

**A STUDY ON THE GOVERNMENT PROCUREMENT
PROVISIONS OF KOREAN FREE TRADE AGREEMENTS
– CENTERING ON THE CASE OF KOREA-US FTA**

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ABSTRACT

Among the FTAs (Korea-Chile FTA, Korea-Singapore FTA, Korea-EFTA FTA, Korea-the United States FTA and Korea-EU FTA) signed by Korea which includes government procurement sector, Korea-United States FTA contains the most positive efforts to realize free and fair trade for government procurement, while it applies mutatis mutandis GPA provisions and also establishes additional obligations as well.

Both Korea and the United States have sought to expand access to both parties' government procurement markets, through negotiations on government procurement under KORUS FTA attached greater importance to providing opportunities to small and medium enterprises. Accordingly, both parties achieved the result of reaching an agreement on the FTA, including reducing thresholds related central (federal) government procurement, prohibiting the imposition of the conditions concerning prior work experience in conducting tenders and including public works concession or concessions among the projects covered by government procurement.

Notwithstanding the foregoing, it is deemed that, through such negotiations, small and medium enterprises in both parties have a very limited opportunity to access the government procurement markets of the other party. At the same time, the issues regarding mutual recognition of entities issuing guarantee insurance policies and technical personnel have yet to be solved.

Here, we look at the result of the negotiations on government procurement for KORUS FTA, from the aspect of free trade aiming to guarantee free international trade based on market economy principles by removing many man-made trade barriers in order to promote free movement of goods and labor among countries.

INTRODUCTION

The WTO regime, formed in 1995, is a multilateral trade frame embracing not only trade in goods but also trade in services, trade-related intellectual property, etc. In contrast, Article 3.8 of the General Agreement on Tariffs and Trade (GATT) 1947 expressly provides that the national treatment principle under Article 3 thereof shall not apply to laws, regulations or requirements governing government procurement, which means the procurement by governmental agencies of products purchased for governmental purposes. In addition, the General Agreement on Trade in Services (GATS), which was adopted in relation to trade in services as the result of Uruguay Round negotiations, also clearly provides that the provisions regarding most-favored nation treatment, national treatment and market access shall not apply to government procurement. Through such explicit provisions as mentioned above, government procurement of goods and services is thus excluded from the transactions regulated by the GATT and the Agreement Establishing the World Trade Organization (WTO) (Arrowsmith, 2003).

Discussions have taken place on the liberalization of trade for government procurement since 1970s and plurilateral protocols for government procurement were adopted in 1979 as a result of Tokyo Round. Afterwards, the Agreement on Government Procurement (WTO GPA: hereinafter referred to as "GPA") was adopted in 1993, through negotiations on government procurement conducted in parallel with Uruguay Round negotiations. However, that agreement has limitations that it applies exclusively to the parties which have separately signed the same agreement (Matsushita, et al., 2006).

In the meanwhile, the GATT and the Agreement Establishing the WTO allow the execution of a free trade agreement (FTA), a preferential trading agreements, pursuant to Article 24 of the GATT with respect of trade in goods and pursuant to Article 5 of the GATS with respect to trade in services. In particular, while DDA (Doha Development Agenda) negotiations started in November 2001 as the WTO's first multilateral trade negotiation, the negotiations are experiencing difficulties in gaining momentum for substantial negotiations to follow. As a result, many countries are seeking to find alternatives in regional trade agreements including FTAs (Kim, 2008). The FTAs entered into by such countries provide for a variety of issues such as the opening up of government procurement markets or protection of intellectual property, depending on the result of negotiations among the signatory countries.

In other words, FTAs need not include provisions on government procurement and the inclusion of such provisions is absolutely dependent on the result of negotiations among the signatory countries concerned. However, looking at the issues regulated by the FTAs being recently signed, the issues of government procurement are increasingly included in the text of FTAs. In particular, GPA signatories do not fail to introduce government procurement provisions in their FTAs.

In contrast, there are some cases where even non-signatories to GPA (for example, Australia, New Zealand and Chile) actively incorporate government procurement provisions into the FTAs entered into by them, and an FTA signed between non-signatories to GPA has introduced such government procurement provisions as in the Australia and New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) between Australia and New Zealand. However, such countries as China, India and ASEAN member countries still stick to their practices of not including government procurement provisions in their FTAs with other countries.

Having recognized the importance of regional trade agreements, Korea has actively sought to enter into FTAs and achieved the following results: Korea-Chile FTA(Came into effect in April 2004), Korea-Singapore FTA(Came into effect in March 2006), Korea-. EFTA FTA(Came into effect in September 2006), Korea-ASEAN(Came into effect in June 2007 with respect to goods; and in May 2009 and in September 2009 with respect to investment), Korea-U.S. FTA(Reached an agreement in April 2007), Korea-EU FTA(Provisionally signed in October 2009).

In particular, Korea-U.S. FTA (hereinafter referred to as “KORUS FTA”) deserves special mention in many aspects. Firstly, the KORUS FTA is the first free trade agreement entered into by Korea with a very large economy. Korea’s FTA road map formed in 2003 stipulated that, in the first place, Korea accumulate negotiating skills and experience by first entering into FTAs with smaller economies such as Chile, Singapore, EFTA, etc., which are expected to have relatively little impact on its domestic industries, and prepare the FTAs with large economies (including the Unite and EU), using such accumulated skills and experience (Gang, 2008). In addition, the government procurement provisions of KORUS FTA may be meaningful in that, compared to other FTAs, more in-depth and specific discussions have been conducted as to the recently emerging agenda on trade for government procurement purpose, in order to improve access to government procurement markets of both countries.

GOVERNMENT PROCUREMENT PROVISIONS OF KOREA FTAs

Among the FTAs entered into by Korea with other countries, Korea includes a chapter devoted for government procurement in Korea-Chile FTA, Korea-Singapore FTA, Korea-EFTA FTA, Korea-U.S. FTA and Korea-EU FTA.

