1. ECONOMIC ASPECTS AND SIGNIFICANCE

Government or public procurement is the purchase, lease or rental of products and services by government entities. The size of the government procurement market and its share of the economy differ from country-to-country, but estimates generally place it between 10 percent and 15 percent of GDP. Therefore, procurement laws that discriminate against foreign suppliers distort the international flow of products and services, which worsens as the economic importance of services and soft industries increases.

National security is one reason offered for policies that favor domestic products in government procurement. However, these policies are also commonly enacted to promote industrial policy, i.e., to protect specific industries. Discrimination between domestic and foreign suppliers in government procurement will, in the short run, help countries achieve their industrial policy objectives, but ultimately create an arbitrary barrier to fostering a fully competitive environment. For entities procuring goods, restrictive policies will prevent them from buying the best possible goods and services at the lowest possible price and will, therefore, prevent the government budget from achieving maximum utility. For suppliers, procurement restrictions mean that domestic industries are given excessive protection, creating disincentives for the protected industries to improve the ways in which they conduct business or develop new products. Such policies, therefore, weaken suppliers.

Given that the size of the government procurement market is quite large, when procurement protection is linked to policies that protect domestic industry, disciplines on subsidies become meaningless; such protection ultimately causes palpable distortions to the free-trading system. Policies that accord preference to domestic products in government procurement are without question detrimental to one’s own economy, as well as to world trade.

2. HISTORY AND BACKGROUND OF THE AGREEMENT ON GOVERNMENT PROCUREMENT AND ITS REVISION

(Please see pages 599-600 in the 2016 Report on Compliance by Major Trading Partners with Trade Agreements – WTO, FTA/EPA and IIA–)

3. LEGAL FRAMEWORK

The revised Agreement on Government Procurement (GPA) includes the principles of national treatment and non-discrimination and requires fair and transparent procurement procedures. The revised Agreement reinforces and improves the 1994 Agreement in the following respects:
Part II: WTO Rules and Major Cases

(1) Scope and Coverage

In the Appendix to the Agreement, each party specifies goods, services and entities subject to the Agreement and sets thresholds (see Figure II-14 for the content of the Appendix for each party regarding the revised Agreement discussed below).

(2) Use of Electronic Tools

Obligations of procurement agencies when using electronic tools have been newly included in the general principles (Article 4 Clause 3). Furthermore, provisions were made for the promotion of electronic tools in the official notice of intended procurement, reducing the time-period for tendering when using electronic tools, as well as procedures when using electronic auction systems (Article 7 Clause 1, Article 11 Clause 5 and Article 14).

(3) Promotion of Accession of Developing Countries

Currently, most of the parties to the revised GPA are developed countries. Therefore, promoting the accession of developing countries, which possess potentially large government procurement markets, is one of the major tasks for the future. Due to this, provisions to promote the accession of developing countries were included in the revised Agreement -- specifically: (1) the provision of S&D (special and differential treatment) of developing countries during the process of accession negotiations and implementation of the revised Agreement; (2) the provision of the most favorable coverage of the Agreement by the existing parties when developing countries accede and special treatment after accession during the transition period for applying the Agreement (i.e., a price preference for developing country products, offsets, the gradual addition of entities or sectors to which the Agreement applies, and a threshold higher than the permanent threshold); and (3) the provision of technical cooperation and capacity-building related to accession and implementation.

(4) Challenge Procedures

It became mandatory for parties to implement systems in which suppliers who believed there was a breach of the Agreement in the procurement procedure of a government entity could file a complaint. A court or an impartial and independent institution that has no relation to the results of procurement must review complaints submitted. If a violation is found, correction of the breach of the Agreement, compensation for damages and other remedial measures shall be provided.

