

# JAPAN'S IMPLEMENTATION OF THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT

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## 1. INTRODUCTION

Over the past fifteen years, Japan has undertaken a number of measures designed to increase opportunities for foreign suppliers to participate in its government procurements. In 1980, Japan joined the United States and other countries in instituting international disciplines on government procurement in the GATT Agreement on Government Procurement ("GATT Code").<sup>1</sup> From 1980 to 1994, Japan entered thirteen bilateral procurement agreements with the United States, covering six sectors of Japanese government procurement.<sup>2</sup> These agreements were aimed at making the Japanese government procurement system more fair, open, transparent, competitive, and accessible to foreign suppliers.<sup>3</sup> During that same period, the Japanese government issued several action plans which contained similar objectives.<sup>4</sup> Most recently, Japan signed the World Trade

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<sup>1</sup> See Agreement on Government Procurement, GATT BISD, 26th Supp. 33, 33 (1980) [hereinafter GATT Code].

<sup>2</sup> See Jean Heilman Grier, *U.S.-Japan Government Procurement Agreements*, 14 WIS. INT'L L.J. 1, 12-13 (1995).

<sup>3</sup> See *id.* at 3.

<sup>4</sup> See *id.* at 13.

Organization's ("WTO") Agreement on Government Procurement ("GPA"),<sup>5</sup> which was negotiated in the Uruguay Round of Multilateral Trade Negotiations.

This Article examines the major changes in Japan's government procurement system that were necessary to fulfill its GPA obligations. This Article first sets forth the requirements of the GPA. It then describes the measures that Japan has taken to implement the GPA and their significance to Japan. Finally, this Article focuses on the implementation of international disciplines by sub-central governments and the establishment of a complaint mechanism.

## 2. WTO AGREEMENT ON GOVERNMENT PROCUREMENT

### 2.1. Overview

Participating governments concluded the multilateral negotiations to revise the GATT Code<sup>6</sup> on December 15, 1993 with a new Agreement on Government Procurement (GPA).<sup>7</sup> These parties signed the GPA on April 15, 1994.<sup>8</sup> Unlike most WTO

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<sup>5</sup> See Agreement on Government Procurement, *reprinted in* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 316, 103d Cong., 2d Sess. 1719 (1994) [hereinafter GPA].

<sup>6</sup> The GATT Code entered into force on January 1, 1981, after it was negotiated during the Tokyo Round of Multilateral Trade Negotiations. See Report (1981) of the Committee on Government Procurement, GATT BISD 28th Supp. 38, 38 (1982); The Uruguay Round Agreements Act: Statement of Administrative Action, Agreement on Government Procurement, *reprinted in* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 316, 103d Cong., 2d Sess. 656, 1037 [hereinafter UR-SAA]. The GATT Code required the signatories to provide non-discriminatory treatment to the products and suppliers of other signatories. See GATT Code, *supra* note 1, art. II. The GATT Code also obligated its signatories to use fair, transparent, and non-discriminatory procedures in procurements by central government entities. See *id.* art. V.

<sup>7</sup> Signatories to the GPA include GATT Code members (Austria, Canada, the member states of the European Union, Finland, Israel, Japan, Norway, Sweden, Switzerland, and the United States) plus one new member, the Republic of Korea. See UR-SAA, *supra* note 6, at 1037-38.

<sup>8</sup> See *id.* at 656.

agreements,<sup>9</sup> the GPA is a plurilateral trade agreement that applies only between the WTO members that agree to adhere to it.<sup>10</sup>

The GPA represents a substantial improvement over the GATT Code because it expands the scope of coverage and imposes stricter procedural disciplines on the signatories.<sup>11</sup> It opens an estimated \$350 billion annually in government contracts to international bidding, an approximate tenfold increase over the contracts subject to the GATT Code.<sup>12</sup> In addition, international procurement rules designed to ensure fair, open, and competitive procurements are expected to promote trade among signatories, reduce trade disputes, and lead to budgetary savings and higher quality procurements.<sup>13</sup> The following sections of this Article describe the components of the GPA.

## 2.2. *Scope and Coverage of the GPA*

Like the GATT Code, the GPA applies to procurements of goods by central government entities, as well as certain quasi-governmental entities.<sup>14</sup> The GPA, however, goes beyond the GATT Code because it governs the government procurement of services and also procurements by sub-central governments.<sup>15</sup> The application of the GPA to a specific procurement depends upon three factors: (1) the type of procurement; (2) the entity conducting the procurement; and (3) the value of the purchase. Each of these factors is considered briefly below.

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<sup>9</sup> Each country that accepted WTO membership automatically became a party to eighteen agreements and legal instruments, referred to as "multilateral trade agreements." *Id.* at 660.

<sup>10</sup> *See id.* The three other plurilateral agreements are the Agreement on Trade in Civil Aircraft, the Arrangement Regarding Bovine Meat, and the International Dairy Arrangement. If all WTO members agree, the parties may add more plurilateral agreements. *See id.*

<sup>11</sup> *See id.* at 1037; Gerard de Graaf & Matthew King, *Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round*, 29 INT'L LAW. 435, 437 (1995).

<sup>12</sup> *See de Graaf & King, supra* note 11, at 435-36.

<sup>13</sup> *See id.* at 437.

<sup>14</sup> *See UR-SAA, supra* note 6, at 1037.

<sup>15</sup> *See id.*

### 2.2.1. *Type of Procurement*

Like the GATT Code, the GPA covers the procurement of goods. The GPA goes further, however, and for the first time brings the procurement of services under international discipline.<sup>16</sup> Due to disagreements among the signatories as to the common services they should cover, services covered by the GPA vary by country. The signatories instead sought comparable coverage on a reciprocal basis through bilateral negotiations.<sup>17</sup> Each signatory, except for the United States,<sup>18</sup> developed a list of services that they will subject to GPA disciplines.<sup>19</sup> Only when both the government of the procuring entity and the government of the supplier have agreed to cover a particular service will the procurement of that service be subject to GPA disciplines.<sup>20</sup> Each signatory also negotiated the exclusion of certain procurements from GPA obligations.<sup>21</sup>

### 2.2.2. *Entity Coverage*

Each signatory applies the GPA to all central government entities, the executive branch in particular, subject to limited exceptions.<sup>22</sup> Although the negotiators of the GPA drafted it to cover sub-central entities and government-related entities, such as utilities, the signatories negotiated the coverage of specific entities on the basis of reciprocity.<sup>23</sup> For example, the European Un-

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<sup>16</sup> See *id.*

<sup>17</sup> See de Graaf & King, *supra* note 11, at 447.

<sup>18</sup> Rather than using a positive list, the United States listed the services that it is excluding from GPA coverage. See GPA, *supra* note 5, app. I, at 1998 (United States Annex 4: Services).

<sup>19</sup> See de Graaf & King, *supra* note 11, at 447. The United States, the European Union (EU), and European Free Trade Agreement (EFTA) countries covered financial services, but Japan did not. As a result, those countries are "not obliged to grant access to financial services contracts to Japanese [financial] service providers." *Id.*

<sup>20</sup> See *id.*

<sup>21</sup> See UR-SAA, *supra* note 6, at 1039. The United States has carried forward the exclusions in its schedule to the GATT Code to the GPA. See *id.* at 1039-40.

<sup>22</sup> See *id.* at 1037-38.

<sup>23</sup> See *id.* at 1038; de Graaf & King, *supra* note 11, at 446.

ion<sup>24</sup> and the European Free Trade Agreement<sup>25</sup> countries included all of their sub-central entities, while Japan and South Korea offered only their major sub-central entities.<sup>26</sup> Each country lists its covered entities in its schedules to the GPA.<sup>27</sup>

### 2.2.3. *Thresholds*

The GPA does not apply to every procurement of the covered entities. Coverage depends upon whether the value of the procurement is above the GPA threshold.<sup>28</sup> This threshold differs depending on the type of procurement and the level of government making the purchase.<sup>29</sup> All signatories of the GPA apply the same thresholds to procurements by central government entities: (1) 130,000 Special Drawing Rights ("SDRs")<sup>30</sup> (\$182,000) for procurements of goods and services; and (2) 5,000,000

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<sup>24</sup> On April 15, 1994, the date of the signing of the GPA, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, the Netherlands, Luxembourg, Portugal, Spain, and the United Kingdom comprised the EU. See de Graaf & King, *supra* note 11, at 435 n.2. Three EFTA countries, Austria, Finland, and Sweden, joined the EU on January 1, 1995. See *id.*

<sup>25</sup> When the GPA was negotiated, the EFTA countries were Austria, Norway, Sweden, Finland, and Switzerland. See *id.* at 435 n.3. Switzerland did not offer all of its sub-central entities, only the first tier. See UR-SAA, *supra* note 6, at 1968-69.

<sup>26</sup> See de Graaf & King, *supra* note 11, at 446. The Japanese and Korean sub-central entities are prefectures or provinces and cities with populations of more than 500,000. See *id.* The United States offered to cover procurements by specified government entities in 37 states, federally-owned utilities and several sub-central utilities, the Port Authority of New York and New Jersey, the Port of Baltimore, and the New York Power Authority. See UR-SAA, *supra* note 6, at 1038.

<sup>27</sup> See UR-SAA, *supra* note 6, at 1038. Annex 1 of the GPA lists central government entities, Annex 2 lists sub-central government entities, and Annex 3 lists government-related entities. See GPA, *supra* note 5, at 1984-97.

<sup>28</sup> See UR-SAA, *supra* note 6, at 1039. The GPA elaborates on provisions in the GATT Code regarding the valuation of contracts to determine whether the GPA covers a procurement. GATT Code, *supra* note 1, art. I(1)(b); GPA, *supra* note 5, art. II; de Graaf & King, *supra* note 11, at 438.

<sup>29</sup> See de Graaf & King, *supra* note 11, at 438.

<sup>30</sup> Special Drawing Rights "are the International Monetary Fund's international reserve unit of account and are based on the currencies of five countries." 2 NANCY E. MORGAN, U.S. DEP'T OF COMMERCE, THE TOKYO ROUND TRADE AGREEMENTS: GOVERNMENT PROCUREMENT 2 n.2 (1981). In 1994, one SDR equaled approximately \$1.40. See UR-SAA, *supra* note 6, at 1039. While the value of the SDR is recalculated every two years, the dollar figures used in this Article are based on the 1994 SDR value.

SDRs (\$7,000,000) for procurements of construction services.<sup>31</sup> Thresholds for procurements by sub-central governments and government-related entities, however, vary by country. Sub-central governments apply thresholds of: (1) 200,000 SDRs (\$280,000) for goods and services, except for the United States and Canada, which apply a 355,000 SDR (\$500,000) threshold; and (2) 5,000,000 SDRs (\$7,000,000) for construction services, except for Japan and Korea, which use a 15,000,000 SDR (\$21,000,000) threshold.<sup>32</sup>

Government-related enterprises follow GPA requirements for procurements of goods and services above a threshold of 400,000 SDRs (\$560,000), except for the United States which uses a \$250,000 threshold for federally-owned utilities.<sup>33</sup> When government-owned entities purchase construction services, they must follow the GPA for procurements valued at 5,000,000 SDRs or more, except for Japan and Korea, which use the same threshold as for sub-central construction services (15,000,000 SDRs).<sup>34</sup>

### 2.3. General Disciplines

#### 2.3.1. National Treatment and Most-Favored-Nation Treatment

Consistent with fundamental GATT principles, the GPA calls for national treatment, which prescribes that foreign goods, services, and suppliers be treated no less favorably than their domestic counterparts.<sup>35</sup> The GPA further calls for most-favored-nation ("MFN") treatment, which requires a signatory to give the best treatment that it accords to any GPA signatory to all GPA parties.<sup>36</sup> While these obligations apply to most procure-

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<sup>31</sup> See UR-SAA, *supra* note 6, at 1039.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.* This was the threshold that applied to the entities under the North American Free Trade Agreement. See North American Free Trade Agreement, art. 1001(1)(c)(ii), *reprinted in* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 159, 103d Cong., 1st Sess. 713 (1993).

