



**Supplementary Submission to the Joint Select Committee on  
Government Procurement**

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## Supplementary submission from Dr Patricia Ranald to the Join Select Committee on Government Procurement

### **1) Comments on submission from the New Zealand High Commission**

The submission from the New Zealand High Commission argues that the proposed changes to procurement guidelines would be inconsistent with the government procurement agreement between Australia and New Zealand.

The 1997 Australia-New Zealand agreement on government procurement is part of a wider agreement between the two countries which is unique to Australia and New Zealand, and involves closer economic integration, including a common procurement market, and other common regulatory arrangements between Australia and New Zealand. No other trade agreement between Australia and its trading partners has similar arrangements.

As such the Australia- New Zealand procurement arrangements constitute an exception which is usually acknowledged in other trade agreements and which the guidelines should acknowledge as an exceptional arrangement.

Similar exceptions have been included in previous trade agreements. For example, the Australia-New Zealand-ASEAN free trade agreement has particular exceptions for Australia and New Zealand in regard to ISDS provisions which acknowledge this relationship, as did the final text of the TPP.

In my view this exceptional arrangement should be acknowledged as an exception. It does not prevent the guidelines from developing rules which would apply to all other trading partners which would enable consideration of economic benefit including local employment, taxation and other benefits in procurement policy

### **2) Summary of cases taken under the WTO Procurement Agreement**

There have been three cases taken under this agreement. See appendix 1 for WTO summaries.

DS 73, EU versus Japan in 1997. The EU alleged that Japan's Ministry of Transport had published a tender with specifications which were not neutral but referred explicitly to US specifications, thus discriminating against EC bidders. The dispute was notified but settled by a mutually agreed solution which was notified to the disputes panel with no further action.

DS 163 a complaint by the United States against Korea in 1999 about procurement practices of the Korean Airport Construction Authority. The disputes panel found that the authority was not in fact a covered entity under the WTO Procurement Agreement, and the panel lapsed.

DS 88 the EU versus the United States in 1997. The EU alleged that the Massachusetts State Act regulating state contracts with companies doing business with Burma (Myanmar) was discriminatory because it excluded companies doing business with Burma from obtaining State government contracts. The disputes panel lapsed because there was a separate successful national lawsuit against the legislation which was struck down by the US Supreme Court and subsequently repealed.

Please note that none of these disputes address the question of measures which it would allow consideration of economic benefit including local employment taxation and other benefits in procurement policy.

## Appendix 1: WTO Summaries of Disputes

# DS 73 Japan — Procurement of a Navigation Satellite

### Current status

- Settled or terminated (withdrawn, mutually agreed solution) on 31 July 1997

### Key facts

Short title:	
Complainant:	European Communities
Respondent:	Japan
Third Parties:	
Agreements cited: (as cited in request for consultations)	Government Procurement: Art. <a href="#">III</a> , <a href="#">VI</a> , <a href="#">XII</a>
<a href="#">Request for Consultations</a> received:	26 March 1997
<a href="#">Mutually Agreed Solution</a> notified:	3 March 1998

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### Latest document

- Japan - Procurement of a Navigation Satellite - Notification of Mutually-Agreed Solution [WT/DS73/5](#) | 3 March 1998

## Summary of the dispute to date

The summary below was up-to-date at 24 February 2010

### Consultations

Complaint by the European Communities.

This request, dated 26 March 1997, is in respect of a procurement tender published by the Ministry of Transport (MoT) of Japan to purchase a multi-functional satellite for Air Traffic Management. The EC contends that the specifications in the tender were not neutral but referred explicitly to US specifications. This meant, the EC contends, that European bidders could effectively not participate in the tender. The EC alleges inconsistency of this tender with Annex I of Appendix I of Japan's commitments under the Government Procurement Agreement (GPA). The EC also alleges violations of Articles VI(3) and XII(2) of the GPA.

### Mutually agreed solution

On 31 July 1997, the EC notified the Secretariat that a mutually agreed solution had been reached with Japan in this dispute. On 19 February 1998, the two parties communicated the text of their agreement to the DSB.

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#### DISPUTE SETTLEMENT

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## DS163: Korea — Measures Affecting Government Procurement

This summary has been prepared by the Secretariat under its own responsibility. The summary is for general information only and is not intended to affect the rights and obligations of Members.

