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1 ARTICLE I

1.1 Text of Article I

Article I

Scope and Coverage

1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.¹

(*footnote original*)¹ For each Party, Appendix I is divided into five Annexes:

- Annex 1 contains central government entities.
- Annex 2 contains sub-central government entities.
- Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.
- Annex 4 specifies services, whether listed positively or negatively, covered by this Agreement.
- Annex 5 specifies covered construction services.

Relevant thresholds are specified in each Party's Annexes.

2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

3. 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. This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.

1.2 General

1. The Panel in *Korea – Procurement* observed that "[t]he 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".¹ The Panel stated that:

"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."²

¹ Panel Report, *Korea – Procurement*, para. 2.7.

² Panel Report, *Korea – Procurement*, para. 7.9.

1.3 Article I:1

1.3.1 "procurement"

2. In *US – Large Civil Aircraft (2nd Complaint)*, the Panel found that transactions properly characterized as purchases of services are excluded from the scope of Article 1 of the SCM Agreement, and then proceeded to address the question of whether the transactions at issue were properly characterized as "purchases of services" (this finding was declared moot and of no legal effect on appeal). In that context, the Panel made reference to prior GATT panel reports examining the question of whether a transaction was properly characterized as a government "procurement". The Panel in *US – Large Civil Aircraft (2nd Complaint)* stated:

"In the Panel's view, whether or not NASA's R&D contracts with Boeing are properly characterized as a 'purchase of services' depends on *the nature of the work* that Boeing was required to perform under the contracts, and more specifically, *whether the R&D that Boeing was required to conduct was principally for its own benefit and use, or whether it was principally for the benefit and use of the U.S. Government (or unrelated third parties)*. This for several reasons. First, the Panel considers that NASA's R&D contracts with Boeing should be characterized based on their *terms*, and the core term of these contracts is the work that Boeing was required to perform. Second, it is inherent in the ordinary meaning of the concept of a 'service' that the work performed be for the benefit and use of the entity funding the R&D (or unrelated third parties). Third, characterizing the transactions on the basis of whether the R&D that Boeing was required to conduct was principally for its own benefit and use, or whether it was principally for the benefit and use of the U.S. Government (or unrelated third parties), is broadly consistent with the arguments of the parties and third parties in this case. Fourth, focusing on whether the work performed was principally for the benefit and use of the government (or unrelated third parties) is consistent with prior GATT panel reports examining the question of whether a transaction was properly characterized as a government procurement."³

3. Regarding the prior GATT panel reports examining the question of whether a transaction was properly characterized as a government procurement, the Panel explained that:

"In *US – Sonar Mapping*, the panel stated that '{w}hile not intending to offer a definition of government procurement within the meaning of Article I:1(a) {of the Tokyo Round Agreement on Government Procurement}, the Panel felt that in considering the facts of any particular case the following characteristics, none of which alone could be decisive, provide guidance as to whether a transaction should be regarded as government procurement within the meaning of Article I:1(a): payment by government, *governmental use of or benefit from the product*, government possession and government control over the obtaining of the product'. The panel concluded that in that case, the government agency would '*enjoy the benefits* of the system's purchase - Antarctic research and the preparation of seabed maps - which were clearly *for government purposes*, and the Government can thus be regarded as the *ultimate beneficiary* of the system'. (GATT Panel Report, *US – Sonar Mapping*, paras. 4.7 and 4.10 (emphasis added). See also, GATT Panel Report, *Norway – Trondheim*, paras. 4.8-4.13.)."⁴

1.3.2 "entities covered by this Agreement, as specified in Appendix I"

4. The Panel in *Korea – Procurement* examined whether several entities concerned at successive stages with the procurement of airport construction in Korea, specifically the Korean Airport Construction Authority (KOACA), Korea Airports Authority (KAA) and the Incheon International Airport Corporation (IIAC) were within the scope of Korea's list of "central government entities" as specified in Annex 1 of Korea's obligations in Appendix I of the Agreement on Government Procurement. The United States contended that the practices of these entities were inconsistent with Korea's obligations under the Agreement on Government Procurement. In this regard, the Panel noted:

³ Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 7.978.

⁴ Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, fn 2471.

"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 of Sugar* ('United States – Sugar') wherein the panel observed that Headnotes could be used to qualify the tariff concessions themselves."⁵

5. Accordingly, the Panel noted that:

"[T]he 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 Incheon International Airport (IIA) procurement is covered. This will include a review of all relevant Annexes and Notes."⁶

6. In light of the fact that the Ministry of Construction and Transportation ("MOCT") was included in the list of central government entities in Annex 1 to Korea's Schedule, the Panel went on to consider 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":

"[T]here 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."⁷

7. The Panel eventually rejected the United States' argument that KAA could be considered a part of MOCT because it was controlled, at least for the purposes of the IIA project, by MOCT. The Panel noted in this respect that:

"There is no use of the term 'direct control' or even 'control' in the sense that the United States wishes to use it. 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.

[W]e 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 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."⁸

8. The Panel in *Korea – Procurement* then put forward two criteria for answering the question before it:

"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

⁵ Panel Report, *Korea – Procurement*, para. 7.30.

⁶ Panel Report, *Korea – Procurement*, para. 7.12.

⁷ Panel Report, *Korea – Procurement*, para. 7.49.

⁸ Panel Report, *Korea – Procurement*, paras. 7.57-7.58.

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 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."⁹

9. With respect to the first question, the Panel, persuaded on balance by the indicia of independence of KAA and its successors, found that KAA was not legally unified with or a part of MOCT, basing itself on the following criteria:

"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 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 project with its own monies."¹⁰

10. With regard to the question whether or not KAA and its successors were acting on behalf of MOCT, at least with respect to the IIA project (i.e., whether the IIA project was really the legal responsibility of MOCT), the Panel, after having reviewed the laws governing construction of the IIA as well as other factual evidence regarding involvement of MOCT in the IIA project, found that:

"[T]here 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."¹¹

11. The Panel ultimately concluded that:

"[T]he 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."¹²

1.4 Article I:3

12. In *Korea – Procurement*, the Panel found that Article I:3 was not applicable to the situation before it. The Panel stated that:

"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

⁹ Panel Report, *Korea – Procurement*, para. 7.59.

¹⁰ Panel Report, *Korea – Procurement*, para. 7.60.

¹¹ Panel Report, *Korea – Procurement*, para. 7.70.

¹² Panel Report, *Korea – Procurement*, para. 7.83.

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."¹³

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¹³ Panel Report, *Korea – Procurement*, fn 724.