<sup>34</sup> See *id.*

<sup>35</sup> See GPA, *supra* note 5, art. III(1)(a).

<sup>36</sup> See *id.* art. III(1)(b).

ments of goods and services by central government entities,<sup>37</sup> the parties departed from MFN treatment for purchases of sub-central and government-related entities based on their reciprocal approach to coverage.<sup>38</sup>

Signatories to the GPA must ensure that their entities do not treat a locally established supplier in a less favorable manner than another locally established supplier “on the basis of degree of foreign affiliation or ownership.”<sup>39</sup> In addition, each GPA party must ensure that their entities do not discriminate against locally established suppliers on the basis of the country of production of the goods or services that they supply.<sup>40</sup>

### 2.3.2. *Offsets*

In a significant improvement over the GATT Code, the GPA prohibits government entities from considering, seeking, or imposing “offsets,” such as local content or investment requirements, in the qualification and selection of suppliers, goods, and services or in the evaluation of tenders and award of contracts.<sup>41</sup> Only one country, Israel, negotiated an offsets exception.<sup>42</sup>

## 2.4. *Procedural Requirements*

In addition to expanding coverage, the GPA improved upon GATT Code procedures. The GPA details requirements for technical specifications;<sup>43</sup> qualifications of suppliers;<sup>44</sup> the publication of invitations to participate in procurements;<sup>45</sup> selection

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<sup>37</sup> Only a few exceptions or differences in treatment were taken. For example, the United States will not apply the GPA disciplines to the National Aeronautical and Space Administration (“NASA”) for bids by Japanese suppliers since Japan refused to cover its National Space Development Agency. See UR-SAA, *supra* note 6, at 1038; de Graaf & King, *supra* note 11, at 446 n.47.

<sup>38</sup> See de Graaf & King, *supra* note 11, at 446.

<sup>39</sup> GPA, *supra* note 5, art. III(2).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* art. XVI; UR-SAA, *supra* note 6, at 1041.

<sup>42</sup> See UR-SAA, *supra* note 6, at 1041.

<sup>43</sup> See GPA, *supra* note 5, art. VI.

<sup>44</sup> See *id.* art. VIII.

<sup>45</sup> See *id.* art. IX. The GPA also delineates the required content of the notice. See *id.*

procedures;<sup>46</sup> time limits for tendering and delivery;<sup>47</sup> the provision of tender documentation;<sup>48</sup> the submission, receipt and opening of tenders and awarding of contracts;<sup>49</sup> negotiations;<sup>50</sup> limited tendering;<sup>51</sup> transparency;<sup>52</sup> and challenge procedures.<sup>53</sup> Drafters of the GPA incorporated provisions from the GATT Code, often with only slight modifications. GPA procedural obligations, however, diverge in several respects from the GATT Code, in part to accommodate new areas of coverage and to provide for greater procurement efficiency.<sup>54</sup> The following discussion of the GPA requirements notes several of the more important differences between the GPA and the GATT Code.

#### 2.4.1. *Tendering Procedures*

As with the GATT Code, the GPA provides for three types of tendering: (1) open tendering procedures under which all interested suppliers may submit a tender; (2) selective tendering procedures, which allow only suppliers invited by the entity to submit a tender; and (3) limited tendering, known as single tendering under the GATT Code, whereby the entity contacts suppliers individually under specified conditions.<sup>55</sup>

The GPA decrees as "the rule" the use of open and selective tendering procedures.<sup>56</sup> When a procuring entity uses a selective tendering procedure, it must "ensure optimum effective international competition" by maximizing the number of domestic and

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<sup>46</sup> See *id.* art. X.

<sup>47</sup> See *id.* art. XI.

<sup>48</sup> See *id.* art. XII.

<sup>49</sup> See *id.* art. XIII.

<sup>50</sup> See *id.* art. XIV.

<sup>51</sup> See *id.* art. XV.

<sup>52</sup> See *id.* art. XVII.

<sup>53</sup> See *id.* art. XX.

<sup>54</sup> See UR-SAA, *supra* note 6, at 1041. For example, the GPA subjects sub-central and government-related entities to less rigorous notice and publication requirements than those of central government entities. See GPA, *supra* note 5, art. XIX(5). It also imposes less stringent statistical reporting requirements on sub-central and government-related entities. See *id.*

<sup>55</sup> See GPA, *supra* note 5, art. VII(3); GATT Code, *supra* note 1, art. V(1); de Graaf & King, *supra* note 11, at 439 n.23.

<sup>56</sup> de Graaf & King, *supra* note 11, at 439; see also GPA, *supra* note 5, art. X(1).



foreign suppliers that it invites to submit tenders.<sup>57</sup> The entity must also select suppliers "to participate in a fair and non-discriminatory manner."<sup>58</sup> Entities may use limited tendering procedures only in specified situations. These circumstances include: (1) where no tenders are received when open or selective tendering procedures are used;<sup>59</sup> (2) where works of art or prototypes are procured;<sup>60</sup> (3) cases of extreme urgency;<sup>61</sup> (4) cases for additional deliveries of a product that has already been supplied;<sup>62</sup> and (5) certain other "cases that would not damage international competition."<sup>63</sup>

#### 2.4.2. *Technical Specifications*

With respect to technical specifications, both the GPA and the GATT Code stipulate that the technical specifications of a product or service to be procured must be based on performance rather than design characteristics.<sup>64</sup> Unlike the GATT Code, however, the GPA explicitly prefers the use of international standards over national standards in the development of technical specifications.<sup>65</sup> Furthermore, the GPA prohibits procuring entities from seeking or accepting advice in the preparation of specifications from a supplier that may have a commercial interest in the procurement, if such advice would impede competition.<sup>66</sup>

<sup>57</sup> GPA, *supra* note 5, art. X(1).

<sup>58</sup> *Id.*

<sup>59</sup> *See id.* art. XV(1)(a).

<sup>60</sup> *See id.* art. XV(1)(b).

<sup>61</sup> *See id.* art. XV(1)(c).

<sup>62</sup> *See id.* art. XV(1)(d).

<sup>63</sup> de Graaf & King, *supra* note 11, at 439.

Specifically, these cases concern (a) the purchase of construction services that were not specified in the original contract or are repeat construction services, (b) procurements following a design contest that has been organized in a manner fully consistent with the principles of the GPA, (c) the purchase of products on a commodities market, or (d) purchases made under exceptionally advantageous conditions that will only arise in the very short term.

*Id.* at 439 n.24.

<sup>64</sup> *See* GPA, *supra* note 5, art. VI(2)(a); GATT Code, *supra* note 1, art. IV(2)(a). The GATT Code only covered products.

<sup>65</sup> *See* GPA, *supra* note 5, art. VI(2)(b); GATT Code, *supra* note 1, art. IV(2)(b); de Graaf & King, *supra* note 11, at 438.

<sup>66</sup> *See* GPA, *supra* note 5, art. VI(4).

#### 2.4.3. *Qualification of Suppliers*

Like the GATT Code, the GPA allows entities to prescribe qualifications for suppliers, subject to constraints that are designed to ensure that all interested suppliers are given sufficient time and opportunity to participate effectively in the qualification process.<sup>67</sup> Entities are also prohibited from discriminating against prospective suppliers on the grounds of nationality.<sup>68</sup>

The GPA incorporates important new safeguards regarding the qualification of suppliers, including a requirement that procuring entities limit conditions for participation to those that are "essential to ensure the firm's capability to fulfil the contract in question."<sup>69</sup> Under the GPA, procuring entities must consider a supplier's global business activity as well as its activity within the territory of the procuring entity in assessing the supplier's financial, commercial, and technical capacity.<sup>70</sup> To further facilitate participation in procurements, GPA signatories must ensure that the constituent parts of each procuring entity use a single qualification procedure, unless there is a demonstrated need for different procedures.<sup>71</sup>

#### 2.4.4. *Information for Prospective Suppliers*

GPA stipulations for furnishing suppliers with information on pending procurements are more extensive than GATT Code requirements. Both the GPA and the GATT Code require

<sup>67</sup> See *id.* art. VIII(a); GATT Code, *supra* note 1, art. V(2); de Graaf & King, *supra* note 11, at 439.

<sup>68</sup> See GPA, *supra* note 5, art. VIII(b); GATT Code, *supra* note 1, art. V(2)(b). The GPA elaborates on this prohibition:

[a]ny conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties.

GPA, *supra* note 5, art. VIII(b). The GATT Code includes virtually the same prohibition. See GATT Code, *supra* note 1, art. V(2)(b).

<sup>69</sup> GPA, *supra* note 5, art. VIII(b).

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* art. VIII(g)(i). Signatories are also obligated to minimize differences in qualification procedures among their entities. See *id.* art. VIII(g)(ii).

procuring entities to publish notice in an official publication<sup>72</sup> of intended procurements that are above certain thresholds, except where limited tendering is used.<sup>73</sup> Also, both agreements prescribe that the procurement notices shall include: (1) the nature and quantity of the procurement;<sup>74</sup> (2) the type of procurement procedures that will be used;<sup>75</sup> (3) information on the qualification process;<sup>76</sup> (4) economic and technical requirements;<sup>77</sup> (5) information on obtaining specifications and other documents;<sup>78</sup> (6) the delivery date;<sup>79</sup> and (7) the amount and terms of payment.<sup>80</sup> The GPA mandates that the content of the notice include any options for further procurement<sup>81</sup> and a statement of whether the entity is seeking offers for purchase, lease, or rental.<sup>82</sup> Entities must also publish a summary of the notices in one of the official languages of the WTO.<sup>83</sup>

As noted above, the GPA includes relaxed notice and publication procedures for sub-central government entities and government-related entities, allowing them to use simplified procedures in the invitation to participate in a tender.<sup>84</sup> For example, sub-

<sup>72</sup> See *id.* art. IX(1). The journals in which the notices are published include Japan's official gazette, the *Kanpō*. See *id.* app. II; UR-SAA, *supra* note 6, at 2014; de Graaf & King, *supra* note 11, at 438 n.16.

<sup>73</sup> See GPA, *supra* note 5, art. IX(1); GATT Code, *supra* note 1, art. V(3).

<sup>74</sup> See GPA, *supra* note 5, art. IX(6)(a); GATT Code, *supra* note 1, art. V(4)(a).

<sup>75</sup> See GPA, *supra* note 5, art. IX(6)(b) (parties must specify whether the procedure is open or selective or will involve negotiation); GATT Code, *supra* note 1, art. V(4)(b).

<sup>76</sup> See GPA, *supra* note 5, art. IX(6)(d); GATT Code, *supra* note 1, art. V(4)(d).

<sup>77</sup> See GPA, *supra* note 5, art. IX(6)(f); GATT Code, *supra* note 1, art. V(4)(f).

<sup>78</sup> See GPA, *supra* note 5, art. IX(6)(e); GATT Code, *supra* note 1, art. V(4)(e).

