Exhibit 9

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 in 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

Therefore, it is binding only on those Members of the WTO which opted to join but no others. At this time, there are 23 Members of the GPA.

The predecessor of the GPA was the Tokyo Round Government Procurement Agreement (1979) which provided for the national treatment and non-discrimination principles in government procurement as well as transparency in laws and regulations related to government procurement. Also special treatment for developing countries was provided. The application of the Tokyo Round Agreement was generally limited to procurement by central government agencies as well as local government and entities related to government. Construction, designing and consulting were excluded from the application.

The GPA came into being on 15 December 1993 as part of the WTO regime. The GPA consists of 23 Articles and Appendixes. The GPA succeeded some principles of the Tokyo Round Agreement such as the national treatment and non-discrimination. However, it added several new features, e.g., *inter alia*, (a) the coverage extends to services, (b) it is stated that local governments are subject to disciplines and (c) Parties are obligated to set up challenge procedures to implement the GPA domestically.

National treatment and non-discrimination is one of the most important principles of the GPA. Article III:1 of the GPA provides that each Party shall provide immediately and unconditionally to products, services and supplies of other Parties treatment no less favorable than that accorded to domestic products and services and those of any other Party. Also Article III:2 provides that each Party shall ensure that its entities shall not treat a locally-established supplier less favorably than another locally-established supplier on the basis of degree of foreign affiliation or ownership and that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the GPA.

Article VI:1 of the GPA provides that the technical specification shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. Article VI:4 requires that entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

With regard to tendering procedures, Article VII provides for three kinds of tendering, e.g., (a) open tending in which all interested suppliers may submit a tender, (b) selective tendering in which only invited supplies

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Trepte, *The Agreement on Government Procurement*, *in* 1 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1124-63 (Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer eds., International Law Institute 2005).

may submit a tender and (c) limited tendering where the procurement entity contracts with suppliers individually. Although not stated explicitly, open tendering and selective tendering are the principle and limited tendering an exception.

It is noteworthy that Article XX of the GPA provides for challenge procedures, i.e. the procedures in which Parties are obligated to establish a dispute settlement body within its jurisdiction where an enterprise which deems that its interests have been adversely affected by an infringement on the part of the procurement agency of provision of the GPA can bring a complaint and seek remedies.

II. DOMESTIC IMPLEMENTATION OF THE GOVERNMENT PROCUREMENT AGREEMENT

Article XXIV of the GPA states that (a) each government which is a Party to the Agreement shall ensure the conformity of its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities subject to the control of the GPA with the provisions of the GPA and (b) each Party shall inform the Committee on the Government Procurement of any changes in its laws and regulations relevant to the GPA in the administration of such laws and regulations. In accordance with this provision, Parties to the GPA reported to the Committee how provisions of the Agreement are implemented. Domestic implementation of the three jurisdictions is explained as examples, i.e. the European Communities, the United States and Japan.

A. The European Communities[2]

The basic provisions in the EC Treaty on government procurement are Articles 6-36 which provide for non-discrimination on the grounds of nationality and the ban on quantitative restrictions on imports and all measures having equivalent effects. Also Article 52 & *seq.* provide the right to establishment in the territory of another Member State and Article 59 & *seq.* the freedom to provide services. There is a group of Directives which lay down rules of government procurement.

The GPA was incorporated into EC law by Council Decisions N. 94/800/EC of 22 December 1994 which require that EC Member States embody its content into their national laws and regulations. Therefore, with respect to the procurement above the threshold value, EC law and domestic

[2] Committee on Government Procurement, *Notification of National Implementing Legislation*, Communication from the European Community, GPA/20 (Jan. 28, 1998); Committee on Government Procurement, *Review of National Implementing Legislation*, European Community, GPA/32 (Jan. 12, 2000).

laws of the Member States reflect principles of the GPA. However, for contracts below the thresholds, national rules are not bound by EC Directives. Although each state has its own public procurement rules, these must comply with the general principles of the EC Treaty providing for non-discrimination in respect of goods and services.

