

世界貿易組織

『韓國之政府採購措施』乙案之評析

**Evaluating the WTO Panel Report on *KOREA*
*Measures Affecting Government Procurement***

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摘要

本件爭端肇因於韓國 Incheon 國際機場建設計劃之採購。美韓之爭在於負責該項計劃之採購單位以及採購之辦理，是否違反韓國在政府採購協定下應負之義務，以及韓國之措施是否造成美國在政府採購協定下應得之利益遭受剝奪或減損。首先，問題在於如何解釋韓國附件一之內容。小組分析協定附錄一有關韓國所列舉之機構，根據用詞之一般意義，以判定負責 Incheon 國際機場計劃之採購單位，是否涵括於其中。同時小組也參考韓國加入政府採購協定之談判史。關於美國在本案中所提出之違反協定行為之控訴，小組認為根據政府採購協定第 I 條之規定，Incheon 國際機場計劃不屬於政府採購協定所適用之機構所辦理之採購。此外，致使未名列於附件當中之機構應納入協定適用範圍之關係並不存在。其次，小組認為由於國際法之原則一般適用於條約之適用與條約之談判，故此應在國際法原則之架構下，審理美國提出之非違反協定行為之控訴。關於美國在本案中所提出之非違反協定行為之控訴，小組之結論為美國未證明韓國之措施根據政府採購協定第 XXII:2 條之規定，造成美國在政府採購協定之下，或因韓國加入政府採購協定之談判而產生合理期待之利益，遭受剝奪或減損。

關鍵字：政府採購協定，爭端解決機構，Incheon 國際機場計劃，維也納公約，控制標準，非違反協定行為之控訴，習慣國際法原則，信守約定原則，舉證責任，條約談判之錯誤。

SUMMARY

This dispute relates to the procurement of airport construction for Incheon International Airport (IIA) project in Korea. The United States raised the issue of whether the procurement practices of the entities that have had procurement responsibility for the project are or have been inconsistent with Korea's obligations under the Agreement on Government Procurement (GPA) and whether they nullify or impair benefits accruing to the United States under that Agreement. First, the question arose as to how to interpret Korea's Annex 1. The Panel examined Korea's Schedule and determined whether, within the ordinary meaning of the terms therein, the entities responsible for the IIA procurement were covered. The Panel also made reference to the negotiating history of Korea's GPA accession. With respect to allegation of violation claims that the United States has made in the context of this case, the Panel concluded that the IIA construction project was not covered as the entities engaged in procurement for the project were not covered entities within the meaning of Article I of the GPA. Furthermore, the kind of affiliation that the Panel deemed necessary to render an unlisted entity subject to the GPA was not present in this case. Second, the Panel reviewed the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treaties but also to treaty negotiation. With respect to allegation of non-violation claims, the Panel concluded that the United States has not demonstrated that benefits reasonably expected to accrue under the GPA, or in the negotiations resulting in Korea's accession to the GPA, were nullified or impaired by measures taken by Korea within the meaning of Article XXII:2 of the GPA.

Keywords: Agreement on Government Procurement (GPA), Dispute Settlement Body (DSB), Incheon International Airport, Vienna Convention, Control Test, Non-Violation Claims, Principles of Customary International Law, Principle of *Pacta Sunt Servanda*, Burden of Proof, Error in Treaty Negotiation.