First, the government procurement chapter of Korea-Chile FTA adopts GPA provisions to a great extent, even though no *mutatis mutandis* application of GPA provisions was clearly mentioned in it, because Chile is not a signatory to GPA. However, it is different from GPA in that: ① the most favored nation status is not granted; ② electronic interchange of tender information is encouraged; and ③ exclusion of privatized entities from the concession list without compensation measures is granted.

While the government procurement chapter of Korea-Singapore FTA applies *mutatis mutandis* the great portion of GPA provisions, it provides differently from GPA: ① encouragement of electronic interchange of tender information; and ② concessions exclusion made by privatized entities without taking compensation measures is granted.

The government procurement chapter of Korea-EFTA FTA also applies *mutatis mutandis* the great portion of GPA provisions, except that it is different from GPA in that: ① the most favored nation status is not granted; and ② concessions exclusion made by privatized entities without taking compensation measures is granted.

In the meantime, while the government procurement chapter of KORUS FTA reaffirms the application of GPA provisions in principle, it also includes separate issues regarding the opening up of government procurement markets. With respect to qualification requirements for a supplier to participate in tender, the text of agreement provides that a procuring entity shall evaluate the supplier's financial capacity and commercial and technical abilities on the basis of that supplier's business activities outside the territory of the party to which the procuring entity belongs, as well as inside the territory of that party. In addition, it is provided that a Party, including its procuring entities, may prepare, adopt or apply technical specifications in order to require a supplier to comply with generally applicable laws regarding ① fundamental principles and rights at workplaces and ② acceptable conditions with respect to minimum wages, working hours, and occupational safety and health, in the territory in which the goods are produced or the services are performed.

At the same time, the government procurement chapter of KORUS FTA also includes the establishment and operation of a Working Group on Government Procurement, providing that “The Working Group shall meet, as mutually agreed or upon request of a Party, to consider issues regarding government procurement that a Party refers to it and exchange information relating to the government procurement opportunities in each Party.

In case of Korea-EU FTA, where negotiations were concluded most recently, there is an added provision prohibiting imposition of the condition that the supplier has previously been awarded one or more contracts by a procuring entity of the other Party or that the supplier has prior work experience in the territory of the other Party, as in the government procurement chapter of KORUS FTA. With respect to concession, the concept and coverage of such public works concession vary between the parties. Therefore, both parties provided differently for the definition of public works concession in accordance with their respective domestic laws. In other words, Korea adopted the definition of ‘build-operate-transfer contract’ as given in KORUS FTA that a **build-operate-transfer contract** means any contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plant, buildings, facilities, or other government-owned works and under which, as consideration for a supplier’s execution of a contractual arrangement, a procuring entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of, such works for the duration of the contract. On the other hand, EU applied the definition of public works concession that Public Works Concession means a contract of the same type as a public works contract, except that that considerations for implementing such works are no more than the rights to develop such works or rights including collection of considerations for the use thereof, as provided in Directive 2004/18/EC and Agreement on Government Procurement under EU-Chile FTA.

At the same time, it was agreed by the parties that, as procedural rules concerning public works concession, only the obligation of non-discrimination and some transparency-related procedural obligations (i.e. public notices of tender announcement and awarding of contracts, including the least fundamental information, and challenge procedures) shall be provided and the other procedures for selecting the concessionaire for public works concession and implementing such public works concession shall be subject to the respective domestic laws of the parties.

COMPOSITION OF GOVERNMENT PROCUREMENT PROVISIONS OF KORUS FTA

Generally, negotiations on government procurement provisions during FTA negotiations may be divided into negotiations on the wording of text and negotiations on concessions. Negotiations on the wording of text is the process for finalizing the text of such provisions including the conditions for participation in tenders, time-periods for giving notice of tenders and technical specifications. Negotiations on concessions is the process for agreeing upon exceptional conditions pursuant to which the application of FTA is excluded, including procuring entities being subject to liberalizing, type of the covered contracts (for goods, services and construction services), the range of contract price and quota for small businesses. Take North American Free Trade Agreement (hereinafter referred to as “NAFTA”) for example; it contains the most extensive government procurement provisions although it came into effect prior to the launch of the WTO GPA in 1993 (Muggenberg, 1993). Significant contents are included in its government procurement provisions, as follows.

<Table 1> NAFTA Chapter Ten: Government Procurement Provisions

Section A - Scope and Coverage and National Treatment
Article 1001: Scope and Coverage
Article 1002: Valuation of Contracts
Article 1003: National Treatment and Non-Discrimination
Article 1004: Rules of Origin
Article 1005: Denial of Benefits
Article 1006: Prohibition of Offsets
Article 1007: Technical Specifications
Section B - Tendering Procedures
Article 1008: Tendering Procedures
Article 1009: Qualification of Suppliers
Article 1010: Invitation to Participate
Article 1011: Selective Tendering Procedures
Article 1012: Time Limit for Tendering and Delivery
Article 1013: Tender Documentation
Article 1014: Negotiation Disciplines
Article 1015: Submission, Receipt and opening of Tenders and Awarding of Contracts
Article 1016: Limited Tendering Procedures
Section C – Bid Challenge
Article 1017: Bid Challenge
Section D – General Provisions
Article 1018: Exceptions
Article 1019: Provision of Information
Article 1020: Technical Cooperation
Article 1021: Joint Programs for Small Business

Article 1022: Rectifications or Modifications
Article 1023: Divestiture of Entities
Article 1024: Further Negotiations
Article 1025: Definitions
Annex 1001.1a: Federal Government Entities/ Government Enterprises State and Provincial Government Enterprises
Annex 1001.1b-1: Goods
Annex 1001.1b-2: Services
Annex 1001.1b-3: Construction Services

When government procurement provisions have been adopted in FTAs signed by countries, they may be classified into a few types where: ① procurement provisions have been reserved as a future task (Canada-Costa Rica FTA); ② only key principles concerning free trade for government procurement are provided, including national treatment (Australia-New Zealand CERTA); ③ GPA provisions apply mutatis mutandis (U.S.-Singapore FTA, Japan-Singapore EPA); and ④ additional obligations were also established, while GPA provisions apply mutatis mutandis (U.S.- Australia FTA, EC-Chile FTA). Here, the type where additional obligations were also established while GPA provisions apply mutatis mutandis may be regarded as the most positive type of agreement in realizing free and fair trade for government procurement (The Ministry of Construction and Transportation (Republic of Korea), 2006).