The Directives issued for implementing the Agreement fall into two categories, e.g., (a) those governing the traditional areas of public procurement (public directives or traditional sectors directives) and (b) those dealing with utilities such as water, energy, transport and telecommunications. Each group is completed by a Remedies directive. The principles of those directives include a ban on discrimination, open access to all EC suppliers, transparency of award procedures, a precise indication of which of the permissible award procedures has been chosen, compliance with technical requirements and transparency of the procedures for selecting contractors and awarding contracts. The EC Report to the Committee explains the details of how each Member State has implemented those directives.

B. The United States[3]

In the United States, the major laws and regulations implementing the GPA are (a) The Uruguay Round Agreements Act, (b) The Trade Agreements Act of 1979, (c) Federal Acquisition Regulation, (d) Armed services Procurement Act, (e) Federal Property and Administrative Services Act and (f) The Office of Federal Procurement Policy Act.

The Uruguay Round Agreements Act[4] approves WTO agreements which are the result of the Uruguay Round and provides for implementation and entry into force of those agreements. This Act amends the Trade Agreements Act of 1979 and authorizes the President of the United States to implement the content of the Agreement. The Federal Acquisition Regulation (the FAR) establishes policies and procedures for acquisition by all United States agencies

In accordance with the Uruguay Round Agreements Act, the GPA took effect in the United States on 1 January 1996. All federal government entities in a narrow sense of the words and those listed in Annex 3 are subject to the Trade Agreements Act of 1979 and therefore to the GPA. Such entities include the St. Lawrence Seaway Development Corporation,

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[3] Committee on Government Procurement, *Notification of National Implementing Legislation*, Communication from the United States, GPA/23 (July 15, 1998); Committee on Government Procurement, *Review of National Implementing Legislation*, United States, GPA/50 (June 15, 2001).

[4] For details of this Act, *see* Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, 103d Congress, 2d Session, House Document 103-316, Vols. I & II (1994).

the Tennessee Valley Authority and the Bonneville Power Administration. Although federal laws and regulations do not govern procurement by state governments, state governments must comply with certain federal requirements when these receive grant from the federal government and carry out projects by such grants.

The Trade Agreements Act of 1979, as amended by the Uruguay Round Agreements Act, authorizes the President of the United States to waive the application of any discriminatory measures and the President ordered federal agencies that are covered by the GPA to comply with obligations to the GPA. Although the Federal Buy American Act of 1933[5] requires federal agencies to purchase U.S. products and make contracts with construction agencies which use U.S. products in principle, the restrictions of the Buy American Act do not apply to procurements that are subject to the agreement. To that extent, therefore, the Federal Buy American Act has been superceded by the GPA. This waiver does not cover Buy American and Buy State laws and regulations of states.

C. Japan[6]

In Japan, the basic law governing government procurement is the Account Law.[7] Under this law, a number of cabinet orders are issued which include, *inter alia*, the Cabinet Order Concerning the Budget, Auditing and Accounting, the Special Order Concerning the Budget, Auditing and Accounting and the Regulations on the Management of Contract Administration.

With respect to local government, the Local Autonomy Law,[8] the ordinance for Enforcement of the Local Autonomy Law and the Cabinet Order Stipulating Special Procedures for Government are the major laws and regulations. There is no provision in the above laws and regulations which incorporate "Buy Japan Policy" and discriminatory measures and, therefore, these laws and regulations are generally in conformity with provisions of the GPA.

In Japan, one of the big issues in government procurement has been that of bid-rigging. In many cases, bid-rigging practices are based on a

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[5] Buy American Act of 1933, 41 U.S.C. § 10(a)-10(d) (1996).