<sup>79</sup> See GPA, *supra* note 5, art. IX(6)(c); GATT Code, *supra* note 1, art. V(4)(c).

<sup>80</sup> See GPA, *supra* note 5, art. IX(6)(g); GATT Code, *supra* note 1, art. V(4)(g).

<sup>81</sup> See GPA, *supra* note 5, art. IX(6)(a).

<sup>82</sup> See *id.* art. IX(6)(h).

<sup>83</sup> See *id.* art. IX(8); GATT Code, *supra* note 1, art. V(4). The official languages are English, French, and Spanish. See de Graaf & King, *supra* note 11, at 439 n.18.

<sup>84</sup> See UR-SAA, *supra* note 6, at 1041.

central entities and government-related entities may use either a notice of planned procurement or a notice of a qualification process as an invitation to participate in a procurement.<sup>85</sup>

The GPA and the GATT Code both detail the minimum contents of tender documentation and require that there be sufficient information to enable suppliers to submit responsive tenders.<sup>86</sup> Procuring entities must also promptly respond to reasonable requests for procurement information, so long as such information does not give the supplier an advantage over its competitors in the procurement.<sup>87</sup>

#### 2.4.5. *Time Limits for Tendering and Delivery*

The GPA changes several deadlines established in the GATT Code. When an entity uses open tendering procedures, it generally must allow suppliers a minimum of forty days to submit tenders after it publishes the notice of procurement.<sup>88</sup> Where an entity uses a selective tendering procedure and does not maintain a permanent list of qualified suppliers, however, it must give suppliers at least twenty-five days from the date of publication of the notice to apply for an invitation to participate in the procurement.<sup>89</sup> Under the GPA, procuring entities may shorten the time period in certain circumstances.<sup>90</sup>

#### 2.4.6. *Negotiations with Tenderers*

A new provision in the GPA allows entities to conduct negotiations with potential suppliers where either the entity has indicated such intent in its notice of proposed procurement or, based on the evaluation, it appears "that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation."<sup>91</sup>

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<sup>85</sup> See GPA, *supra* note 5, art. IX(3).

<sup>86</sup> See *id.* art. XII(2); GATT Code, *supra* note 1, art. V(12).

<sup>87</sup> See GPA, *supra* note 5, art. XII(3)(c); GATT Code, *supra* note 1, art. V(13)(c).

<sup>88</sup> See GPA, *supra* note 5, art. XI(2)(a). Under the GATT Code, the minimum time is 30 days. See GATT Code, *supra* note 1, art. V(10)(a).

<sup>89</sup> See GPA, *supra* note 5, art. XI(2)(b). Under the GATT Code, the minimum time is 30 days. See GATT Code, *supra* note 1, art. V(10)(b).

<sup>90</sup> See GPA, *supra* note 5, art. XI(3)(a).

<sup>91</sup> *Id.* art. XIV(1).

The primary purpose of such negotiations is to enable the entity to identify the strengths and weaknesses of the tenders.<sup>92</sup> In conducting the negotiations, entities are warned to treat tenders in confidence<sup>93</sup> and not to discriminate between suppliers.<sup>94</sup>

#### 2.4.7. *Award of Contracts*

When awarding a contract under the GPA, entities must follow the same methodology as under the GATT Code. They must award the contract to the supplier who is “fully capable of undertaking the contract” and who offers either the lowest price or the most advantageous tender<sup>95</sup> “based on various criteria such as quality, technical merit, delivery costs, and price.”<sup>96</sup> The GPA adds the requirement that awards must be based on the criteria and essential requirements specified in the tender documentation.<sup>97</sup>

#### 2.4.8. *Post-Award Information*

The GPA imposes a new obligation on entities to publish a post-award notice within seventy-two days of the awarding of a contract.<sup>98</sup> Entities must include the following information in the notice: (1) the nature and quantity of the procurement;<sup>99</sup> (2) the name and address of the winning tenderer;<sup>100</sup> (3) “the value of the winning award or the highest and lowest offer taken into account in the award of the contract;”<sup>101</sup> (4) the type of procedure used;<sup>102</sup> and (5) where limited tendering was used, the

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<sup>92</sup> See *id.* art. XIV(2).

<sup>93</sup> See *id.* art. XIV(3).

<sup>94</sup> See *id.* art. XIV(4). In particular, entities must: (1) follow criteria set out in the notices and tender documentation in eliminating any participants; (2) send modifications of criteria and technical requirements to all participants remaining in the negotiations and afford them an opportunity to make new or amended submissions; and (3) when the negotiations are concluded, allow all participants to submit final tenders by a common deadline. See *id.*

<sup>95</sup> *Id.* art. XIII(4)(b); see GATT Code, *supra* note 1, art. V(14)(f).

<sup>96</sup> de Graaf & King, *supra* note 11, at 439-40.

<sup>97</sup> See GPA, *supra* note 5, art. XIII(4)(c).

<sup>98</sup> See *id.* art. XVIII(1).

<sup>99</sup> See *id.* art. XVIII(1)(a).

<sup>100</sup> See *id.* art. XVIII(1)(b).

<sup>101</sup> *Id.* art. XVIII(1)(e).

<sup>102</sup> See *id.* art. XVIII(1)(g).

justification for its use.<sup>103</sup> Also, when requested by a supplier, the entity must disclose: (1) relevant information as to why the supplier's application for qualification was rejected;<sup>104</sup> (2) why the supplier's tender was not selected;<sup>105</sup> (3) the name of the winning tenderer; and (4) the distinguishing features and relative advantages of the tender selected.<sup>106</sup>

#### 2.4.9. Bid Challenge Procedures

One of the most important improvements in the GPA is the mandate that signatories set up a bid challenge system.<sup>107</sup> For the first time, the agreement obligates each signatory to "provide non-discriminatory, timely, transparent and effective procedures,"<sup>108</sup> which will enable aggrieved suppliers to challenge procurements that are allegedly conducted in contravention of the GPA. GPA parties must provide for an independent assessment of alleged violations of the GPA.<sup>109</sup> Authority for this review must be given to either a court or an impartial and independent review body that has no interest in the outcome of the procurement and that is made up of members who are secure from external influence.<sup>110</sup>

When the reviewing body is not a court, its actions must be subject to judicial review or it must have procedures that provide, *inter alia*, that: (1) participants have the right to be heard,<sup>111</sup> to have access to and be represented in all proceedings,<sup>112</sup> and to present witnesses;<sup>113</sup> (2) proceedings can take place in public;<sup>114</sup>

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<sup>103</sup> See *id.* art. XVIII(1)(f).

<sup>104</sup> See *id.* art. XVIII(2)(b).

<sup>105</sup> See *id.*

<sup>106</sup> *Id.* art. XVIII(2)(c); see also GATT Code, *supra* note 1, art. VI(2). There are several exceptions to the required disclosure under the GPA. See, GPA, *supra* note 5, art. XVIII(4).

<sup>107</sup> See GPA, *supra* note 5, art. XX(1). The GATT Code did not impose any obligation on signatories to provide for bid challenges.

<sup>108</sup> *Id.* art. XX(2). Signatories must encourage suppliers that complain of breaches of the GPA to seek resolution of the complaint with the procuring entity. See *id.* art. XX(1).

<sup>109</sup> See *id.* art. XX(6).

<sup>110</sup> See *id.*

<sup>111</sup> See *id.* art. XX(6)(a).

<sup>112</sup> See *id.* art. XX(6)(b)-(c).

<sup>113</sup> See *id.* art. XX(6)(f).

and (3) written opinions or decisions will be issued with a statement of their basis.<sup>115</sup> If the reviewing body finds a breach of the GPA, it must have the authority to order either a correction of the GPA violation or “compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.”<sup>116</sup> Signatories must also provide “rapid interim measures to correct breaches of the [GPA] and to preserve commercial opportunities.”<sup>117</sup> The new bid challenge systems should contribute significantly to “improving domestic enforcement of [GPA] obligations.”<sup>118</sup>

### 2.5. Consultations and Dispute Settlement

The GPA requires signatories to settle their disputes related to the GPA’s implementation under the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”).<sup>119</sup> The GPA, however, provides for several departures from DSU procedures, including: (1) shortening the panel review period to the extent possible;<sup>120</sup> (2) allowing only GPA signatories to participate in Dispute Settlement Body proceedings involving GPA disputes;<sup>121</sup> (3) requiring panels to include persons qualified in government procurement;<sup>122</sup> and (4) prohibiting cross-retaliation.<sup>123</sup>

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<sup>114</sup> See *id.* art. XX(6)(d).

<sup>115</sup> See *id.* art. XX(6)(e).

<sup>116</sup> *Id.* art. XX(7)(c). Japan, the European Union, and EFTA had advocated limiting recoverable damages to bid-preparation costs. See de Graaf & King, *supra* note 11, at 440 n.29.

<sup>117</sup> GPA, *supra* note 5, art. XX(7)(a). “Such action may result in suspension of the procurement process.” *Id.* The GPA also provides that “overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied,” and where they are not applied, written justification must be provided. *Id.*

<sup>118</sup> UR-SAA, *supra* note 6, at 1041.

<sup>119</sup> See GPA, *supra* note 5, art. XXII(1).

<sup>120</sup> See *id.* art. XXII(6).

<sup>121</sup> See *id.* art. XXII(3).

<sup>122</sup> See *id.* art. XXII(5).

<sup>123</sup> See *id.* art. XXII(3). DSU procedures allow cross-retaliation if a party can show that retaliation in the same area would not be effective. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22(3)(b), reprinted in MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF

## 2.6. Implementation of the GPA

The GPA was signed on April 15, 1994,<sup>124</sup> and all of the signatories were obligated to implement it by January 1, 1996,<sup>125</sup> with one exception.<sup>126</sup>

## 3. JAPAN'S IMPLEMENTATION OF THE GPA

### 3.1. Background

When Japan implemented the GPA on January 1, 1996,<sup>127</sup> it undertook its third set of international obligations to improve its government procurement system. To understand the implications of the new commitments for Japan, it is necessary to consider the extent to which Japan had already reformed its procurement system as a result of outside influences.

Before Japan became a signatory to the GATT Code, it made relatively little use of an open competitive bidding system in government procurements.<sup>128</sup> As a consequence, when Japan implemented the Code in 1981, it instituted unprecedented changes in its procurement system as it opened government purchases to foreign suppliers.<sup>129</sup> The reform of Japan's procurement system, however, did not end with its assumption of GATT

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AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 316, 103d Cong., 2d Sess. 1654 (1994).

<sup>124</sup> See GPA, *supra* note 5, at 1719.

<sup>125</sup> See *id.* art. XXIV(1).

<sup>126</sup> The exception is the Republic of Korea, which was granted an additional year, until January 1, 1997, to implement the GPA. See *id.* art. XXIV(3)(a). Korea had not been a member of the GATT Code. See *supra* note 7.

<sup>127</sup> In December 1994, the Japanese Diet approved the Agreement Establishing the World Trade Organization, which included the GPA in Annex 4, and a related package of seven bills. See Japan Economic Institute, Japan's Uruguay Round Package, JEI Report No. 47B (Dec. 16, 1994) 12. The Lower House approved the package on December 2, 1994, and the Upper House on December 9, 1994. See *id.* Cabinet ratification of the package soon followed. See *id.* Under Article 65 of the Japanese Constitution, "executive powers are vested in the Cabinet." MITSUO MATSUSHITA, INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN 6 (1993).

<sup>128</sup> See Grier, *supra* note 2, at 10.