Japan formed a Government Procurement Review Board consisting of experts in the field to serve as the complaint resolution body under the Cabinet Office. Since 1996, 14 complaints have been processed.1

(5) Filing Objections Concerning the Modification of Application Coverage

Concerning the procurement entities that are subject to the Agreement by a party, when it wishes to revise the content of its annexes to change the name of entity (or something else) or to withdraw an entity from the annexes due to reasons such as privatization, it must submit a notification to the Committee on Government Procurement. It is possible for other parties to file an objection against this notification. If no objection has been filed by any other parties or when a resolution has been reached with respect to an objection, the modifications will be approved. Before the GPA is revised, as long as other parties do not retract their objection, privatized entities could not be excluded from

1 http://www5.cao.go.jp/access/japan/short-j.html
the annexes. (For example, three Japanese companies -- East Japan Railway Company (JR EAST), Central Japan Railway Company (JR CENTRAL) and West Japan Railway Company (JR WEST) -- had all of their state-owned shares sold, and thus the companies’ capital became owned by the private sector. However, since the EU did not retract its objection concerning the withdrawal of these companies from the annex of the Agreement, the three companies remained to be covered by the Agreement. The EU then retracted the objection against three companies on October 28, 2014, and they were no longer covered by the Agreement under Japan’s Note 5 to Annex 3 of the revised Agreement). Specific dispute settlement procedures (i.e., consultation by involved countries and the arbitration procedure adopted by the Committee on Government Procurement) were established in order to secure a measure for a third party to objectively judge and resolve such conflicts between parties. Furthermore, the adoption of indicative criteria (for removing a privatized organization from the annex) became a mandatory responsibility of the Committee on Government Procurement. Discussions on the specific substances continue in the Committee on Government Procurement.

(6) Dispute Settlement Procedures

The Agreement requires that in principle, disputes be settled in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). There are, however, several departures from normal DSU procedures. First, given the time-sensitive nature of government procurement tenders, the Agreement requires that an effort be made to shorten the panel review period that is set out in normal DSU procedures as much as possible. Second, the Agreement does not allow cross retaliation under any circumstances (imposition of countermeasures that suspend concessions or obligations under the agreements in other fields (such as services and TRIPS) is not allowed. Conversely, for disputes arising in connection with the agreements in other fields, imposition of countermeasures that suspend concessions or obligations under the GPA is not allowed).

(7) Reduced Obligations for Sub-Central and Government-Related Entities

The Agreement allows sub-central and government-related entities to use simplified procedures in requests for tenders and to maintain lower statistical reporting obligations than central-government entities. This has the effect of reducing the burden on sub-central and government-related entities to which coverage has been newly extended.

(8) Future Tasks

After the revised Agreement came into effect, conducting further negotiations were planned with the objective of further improvements to the Agreement and reducing and abolishing discriminatory measures. As part of this, a specific work plan was formulated concerning the five areas -- SMEs, statistical data, sustainable procurement, exclusion and restriction in parties’ annexes and safety standards in international procurement.
Part II: WTO Rules and Major Cases

**Figure II-14 Outline of Commitments by Major Countries under the revised GPA**

<table>
<thead>
<tr>
<th>[Entities]</th>
<th>Central government entities</th>
<th>Sub-central government entities</th>
<th>Government-related entities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Japan</strong></td>
<td>All central government entities (including legislative and judiciary entities)</td>
<td>47 prefectures and 19 designated cities</td>
<td>About 130 special corporations and independent administrative institutions</td>
</tr>
<tr>
<td><strong>US</strong></td>
<td>Federal government entities</td>
<td>37 states</td>
<td>TVA, 5 power marketing administrations of the Department of Energy and the St. Lawrence Seaway Development Corporation (10 entities total)</td>
</tr>
<tr>
<td><strong>EU</strong></td>
<td>The Council of the European Union, the European Commission and central government entities of 27 EU member countries</td>
<td>Sub-central government entities of 28 EU member countries (including municipal-level entities)</td>
<td>Entities in the water, electricity, transport, port and airport sectors</td>
</tr>
<tr>
<td><strong>Canada</strong></td>
<td>Central government entities (including some judiciary entities but excluding legislative entities)</td>
<td>10 provinces and 3 territories</td>
<td>10 Crown Corporations</td>
</tr>
<tr>
<td><strong>Rep. of Korea</strong></td>
<td>Almost all central government entities</td>
<td>16 cities including Seoul Metropolitan Government and local governments of 3 Metropolitan cities</td>
<td>25 entities including Republic of Korea Development Bank</td>
</tr>
</tbody>
</table>