[6] Committee on Government Procurement, *Notification of National Legislation of Japan*, Communication from Japan, GPA/37 (June 20, 2000); Committee on Government Procurement, *Notification of National Legislation of Japan*, Communication from Japan, GPA/67 (Apr. 15, 2002); Jean Heilman Grier, *U.S. – Japan Government Procurement Agreements*, 14 WIS. INT'L L.J. 1, 1-68 (1995). The last one discusses some features of Japanese procurement practices. Although this article appeared before the inauguration of the WTO, some features described there still remain true.

[7] Law No. 35 (Mar. 31, 1947).

[8] Law No. 67 (1947).

close relationship between the procurement agencies and bidders. In selective bid, the procurement agencies can exercise powerful control over potential bidders and this situation may create "in groups" out of which bidders are selected. These practices affect adversely openness of the procurement market in Japan. However, this is more a problem of competition policy and law than the GPA.[9]

III. MAJOR DISPUTE CASES AT THE GATT/WTO DISPUTE SETTLEMENT SYSTEM

Government procurement is a large market in terms of volume and value of transactions and there are many disputes with regard to openness of procurement market. However, there is a relatively small number of dispute cases that were raised at the WTO dispute settlement procedures and dispute settlement bodies established by the Parties. The smallness of the number of dispute cases that are reported may be due to the fact that the GPA is one of the Plurilateral Agreements in which whether to join it or not is optional and the number of Parties is relatively small. It may be that dispute cases handled by national courts and other dispute settlement bodies are not widely publicized and not known.

In any event, there are two kinds of dispute cases with regard to the Agreement, e.g., those raised before the WTO Dispute Settlement Body and those handled by challenge procedures in national jurisdictions of Parties established in accordance with Article XX of the Agreement.

So far there are two adopted GATT/WTO Panel reports which interpreted and applied the government procurement agreement. One is *the Trohdheim Case* in which the GATT Panel interpreted and applied provisions of the Tokyo Round Government Procurement Agreement and another one is *the Korean Inchon Airport Case* in which the WTO Panel interpreted and applied provisions of the GPA.

A. The Trondheim Case[10]

This case involved the award of a contract related to electronic toll collection equipment for a toll system around the city of Trondheim to a Norwegian company, Micro Design, by the Norwegian Public Roads Administration. The award was made by way of single tendering. The

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[9] On this issue, *see generally* H. IYORI & A. UESUGI, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN 86-92 (NY: Federal Legal Publications 1994). The information contained in this volume is somewhat outdated. However, its description of the nature of problems is still valid today.

[10] GATT Panel Report, *Norway – Procurement of Toll Collection Equipment for the City of Trondheim*, GPR.DS2/R (May 13, 1992) [hereinafter *The Trondheim Report*]. For a comment on this case, *see generally* Petros Mavroidis, *Government Procurement Agreement – The Trondheim Case: the Remedies Issue*, 48 SWISS REV. INT'L ECON. REL. 77 (1933).

United States took Norway to the GATT dispute settlement procedures and argued that Norway did not meet the requirement of Article V:15(e) of the Tokyo Round Agreement.[11] Article V:15 of the Tokyo Round Agreement provided that a procurement entity could use single tendering instead of open or selective tendering if there were certain conditions and, as one of such conditions, Article V:15(e) stated that a procurement entity could use single tendering "when an entity purchases prototypes or a first product which are developed at its request in the course of, and for, a particular contract for research, experiment, study or original development." The United States argued also that, in conducting the procurement, Norway had failed to respect its obligations under Article II:1 to accord to the products and suppliers of other Parties treatment no less favorable than that accorded to domestic products and suppliers.