The government procurement provisions contained in the FTAs signed by Korea may be classified into a type of applying mutatis mutandis GPA provisions (Korea-EFTA FTA and Korea-Singapore FTA) and another type of establishing additional obligations while applying mutatis mutandis GPA provisions (KORUS FTA and Korea-EU FTA).

<Table 2> FTA Government Procurement Provisions

Provisions	GPA	NAFTA	US-Austr. FTA	EC-Chile FTA	Korea-Chile FTA	Newzealand- Singapore CEP	KORUS FTA
Aims		○		○		○	○
Scope and Coverage	○	○	○	○	○	○	○
Valuation of Contracts	○	○	○	○		○	○
National Treatment/ Non-discrimination	○	○	○	○	○	○	○
Rules of Origin	○	○	○			○	○

Special Treatment for Developing Countries	<input type="radio"/>						
Technical Speculation	<input type="radio"/>		<input type="radio"/>				
Tendering Procedures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>		<input type="radio"/>	<input type="radio"/>
Selective Tendering Procedures		<input type="radio"/>	<input type="radio"/>	<input type="radio"/>			
Limited Tendering Procedures		<input type="radio"/>	<input type="radio"/>	<input type="radio"/>			<input type="radio"/>
Qualification of Suppliers	<input type="radio"/>		<input type="radio"/>				
Invitation to Participate	<input type="radio"/>		<input type="radio"/>				
Selection Procedures	<input type="radio"/>						
Time-limits for tendering and Delivery	<input type="radio"/>		<input type="radio"/>				
Tender Documentation	<input type="radio"/>		<input type="radio"/>				
Submission, and Opening of Tenders	<input type="radio"/>		<input type="radio"/>				
Negotiation	<input type="radio"/>	<input type="radio"/>		<input type="radio"/>			<input type="radio"/>
Offsets	<input type="radio"/>						
Transparency	<input type="radio"/>		<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	
Obligations Information and Review	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>			<input type="radio"/>
Challenge Procedures	<input type="radio"/>		<input type="radio"/>				
Institutions	<input type="radio"/>	<input type="radio"/>			<input type="radio"/>		<input type="radio"/>
Consultation and Dispute Settlement	<input type="radio"/>						
Exceptions to the Agreement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>			<input type="radio"/>
Information Technology Cooperation		<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>		<input type="radio"/>
Cooperation for Small-business		<input type="radio"/>					
Divestiture of Entities		<input type="radio"/>					

Further Negotiations	○	○	○	○	○		○
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* The Ministry of Construction and Transportation (Republic of Korea), 2006

Since, in particular, KORUS FTA contains the government procurement provisions aiming to aggressively impose far more advanced obligations of opening up the markets than the level of such obligations assumed by both parties in the concessions under the existing GPA, it should be necessary to review its contents carefully.

In the meantime, the government procurement provisions contained in KORUS FTA are composed of the following:

<Table 3> KORUS FTA Chapter Government Procurement Provisions

Article 17.1: General Provisions
Article 17.2: Scope and Coverage
Article 17.3: Incorporation of GPA Provisions
Article 17.4: General Principles
Article 17.5: Conditions for Participation
Article 17.6: Publication of Notices
Article 17.7: Technical Specifications
Article 17.8: Time-Periods
Article 17.9: Modifications and Rectifications to Coverage
Article 17.10: Government Procurement Working Group
Article 17.11: Definitions
Annex 17-A: Government Procurement Annex

Pursuant to Article 17.3 (Incorporation of GPA Provisions) of KORUS FTA, the following GPA provisions and appendices are incorporated mutatis mutandis into the government procurement chapter of KORUS FTA, forming part thereof: Application to entities not covered by the Agreement (Article 1.3 of GPA), Valuation of Contracts (Article 2 of GPA), National Treatment and Non-discrimination (Article 3 of GPA), Rules of Origin (Article 4.1 of GPA), Technical Specifications (Article 6 of GPA), Tendering Procedures (Article 7 of GPA), Qualification of Suppliers (Article 8 of GPA), Invitation to Participate Regarding Intended Procurement (Article 9 of GPA), Selection Procedures (Article 10 of GPA), the Required Realistic Time to be Taken into Account (Article 11.4 of GPA), Tender Documentation (Article 12 of GPA), Submission, Receipt, Opening of Tenders and Awarding of Contracts (Article 13 of GPA), Negotiation (Article 14 of GPA), Limited Tendering (Article 15 of GPA), Counter-purchase (Article 16.1 of GPA), Information and Review As Regards Obligations of Entities (Article 18 of GPA), Information and Review As Regards Obligations of Parties,

Challenge Procedures (Article 20 of GPA) and Exceptions to the Agreement(Article 23 of GPA).

ANALYSIS OF MAIN CONTENTS OF THE GOVERNMENT PROCUREMENT CONTAINED IN KORUS FTA

1. Relations with WTO GPA

Throughout the text of agreement adopted following negotiations on government procurement under KORUS FTA, are provisions emphasizing its relationship to WTO GPA, to which both parties are signatories; especially, Article 17.3.1 of KORUS FTA applies mutatis mutandis a wide range of WTO GPA provisions, including national treatment and non-discrimination, rules of origin, technical specifications, tendering procedures, counter-purchase and challenge procedures. In addition, Article 17.3.3 thereof provides that “The Parties recognize that on December 8, 2006, the WTO Committee on Government Procurement provisionally approved the text of the revised GPA. Further to Article 24.3 (Amendment of the WTO Agreement), at such time as the revised GPA enters into force for both Parties, the Parties shall promptly incorporate by reference the appropriate provisions of the revised GPA in place of the provisions in paragraph 1.”