**[Threshold values]**  
(Unit: SDR 10,000 except as otherwise indicated)

<table>
<thead>
<tr>
<th>Products</th>
<th>Japan</th>
<th>US</th>
<th>EU</th>
<th>Canada</th>
<th>Rep. of Korea</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central government entities</td>
<td>10</td>
<td>13</td>
<td>13</td>
<td>13</td>
<td>13</td>
</tr>
<tr>
<td>Sub-central government entities</td>
<td>20</td>
<td>35.5</td>
<td>20</td>
<td>35.5</td>
<td>20(40)</td>
</tr>
<tr>
<td>Government-related entities</td>
<td>13</td>
<td>250,000 USD* (40)</td>
<td>40</td>
<td>35.5</td>
<td>40</td>
</tr>
</tbody>
</table>
### Chapter 14: Government Procurement

**Table: Commitments by Major Countries under the revised GPA**

<table>
<thead>
<tr>
<th>Services (excluding construction services and architectural, engineering and other technical services)</th>
<th>Central government entities</th>
<th>Sub-central government entities</th>
<th>Government-related entities</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10</td>
<td>13</td>
<td>13</td>
</tr>
<tr>
<td>Construction services</td>
<td>450</td>
<td>500</td>
<td>500</td>
</tr>
<tr>
<td>Architectural, engineering and other technical services</td>
<td>45</td>
<td>13</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>150</td>
<td>35.5</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>45</td>
<td>250,000 USD * (40)</td>
<td>40</td>
</tr>
</tbody>
</table>

* The US notifies the WTO of the threshold values based on US dollars. 1 SDR = approx. 1.4 USD (calculated using the conversion factor applied to 2016-2017 figures notified by the US to the WTO)

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**4. RESPONSES IN JAPAN CONCERNING THE REVISED GPA**

General regulations in Japan concerning government procurement relating to central government entities include the Public Accounting Act, the Cabinet Order concerning the Budget, Auditing and Accounting, and the Special Ad Hoc Cabinet Order concerning the Budget, Auditing and Accounting. These regulations include the principles of fairness, equal opportunity and economy. They share the same basic principles of non-discrimination and transparency contained in the GPA. Additionally, the consistency of the procurement procedures subject to the revised GPA is ensured by domestic regulations such as the Cabinet Order Providing for the Special Cases of Procurement Procedure of Domestic Products or Specified Services and the Ministerial Ordinance Specifying the Special Cases of Procurement Procedure of Domestic Products or Specified Services. Furthermore, regional government entities and government-related entities each put in place ordinances based on the Local Autonomy Act and by laws conforming to the revised GPA, ensuring the implementation of procurement procedures of the revised GPA within Japan.

In addition, voluntary measures that exceed the standards in the revised GPA designated, such as having the bidding period stipulated to be forty days or more, while it is fifty days or more in the revised GPA.
Part II: WTO Rules and Major Cases

RECENT DEVELOPMENTS

After the substantive conclusion of revised GPA, negotiations for accessions of developing countries will become the focus. As of February 2017, ten countries are currently involved in accession negotiations -- Albania, Australia, China, the Republic of Georgia, Jordan, Kyrgyz Republic, Moldova, Oman, Russia, and Tajikistan. China, in particular, has a large government procurement market, and its accession will have a large impact on promoting the accession of non-parties. Therefore, early accession of China at a high commitment level is desired.

