes.

2. *U.S. Complaints and the Korean Response*

The GPA became effective for Korea on January 1, 1997. Subsequently, the United States raised concerns with the practices that Korea was using in IIA Project procurements. Specifically, the United States complained:

33. *Id.* ¶ 7.106.

34. *Id.*

35. Authority for the IIA Project was subsequently transferred first to the Korean Airport Construction Authority (KOACA) and then to the Inchon International Airport Corporation (IIAC).

(a) that by imposing bid deadlines for the receipt of tenders that are shorter than the GPA-required forty days, Korea was in violation of Articles 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 license that in turn required that supplier to build or purchase manufacturing facilities in Korea, just so the supplier could be eligible to bid as a prime contractor, Korea violated Articles III:1(a), VIII and VIII(b) of the GPA;
(c) that by imposing domestic partnering requirements that forced foreign firms to partner with, or act as subcontractors to, local Korean firms in order to participate in tendering procedures, Korea violated the qualification requirements in Articles III:1(a), VIII and VIII(b) of the GPA; and
(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 violated Article XX of the GPA.[36]

The United States recognized that KAA (and later KOACA and IIAC) conducted the IIA Project procurements, but argued that these entities were covered by Korea's Annex 1 as branches or subsidiary organizations of MOCT, a listed entity, and that they were controlled by MOCT. Otherwise, according to the United States, a signatory could significantly reduce the value of a concession made under the GPA simply by transferring procurement responsibility to a new unlisted entity. The United States also argued, under Article XXII:2 of the GPA, that even if the KAA were not found to be a covered entity under the GPA, the conduct of IIA Project procurements had substantially nullified or impaired benefits that the United States had reasonably expected to obtain by agreement to Korea's accession to the GPA.

Korea did not directly contest the U.S. claims with regard to the Korean procurement practices, but rather argued that procurements by the KAA (and subsequently the KOACA and the IIAC) were not covered by the GPA. Specifically, Korea argued that Note 1 to Korea's Annex 1 expressly defined the entities covered as the central government entities listed and "their subordinate linear organizations . . . and attached organs as prescribed in the Government Organization Act."[37] According to Korea, neither the KAA nor the subsequent airport authorities were "central government entities" or met the Government Organization Act's definition as "subordinate linear organizations."[38]

3. *Panel Decision*

The key issue before the WTO Panel was whether the Korean entities conducting the IIA Project procurements were covered entities and thus subject to GPA disciplines. In the report, the Panel exhaustively reviewed the parties' factual and legal contentions, including those of the EC, which had participated as a third party. Ultimately, the Panel rejected both contentions made by the United States.

With respect to the United States' claim that KAA (and the later entities) was covered by Korea's Annex 1, the Panel not only rejected the broad control test advocated by the United States, but also Korea's position that only those entities literally identified on the Annex were covered by the GPA. The Panel noted that signatories could expressly exclude

36. WTO Panel Report, *supra* note 27, ¶ 3.1.
37. *Id.* ¶ 4.20.
38. *Id.* ¶¶ 4.14, 4.168.

specific entities, and they could affirmatively place specific entities (and specific procurements) on their Annexes. Where, as here, however, the Annex was silent with respect to a specific entity, the Panel suggested that two questions needed to be answered to determine whether the entity was covered: (a) whether the procuring entity was "legally unified" with the listed entity; or (b) whether the procuring entity was acting on behalf of the listed entity.[39] Because KAA was established by law as an independent legal entity, authored and adopted its own bylaws, had its own management and employees who were not government employees, performed its own contracting, and had funded portions of the IIA Project with its own funds, the Panel concluded that KAA was not "legally unified" with the MOCT.

Nor did the Panel find that KAA was acting on behalf of the MOCT in conducting the IAA Project procurements. Here, the Panel looked to which entity had the legal responsibility for the IIA Project, and concluded that, under the Seoul Airport Act, the KAA was responsible, not the MOCT. Although the MOCT retained certain monitoring and oversight functions, including review and approval of the master plan of the Project, the Panel was "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."[40]

With respect to the United States' non-violation claim, the Panel noted that it differed from traditional non-violation claims, which "have been based on nullification and impairment of benefits reasonably expected to flow from negotiated concessions."[41] The Panel had already concluded that Korea's concessions (as reflected by the entities covered by its Annexes) did not include the IIA Project procurements. According to the Panel, "[i]n this case it was the negotiations which give rise to the reasonable expectations rather than any concessions."[42]

The Panel's extensive review of the negotiating history suggested that the United States' nullification claim was more appropriately addressed under Article 48 of the Vienna Convention on the Law of Treaties of 1969,[43] which provides in relevant part:

> Error
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> 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 the State to exist at the time when the treaty was concluded and formed an essential basis of the 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.[44]

The Panel concluded that the United States met the first condition because it had erroneously assumed that the IIA Project procurements were covered and that the Project "arguably formed an essential basis of" the U.S. consent.[45] The Panel was critical of the lack of clarity in Korea's response to the United States' question on procurement for airport construction. In the Panel's view:

39. *See id.* ¶¶ 7.59, 7.71.
40. *Id.* ¶ 7.68.
41. *Id.* ¶ 7.120.
42. *Id.*
43. Vienna Convention on the Law of Treaties of 1969, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 48, *available at* http://www.un.org/law/ilc/texts/treatfra.htm.
44. WTO Panel Report, *supra* note 27, ¶ 7.123.
45. *Id.* ¶ 7.124.