Accordingly, in the text of agreement on the government procurement chapter of KORUS FTA, it is anticipated that WTO GPA provisions will apply, as they are, with respect to significant principles in addition to individual concessions and, once negotiations on the revision of GPA currently under way are completed, the outcome of such negotiations will also be incorporated into the text of FTA and be operated, as they are.

2. Analysis of the Result of Negotiations on the Wording of Text

In the meantime, an analysis will be here made on the wording of text, apart from the existing GPA provisions, centering on the content added to the government procurement provisions of KORUS FTA.

Firstly, Article 17.2.3 of KORUS FTA provides as follows: This Chapter does not apply to: (a) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives; (b) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption, and distribution of public debt, including loans and

government bonds, notes and other securities; or (c) procurement conducted for the specific purpose of providing international assistance, including development aid.

In particular, paragraph (c) stipulates that the government procurement provisions of KORUS FTA do not apply to the procurement activities conducted by entities, such as U.S. Agency for International Development (USAID) from the United States and Korea International Cooperation Agency (KOICA) from Korea, for the specific purpose of providing international assistance including development aid. Notwithstanding the foregoing, OECD Development Assistance Committee (DAC) recommends that procurements over the given amount, which are conducted in the course of providing assistance for the purpose of fulfilling untied aid-related obligations, will be carried out through international competitive bidding and such obligations have an effect on both Korea and the United States, as member countries of OECD DAC.

In addition, Article 17.2.4 of KORUS FTA provides, for greater certainty relating to the procurement of digital products: For greater certainty relating to the procurement of digital products as defined in Article 15.9 (Definitions): (a) covered procurement includes the procurement of digital products; and (b) no provision of Chapter Fifteen (Electronic Commerce) shall be construed as imposing obligations on a Party with respect to the procurement of digital products.

As used in these provisions, the expression “digital products” have the meaning given to the same term in Chapter 15 (Electronic Commerce) of KORUS FTA. Article 15.9 of KORUS FTA provides that “digital products mean computer programs, text, video, images, sound recordings, and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically.” And, at the same time, Note No.4 to this definition provides that “the definition of digital products should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.”

The procurement covered by the government procurement chapter of KORUS FTA varies among goods and services. In case of goods, the chapter applies to all goods procured by an entity listed on the positive list pursuant to Annex 17-A (see Section B of Annex). In case of services, however, the chapter only applies to the procurement of the services that are specified as the covered services in Annex 4 of Appendix I attached to WTO GPA signed by each party. Then, if, pursuant to the definition clause and notes thereto

under Chapter 15, it does not matter whether digital products are categorized as goods or services, it may be open to dispute whether KORUS FTA will apply beyond the scope and coverage of “services” defined in Annex 17-A if a party argues that certain services provided as digital products are “goods”. And, because the services are listed on the positive list, in case that some on-line services are procured by a government agency, it may come into question whether such procurement is covered by the government procurement provisions of KORUS FTA.

Furthermore, Article 17.5.2 of KORUS FTA, with respect to the conditions for participation regarding government procurement, provides as follows: In assessing whether a supplier satisfies the conditions for participation, a procuring entity: (a) shall evaluate the supplier’s financial capacity and commercial and technical abilities on the basis of that supplier’s business activities outside the territory of the Party of the procuring entity, as well as its business activities, if any, inside the territory of the Party of the procuring entity; (b) shall not impose the condition that, in order for a supplier to participate in a procurement or be awarded a contract, the supplier has previously been awarded one or more contracts by a procuring entity of that Party or that the supplier has prior work experience in the territory of that Party; and (c) shall base its determination of whether a supplier has satisfied the conditions for participation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation.

Apart from limiting such conditions for participation in order to improve access to government procurement markets, especially in connection with construction procurement, the issues regarding mutual recognition of bonds issued by the entities issuing guarantee insurance policies and of technical personnel, to the extent practicable, have yet to be settled. For instance, the Federal Acquisition Regulations (FAR) of the United States require that a contractor participating in a tender for public works over the prescribed contract value should submit a bid bond and a surety bond and also limit bond-issuing entities to over 250 U.S.-based financial institutions (guarantee companies) approved by the U.S. Treasury Department.

Despite that fact, it is practically difficult for U.S.-based guarantee companies to examine the credit standing of enterprises located in Korea and, furthermore, this is likely to imply imposition of the conditions that such enterprises have prior work experience in the home country of such guarantee companies. Then, it follows that it may be impossible for them even to get such a letter of guarantee issued or they are likely to bear higher insurance premiums even if it may be issued at all. Therefore, the dominant opinion in the domestic

construction industry is that the bonds issued by Korean or U.S. guarantee insurance companies should be mutually recognized by their counterparties based in the other country. Despite the fact, especially, the matter of mutually recognizing the entities issuing guarantee insurance policies still remain a complicated issue, together with the matter of mutually recognizing technical personnel, for reason that an agreement has yet to be reached on the financial service sector of KORUS FTA.

On the other hand, Article 17.7 of KORUS FTA provides, as follows, with respect to technical specifications: For greater certainty, a Party, including its procuring entities, may, in accordance with Article VI of the GPA, prepare, adopt, or apply technical specifications: (a) to promote the conservation of natural resources or protect the environment; or (b) to require a supplier to comply with generally applicable laws regarding (i) fundamental principles and rights at work; and (ii) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health, in the territory in which the good is produced or the service is performed.

If any country pursues a policy that is oriented toward environmental protection by adopting technical specifications for environmental protection, the provisions concerning technical specifications under WTO GPA exist to restrain the country from giving rise to entry barriers to its government procurement markets. Article VI:1 of GPA provides that Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

Simultaneously, the nature of specifications in the tenders announced by the procuring entity of each country will comply mainly with the provisions of Article III (National Treatment and Non-discrimination) of GPA. In short, if technical specifications of both parties happen to cause discrimination between their goods or services and those of other GPA signatories, it will constitute a breach of national treatment principle set forth in Article III of GPA.