<sup>129</sup> See *id.* at 12. For a thorough discussion of Japan's response to its GATT Code responsibilities, see Kozo Toyama et al., *Government Procurement Procedures of Japan*, 21 GEO. WASH. J. INT'L L. & ECON. 91 (1987).



Code obligations. Japan subsequently entered into a series of bilateral arrangements with the United States and issued several unilateral action plans in order to further reform its procurement system.<sup>130</sup>

Between 1980 and 1994, the United States and Japan negotiated thirteen bilateral government procurement agreements.<sup>131</sup> With the negotiation of these agreements, the United States sought to remove impediments faced by foreign suppliers in specific procurement areas.<sup>132</sup> The resulting agreements required the Japanese government and certain government-related entities to adopt more transparent, competitive, and non-discriminatory procurement procedures.<sup>133</sup>

While each bilateral agreement was tailored to remove the obstacles encountered by foreign suppliers in a particular sector, the separate agreements have several common characteristics. Each sets out procedures that generally are more detailed than those required by the GATT Code. The agreements, for the most part, supplement or fill "gaps" in the GATT Code<sup>134</sup> by covering procurements not subject to multilateral disciplines, providing more detailed procedures, and addressing specific market access barriers posed by Japan's procurement system.<sup>135</sup> Each agreement applies only to procurements that meet certain thresholds and are conducted by specified central government and quasi-governmental entities.<sup>136</sup> These Japanese entities closely correspond to the entities subject to the GATT Code and the GPA.<sup>137</sup> Japan accords the benefits of the bilateral agreements

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<sup>130</sup> See Grier, *supra* note 2, at 12-13.

<sup>131</sup> For a comprehensive explanation of each of the 13 bilateral agreements, see *id.* at 18-61. The six sectors covered by these agreements are supercomputers, public works, satellites, computers, medical technology, and telecommunications. See *id.*

<sup>132</sup> See *id.* at 62.

<sup>133</sup> See *id.* at 62-63.

<sup>134</sup> See *id.* at 62. In the negotiation of the bilateral agreements, Japan's compliance with the GATT Code was not at issue. Despite the criticisms of Japan's procurement system, there have been no formal complaints regarding its compliance with the GATT Code.

<sup>135</sup> See *id.* at 62-63.

<sup>136</sup> See *id.* at 18-61.

<sup>137</sup> Some agreements were limited to a single entity or specified projects. See *id.*

to all foreign suppliers, not just those from the United States.<sup>138</sup>

An example of an agreement negotiated to compensate for limitations in GATT Code coverage is the first bilaterally negotiated agreement, which applies to procurements by Japan's domestic telecommunications carrier, Nippon Telegraph and Telephone Corporation ("NTT").<sup>139</sup> The United States had sought a bilateral agreement to open NTT's purchases of public telecommunications equipment to foreign suppliers because the United States believed that Japan's GATT Code coverage was inadequate.<sup>140</sup> Other bilateral agreements cover services that were not subject to the GATT Code, in particular construction services.<sup>141</sup>

In addition to the bilateral accords, Japan, on its own initiative, but at least partially in response to foreign criticism of its procurement system, adopted several action plans that augmented its international commitments.<sup>142</sup> For example, Japan improved on its GATT Code obligations by voluntarily adding entities that would follow GATT Code requirements, increasing the period between the publication of notices of procurement and the deadline for the submission of tenders, and lowering the threshold for procurements announced in the *Kanpō*, Japan's official gazette.<sup>143</sup>

### 3.2. *Japan's GPA Obligations*

#### 3.2.1. *Japanese Entities Subject to the GPA*

Like all GPA signatories, Japan subjected three categories of entities to GPA disciplines: central government entities, sub-central entities, and government-related entities. This Article describes the specifics of the coverages below.

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<sup>138</sup> See *id.* at 63. The agreements did not impose reciprocal obligations on the United States. See *id.*

<sup>139</sup> See *id.* at 18-21.

<sup>140</sup> See *id.* at 19.

<sup>141</sup> See *id.* at 32-45, 62.

<sup>142</sup> See *id.* at 24 (1985 Japanese Action Program), 49 (1991 Japanese Action Program), 53 (1994 Action Program on Government Procurement).

<sup>143</sup> See *id.* at 24 (1985 Japanese Action Program), 49 (1991 Japanese Action Program).

### 3.2.1.1. Central Government Entities

Consistent with its coverage under the GATT Code, Japan applies the GPA to the procurement of all central government entities.<sup>144</sup> These entities include both houses of the Diet (Japan's legislative body), the Supreme Court, the Cabinet, twelve ministries, and fifteen other central government entities that are subject to the Accounts Law.<sup>145</sup> Japan, however, withheld its National Space Development Agency from GPA coverage,<sup>146</sup> and has taken a few other exceptions, including contracts awarded to cooperatives or associations.<sup>147</sup> Japan applies the same thresholds for central government procurements as the other signatories: 130,000 SDRs for goods; 4,500,000 SDRs for construction services; 450,000 SDRs for architectural, engineering, and technical services; and 130,000 SDRs for other services.<sup>148</sup>

### 3.2.1.2. Sub-Central Entities

Second, in a major departure from its prior practice,<sup>149</sup> Japan has subjected its most important sub-central governmental entities to GPA disciplines.<sup>150</sup> Japan has required its forty-seven prefec-

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<sup>144</sup> See GPA, *supra* note 5, app. I, at 1900 (Japan Annex 1: Central Government Entities Which Procure in Accordance with the Provisions of This Agreement) [hereinafter Japan Annex 1]; see also GOVERNMENT OF JAPAN, 1995 REPORT ON THE WTO: CONSISTENCY OF TRADE POLICIES BY MAJOR TRADING PARTNERS tbl. 2-6-1 (1995) [hereinafter 1995 GOJ REPORT].

<sup>145</sup> See Japan Annex 1, *supra* note 144, at 1900. In addition, "internal subdivisions, independent organs, attached organizations, and other organizations and local branch offices" of the central government entities must comply with the GPA. *Id.* at 1901 n.1. The Accounts Law is Japan's basic procurement statute, which "governs the overall aspects of budgeting, auditing, and accounting by the National Government." Toyama et al., *supra* note 129, at 93; see Kaikei Hō [Accounts Law] (Law No. 35 of 1947) [hereinafter Accounts Law].

<sup>146</sup> Because Japan refused to cover its National Space Development Agency, the United States did not cover NASA with regard to Japan. See UR-SAA, *supra* note 6, at 1038.

<sup>147</sup> Japan Annex 1, *supra* note 144, at 1901 nn.2-4. Japan has limited Defense Agency coverage to specified categories of procurements. See *id.* at 1901 n.4.

<sup>148</sup> See *id.* at 1900.

<sup>149</sup> Sub-central entities were not subject to the GATT Code.

<sup>150</sup> See GPA, *supra* note 5, app. I, at 1903 (Japan Annex 2: Sub-Central Government Entities Which Procure in Accordance with the Provisions of This Agreement) [hereinafter Japan Annex 2]. As in the case of the central entities,

tures and twelve designated cities<sup>151</sup> (*shitei toshi*) to comply with the GPA, subject to several exceptions.<sup>152</sup> The excepted procurements include: contracts awarded to cooperatives and associations;<sup>153</sup> contracts awarded as part of entities' "daily profit-making activities which are exposed to competitive forces in markets;"<sup>154</sup> and "[p]rocurement related to the production, transport or distribution of electricity."<sup>155</sup> Japan negotiated GPA thresholds for its sub-central government procurements of 200,000 SDRs for goods and all services, except for construction services and architectural, engineering, and technical services, which have thresholds of 15,000,000 SDRs and 1,500,000 SDRs, respectively.<sup>156</sup>

### 3.2.1.3. *Government-Related Entities*

Japan has included eighty-four government-related entities in the third category of entities subject to the GPA.<sup>157</sup> These include the partially privatized NTT, several railway companies created after the breakup of Japan National Railways Corporation, the Japan External Trade Organization, and various financial corporations, such as the Housing Loan Corporation.<sup>158</sup> Japan

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the GPA obligations extend to "all internal sub-divisions, attached organizations and branch offices of all their governors or mayors, committees and other organizations provided for in the Local Autonomy Law." *Id.* at 1904 n.1. See also 1995 GOJ REPORT, *supra* note 144, tbl. 2-6-1. See *infra* notes 182-281 and accompanying text for discussion of extension of international disciplines to local governments in Japan.

<sup>151</sup> See Japan Annex 2, *supra* note 150, at 1904. Designated cities are cities with populations over 500,000. See Chihō Jichi Hō (Law No. 67 of 1947, as amended) [hereinafter Local Autonomy Law]. The cities subject to the GPA are: Osaka, Nagoya, Kyoto, Yokohama, Kobe, Kitakyushu, Sapporo, Kawasaki, Fukuoka, Hiroshima, Sendai, and Chiba. See Japan Annex 2, *supra* note 150, at 1903. Tokyo is classified as a prefectural government. See *id.*

<sup>152</sup> See Japan Annex 2, *supra* note 150, at 1904.

<sup>153</sup> See *id.* at 1904 n.3.

<sup>154</sup> *Id.* at 1904 n.4. Entities may not use this exception to circumvent the GPA. See *id.*

<sup>155</sup> *Id.* at 1904 n.6. Japan did not open its electricity and public transport utilities to international bidding. See de Graaf & King, *supra* note 11, at 447.

<sup>156</sup> See Japan Annex 2, *supra* note 150, at 1903.

<sup>157</sup> See GPA, *supra* note 5, app. I, at 1905 (Japan Annex 3: All Other Entities Which Procure in Accordance with the Provisions of This Agreement) [hereinafter Japan Annex 3]; 1995 GOJ REPORT, *supra* note 144, tbl. 2-6-1.

<sup>158</sup> See Japan Annex 3, *supra* note 157, at 1905-07.

has also taken several general exceptions for its government-related entities, similar to those taken for central and sub-central entities. These exceptions from the GPA include contracts awarded to cooperatives and associations and contracts for “daily profit-making activities.”<sup>159</sup> In contrast to the other categories, Japan has also exempted certain procurements of specific government-related entities.<sup>160</sup> For example, NTT’s procurement of public electrical telecommunications equipment remains outside the GPA.<sup>161</sup>

The thresholds that apply to procurements of Japanese government-related entities are equivalent to the thresholds for central government entities.<sup>162</sup> An exception exists for construction services, which have the same threshold as sub-central entities, 15,000,000 SDRs.<sup>163</sup>

#### 3.2.1.4. *Coverage Relative to the United States*

When the GPA signatories concluded their negotiations, the United States and Japan had reached only partial agreement on bilateral coverage. The United States and Japan had agreed on the coverage of central government procurements and services, including construction services, but they had not reached agreement on sub-central government entities and government-related entities.<sup>164</sup> On January 23, 1996, however, the two nations finalized their coverage negotiations, and agreed to extend bilateral access to their sub-central and government-related entities at the thresholds set out in their respective annexes, effective February 25, 1996.<sup>165</sup>

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<sup>159</sup> *Id.* at 1907.

<sup>160</sup> *See id.* at 1907-08 n.4.

<sup>161</sup> *See id.* at 1908 n.4(f). This category of NTT procurement, while exempt from the GPA, is covered by the bilateral NTT Agreement. *See Grier, supra* note 2, at 20-21.

<sup>162</sup> *See supra* note 148 and accompanying text; *see also* Japan Annex 3, *supra* note 157, at 1905.

<sup>163</sup> *See* Japan Annex 3, *supra* note 157, at 1906.