The Panel noted, as a general proposition, that Article V:15 is an exceptions provision and needed to be interpreted narrowly and it was incumbent on the respondent, Norway, to prove that its invocation was justified.[12] The Panel stated that the question before it was whether the Norwegian Public Roads Administration had procured prototypes which had been developed at its request in the course of, and for, a particular contract for research or original development. According to the Panel, the crucial question was what the procuring entity was procuring (i.e. the output that it was procuring) and not the nature of the work that would have to be undertaken by the supplier to supply the goods and/or services being procured. The Panel held that the phrase "contract for research . . . or original development" had to be understood as referring to a contract for the purpose of the procurement by the procuring entity of the results of research and/or original development, i.e. knowledge.[13]

The Panel continued to state that, in order to be covered by Article V: 15(e), Norway would have had to have demonstrated that (1) the Norwegian Public Roads Administration had had as its principal purpose in concluding the contract the procurement of the results of research and/or original development from Micro Design and (2) that the principal purpose of the equipment procured from Micro Design under the contract had been to rest and provide a means of further developing the knowledge generated through that research and/or original development. In the view of the Panel, Norway did not fulfill the burden of proof on this issue. All of the evidence provided by Norway only indicated that the principal purpose of the contract of the Norwegian Public Roads Administration with Micro Design

[11] In this Report, the Panel refers to Article V:16(e). However, Article V:16(e) seems to be irrelevant to the issue here. It must have been Article V:15(e). Therefore, in this chapter, Article V:15(e) is referred to.

[12] *The Trondheim Report*, *supra* note 10, ¶ 4.5.

[13] *Id.*¶ 4.8.

had been the procurement of operational toll collection equipment for a functioning toll rig system.

The Panel further noted that Norway had not claimed that the Public Roads Administration had plans to procure further toll ring systems on the basis of the model developed at Trondheim and found that Norway had not shown that the principal purpose of the Norwegian Public Roads Administration had been the procurement of the results of research and/or development rather than operational toll collection equipment as part of a functioning toll rig system.[14]

For the above reasons, the Panel found that the single tendering of the contract by the Norwegian Public Roads Administration did not meet the requirements of Article V:16(e).

Then the Panel addressed the issue of recommendation that was raised by the United States. The United States argued that the Panel make a recommendation to the effect that Norway bring its procurement into conformity with the Tokyo Round Agreement and also that Norway negotiate with the United States a mutually satisfactory solution taking into account the lost opportunities for U.S. companies. However, the Panel declined from making such a recommendation for the reason that it was not the past practice of Panels to recommend anything more than a request of conformity with the agreement in question and that and there was no provision in the Tokyo Round Agreement to clarify that it was within the power of Panels.

B. The Korean Inchon Airport Case[15]

This is a case concerning the construction of Inchon International Airport in South Korea. Originally the Ministry of Transportation and the New Airport Development Group which was under the jurisdiction of the Ministry were responsible for the construction. By the Seoul Airport Act, the authority to construct the airport was given to the Korean Airport Authority and subsequently to the Inchon International Airport Corporation. The United States petitioned to the WTO Dispute Settlement Body on the ground that all of those entities were covered by the Agreement and it was wrong for the Korean government to impose requirements on bid deadlines, qualification and domestic partnership. It also alleged that Korea failed to establish a proper dispute settlement body in accordance with the Agreement.

The Panel focused on the issue of whether the Korean Airport Authority was included in the entities in Korea's GPA Appendix. Korea

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[14] *Id.* ¶¶ 4.10-4.11.

[15] Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R (June 19, 2000) [hereinafter *The Korean Report*].

argued that it was not covered by the GPA. The Panel stated first that the Schedules in the GPA constituted part of the Agreement and were subject to the rules of interpretation as incorporated in Articles 31 and 32 of the Vienna Convention.

