

# KOREA – PROCUREMENT<sup>1</sup>

(DS163)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>GPA Arts I and XXII:2</i>	Establishment of Panel	<i>16 June 1999</i>
			Circulation of Panel Report	<i>1 May 2000</i>
Respondent	<i>Korea</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>19 June 2000</i>

## 1. PROJECT AND ENTITY AT ISSUE

- Project and entity at issue: Construction of the Incheon International Airport ("IIA") in Korea and Korea Airport Authority ("KAA") and New Airport Development Group ("NADG"), which were allegedly responsible for the construction of IIA.

## 2. SUMMARY OF KEY PANEL FINDINGS

- GPA Art. I (Scope of Korea's GPA Appendix I commitment): Having found, based on the terms of Korea's concessions in its GPA Schedule and the supplementary negotiating history of the Schedule, that the entities allegedly responsible for IIA procurement – i.e. NADG or KAA – were not entities covered by Korea's GPA schedule, the Panel concluded that the IIA project was not covered by Korea's commitments under the GPA.
- GPA Art. XXII:2 (Non-violation nullification or impairment): Regarding the US non-violation claim under GPA Art. XXII:2, which was based on the frustration of reasonably expected benefits from alleged promises made during "negotiations" rather than nullification or impairment of actual concessions made, the Panel considered that the concept of non-violation could be extended to contexts other than the traditional approach. As such, the Panel decided to examine the US claim "within the framework of principles of international law (Art. 48 of the VCLT) which are generally applicable not only to performance of treaties but also to treaty negotiations" (error in treaty formation).

The Panel found that (i) under the traditional concept of non-violation, the US failed to prove that it had reasonable expectations that a benefit had accrued, as Korea had made no concessions on the project at issue; and (ii) under the concept "error in treaty formation", the alleged error in treaty formation in this case could not be considered "excusable" under Art. 48(1) of the VCLT<sup>2</sup>, as the United States was put on notice of the existence of the entity – i.e. KAA – and the relevant legislation within the meaning of Art. 48(2) of the VCLT.

<sup>1</sup> *Korea – Measures Affecting Government Procurement*

<sup>2</sup> Art. 48 of the Vienna Convention on the Law of Treaties provides:

"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 States on notice of a possible error."