<sup>164</sup> *See* USTR, 1994 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 154 (1994) [hereinafter 1994 NTE REPORT]. The primary reason the United States and Japan had not reached an agreement was Japan’s insistence on applying a threshold for construction services that was three times higher than that agreed upon by other signatories. *See id.*

<sup>165</sup> *See* Letter from Dorothy Dwoskin, Assistant U.S. Trade Representative for WTO and Multilateral Affairs, to Yoichi Suzuki, Director, First Interna-

### 3.2.2. *Japanese Service Procurements Subject to the GPA*

The services that Japan has brought under GPA disciplines include vehicle repair and maintenance, air transport services, courier services, telecommunications services, computer and related services, public works, and publishing and printing services.<sup>166</sup> These services, including several construction services,<sup>167</sup> are subject to several exclusions.<sup>168</sup>

### 3.3. *Incorporation of the GPA into Japanese Law*

The legal regime that governs Japan's procurement system is comprised of a basic procurement statute, the Accounts Law,<sup>169</sup> as well as cabinet orders, ministerial ordinances, and internal circulars.<sup>170</sup> After signing the GATT Code, Japan had to modify significantly its legal framework to conform it to the country's new international obligations.<sup>171</sup> Surprisingly, howev-

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tional Organizations Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Government of Japan (Jan. 23, 1996) [hereinafter Letter from Dorothy Dwoskin] (copy on file with author); Letter from Yoichi Suzuki, Director, First International Organizations Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Government of Japan, to Dorothy Dwoskin, Assistant U.S. Trade Representative for WTO and Multilateral Affairs (Jan. 23, 1996) [hereinafter Letter from Yoichi Suzuki] (copy on file with author). Both the United States and Japan extended coverage to the other country by amending their respective "General Notes" in Appendix I of the GPA. See Letter from Dorothy Dwoskin, *supra*, Attachment I: Modifications to the U.S. General Notes in Appendix I, WTO Government Procurement Agreement (stating that the United States withheld the benefits of the GPA from Japan for procurements by Annex 3 entities "responsible for the generation or distribution of electricity"); Letter from Yoichi Suzuki, *supra*, Attachment II: Modifications to Japan's General Notes in Appendix I, WTO Agreement on Government Procurement.

<sup>166</sup> See GPA, *supra* note 5, app. I, at 1909 (Japan Annex 4: Services).

<sup>167</sup> See *id.* at 1910 n.3.

<sup>168</sup> See *id.* at 1910. For example, letters are not included in the covered courier services. See *id.* at 1910 n.2.

<sup>169</sup> The Accounts Law provides the legal authority for cabinet orders, which set out the details of procurement regulations. See Accounts Law, *supra* note 145, art. 50.

<sup>170</sup> For a detailed discussion of Japanese government procurement procedures, see Toyama et al., *supra* note 129, at 93-96 and Grier, *supra* note 2, at 4-10.

<sup>171</sup> See Toyama et al., *supra* note 129, at 97-112; MATSUSHITA, *supra* note 127, at 196.

er, Japan did not need to amend its “most relevant authority,” the Accounts Law, because the statute did not depart from the principle of national treatment for foreign suppliers.<sup>172</sup> Instead, Japan was able to incorporate the GATT Code through the modification and adoption of Cabinet orders, ministerial ordinances, and other administrative measures.<sup>173</sup>

Japan undertook similar measures to incorporate GPA disciplines into its legal framework.<sup>174</sup> Japan, however, had to make fewer changes to meet the GPA requirements than when it implemented the GATT Code. Predictably, in light of its GATT experience, Japan did not need to amend its Accounts Law. As with the GATT Code implementation, Japan was able to fulfill its new international responsibilities through the revision of cabinet orders, ministerial ordinances and other administrative actions as described below.

To provide for central government implementation of the GPA, the Cabinet revised three orders: (1) the Cabinet Order Concerning Budgeting, Auditing, and Accounting (*Yosan, Kessan oyobi Kaikei Rei*);<sup>175</sup> (2) the Special Provisions for Cabinet Order Concerning Budgeting, Auditing, and Accounting (*Yosan, Kessan oyobi Kaikei Rei Rinji Tokurei*);<sup>176</sup> and (3) the Cabinet Order Stipulating Special Procedures for Government Procurement of Goods and Specified Services (*Kuni no Buppin tō matawa Tokutei Ekimu no Chōtatsu Tetsuzuki no Tokurei o Sadameru Seirei*).<sup>177</sup>

In addition, the Ministry of Finance (“MOF”) revised the Ministerial Ordinance Stipulating Special Procedures for Government Procurement of Goods and Specified Services (*Kuni no Buppin tō matawa Tokutei Ekimu no Chōtatsu Tetsuzuki no Tokurei o Sadameru Shōrei*) that it had issued in 1980 as part of the

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<sup>172</sup> Toyama et al., *supra* note 129, at 93-94. The Accounts Law is typical of Japanese laws in the general nature of its provisions and its delegation of the responsibility for detailed regulations to cabinet orders and ministerial ordinances. *See id.* at 93. This approach allows the cabinet and ministries considerable discretion in implementing laws. *See id.*

<sup>173</sup> *See id.* at 94-96.

<sup>174</sup> *See infra* notes 175-181, 193-198, and 295-297 and accompanying text.

<sup>175</sup> Imperial Edict No. 165 of 1947, as amended by Cabinet Order No. 359 of 1995 [hereinafter Cabinet Accounting Order].

<sup>176</sup> Imperial Edict No. 558 of 1946, as amended by Cabinet Order No. 359 of 1995.

<sup>177</sup> Cabinet Order No. 300 of 1980, as amended by Cabinet Order No. 368 of 1995.

implementation of the GATT Code.<sup>178</sup> The MOF also modified Regulations Concerning Management of Government Contracts (*Keiryaku Jimu Toriatsukai Kisoku*).<sup>179</sup> The central government also undertook several measures to obtain local government compliance with the GPA.<sup>180</sup> Finally, the Japanese government established a complaint mechanism.<sup>181</sup>

The effects of the GPA on Japan's government procurement system are most prominent in two areas: (1) the application of GPA disciplines to local government entities; and (2) the establishment of a domestic complaint mechanism. The following two sections of this Article describe Japan's implementation measures in these areas.

### 3.4. Local Government Procurement

#### 3.4.1. Background

Japan's adherence to the GPA may have the greatest impact at the sub-central level because for the first time Japan's prefectures and twelve largest cities must comply with international disciplines for certain procurements.<sup>182</sup> The GATT Code did not impose obligations on local governments.<sup>183</sup> The sub-central governments also escaped binding coverage by the bilateral accords. The only bilateral commitment that the Japanese government undertook with regard to local governments was in several agreements to "encourage" them to adopt open, transparent, fair, and non-discriminatory procurement procedures

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<sup>178</sup> See Ministry of Finance Ordinance No. 45 of 1980, as amended by Ministry of Finance Ordinance No. 70 of 1995.

<sup>179</sup> See Ministry of Finance Ordinance No. 52 of 1962, as amended by Ministry of Finance Ordinance No. 74.

<sup>180</sup> See *infra* notes 193-253 and accompanying text (discussing the measures adopted with respect to implementation of the GPA by local governments).

<sup>181</sup> See *infra* notes 295-348 and accompanying text (discussing the measures taken to establish a complaint mechanism).

<sup>182</sup> See *supra* notes 150-156 and accompanying text (discussing the coverage of Japan's sub-central entities).

<sup>183</sup> The Japanese central government had drawn the attention of local governments to the GATT Code. On January 23, 1981, shortly after the Code became effective, the Ministers of Foreign Affairs and Home Affairs sent a joint letter to all local governments, describing the contents of the GATT Code and urging them to comply with its provisions. See MATSUSHITA, *supra* note 127, at 197.



comparable to those assumed by the central government.<sup>184</sup>

### 3.4.2. Local Government Procurement Law

In contrast to the United States' federal system, Japan has a unitary system comprised of two tiers of local government, each with some measure of autonomy.<sup>185</sup> The first tier consists of prefectures and cities, and the second tier includes towns and villages.<sup>186</sup> While the Japanese Constitution gives local governments the "right to manage their property, affairs and administration and to enact their own regulations within law",<sup>187</sup> in fact "[m]ost of the important items of local government are regulated by national statutes."<sup>188</sup> Ordinances (*jōrei*) enacted by local assemblies and regulations (*keisoku*) issued by prefectural governors and city mayors are subject to national laws, cabinet orders, ministerial ordinances, and other central government regulations.<sup>189</sup>

The Local Autonomy Law<sup>190</sup> outlines the general procedures for conducting local government procurements and delegates the details to cabinet orders.<sup>191</sup> The Cabinet Order Concerning Enforcement of the Local Autonomy Law (*Chihō Jichi Hō Shikō Rei*) ("Local Autonomy Order") is the primary Cabinet Order setting out the requirements for local government procurement.<sup>192</sup>

In 1995, in order to bring local governments into compliance with the requirements of the GPA, the Cabinet amended the Local Autonomy Order<sup>193</sup> and adopted a new Cabinet Order Stipulating Special Procedures for the Procurement of Goods and

<sup>184</sup> See e.g., Grier, *supra* note 2, at 42 n.336, 56.

<sup>185</sup> See THE JAPANESE LEGAL SYSTEM 44 (Hideo Tanaka ed. 1976) [hereinafter Tanaka].

<sup>186</sup> See *id.*

<sup>187</sup> KENPŌ [Constitution], art. 94 (Japan).

<sup>188</sup> Tanaka, *supra* note 185, at 44.

<sup>189</sup> See *id.* at 57.

<sup>190</sup> See Local Autonomy Law, *supra* note 151.

<sup>191</sup> See Toyama et al., *supra* note 129, at 96.

<sup>192</sup> See Cabinet Order No. 16 of 1947, as amended by Cabinet Order No. 359 of 1995 [hereinafter Local Autonomy Order]; Toyama et al., *supra* note 129, at 96-97.

<sup>193</sup> See Cabinet Order No. 359 of 1995. The application of this Order is not limited to the local government entities subject to the GPA. See *id.*

Specified Services by Local Public Entities (*Chihō Kōkyō Dantai no Buppin to matawa Tokutei Ekimu no Chōtatsu Tetsuzuki no Tokurei o Sadameru Seirei*) ("Special Local Order").<sup>194</sup>

Central government entities, primarily the Ministry of Home Affairs ("MHA"),<sup>195</sup> have issued various administrative rules, including notifications (*tsūchi*) and circulars (*tsūtatsu*) that pertain to local government compliance with the GPA's provisions. The MHA has issued the ministerial counterpart to the Special Local Order, the Ministerial Ordinance Concerning the Announcement of Special Procedures for the Procurement of Goods and Specified Services by Local Public Entities (*Chihō Kōkyō Dantai no Buppin to matawa Tokutei Ekimu no Chōtatsu Tetsuzuki no Tokurei o Sadameru Seirei no Kōfu ni tsuite*).<sup>196</sup> The MHA has also issued other notifications detailing local government obligations.<sup>197</sup> The MHA and the Ministry of Construction ("MOC") jointly issued a circular promoting the reform of bidding and contract procedures used for public works.<sup>198</sup>

The central government directives and guidance are intended to ensure that the local governments are fully aware of their obligations under the GPA. Based on the authority granted by the central government, and subject to its constraints, each local government establishes its own regulations, rules, and internal circular notices to govern its procurement practices and comply

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<sup>194</sup> See Cabinet Order No. 372 of 1995 [hereinafter Special Local Order].