The Panel noted that Note 1 to Annex 1 of the Korean concession stated that the central government entities included their subordinate linear organizations, special local administrative organs and attached organs as prescribed in the Government Organization Act of the Republic of Korea. After examining the wording of Note 1, the Panel concluded that the Korean Airport Authority could not be included in the concession of Korea and that it was not legally unified with the government and was established by law as an independent entity. It also enacted its own by-laws, had its own management and employees who were not government employees. The Panel cited pieces of evidence such as above and concluded that the Inchon International Airport Project was not covered by the Agreement.[16]

The United States also raised a non-violation complaint alleging that its interest was nullified and impaired. The Panel pointed out that this case was different from traditional non-violation cases in that Korea had made no concession as far as the Korean Airport Authority was concerned and the United States could not have suffered nullification and impairment of a concession that had been given. However, the Panel pointed out that a non-violation was related to *pacta sunt servanda* and this applied to negotiation for concession as well as concession that had been already given. The Panel also stated that a non-violation could be related to an infringement of reasonable expectation with regard to trade negotiations. On this premise, the Panel examined whether there was a nullification and impairment suffered by the United States.[17] The Panel held that the Seoul Airport Act which authorized the Korean Airport Authority to prosecute the project was enacted in December 1991 and the United States bore the burden of proving that it had not known the legislation or the meaning of it at the time of trade negotiation. Korea claimed that the United States knew this legislation at the time of negotiation and other WTO Members took derogations on airport matters in their Schedules because of the Korea's legislation. For this reason, the Panel held that the United States did not clear the burden of proof and rejected the claim of the United States for nullification and impairment.[18]

In disposing of the non-violation issue in this case, the Panel stated that nullification and impairment could refer not only to that of benefit that had been conferred by a concession but also to expectation in negotiation of trade agreement. This aspect has not been given much attention in earlier

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[16] *Id.* ¶ 7.36.
[17] *Id.* ¶ 7.99.
[18] *Id.* ¶ 7.116.

panel and Appellate Body reports.

IV. DISPUTE CASES AT THE NATIONAL JURISDICTION

A. United States

In the United States, there are federal buy American laws and state laws which provide for buy American and buy state. As mentioned earlier, the Federal Buy American Act of 1930 has been basically replaced by the GPA and whatever remains in the Act are in conformity with the GPA. Problems lie in buy national laws enforced by States in the Union. States Buy American laws are quite complex in the sense that such laws stipulate that the state governments purchase U.S. made products and sometime that the states governments purchase products made in the state concerned. Also such Buy American and Buy State laws take the form of state statutes and sometime regulations of counties or townships. Because of this complexity, it is hard to grasp the total picture of Buy American laws exercised by various states.

However, some jurisprudential rules have been formulated through court decisions in the United States which deal with public procurement. On the one hand, there are a set of decisions holding that Buy American or Buy State laws were contrary to the Constitution of the United States because, under the Constitution of the United States, the regulation of foreign commerce belongs exclusively to the federal government and state laws and regulations usurp this exclusive power of the federal government by excluding purchase of foreign made products from the procurement of the state government concerned.[19]

On the other hand, there are a handful of court decisions which enunciate "the market participant doctrine" according to which state governments act as mere purchasing entities just like private enterprises when procuring products which they need. It argues that state procurement entities are entitled to select suppliers and sources of products which they desire to purchase. In this doctrine, there is no infringement of the constitutional limitation imposed on states that they should not encroach upon the realm of the federal government in regulating the commerce with foreign nations even if state governments exclude foreign products from their public purchase.[20]

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[19] Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Bethlehem Steel Corp. v. Bd. of Comm'n, 276 Cal. App. 2d 221, 80 Cal. Rptr. 809 (1969).

[20] Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stokes, *in* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXTS ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMICS 187-89 (West Group 1986).

Another issue is the effect of GATT/WTO disciplines on the conducts of state governments in public procurement. Although the Marrakesh Agreement is not a treaty in the sense of the United States Constitution, there are cases in which courts pronounced the state buy national laws were superseded by GATT.[21]

As mentioned above, legal issues regarding the status of state buy national laws in light of the United States Constitution and in relation to GATT/WTO are not entirely settled.