In addition, although formally there exists no discrimination between foreign goods and domestic ones in conducting a tender, it will be against national treatment principle to place restrictions on suppliers to participate in such tender if such suppliers can provide the goods that are equivalent in function, safety and quality by using

materials other than those set out in the relevant technical specifications for the tender in question; for instance, just as, in a tender announced by the U.S. federal government conducts for the supply of office chairs, technical specifications are prepared so that the goods should be manufactured by using certain materials that are used only in the United States but are never used in Korea at all. In such a case, if it results in actually ‘modifying the conditions of competition’ between the domestic and foreign industries, it will constitute a breach of national treatment principle set forth in Article III of GPA (Arrowsmith, 2003).

Just as there is no denying the necessity that each member country of WTO GPA should realize its individual policy objectives at its own discretion, such agreement itself in KORUS FTA can also be justifiable. Nevertheless, it is greatly necessary to monitor the adoption of technical specifications for environmental protection, if any, so as to ensure that it will not operate as another barrier to entering government procurement markets. As discussed in WTO GPA, therefore, the criteria for legitimacy of such technical specifications should be that “the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade”, as provided in the front end of Article XXIII:2 of GPA, be satisfied first of all. Subject to the immediately preceding sentence, a careful approach intended to strike balance between environment and trade should be necessarily made in adopting technical specifications for environmental protection in government procurement sector of KORUS FTA as well. For this purpose, we may impose appropriate requirements, including without limitation that “the imposition or enforcement of such measures as are necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labor”, as enumerated in the latter part of Article XXIII:2 of GPA, should be necessary for and relevant to the objectives being safeguarded and should be conducted without discrimination.

In addition, Article 17.10 of KORUS FTA, with respect to the establishment and operation of a Working Group on Government Procurement, provides as follows: 1. The Parties shall establish a Working Group on Government Procurement comprising representatives of each Party. 2. The Working Group shall meet, as mutually agreed or upon request of a Party, to: (a) consider issues regarding government procurement that a Party refers to it, including issues related to information technology; and (b) exchange

information relating to the government procurement opportunities in each Party.

This Working Group on Government Procurement should make active efforts to place itself, in the future, as a consultative body to derive further advanced agreement on such issues as preferential policies for small businesses in federal government procurement and issuance by U.S. based financial institutions of surety bonds for construction procurement, as mentioned above.

3. Analysis of the Result of Negotiations on Concessions

1) Reduction of Thresholds by Central Government (Federal Government)

In Section A of Annex 17-A to Chapter 17 (Government Procurement) of KORUS FTA, thresholds for federal government procurement markets was reduced. Then, the area in which government procurement markets access barriers have been newly reduced through negotiations this time is the area where the contract value amounts about US\$ 100,000~200,000. However, access to state government markets representing approximately 63% (as in the fiscal year of 2005) of the U.S. government procurement markets was not improved during negotiations on KORUS FTA.

In connection with negotiations for opening up regional government procurement markets, concession proposals could be prepared in diverse ways. While 37 States of the United States were opened up by WTO GPA, New York, Pennsylvania, Maryland, Michigan, Florida, Illinois, etc. opened up their markets, but excluded the application of WTO GPA to automobiles and steel or otherwise. European member countries expressly provide in Annex 2 to WTO GPA that all state or regional government agencies will be opened up, in principle. In the meantime, to some countries such as Japan and Korea where the application of WTO GPA is limited to regional governments with the number of residents over 500,000 persons, a limited most-favored nation status is applied by placing restrictions on the right to utilize challenge procedures with respect to regional government agencies under Annex 2 or otherwise.

The procurement markets of 37 States of the United States are already opened up under WTO GPA, although the applicable lower thresholds (SDR 355,000) remain higher than the federal government procurement threshold as agreed upon in KORUS FTA (SDR 100,000) and the recent weakening of control by the federal government over state governments may pose difficulty in trade negotiations. However, considering the significance of pursuing

FTA to attain more improved access to the markets than the framework of WTO multilateral negotiations and also the FTAs recently entered into by the United States with other countries, more active efforts should have been made by both governments in order to reduce thresholds even by a few of state governments although perhaps not by all of them.

2) Provisions for Exceptions to Application, including Preferential Policies for Small Business under General Note

Section E (General Notes), Annex 17-A to the government procurement chapter of KORUS FTA provides as follows: Unless otherwise specified herein, the following General Notes in each Party's Schedule apply without exception to this Chapter, including to all sections of this Annex. (Schedule of Korea) 1. This Chapter does not apply to procurement in furtherance of human feeding programs. 2. This Chapter does not apply to: (a) the single tendering procurement and set-asides for small- and medium-sized businesses according to the Act Relating to Contracts to which the State is a Party and its Presidential Decree; or (b) set asides for small-and medium-sized businesses according to the Act on Private Participation in Infrastructure. (Schedule of the United States) 1. This Chapter does not apply to any set-aside on behalf of small or minority-owned businesses. A set-aside may include any form of preference, such as the exclusive right to provide a good or service, or any price preference.

Korea has already excluded, from the areas required to open up the markets, the manufacture and purchase of products manufactured by small and medium enterprises under 'the Facilitation of Purchase of Small and Medium Enterprise-Manufactured Products Act' in its WTO GPA concession schedule. The United States also contains in its WTO GPA concession schedule, as an exception to opening up the market, the set-aside on behalf of small or minority-owned businesses under 'the Small Business Act'. KORUS FTA also includes these exceptions, including the set-aside on behalf of small businesses.

When it comes to talking about the exception of small and minority-owned businesses, each country often uses government procurement as a means to protect its industries growing less fast or realize their non-economic or ancillary policy objectives. Measures intended to support minority-owned businesses including small and medium enterprises are a policy that attracts a great deal of political support.