<sup>195</sup> The MHA is responsible for local government affairs. CCH INTERNATIONAL, JAPAN BUSINESS LAW GUIDE, para. 2-380 (Barker Gosling et al. adduce. 1993).

<sup>196</sup> See Ministry of Home Affairs Notification No. 182 of 1995. This notification includes a delegation of authority to the local governments to establish necessary rules. See *id.* art. 8.

<sup>197</sup> See Ministry of Home Affairs Notification No. 83 of 1995 (detailing requirements related to the investigation of qualifications of suppliers, establishment of a registry of qualified suppliers, provision of public notice, tendering by mail, tendering explanation document, selection and announcement of the winning supplier, and the preparation and storage of records); Ministry of Home Affairs Notification No. 84 of 1995 (addressing various procurement requirements, including valuation of contracts, announcement of qualifications of suppliers, qualification restrictions, tendering by mail, application of the minimum price system, and the use of single tendering).

<sup>198</sup> Ministry of Construction Notification No. 23 of 1995 & Ministry of Home Affairs Notification No. 86 of 1995. The MOC is the ministry responsible for administrative matters relating to construction and civil engineering. See CCH INTERNATIONAL, *supra* note 195, para. 2-330.

with the GPA.<sup>199</sup> The most important procedural obligations imposed on local entities covered by the GPA are described below.

### 3.4.3. *Basic Requirements of Local Government Procurement*

#### 3.4.3.1. *Procurement Procedures*

The Local Autonomy Law requires local governments to use open tendering procedures (*ippan kyōsō nyūsatsu*), selective tendering procedures (*shimei kyōsō nyūsatsu*), or single tendering procedures (*zuii keiyaku*).<sup>200</sup> Selective tendering procedures and single tendering procedures, however, may be used only if they meet the conditions prescribed by cabinet order.<sup>201</sup>

The Local Autonomy Order limits the use of selective tendering procedures to the following cases: (1) in contracts for construction, production, or the purchase of goods, where, due to the nature or purpose of the contract, the use of open tendering procedures would not be appropriate;<sup>202</sup> (2) where the use of open tendering procedures is not necessary because, based on the nature and purpose of the contract, only a small number of suppliers are expected to participate;<sup>203</sup> and (3) where the use of open tendering procedures is deemed to be disadvantageous.<sup>204</sup>

In the Local Autonomy Order, the Cabinet restricts the use of single tendering procedures to specific circumstances.<sup>205</sup> Local governments are allowed to use single tendering procedures for procurements covered by the GPA in the following situations: (1) when it is not possible to use competitive tendering procedures

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<sup>199</sup> See Toyama et al., *supra* note 129, at 97. Examination of the laws and regulations adopted by specific local governments to meet their GPA obligations is beyond the scope of this Article.

<sup>200</sup> See Local Autonomy Law, *supra* note 151, art. 234(1).

<sup>201</sup> See *id.* art. 234(2).

<sup>202</sup> See Local Autonomy Order, *supra* note 192, art. 167-1(1).

<sup>203</sup> See *id.* art. 167-1(2).

<sup>204</sup> See *id.* art. 167-1(3).

<sup>205</sup> See *id.* art. 167-2; Special Local Order, *supra* note 194, art. 10. This provision of the Special Local Order limits the use of single tendering contracts authorized by the Local Autonomy Order and adds additional procurements in which single tendering contracts may be used. See *id.*

because of extreme urgency;<sup>206</sup> (2) where there are no participants in a procurement using open tendering or selective tendering procedures, or there is no successful bidder when a procurement is re-tendered;<sup>207</sup> (3) where the successful supplier failed to conclude the contract;<sup>208</sup> (4) where for works of art or goods or services that are protected by exclusive rights such as patents, or based on specialized knowledge, only a particular supplier can supply the goods or services and no alternative good or service exists;<sup>209</sup> (5) when the procurement is for goods that are replacement parts or related parts for goods already procured or services of the same kind as those originally procured, and single tendering is necessary to realize the benefits of the previously procured goods, and procuring goods or services from a supplier other than the original supplier would be extremely inconvenient;<sup>210</sup> (6) when an entity procures a prototype or a sample of a good or service, which results from experimental research undertaken as the result of a commission by the local entity;<sup>211</sup> (7) when the procurement is for additional construction services that were not included in the original contract, but which are necessary to complete the original contract due to unforeseen circumstances, and procuring the goods or services from anyone other than the original supplier would be extremely inconvenient;<sup>212</sup> (8) when the procurement is for additional construction services of the same kind as those in the original contract, but which were not included in the original contract, and the additional services are within the objectives of the original contract and it would be

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<sup>206</sup> See Local Autonomy Order, *supra* note 192, art. 167-2(1)(iii).

<sup>207</sup> See *id.* art. 167-2(1)(vi). Where the use of single tendering is based on this provision, entities may not change the estimated price and other tendering conditions which were established for the initial competitive tendering, except for the contract deposit and the date of performance. See *id.* art. 167-2(2).

<sup>208</sup> See *id.* art. 167-2(1)(vii). Where this provision is relied upon to justify the use of single tendering, the procuring entity may neither accept a price higher than the price offered by the successful tenderer, nor change any of the initial tendering conditions, other than the time of performance. See *id.* art. 167-2(3).

<sup>209</sup> See Special Local Order, *supra* note 194, art. 10(1)(i).

<sup>210</sup> See *id.* art. 10(1)(ii).

<sup>211</sup> See *id.* art. 10(1)(iii).

<sup>212</sup> See *id.* art. 10(1)(iv). The total value of the contract for the additional construction services may not exceed 50% of the amount of the main contract. See *id.*

relatively disadvantageous to procure from someone other than the original contractor;<sup>213</sup> and (9) for procurements in which in a contest for the design of a building, the winner is selected based on procedures which satisfy conditions established by the Minister of Home Affairs.<sup>214</sup>

### 3.4.3.2. *Qualifications of Suppliers*

In order to participate in a local government procurement, an interested supplier must meet the qualifications set by the procuring entity and avoid disqualification. Local governments are allowed to establish qualifications for their procurements, subject to restrictions imposed by the central government.

A local government may not qualify a potential supplier for participation in a procurement if the supplier has been determined to be incompetent, quasi-competent, or bankrupt, except in special cases.<sup>215</sup> A local government has discretion to refuse to qualify a supplier when the supplier, any of its agents, managers, or other employees, or its representative in the tendering has committed a disqualifying act described in the Local Autonomy Order.<sup>216</sup> These disqualifying acts include: (1) intentionally constructing or producing low quality goods or engaging in dishonest behavior related to the quantity or quality of goods in performing a contract; (2) obstructing the conduct of fair tendering procedures, including conspiring to fix prices; (3) interfering with the completion of a contract by the successful tenderer; (4) hindering an official in the performance of his supervisory duty of inspection related to the performance of a contract; (5) failing to perform a contract without a valid reason; and (6) employing in

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<sup>213</sup> See *id.* art. 10(1)(v). This provision is limited to cases in which the contract for the original construction services was concluded in accordance with competitive tendering procedures in Articles 4 through 9 of the Special Local Order, and the public notice or announcement indicated that additional construction services of the same kind might be procured. See *id.*

<sup>214</sup> See *id.* art. 10(1)(vi).

<sup>215</sup> See Local Autonomy Order, *supra* note 192, arts. 167-4(1) (open tendering), 167-11(1) (selective tendering).

<sup>216</sup> See *id.* arts. 167-4(2) (open tendering), 167-11(1) (selective tendering). The disqualifying acts in central government procurement are very similar. See Cabinet Accounting Order, *supra* note 175, art. 71(1); Toyama et al., *supra* note 129, at 100-01; Grier, *supra* note 2, at 7 n.38. The disqualification applies for two years after the commission of any of the disqualifying acts. See Local Autonomy Order, *supra* note 192, art. 167-4(2).

the performance of a contract an agent, manager, or other employee who in the prior two years has engaged in one of the disqualifying acts described above.<sup>217</sup>

In addition to specifying grounds for disqualifying an interested supplier, the central government also gives local governments direction as to the types of qualifications that they may impose on suppliers seeking to participate in open tendering procedures.<sup>218</sup> The permissible qualifications include the supplier's past business performance in construction, production, or sales; the number of employees in its workforce; the amount of its capitalization; and other matters relating to the scale of the supplier's operations and general state of its business.<sup>219</sup> Local governments must apply these qualifications when they use selective tendering procedures for certain types of contracts, particularly those for construction, production, and the purchase of goods.<sup>220</sup> Additionally, the local government may impose further qualifications on suppliers.<sup>221</sup>

While local governments are generally allowed to require that suppliers maintain an office within the jurisdiction,<sup>222</sup> entities covered by the GPA are expressly prohibited from establishing such a qualification in procurements covered by the GPA when open tendering procedures are used.<sup>223</sup>

When an entity undertakes a procurement using open tendering procedures, it must publish a notice of the qualifications that suppliers must have in order to participate in the procure-

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<sup>217</sup> See Local Autonomy Order, *supra* note 192, arts. 167-4(2) (open tendering), 167-11(1) (selective tendering).

<sup>218</sup> See *id.* art. 167-5(1).

<sup>219</sup> See *id.* These qualifications are similar to those that may be established for suppliers interested in participating in central government procurements. See Cabinet Accounting Order, *supra* note 175, art. 72(1); Toyama et al., *supra* note 129, at 102; Grier, *supra* note 2, at 7. When a local government establishes such qualifications as necessary in open tendering procedures, it must give public notice of the qualifications. See Local Autonomy Order, *supra* note 192, art. 167-5(2).

<sup>220</sup> See Local Autonomy Order, *supra* note 192, art. 167-11(2).

<sup>221</sup> See *id.*

<sup>222</sup> See *id.* arts. 167-5-2 (open tendering), 167-11(3) (selective tendering). See also *infra* notes 258-260 and accompanying text.

<sup>223</sup> See Special Local Order, *supra* note 194, art. 5.

ment.<sup>224</sup> Every year, entities must also announce supplier qualifications for expected procurements.<sup>225</sup> Entities must maintain a registry of suppliers who meet the qualification requirements.<sup>226</sup> When open tendering procedures are used, entities must establish by regulation the amount or percentage of deposit that will be required of suppliers participating in a procurement.<sup>227</sup>

#### 3.4.3.3. *Designation of Participants in Selective Tendering Procedures*

When local entities use selective tendering procedures, they must select the suppliers that will be allowed to participate in the procurement from among the suppliers that have the necessary qualifications.<sup>228</sup> In such cases, the entity must notify the designated suppliers of the time and place for submitting their tenders and other important tender information.<sup>229</sup> The entity must also notify the suppliers that it will deem invalid tenders submitted by suppliers who lack the necessary qualifications and tenders that do not comply with the tendering terms.<sup>230</sup>

#### 3.4.3.4. *Procurement Information*

When open tendering procedures are used, entities must publish a notice of the proposed procurement, which includes the following information: (1) the procurement procedures being used; (2) qualifications required of suppliers; (3) the place for obtaining the contract terms; (4) the time and place for submitting tenders; (5) information on obtaining the tender explanation

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<sup>224</sup> See Local Autonomy Order, *supra* note 192, art. 167-6(1). This notice must include a statement that tenders submitted by suppliers that do not meet the necessary qualifications and tenders that violate the tendering conditions will be deemed invalid. See *id.* art. 167-6(2).

<sup>225</sup> See Special Local Order, *supra* note 194, art. 4.