B. The State of Massachusetts Case

This case grew out of a legislation in the State of Massachusetts in the United States entitled as "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myammar)."[22] This law prohibited state entities from purchasing goods and services from any persons who are doing business in or with Burma. The purpose of this law was to impose economic sanctions on Burma for infringement of human rights and political oppressions. In 1998, the EC and Japan brought a petition to the WTO Dispute Settlement Body against the United States on the ground that this law infringed certain provisions of the GPA and a Panel was established.[23] However, the National Foreign Trade Council, a trade association in the United States, brought a suit against the State of Massachusetts in U.S. courts. The case was argued and decided by U.S. District Court[24] and Court of Appeals[25] and then petitioned to the Supreme Court of the United States.[26] The EC and Japan took into consideration the fact that a domestic proceeding was pending in the United States with regard to this legislation and suspended the Panel proceeding.[27] The Panel was disbanded when 12 month period passed after the suspension.

The Supreme Court of the United States held that the law in question was contrary to the Constitution of the United States. A brief summary of this decision follows.

The Massachusetts Law in question here was passed by the Congress of the State of Massachusetts in 1996 and subsequently the U.S. Congress

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[21] Baldwin-Lima Hamilton Corp. v. Superior Court, 25 Cal. Rptr. 799 (1962); Territory of Hawaii v. Ho, 41 Hawaii 565 (1957). *See*, however, K.S.B. Technical Sales Corp. v. North Jersey Water Supply Comm'n, 75 N.J. 272, 381 A. 2d 774 (1977).

[22] 1996 Mass. Acts 239, ch. 130 (codified at Mass. Gen. Law, ¶ 7:22 GM, 40 1/2 (1997).

[23] WTO Doc., *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*, WT/DS88/4 (Jan. 11, 1999); WT/DS95/4 (Jan. 11, 1999).

[24] Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d (D. Mass. 1998).

[25] Nat'l Trade Council v. Natsios, 181 F. 3d 38 (C.A. 1 1999).

[26] Crosby v. Nat'l Foreign Trade Council, 520 U.S. 372 (2000).

[27] WTO Doc., *United States – Measures Affecting Government Procurement–Communication from the Chairman of the Panel*, WT/DS88/5 (Feb. 12, 1999); WT/DS95/5 (Feb. 12, 1999).

imposed sanctions on Burma which were limited to certain areas. The Foreign Trade Council, a private association, brought a suit in U.S. courts and sought for an injunction restraining state officials from enforcing this law for the reason of unconstitutionality. The Council argued that the law infringed the power to conduct foreign affairs conferred on the Federal Government. Both the District Court and the Court of Appeals upheld the injunction. The State of Massachusetts appealed to the Supreme Court of the United States.

The Supreme Court pointed out that the U.S. Congress authorized the President of the United States to impose sanctions and withdraw them when situation improves, i.e. the Congress conferred on the President discretion and flexibility in imposing and withdrawing such sanctions. However, the Massachusetts Law in question imposed immediate and perpetual sanctions and there was no termination clause. In this way, the State Law erected an obstacle to smooth operation of this Presidential power. State law must yield to a federal power if the U.S. Congress intends to occupy the area.

The State Law prohibited some contracts even when the federal laws permitted them and, although federal prohibitions applied only to U.S. citizens, the State Law applied to every person doing business in or with Burma. The Supreme Court stated that, in this respect, there was a conflict between the State Law and federal regulations. Finally the Supreme Court held that the State Law infringed the authority of the President of the United States to conduct diplomacy with other nations and was unconstitutional for this reason.

This case is a domestic case in the United States. However, the subject matter dealt with in this case was also that of the WTO Agreement. It is significant that the Supreme Court mentioned the fact that some nations brought claim against the United States in the World Trade Organization and relied on this fact to claim that the matter belonged to the diplomatic power of the President.

C. Japan

As stated earlier, Article XX of the Agreement requires that Parties to establish challenge procedures with which foreign enterprises can lodge complaints against procurement entities on account of violation of the Agreement. Parties established such procedures in their domestic jurisdictions. In the following passages, a Japanese case will be discussed as an example of such dispute settlement at challenge procedures.