<Table 4> Small & Medium Enterprises Support System
in Korea, in relation to Government Procurement

Categories		Description
Small & Medium Enterprises Support System	Facilities construction works	① To maintain a list of qualified contractors by grade in order to prevent large enterprises from participation without restrictions ② Limited tendering by region and joint contracting system Evaluation in favor of small & medium enterprises in reviewing PQ and eligibility
	Purchase of goods	① Preferential purchase of products manufactured by the Small and Medium Enterprise Cooperative, organizations of people with disability or veterans, etc. ② Giving support to start-up and venture businesses, through purchase of their high quality products ③ Designation and operation of competitive products among small & medium enterprises (226 items) ④ Grant of extra points in reviewing eligibility - Technically innovative small & medium and venture businesses: 1.5 points, small & medium enterprises: 1.0 point ⑤ Active purchase of products manufactured by small & medium enterprises through MAS Purchase System
	Stockpiling	① Preferential supply to small & medium enterprises of major raw materials such as aluminum and electrolytic cathode copper ② Supply of major raw materials to small & medium enterprises, on credit at a lower interest rate
	Other support system	① Advance payment to small & medium enterprises to support them financially ② Making payment for goods immediately upon delivery

<Table 5> Small & Medium Enterprises Support System
in the United States, in relation to Government Procurement

Programs	Description
Certificate of Competency	A system where Small Business Administration certifies competency of an enterprise if it fails to be awarded a contract due to a shortage of production capability or creditability
Section 8(a) Program	A Comprehensive Guidance system provided in Article 8(a) of the Small Business Act, including without limitation financing, consulting, training and marketing

Small Disadvantage Business Certification	A system to issue certification to enterprises with socially and/or economically disadvantageous conditions, thereby giving favors to them in participating in procurement
Mentor-Protégé Program	A system in which large enterprises or graduates from the 8(a) program act as mentor to assist small businesses in strengthening the ability to participate in procurement
Small Business Modernization	A system in which government provides a guarantee on behalf of small businesses when they purchase or lease production equipment
Small Business Technology Transfer Program	A system where government departments with R&D budgets over US\$ 10 billion allocate 0.15% of such budgets to joint R&D with small businesses
Small Business Innovation Researcher Program	A three-phase R&D program subsidized by government phase by phase
Vendor Identification Program	A system to assist subcontractors now supplying defense-related products to main contractors, by providing them with the information on the procuring entities of such products so that they can supply products directly to such entities
Surety Bonds Guarantee	A system to provide a re-guarantee on the guarantee issued by a private guarantee company on behalf of an enterprise which cannot obtain a guarantee issued by such guarantee company

As shown in <Table 4> and <Table 5>, both Korea and the United States treat their small and minority-owned businesses preferentially in government procurement through diverse means. Such preferential treatment is usually conducted in such a way as the Administration and the National Assembly (or Congress) encourages government agencies to set their own purchase targets and then preferentially purchase products produced by such minority-owned businesses, rather than through mandatory purchase.

But, it requires rather a more careful approach to adopt the objectives for considering the socially disadvantaged, since it may face a lot of challenge to attain any successful results through procurement sector. For example, such a policy for supporting groups of the socially disadvantaged people could lead to an unbalanced concentration on some group or result in such groups being unable to adapt themselves to the circumstances involving market-based competition. In addition, it is not clear how much such a policy will have economic and social effect specifically on the industry generally, not on individual suppliers and foreign suppliers, through procurement sector. Among other things, it should also be considered financial inefficiency possibly resulting from the fact that institutions

(government offices of different levels, schools, etc.) directly using the goods so procured may become unable to use quality products.

Such preferential measures for small & medium enterprises and minority-owned businesses were mutually recognized by both parties as exceptions to opening up the market in KORUS FTA as well as in WTO GPA. Then, the volume of such exceptions is found to substantially reduce the effect of opening up the market. In KORUS FTA, a close review should have been conducted in advance as to the preferential policies for small & medium enterprises and the restrictions placed on market access now in effect in both parties in order to achieve the opening-up of the market further advanced than the content of the concessions mutually accepted as exceptions to the application of both parties' WTO GPA.

In particular, while the United States provides for such exceptions comprehensively by describing the means of granting preference without designating any specific laws or regulations, Korea provides for exclusions from the application of the agreement after having specifically designated the Private Participation Act (as defined below) and the Act on Contracts to which the State is a Party and, therefore, the content of such agreement may be regarded as rather limited, compared to those of the United States.

3) Provisions for Exclusion from Application of Procurement Related to Furtherance of School Feeding Programs

Section E (General Notes) of Annex 17-A to the government procurement chapter of KORUS FTA provides, in item 1 of the Schedule of Korea, that the government procurement chapter of KORUS FTA does not apply to procurement in furtherance of human feeding programs. And the Korean Government states that a provision for exception of school feeding programs was newly added, pursuant to this provision. The expenses for school feeding programs consist of the subsidies from central government or local governments and the contributions made by parents. Then, in case of the contributions by the parents, it may be construed as open to a claim for breach of national treatment if expenditures of such contributions are restricted so as to be preferentially applied to purchase domestic agricultural products in procuring raw materials for school feeding programs.

In the meantime, paragraph 2 (Exceptions by Department of Agriculture) of Notes to United States Schedule, Section A (Central Level Government Entities) states that This Chapter does not cover the procurement of any agricultural good made in furtherance of an agricultural support program or a human feeding program. Unlike the United States which links the government procurement of

agricultural products to its domestic agricultural support program requiring a huge amount of budget, Korean Schedules do not include any similar provisions (general exceptions for government procurement of agricultural products to its domestic agricultural support program) .

4) Other Additional Concessions

① Central Product Classifications not included in the existing GPA signed by Korea

When comparing the government procurement provisions of KORUS FTA to WTO GPA; i) in Section A of Annex 17-A, regional governments and government enterprises are excluded from the entities to which this agreement applies; ii) in Section C thereof, the services to which this agreement applies mutatis mutandis Annex 4 of Appendix I to GPA as they are; iii) in case of Section D (Construction Services) , Korea did not include in WTO GPA Group 518 under Category 51 of Central Product Classification (see the table below) but included the Group 518 in the KORUS FTA (The United States has already included Group 518 in WTO GPA).