<sup>226</sup> See Ministry of Home Affairs Notification No. 83 of 1995, *supra* note 197.

<sup>227</sup> See Local Autonomy Order, *supra* note 192, art. 167-7(1). In place of a money deposit, entities are authorized to substitute national or local bonds or other securities deemed safe by the local entity. See *id.* art. 167-7(2).

<sup>228</sup> See *id.* art. 167-12(1).

<sup>229</sup> See *id.* art. 167-12(2).

<sup>230</sup> See *id.* art. 167-12(3).

document;<sup>231</sup> (6) the deposit required to participate in the tendering; (7) information that the procurement is part of a series of procurements;<sup>232</sup> and (8) the method of selecting the winning tender.<sup>233</sup> For procurements using selective tendering procedures, the entities must publicly announce the same information.<sup>234</sup>

When a local entity uses either open tendering procedures or selective tendering procedures, it must make available a document that explains the local requirements for tendering.<sup>235</sup> This document must be provided upon request to suppliers who want to participate in the procurement.<sup>236</sup>

### 3.4.3.5. *Selection of Winning Tender*

Under the GPA, contracts are to be awarded to the tenderer that is "determined to be fully capable of undertaking the contract" and that offers "either the lowest tender or the tender which in terms of the specific evaluation criteria . . . is determined to be most advantageous."<sup>237</sup> The GPA does not express a preference between the two approaches.

Under Japanese law, however, the selection of a tenderer other than the one offering the lowest price is narrowly restricted. The Accounts Law, in the case of central government procurements,<sup>238</sup> and the Local Cabinet Law, in the case of local government procurements,<sup>239</sup> stipulate that when open tendering or selective tendering procedures are used, the procuring entity generally must award the contract to the supplier who submits the lowest or highest price, depending on the contract, that is within the provisional value of the contract.<sup>240</sup> The provisional value

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<sup>231</sup> See Special Local Order, *supra* note 194, art. 6(5); see also *infra* notes 235-236.

<sup>232</sup> See Special Local Order, *supra* note 194, art. 6(4).

<sup>233</sup> See Local Autonomy Order, *supra* note 192, art. 167-6(1); Special Local Order, *supra* note 194, art. 6.

<sup>234</sup> See Special Local Order, *supra* note 194, art. 7.

<sup>235</sup> See *id.* art. 8.

<sup>236</sup> See *id.*

<sup>237</sup> GPA, *supra* note 5, art. XIII(4)(b); *supra* note 95 and accompanying text.

<sup>238</sup> See Accounts Law, *supra* note 145, art. 29-6(1).

<sup>239</sup> See Local Autonomy Law, *supra* note 151, art. 234(3).

<sup>240</sup> See Accounts Law, *supra* note 145, art. 29-6(1); Local Autonomy Law, *supra* note 151, art. 234(3).



or estimated contract price (*yotei kakaku*) is the upper limit of the amount that the entity is authorized to expend on a given procurement.<sup>241</sup> Two exceptions for awarding the contract to the supplier offering the second lowest price within the provisional value are when the procuring entity finds that: (1) the supplier offering the lowest price will be unable to perform the contract adequately because the tender price is extraordinarily low; or (2) it would be inappropriate to award the contract to the lowest tenderer because it would not be in the interests of fair and orderly trade.<sup>242</sup> In such a case, the entity may select the second lowest tender that is within the provisional value.<sup>243</sup> In the case of local government procurement, these exceptions only apply to contracts for construction or production.<sup>244</sup>

The central government had seldom used its authority to employ other evaluation methods<sup>245</sup> until it was obligated in a series of bilateral agreements to use "the greatest overall value methodology" to evaluate tenders in a variety of procurements.<sup>246</sup>

Local governments have general authority to establish minimum prices (*saitei seigen kakaku*) in procurements for construction or production, if they determine that there is a special need to ensure performance of the contract.<sup>247</sup> Under this system, the local entity sets a minimum price for the procurement and then rejects any tender with a price that is

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<sup>241</sup> Toyama et al., *supra* note 129, at 106.

<sup>242</sup> See Accounts Law, *supra* note 145, art. 29-6(1); Local Autonomy Order, *supra* note 192, art. 167-10; see also Toyama et al., *supra* note 129, at 106. In central government procurements, these exceptions apply to construction and production procurements of more than 10,000,000 yen. See Cabinet Accounting Order, *supra* note 175, art. 84.

<sup>243</sup> See Accounts Law, *supra* note 145, art. 29-6; Local Autonomy Order, *supra* note 192, art. 167-10(1); see also Toyama et al., *supra* note 129, at 106-07 (noting that, although the exceptions permitting officials to take the second lowest bid potentially allows the "effective evisceration" of the rule, the exceptions are rarely used).

<sup>244</sup> See Local Autonomy Order, *supra* note 192, art. 167-10(1).

<sup>245</sup> See Toyama et al., *supra* note 129, at 106-07.

<sup>246</sup> See Grier, *supra* note 2, at 64. This methodology requires consideration of the technical and functional merits of a tender, as well as price. See *id.*

<sup>247</sup> See Local Autonomy Order, *supra* note 192, art. 167-10(2) (open tendering), art. 167-13(1) (selective tendering); see also *infra* notes 269-278 and accompanying text (discussion of the practice).

below the minimum price.<sup>248</sup> As part of its implementation of the GPA, the Cabinet has prohibited local entities from using the minimum price system in procurements covered by the GPA.<sup>249</sup> In place of the minimum price system, entities are to use a "low price investigation system" (*teikakaku chosa seido*),<sup>250</sup> which allows entities to investigate very low bids.<sup>251</sup>

#### 3.4.3.6. *Public Announcement of the Winning Tenderer*

When a local entity selects a winning tender using open tendering or selective tendering procedures, or when a supplier in a single tendering contract is selected, the entity is required to announce publicly the name of the winning supplier.<sup>252</sup>

#### 3.4.3.7. *Complaint Mechanism*

The MHA has issued a notification to prefectural governors and mayors of the designated cities with regard to establishment of a complaint mechanism to meet the requirements of Article Twenty of the GPA.<sup>253</sup> In this notification, the MHA requested that the local governments make the necessary arrangements to establish a government procurement review board and complaint review procedures, which are comparable to those instituted by the central government for its procurements.<sup>254</sup>

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<sup>248</sup> See Local Autonomy Order, *supra* note 192, art. 167-10(2).

<sup>249</sup> See Special Local Order, *supra* note 194, art. 9.

<sup>250</sup> See Ministry of Home Affairs Notification No. 84, *supra* note 197; *Home Affairs Ministry to Reform Bidding System for More Than 2.43 Million Worth of Public Works Projects Sponsored by Prefectures and Government Ordinance-Designated Cities*, NIHON KEIZAI SHIMBUN, Aug. 28, 1995, at 1 translated in Cable 9816 from American Embassy, Tokyo, to U.S. Dep't of Commerce, Wash. D.C. (Aug. 29, 1995) [hereinafter NIKKEI — Aug. 28, 1995] (copy on file with author).

<sup>251</sup> See NIKKEI — Aug. 28, 1995, *supra* note 250.

<sup>252</sup> See Special Local Order, *supra* note 194, art. 11.

<sup>253</sup> See Seifu Chōtatsu ni Kansuru Kyōtei Dai 20 ni Sadameru Kujō Shori Tetsuzuki no Seibi ni Tsuite [Notification Concerning Preparation of Complaint Review Procedures Stipulated in GPA Art. 20], Ministry of Home Affairs Notification (Dec. 1, 1995).

<sup>254</sup> See *id.* See also *infra* notes 295-297 (regarding the complaint mechanism established by the central government).

### 3.4.4. *Implications of Application of GPA to Local Governments*

Local governments are important players in public sector procurement. For example, they account for approximately eighty percent of public works undertaken in Japan.<sup>255</sup> The extension of the GPA to the most important local governments is likely to have two major effects on local procurement. First, the GPA requires local entities to use fair, transparent, and predictable procurement procedures that will reduce the exercise of local discretion and increase competition.<sup>256</sup> Second, the GPA requires the removal of certain local procurement practices, in particular the use of qualification requirements favoring local firms and the minimum price system. These practices are discussed below. The result should be new opportunities for foreign firms to participate in an important segment of government procurement in Japan.

#### 3.4.4.1. *Preferential Qualifications*

Although local procurement requirements have largely paralleled those of the central government,<sup>257</sup> they were not subject to the disciplines imposed by the GATT Code. Because local entities were not under any obligation to accord non-discriminatory treatment to foreign suppliers, they could favor local firms in their procurements without fear of penalty.

It is an “unwritten law” in Japan that local governments give priority to local firms when conducting procurements.<sup>258</sup> Local governments routinely give preferential treatment to local firms by establishing qualifications for participation in a procurement that non-local firms cannot meet.<sup>259</sup> Most local governments

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<sup>255</sup> See *Limits of “Restrictions Applicable” — Hard to Eliminate Preference for Local Firms*, NIHON KEIZAI SHIMBUN, Nov. 7, 1994, at 1 [hereinafter NIKKEI — Nov. 7, 1994].

<sup>256</sup> See *id.*

<sup>257</sup> See Toyama et al., *supra* note 129, at 96.

<sup>258</sup> See NIKKEI — Nov. 7, 1994, *supra* note 255.

<sup>259</sup> See *Follow-up Meeting for Japan-U.S. Construction Talks*, NIHON KEIZAI SHIMBUN, June 27, 1995, at 5 translated in Cable 7586 from U.S. Embassy, Tokyo, to U.S. Dep’t of Commerce, Wash., D.C. (June 30, 1995) [hereinafter NIKKEI — June 27, 1995] (copy on file with author); *WTO Government-Procurement Accord to Take Effect Next Year*, NIHON KEIZAI SHIMBUN, June 24, 1995,

accomplish this aim by requiring suppliers to maintain a branch or headquarters office within their jurisdiction if the suppliers want to be eligible to participate in local procurements.<sup>260</sup> One example is Akaho City, which awarded eighty percent of its 200 contracts to approximately seventy local firms.<sup>261</sup>

Preference for local firms is attributable in part to Japan's "highly decentralized system [which] allows local procurement decisions to reflect parochial concerns and to favor local suppliers."<sup>262</sup> Local governments often defend local preferences as a necessary means of ensuring funds from their legislative assemblies.<sup>263</sup> As noted above, in its implementation of the GPA, the Japanese government has expressly prohibited local government entities subject to the GPA from employing office location as a qualification criterion in GPA-covered procurements.<sup>264</sup> For entities and procurements not under the GPA, however, the Local Autonomy Law allows such qualifications.<sup>265</sup>

Qualification requirements based on locality impede foreign and non-local domestic firms from gaining access to public sector procurements at the local level, even if they have the necessary technical capability and offer competitive prices.<sup>266</sup> Maintaining offices in every local jurisdiction in which a firm wants to bid on local government contracts is not a practical alternative.<sup>267</sup> Such practices that discriminate against foreign firms are prohibited by the GPA, which requires signatories to accord national treatment to the products, services, and suppliers of the other signatories.<sup>268</sup>

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at 5 *translated in* Cable 8200 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce, Wash., D.C. (July 17, 1995) [hereinafter NIKKEI — June 24, 1995] (copy on file with author).

<sup>260</sup> See *Local Japanese Governments Urged to Use Open Construction Bidding*, INSIDE U.S. TRADE, Oct. 6, 1995, at 12 [hereinafter *Local Governments Urged to Use Open Bidding*]; NIKKEI — June 27, 1995, *supra* note 259.