MAJOR CASES

(1) United States - Myanmar Sanctions Law (The Massachusetts Act of June 25, 1996 Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar) (DS88, 95)

In June 1996, the Commonwealth of Massachusetts passed a law prohibiting the ability to contract with companies doing business in Burma (Myanmar). The law excludes from state agency procurement: (1) companies that have a principal place of business in Myanmar or who otherwise conduct business in Myanmar, including any majority-owned subsidiaries of such companies; (2) companies providing financial services to the Government of Myanmar; (3) companies promoting the importation or sale of gems, timber, oil, gas or other related products from Myanmar (trading in all is largely controlled by the Government of Myanmar); and (4) companies providing any goods or services to the Government of Myanmar. Under the law, the state government created a “restricted purchase list” of companies that meet these criteria. Companies on the list are, in principle, barred from bidding on state contracts, or when allowed to bid, less favorable terms are imposed on them than companies not on the list. There were 350 companies on the list, 50 of which were Japanese.

The Commonwealth of Massachusetts is included among the 37 state governments listed by the United States under the 1994 Agreement on Government Procurement. The law is likely in violation of Article VIII, which mandates the qualification of suppliers, and Article XIII: 4, which contain bidding standards. In addition, the state government discriminates between companies depending on whether they are on the list, which may also be inconsistent with Article III: 1 of the 1994 Agreement, which mandates both national treatment and non-discrimination.

Japan repeatedly expressed its concerns about the apparent inconsistency of this state law with the GPA, and in March 1997 requested further information under the terms of the Agreement. Japan repeatedly asked the United States to expedite its answers on Agreement-consistency and its provision of further information, but the government of the United States failed to respond in good faith on this matter. The EU shared many similar concerns with Japan on this issue. The EU and Japan requested consultations with the United States in June and July 1997, and during 1997 three consultations were jointly conducted.

Subsequently, Japan decided - in light of the situation in the United States, the schedule of the Massachusetts state legislature, and the apparently positive attitude of the country - to observe the US actions. No progress was made, however, leading Japan and the EU to jointly request the establishment of a WTO panel in September 1998. This panel was established in October, but subsequent litigation within the United States (described below) declared the law unconstitutional and void, so Japan and the EU took procedures to suspend the panel in February 1999. On
February 11, 2000, the authority of the panel lapsed because Article 12.12 of the Dispute Settlement Understanding (DSU) voids panels that have been suspended for more than twelve months.

Apart from the WTO panel, in the United States a private US organization, the National Foreign Trade Committee (NFTC), filed a suit in federal court on April 1, 1998, claiming that the state law conflicted with the US Constitution. In November 1998, the federal district court decided that the law was indeed unconstitutional and declared it null and void. The Commonwealth of Massachusetts appealed the decision and filed a motion for stay pending appeal, but in June 1999 the federal appeals court upheld the decision of the district court. Massachusetts appealed to the US Supreme Court, but the Supreme Court in June 2000 affirmed the lower courts’ findings that the Massachusetts law was unconstitutional.

One problem is that many US states and local governments have imposed or are considering sanctions similar to those enacted by Massachusetts. Most of these sanctions take the form of restricting government procurement from companies that have business dealings with the sanctioned countries. We are pleased that the US Supreme Court found the law unconstitutional because the ruling will eliminate the barriers for private companies from trade-related legislation passed by individual states. The Supreme Court bases its ruling on the principle that foreign relations is an area specifically reserved to the federal authority and state laws that impinge upon this authority are unconstitutional. The ruling will act as a restraint on future state-level legislation.

In some cases, however, the state or local government will not be bound by the obligations of the GPA because it was not included in the “offered” institutions, although many of the measures themselves are likely to constitute violations. We should pay close attention to whether these measures will be eliminated or amended in the United States.

In the meantime, the US Federal Government established a law in July 2003 that bans imports from Myanmar and freezes their assets in the United States until Myanmar’s military regime improves human rights policies and adapts democratic policies. This calls for close observation in the future.

(2) National Security Exceptions

(Please see pages 608-609 in the 2016 Report on Compliance by Major Trading Partners with Trade Agreements –WTO, FTA/EPA and IIA-)

(3) EU Utilities Directive

(Please see pages 609-611 in the 2016 Report on Compliance by Major Trading Partners with Trade Agreements –WTO, FTA/EPA and IIA-)