The Japanese Government established a dispute settlement body called The Office for Government Procurement Challenge System ("CHANS") within the Secretariat Office of the Cabinet. CHANS is authorized to receive complaints from foreign enterprises with regard to implementation

of the Japanese procurement entities under the GPA and issue recommendation to the entities in question. So far there have been three cases before CHANS and one case before the dispute settlement body established by the Osaka Fu.[28]

D. The Japan Railway ("JR") Case

One of these cases brought to CHANS is the Japan Railway ("JR") Case.[29] JR was originally part of the government running railways throughout the country and later privatized to a joint-stock company and is designated as one of the entities covered by the Agreement. The issue involved was the procurement by JR of an electronic system used to operate automatic ticket gates at train stations. JR held an open bid and Sony, a Japanese company, won the contract. Motorola, a U.S. company which was unsuccessful in the bid, brought a claim against JR before CHANS. The complaint was based on 4 grounds, i.e. (a) non-adoption of international standards, (b) the use of specifications which cause unnecessary obstacles to international trade, (c) an inappropriate use of advice, (d) an unreasonable period for offering a trial product and the final product and (e) an improper opening of bids. A rule established by CHANS states that a complaint should be made within 10 days after specifications were handed down. In this case, however, Motorola submitted a complaint after this period expired. CHANS, therefore, held that the complaint by Motorola must be rejected for the reason that it was submitted untimely. However, CHANS went on to express its view of the above claims. Only items (a) and (b) will be discussed below.

At the time of dispute, a draft of international standard concerning the electronic devices involved in this case was examined by ISO. This standard is called ISO/IEC144431 TypeB ("TypeB") and, on this, "Final Draft International Standard" ("FDIS") was about to be adopted. Motorola argued that the GPA requires that domestic standards be based on international standards and the adoption of international standard was imminent. It argued that, when domestic standards are adopted, they should be based on FDIS.

CHANS held that Article 6:2 of the Agreement requires that domestic standards be based on international standards "when they exist" and that it was clear that FDIS had not been adopted when the bid was made. On this ground, CHANS rejected the claim of Motorola.

Motorola claimed that TypeB was a *de facto* standard and should have been based on by JR in its procurement. However, CHANS held that TypeB

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[28] These cases are briefly summarized in Attachment 6 of the document cited in *supra* note 6.

[29] *Report of CHANS* (Oct. 3, 2000). This Report in Japanese is available at http://www/cao.go.jp/access/japan/chans_main_j.html-12k.

did not reach a level of *de facto* standard.

JR announced that it would use IC card system that it had developed jointly with Sony, the successful bidder. Motorola argued that it amounted to an inappropriate use of advice rendered by the successful bidder. On this issue, CHANS held that the mere fact that JR had jointly developed IC card system with Sony did not mean that JR had inappropriately relied on advice rendered by Sony in the procurement of the system in question in this case.

There is difference between the GPA and the TBT Agreement in the treatment of international standards that are not adopted yet but their adoption is imminent. Article 2.4 of the TBT Agreement contains the wording that an international standard whose adoption is imminent should be relied on by Members when adopting domestic standards. However, the word "imminent" is lacking in the Agreement. CHANS, therefore, took a literal interpretation and decided that the Agreement did not cover a draft of international agreement although its adoption may be imminent. This seems clear from textual analysis of both Agreements. However, it is significant that this interpretation was recognized by CHANS.

On the other hand, the remark of CHANS on *de facto* standard is misplaced. By glancing through the tests of the Agreement, it is clear that *de facto* standards are not covered by the Agreement. CHANS stated that Type B was not a *de facto* standard. This may have been simply a response to the claim of Motorola that Type B was a *de facto* standard and should have been relied upon. However, this statement is misleading because, by *a contrario* interpretation, a *de facto* standard could be regarded as being covered by the Agreement if it is established as *de facto* standard. This was probably not an intention of CHANS. It seems, however, a wise policy for a dispute settlement body to refrain from stating something that may be misleading.

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