### Key facts

Short title:	Korea — Procurement
Complainant:	United States
Respondent:	Korea, Republic of

Third Parties:	European Communities; Japan
Agreements cited: (as cited in request for consultations)	Government Procurement: Art. <a href="#">I:1</a> , <a href="#">III</a> , <a href="#">III:1</a> , <a href="#">VIII</a> , <a href="#">XI</a> , <a href="#">XVI</a> , <a href="#">XX</a> , <a href="#">XXII:2</a> , <a href="#">Annex 1</a> , <a href="#">Annex I</a>
<a href="#">Request for Consultations</a> received:	16 February 1999
<a href="#">Panel Report</a> circulated:	1 May 2000

## Latest document

- Korea - Measures Affecting Government Procurement - Panel Report - Action by the Dispute Settlement Body  
[WT/DS163/7](#) | 6 November 2000

## Summary of the dispute to date

The summary below was up-to-date at 24 February 2010

See also: [One-page summary of key findings of this dispute](#)

## Consultations

Complaint by the United States.

On 16 February 1999, the US requested consultations with Korea in respect of certain procurement practices of the Korean Airport Construction Authority (KOACA), and other entities concerned with the procurement of airport construction in Korea. The US claimed that such practices were inconsistent with Korea's obligations under the Agreement on Government Procurement (GPA). These include practices relating to qualification for bidding as a prime contractor, domestic partnering, and the absence of access to challenge procedures that are in breach of the GPA. The US contended that KOACA and the other entities are 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 GPA, and pursuant to Article I(1) of the GPA, apply to the procurement of airport construction.

On 11 May 1999, the US requested the establishment of a panel. At its meeting on 26 May 1999, the DSB deferred the establishment of a panel.

## Panel and Appellate Body proceedings

Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 16 June 1999. The EC and Japan reserved their third party rights. On 30 August 1999, the Panel was composed. The report of the panel was circulated to Members on 1 May 2000. The panel found that:

- the entities conducting procurement for the project at issue were not covered entities under Korea's Appendix I of the GPA and were not otherwise covered by Korea's obligations under the GPA.
- based on less than complete Korean answers to certain US questions during negotiations for Korea's accession to the GPA, there had initially been an error on the part of the US as to which Korean authority was in charge of the project at issue. However, in light of all the facts the panel considered that there was notice of the error and the US should at least have conducted further inquiries in this regard before the negotiations were ended.
- the US had 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 (whether or not in conflict with the provisions of the GPA), within the meaning of Article XXII:2 of the GPA.

The DSB adopted the Panel Report at its meeting on 19 June 2000.

## DS88: United States — Measure Affecting Government Procurement

This summary has been prepared by the Secretariat under its own responsibility. The summary is for general information only and is not intended to affect the rights and obligations of Members.

### Key facts

Short title:	US — Procurement
Complainant:	European Communities
Respondent:	United States
Third Parties:	Japan
Agreements cited: (as cited in request for consultations)	Government Procurement: Art. <a href="#">VIII</a> , <a href="#">III</a> , <a href="#">XIII</a> , <a href="#">XXII:2</a>

[Request for Consultations](#) received:

20 June 1997

## Latest document

- United States - Measure Affecting Government Procurement - Lapse of Authority for Establishment of the Panel - Note by the Secretariat [WT/DS88/6#WT/DS95/6](#) | 14 February 2000

## Summary of the dispute to date

The summary below was up-to-date at 24 February 2010

### Consultations

Complaint by the European Communities.

This request, dated 20 June 1997, is in respect of an Act enacted by the Commonwealth of Massachusetts on 25 June 1996, entitled Act regulating State Contracts with companies doing Business with Burma (Myanmar). The Act provides, in essence, that public authorities of the Commonwealth of Massachusetts are not allowed to procure goods or services from any persons who do business with Burma. The EC contends that, as Massachusetts is covered under the US schedule to the GPA, this violates Articles VIII(B), X and XIII of the GPA Agreement. The EC also contends that the measure also nullifies benefits accruing to it under the GPA, as well as impeding the attainment of the objectives of the GPA, including that of maintaining balance of rights and obligations.

### Panel and Appellate Body proceedings

On 8 September 1998, the EC requested the establishment of a panel. At its meeting on 21 October 1998, the DSB established a panel. Japan reserved its third-party right. The DSB agreed that pursuant to Article 9.1 of the DSU, a single panel would examine this dispute together with [WT/DS95](#). At the request of the complainants, dated 10 February 1999, the Panel agreed, pursuant to Article 12.12 of the DSU, to suspend the panel proceedings.

### Withdrawal/termination

Since the panel was not requested to resume its work, pursuant to Article 12.12 of the DSU, the authority for establishment of the panel lapsed as of 11 February 2000.

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