<Table 6> Category 51 of Central Product Classification

Code	Name of Group
511	Pre-erection work at construction sites
512	Construction work for buildings
513	Construction work for civil engineering
514	Assembly and erection of prefabricated constructions
515	Special trade construction work
516	Installation work
517	Building completion and finishing work
518	Renting services related to equipment for construction or demolition of buildings or civil engineering works, with operator

② Opening up of Public Works Concession (Article 17.2.2)

In Article 17.2.2(b) of KORUS FTA, it is provided that “procurement for government purposes by any contractual means, including purchase; lease; rental or hire purchase, with or without an option to buy; build-operate-transfer (BOT) contracts; and public works concession contracts” are subject to government procurement

under Chapter 17 (government procurement) hereof. Therefore, it was made clear that the private participation in social overhead capital facilities now in effect in Korea, like BOT, is regarded as government procurement and it is one of the areas which are required to open up the market pursuant to this FTA.

The text itself of KORUS FTA includes nothing exceeding the level of opening up the market included in WTO GPA to which the United States is a signatory. Korea permits foreign corporations to participate in public works concession pursuant to the Act on Private Participation in Infrastructure (hereinafter referred to as "Private Participation Act"; its original title at the time of enactment was "the Promotion of Private capital into Social Overhead Capital Facilities Act") enacted on August 8, 1994. It will be, therefore, appropriate to review the significance of the existing private participation system with respect to the opening-up of the market, rather than that of the opening-up of the market pursuant to the content of government procurement in KORUS FTA.

At present, most of public works concession currently under construction are being carried out on a build-transfer-operate (BTO) or build-transfer-lease (BTL) basis. Then, BTO applies mainly to construction of highways and bridges, whereas the operation of such facilities is not included among the services which are required to open up the market; therefore, service chapter in KORUS FTA does not apply to it, either. In addition, BTL applies mainly to schools and other life infrastructure, whereas operation is the responsibility of the state and the private sector is responsible for construction only. Therefore, taking into account the concessions regarding construction services only, it appears that KORUS FTA could apply to it. However, in case of new construction or re-construction of schools, it is realistically difficult to apply KORUS FTA, because it is one of the areas controlled by regional governments. In the United States, the volume of public works concession still remains small and the construction and operation of most infrastructure are controlled by state or local governments even though such projects receives financial support from the federal government. Therefore, in practice, KORUS FTA will not apply to public works concession.

Considering these factors, it may be said that the permission of foreign corporations to participate pursuant to the private participation has much more effect of substantially opening up the market than through KORUS FTA, from the viewpoint of the United States. Judging from the procurement only covered by KORUS FTA, it follows that, from Korea's standpoint, the level of opening up the market has not improved when compared to WTO GPA.

4. Unsolved Issues

1) Settlement of the Origin of Products from the Gaeseong Industrial Park and Access to Procurement Markets

Serving as regulations to set the criteria for determining the nationality of goods, the rules of origin are of importance in FTA in that the benefit of preferential duties under FTA applies only to the goods deemed to have met the criteria for the country of origin under the FTA.

In connection with the rules of origin related to KORUS FTA, it is necessary to consider how the origin of products, which South Korean (Republic of Korea) Corporations have produced from the Gaeseong Industrial Park in North Korea (Democratic People's Republic of Korea), will be determined at the time of access to the U.S. markets.¹ The industrial park has been created by Korea around the City of Gaeseong, as a South Korea-North Korea joint industrial park, and is now in operation. While the portion of products from the Gaeseong Industrial Park among South Korea's domestic industrial products still remains not very big, the issues regarding the country of origin may have to be settled in advance, with respect to exporting such products to United States in order to encourage more enterprises to enter the industrial park in the coming future.

While the United States has expressed a negative opinion as to recognizing South Korean origin for products from the said industrial park, South Korea has taken up the position that South Korea must be recognized as the country of origin for the products produced in Gaesung in KORUS FTA. South Korea has established in other previous FTAs (such as Korea-Singapore FTA and Korea-EFTA FTA) provisions which laid the basis for allowing preferential duties to be granted to products from the industrial park (Gang, 2008). In the final agreement, it was agreed by the parties that some provisions will be established in KORUS FTA to lay the basis for 'the Committee on Outward Processing Zone on the Korean Peninsula' and that the committee will prepare specific criteria for designating the outward processing zone. Unlike the standard criteria for origin, the criteria referred to here consist of very extensive and, to some degree, political contents, since such criteria are to be established by the said committee, including but not limited to: progress in denuclearization of the Korean Peninsula; the impact of the outward processing zone on intra-Korean relations; and the environmental standards, labor standards and practices, wages, etc.

¹ According to the Ministry of Unification, South Korea, the total annual production by the enterprises operating in the Gaeseong Industrial Park (117 enterprises, as in December 2009) last year amounted to US\$250 million.

prevailing in the outward processing zone, with the due reference to the general standards prevailing elsewhere in North Korea and the relevant international norms. As a matter of fact, those requirements will cause an obstacle to the benefit of preferential duties under KORUS FTA that is proposed to be granted to products from the Gaeseong Industrial Park and, therefore, will also result in such products having difficulties in entering the markets of the United States, including the procurement market.

2) Frame Agreement and Access to Procurement Markets

As signatories to GPA, both Korea and the United States are guaranteed the opportunity to participate in tendering procedures conducted by public entities for goods, services and construction services over the given threshold. In addition to such tendering procedures, however, diverse methods to select suppliers for public procurement are being introduced mainly in advanced countries, including the United States and EU. Frame agreement is one of them.

Frame agreement represents a master agreement between one or more suppliers and the procuring entity, setting forth the terms of contract such as price, the estimated quantity, etc. in order to govern the contracts that may be awarded for the prescribed period, so that the user entities can choose the goods identical or similar in terms of quality, performance, efficiency, etc. to satisfy diverse demand of public entities. This type of system is distinguished from other standard agreements in that it may be entered into with one or more suppliers, unlike a standard procurement method, and that the necessary fundamental conditions such as price, estimated quantity, etc. will be set forth later at the time of signing the definitive agreement.