> [a]n 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. . . . It was objectively clear what the U.S. 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.[46]

The Panel concluded, however, that while the United States had not contributed to the initial error, the facts sufficiently placed the United States on notice of the possibility of an error.[47] Specifically, the Panel cited the United States' failure to inquire further during the two and a half year interval between the initial response and conclusion of the negotiations despite a qualification in the Korean response that suggested the airport procurement information remained preliminary and possibly subject to change.[48] Furthermore, the Panel cited to the fact that in late 1993 the EC and other signatories added a derogation with respect to Korea's airport coverage, which also should have served to cause the United States to inquire further.[49] Accordingly, the Panel concluded that the United States had not demonstrated error that would sustain a claim of a non-violation nullification or impairment of benefits that could reasonably have been expected to accrue from the GPA or the negotiations resulting in Korea's accession.[50]

C. The Massachusetts Burma Case

Also in 2000, the dispute pending before a WTO Panel against a Massachusetts state law terminated.[51] That case began in July 1997, when the EC and Japan complained that the Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar),[52] enacted by the Commonwealth of Massachusetts on June 25, 1996, violated the GPA.[53] The Massachusetts law, inter alia, applied a 10 percent pricing penalty to tenders submitted in state procurements by companies doing business with Burma. The EC and Japan complained that the law violated GPA provisions on the qualification of suppliers, selection procedures, and the award of contracts. Pursuant to requests by both the EC and Japan, the DSB established a Panel to review the matter. After a U.S. District Court issued a permanent injunction against the statute,[54] the Panel, at the request of the EC and Japan, suspended its work on February 10, 1999. Because the EC and Japan did not ask the Panel to resume its work within twelve months of the suspension of the panel, the authority of the Panel lapsed on February 11, 2000.[55]

46. *Id.* ¶ 7.110.
47. *Id.* ¶ 7.125.
48. *Id.* ¶¶ 7.125, 7.111.
49. *Id.* ¶¶ 7.125, 7.116.
50. *Id.* ¶ 8.2.
51. A summary of the WTO dispute over Massachusetts's Burma sanctions is provided in the WTO's report (2000) of the Committee on Government Procurement, GPA/44 (Nov. 2, 2000), *available at* http://docsonline.wto.org; *see also* The President's 1999 Annual Report on the Trade Agreements Program (2000) at 143.
52. Mass. Ann. Laws ch. 7, § 22 G (2000) [hereinafter Burma Act].
53. Massachusetts is one of the thirty-seven U.S. states that agreed to be covered by the GPA.
54. *See* Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998) (holding the Massachusetts Act unconstitutional).
55. *See* Article 12:12 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.

In the interim, the court case challenging the constitutionality of the statute proceeded to the U.S. Supreme Court.[56] On June 19, 2000, the Supreme Court held that the Massachusetts statute was preempted by the federal statute[57] imposing sanctions on Burma and thus invalid under the Supremacy Clause of the Constitution.[58] The test applied by the Court was whether the Massachusetts statute created sufficient obstacles to frustrate the accomplishment of Congress's full objective under the Foreign Operations, Export Financing, and Related Programs Appropriations Act (Federal Act). The Court found the Massachusetts statute undermined at least three provisions of the Federal Act. First, Congress intended the Federal Act to provide the president with flexibility and effective authority over the economic sanctions imposed against Burma.[59] By imposing immediate and perpetual sanctions on Burma, the Massachusetts statute restricted the president's ability to remove sanctions or devise the right mix of sanctions to achieve the nation's goals with respect to Burma.[60]

Second, the Federal Act contained very specific limitations on the range of sanctions that the president could employ (e.g., sanctions only applied to U.S. persons and exempted contracts to sell or purchase goods or services).[61] By extending its sanctions beyond those permitted under the Federal Act, the Massachusetts statute conflicted with the federal scheme. That companies would literally be able to comply with both statutes did not "mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ."[62]

Finally, the Massachusetts statute interfered with the Federal Act's directive that the president proceed diplomatically to develop a "comprehensive, multilateral strategy to bring democracy to . . . Burma."[63] In addition to the obvious interference with the president's ability to speak for the nation with one voice, the Court specifically noted that the EC's and Japan's complaints had embroiled the United States "in an international dispute proceedings under the auspices of the WTO."[64] Furthermore, the Massachusetts statute placed the United States in the awkward diplomatic posture of defending the state law under the GPA while seeking to obtain EC agreement to a multilateral strategy on Burma.[65] Accordingly, the Court held that the Massachusetts statute was unconstitutional.

56. *See Crosby*, 530 U.S. 363. In June 1999, the U.S. Court of Appeals affirmed the District Court and held that the Act was unconstitutional because it (a) interfered with the foreign affairs power of the national government; (b) violated the Foreign Commerce Clause; and (c) was preempted by the federal law imposing sanctions on Burma. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999).

57. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Pub. L. No. 104-204 § 570, 110 Stat. 3009-166 (1996) [hereinafter Federal Act], (enacted as part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996)).

58. *See Crosby*, 530 U.S. 363.

59. *See* Federal Act, *supra* note 57, § 570(a).

60. *See Crosby*, 530 U.S. at 376-77.

61. *See* Federal Act, *supra* note 57, §§ 570(b), 570 (f)(2); *see also* Burma Act, *supra* note 52.

62. *Crosby*, 530 U.S. at 380.

63. Federal Act, *supra* note 57, § 570(c).

64. *Crosby*, 530 U.S. at 383.

65. *Id.* at 383-84.