The central procurement entities in both Korea and the United States, respectively, operate frame agreements called Multiple Award Schedule (MAS) system, based on electronic commerce environment. In particular, the value of goods supplied in Korea through this MAS system amounts to US\$3.9 billion in 2008, thus representing 29.5% of the total value of national contracts executed by the Public Procurement Service (The Public Procurement Service (Republic of Korea), 2009).

While the trading volume through such frame agreement system is expected to grow more extensively, such system is not reflected on either WTO GPA or government procurement provisions of KORUS FTA and, thus, the environment for foreign suppliers to access such system is not very open to them. Among other things, registration procedures for suppliers including application for eligibility test are rather unfamiliar to foreign suppliers, in contrast with standard

tendering procedures. Therefore, some specific arrangements may have to be made to improve the conditions for suppliers from both parties to participate in such frame agreements, through discussions by KORUS FTA Working Group to be established in the future.

CONCLUSION

When government procurement provisions are adopted in FTAs signed by countries, they may be classified into a few types in which: ① procurement provisions have been reserved as a future task (Canada-Costa Rica FTA), ② only key principles of free trade for government procurement are provided, including national treatment (Australia-New Zealand CERTA), ③ GPA provisions apply mutatis mutandis (U.S.-Singapore FTA, Japan-Singapore EPA) ④ additional obligations were also established, while GPA provisions apply mutatis mutandis (U.S.- Australia FTA, EC-Chile FTA). Among the FTAs (Korea-Chile FTA, Korea-Singapore FTA, Korea-EFTA FTA, Korea-the United States FTA and Korea-EU FTA) signed by Korea in a form containing government procurement sector, KORUS FTA is a type of agreement containing the most positive efforts to realize free and fair trade for government procurement, it applies mutatis mutandis GPA provisions and also has established additional obligations as well.

Both Korea and the United States have sought to expand access to both parties' government procurement markets through negotiations on government procurement under KORUS FTA. Both parties achieved the result of reaching an agreement on the FTA, including lowering threshold related central (federal) government procurement, prohibiting the imposition of the conditions concerning prior work experience in conducting tenders and including public works concession among the projects covered by government procurement.

Notwithstanding the foregoing, it is deemed that, through such negotiations, small and medium enterprises in both parties have a very limited opportunity to access the government procurement markets of the other party. That is because the agreement reached by both parties failed to remove extensive preferential policy by both parties for small and medium enterprises or improvement of access to state or local governments' procurement markets and, at the same time, the issues regarding mutual recognition of entities issuing guarantee insurance policies and technical personnel have yet to be solved.

Here, let us look at the result of the negotiations on government procurement for KORUS FTA, from the aspect of free trade aiming to guarantee free international trade based on market economy principles by removing many man-made trade barriers in order to

promote free movement of goods and labor among countries. Judging from such viewpoint, the negotiations on procurement this time have increased the opportunity for free trade by reducing the existing thresholds related central (federal) government procurement, prohibiting the imposition of the conditions that prior work experience in the tendering country in conducting tenders and including public works concession among the project covered by government procurement.

Nonetheless, while state governments' procurement markets are already partially opened up in WTO GPA, access to such markets was not improved through such negotiations. At the same time, the adoption of technical specifications for environmental protection both countries could place restrictions on free trade.

Seen from the aspect of transparency, the government procurement provisions of KORUS FTA does not contain anything more improved than the existing transparency-related provisions set forth in WTO GPA such as compliance with tendering procedures. Rather, as a result of having accepted the adoption of such technical specifications for environmental protection, more attention will be necessarily paid to the operation of such system so that an arbitrary operation thereof will not result in a barrier to entering government procurement markets. In addition, in recognizing exceptions regarding the set-asides on behalf of small or minority-owned businesses, the scope and coverage of recognition is not clearly defined and the benefit of concessions already made may be prejudiced in the future, depending the scope and coverage that are actually applied.

Furthermore, in relation to the issue concerning determination of the origin that may have substantial effect on access to government procurement markets, the Committee on Outward Processing Zone on the Korean Peninsula is required to prepare a very extensive and, to some degree, political criteria for determining the origin for products from the Gaeseong Industrial Park. Unlike the standard criteria rules of origin, the rule of origin for products from Gaesung will reflect progress in denuclearization of the Korean Peninsula; the impact of the outward processing zone on intra-Korean relations; and the environmental standards, labor standards and practices, wages, etc. As a matter of fact, those requirements will cause difficulties in products from the Gaeseong Industrial entering the (procurement) markets of the United States.

In the meantime, while the trading volume through frame agreements is expected to grow more extensively, such system is not reflected on either WTO GPA or government procurement provisions of KORUS FTA and, thus, the environment for foreign suppliers to

access such system is not very open to them. Among other things, registration procedures for suppliers including application for eligibility test are rather unfamiliar to foreign suppliers, in contrast with standard tendering procedures. Therefore, some specific arrangements may have to be made to improve the conditions for suppliers from both parties to participate in such frame agreements, through discussions by KORUS FTA Working Group to be established in the future.

Upon a close analysis of the content of agreement reviewed above, it can be found that the result of negotiations on KORUS FTA has reflected a point of compromise between trade policies of improving market access by removing trade barriers and a domestic understanding of utilizing government procurement as a means to protect industrial policy and environment, and that it was an agreement through which we confirm there remain many issues to be solved in order to achieve free trade in government procurement sector.

In order to mutually promote substantial access to each other's market in the future, it is important for each party to provide the other party with such statistics and data as the content of procurement by central and local governments, purchases from overseas, set-aside on behalf of small and minority-owned businesses and, at the same time, cooperation should be provided with each other in conducting a close survey as to the characteristics and discriminative practices of the other party, if any. In providing such cooperation, an active role should be placed by the Working Group on Government Procurement which was agreed by both parties to establish in KORUS FTA this time.

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