<sup>261</sup> See NIKKEI — Nov. 7, 1994, *supra* note 255.

<sup>262</sup> Grier, *supra* note 2, at 11.

<sup>263</sup> See NIKKEI — June 24, 1995, *supra* note 259.

<sup>264</sup> See *supra* note 223 and accompanying text.

<sup>265</sup> See Local Autonomy Order, *supra* note 192, arts. 167-5-2, 167-11(3).

<sup>266</sup> See NIKKEI — June 27, 1995, *supra* note 259; *Local Governments Urged to Use Open Bidding*, *supra* note 260.

<sup>267</sup> See *Local Governments Urged to Use Open Bidding*, *supra* note 260.

<sup>268</sup> See GPA, *supra* note 5, art. III(1).

### 3.4.4.2. Minimum Price System

Another common local practice that has been abolished as part of Japan's implementation of the GPA is the minimum price system.<sup>269</sup> Under this practice, local governments set a minimum bidding price or "lowest permissible value"<sup>270</sup> at a level that is about twenty percent lower than the estimated price or provisional value.<sup>271</sup> Procuring entities then exclude from participation in the procurement all suppliers that submit tenders with prices below the minimum price, solely for that reason.<sup>272</sup>

A Japanese government study revealed that in Japanese Fiscal Year 1994, forty-five of forty-seven prefectures and nine of the twelve designated cities maintained restrictions on the lowest price in bidding for public works projects.<sup>273</sup> These restrictions are intended to prevent firms from being awarded a contract at a price that is excessively low and may result in inferior construction work.<sup>274</sup> In fact, the minimum price restrictions exclude firms that are fully able to fulfill the requirements of the procurement merely because they submitted a tender with a price below the minimum price.<sup>275</sup> This technical requirement results in the exclusion of foreign and Japanese suppliers with sufficient capabilities of supplying the required goods and services at prices below the minimum price.<sup>276</sup> According to U.S. general contractors,

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<sup>269</sup> See NIKKEI — Aug. 28, 1995, *supra* note 250.

<sup>270</sup> See Toyama et al., *supra* note 129, at 106 n.80, (citing Local Autonomy Law, *supra* note 151, art. 234(3) and Local Autonomy Order, *supra* note 192, art. 167-10(2)); see also NIKKEI — Aug. 28, 1995, *supra* note 250.

<sup>271</sup> See NIKKEI — Aug. 28, 1995, *supra* note 250; NIKKEI — June 24, 1995, *supra* note 259.

<sup>272</sup> See NIKKEI — Aug. 28, 1995, *supra* note 250; NIKKEI — June 24, 1995, *supra* note 259.

<sup>273</sup> See NIKKEI — June 24, 1995, *supra* note 259. The comparable figure for other local governments was as follows: 420 cities (62% of the total) and more than 1300 towns and villages (51% of the total) maintained restrictions on lowest price. See *id.*

<sup>274</sup> See *id.*

<sup>275</sup> See NIKKEI — June 24, 1995, *supra* note 259; see also *Aftermath of General Bidding — Minimum-Price System Serves as Underpinning*, NIHON KEIZAI SHIMBUN, Nov. 4, 1994, at 1 [hereinafter NIKKEI — Nov. 4, 1994] (citing examples in which firms have been excluded from participation in a procurement because they submitted bids that fell below the lowest acceptable price).

<sup>276</sup> NIKKEI — June 24, 1995, *supra* note 259.

the "unconditional application of the lower limit hampers [efforts] to reduce construction costs with various cost-saving measures, and negates technical and operational efficiencies of U.S. firms, as well as the cost advantages of U.S.-made construction materials."<sup>277</sup> One of the consequences of this practice is that public works projects are estimated to cost ten to forty percent more in Japan than in the United States.<sup>278</sup>

Abolition of the minimum price for GPA-covered procurements removes an arbitrary basis for excluding suppliers from participating in a procurement if they are able to offer a low price. It also ensures that when local governments use the lowest price methodology for selecting the winning supplier, they will award the contract to the supplier that offers the lowest price. Use of a low price investigation system will mean that local entities can investigate prices that they believe may be too low to enable the supplier to adequately fulfill the contract.

The use of the minimum price system and the locality requirements block participation in procurements by firms with the technical capability of undertaking the contract and offering a competitive price.<sup>279</sup> The elimination of these practices is expected to have a significant impact on the opportunities available to foreign firms to compete in local government procurements in Japan.<sup>280</sup> Implementation of the GPA at the sub-central level is likely to be a "continuing challenge in coming years" as local governments subject for the first time to international procurement standards modify their local regulations and practices.<sup>281</sup>

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<sup>277</sup> Cable 10283 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce, Wash., D.C., (Sept. 11, 1995) (Major Projects: In Wake Bilateral Construction Action Plan Review, MHA Announces Abolition of "Lower Limit" and "Office Location" Requirements) (copy on file with author) [hereinafter Sept. 11, 1995 Cable].

<sup>278</sup> See NIKKEI — Nov. 4, 1994, *supra* note 275; NIKKEI — June 24, 1995, *supra* note 259.

<sup>279</sup> See NIKKEI — Aug. 28, 1995, *supra* note 250.

<sup>280</sup> See Sept. 11, 1995 Cable, *supra* note 277.

<sup>281</sup> USTR, ANNUAL REPORT ON DISCRIMINATION IN FOREIGN GOVERNMENT PROCUREMENT 11 (1996).

### 3.5. Japan's Adoption of a Complaint Mechanism

#### 3.5.1. Government Procurement Review Prior to the GPA

Before 1990, Japan did not have a review system tailored to government procurement<sup>282</sup> analogous to the system which is integral to the procurement system in the United States.<sup>283</sup> Beginning with the 1990 U.S.-Japan Supercomputer Agreement ("Supercomputer Agreement"),<sup>284</sup> Japan agreed in a series of bilateral procurement agreements to establish review boards to hear complaints of suppliers regarding procurements covered by the agreements. Complaint mechanisms were incorporated into all but one of the bilateral accords negotiated by the United States and Japan between 1990 and 1994.<sup>285</sup> In addition, during this period, Japan adopted action plans that included complaint mechanisms similar to those found in the bilateral agreements.<sup>286</sup>

The United States sought the establishment of the complaint mechanisms to provide suppliers with a means for obtaining independent review of procurements, thereby eliminating the need for U.S. government intervention on the supplier's behalf.<sup>287</sup>

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<sup>282</sup> See GATT, PRACTICAL GUIDE TO THE GATT AGREEMENT ON GOVERNMENT PROCUREMENT 271 (1989) (Revised).

<sup>283</sup> Bid challenge mechanisms have long been a part of the U.S. Government procurement system. See 1 RALPH C. NASH, JR., & JOHN CIBINIC, JR., FEDERAL PROCUREMENT LAW 803 (1977).

<sup>284</sup> The 1990 U.S.-Japan Supercomputer Agreement is comprised of an exchange of letters between the Ambassador of Japan and the U.S. Trade Representative and an incorporated attachment, *Procedures to Introduce Supercomputers*. See Letters between Carla A. Hills, U.S. Trade Representative, and Ryohei Murata, Ambassador of Japan (June 15, 1990) [hereinafter 1990 Supercomputer Agreement] (copy on file with author); see also Grier, *supra* note 2, at 30-31 (discussing the establishment of a Procurement Review Board by the Japanese government to enable foreign suppliers to challenge any aspect of a supercomputer procurement).

<sup>285</sup> See Grier, *supra* note 2, at 64. Bilateral complaint mechanisms cover procurements of supercomputers, satellites, public works, computers, medical technology, and telecommunications. See *id.* at 64-65. The only exception is the 1994 NTT Improved Procedures. See *id.* at 64 n.530.

<sup>286</sup> See *id.* at 44 (Public Works Action Plan), 53-54 (1994 Action Program). See *infra* note 291 and accompanying text for a description of the 1994 Action Program.

<sup>287</sup> See Jean Heilman Grier, *The Use of Section 301 to Open Japanese Markets to Foreign Firms*, 17 N.C. J. INT'L L. & COM. REG. 1, 14 (1992).

These complaint mechanisms require the Japanese government to establish procurement review boards to investigate complaints by domestic and foreign suppliers alleging that government entities have improperly conducted procurements covered by the agreements.<sup>288</sup> The Board must allow procuring entities and suppliers participating in the procurement to present their views on the procurement.<sup>289</sup> At the conclusion of its investigation, the Board issues a report of its findings and recommendations.<sup>290</sup>

The bilateral mechanisms cover complaints involving procurements subject to the particular agreement. The 1994 Action Program,<sup>291</sup> which applied to all product areas covered by the GATT Code, established the mechanism with the broadest application.<sup>292</sup> This program, however, was "provisional" until Japan established the complaint mechanism required by the GPA.<sup>293</sup> The GPA mechanism is very similar to the complaint mechanisms established under the bilateral accords and the action plans, particularly the 1994 Action Program.

Despite the availability of these complaint mechanisms, only one party has filed a complaint seeking review of a procurement under a bilateral complaint mechanism.<sup>294</sup> Because Japan's treatment of that complaint raised concerns of both the U.S. government and U.S. industry, the circumstances of Japan's review of that complaint are considered later in this Article.

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<sup>288</sup> See, e.g., 1990 Supercomputer Agreement, *supra* note 284, Attachment § III(2).

<sup>289</sup> See *id.*

<sup>290</sup> See *id.* Attachment § III(4.1).

<sup>291</sup> See Government of Japan, *Action Program on Government Procurement*, in Letter from Koichiro Matsuura, Japanese Deputy Minister for Foreign Affairs, to Charlene Barshefsky, Deputy USTR (Feb. 4, 1994) [hereinafter *1994 Action Program*] (copy on file with author); see also Grier, *supra* note 2, at 53-54 (discussing the main objectives and contents of the 1994 Action Program for government procurement).

<sup>292</sup> See *1994 Action Program*, *supra* note 291, § IV(A).

<sup>293</sup> See *id.* Similarly, the complaint mechanisms provided for in the 1994 Public Works Action Plan and in the bilateral accords covering telecommunications and medical technology procurements were also provisional until the new WTO mechanism entered into effect. See Grier, *supra* note 2, at 44, 60 n.513.

<sup>294</sup> See *infra* notes 355-366 and accompanying text for discussion of the complaint.



### 3.5.2. *Japan's Complaint Mechanism*

#### 3.5.2.1. *Overview*

To meet the GPA requirement for a complaint mechanism, the Japanese Cabinet established two entities on December 1, 1995, an Office of Government Procurement Review ("OGPR")<sup>295</sup> and a Government Procurement Review Board ("GPRB" or "Board").<sup>296</sup> Subsequently, on December 14, 1995, the OGPR adopted procedures to govern the complaint review process.<sup>297</sup> This Article will next examine the OGPR, the GPRB, and the complaint review process.

#### 3.5.2.2. *Office of Government Procurement Review*

The Cabinet directed the OGPR to implement the procedures required by the GPA for challenging procurements by the central government entities and other central government-related entities.<sup>298</sup> The Cabinet further instructed the OGPR "to enhance the transparency, fairness, and competitiveness" of the Japanese government procurement system.<sup>299</sup>

The Chief Cabinet Secretary heads the new OGPR.<sup>300</sup> Its members include the Administrative Vice Ministers of the twelve ministries and high-level officials from various agencies.<sup>301</sup> These agencies include the National Defense Agency, the National Police

<sup>295</sup> See GOVERNMENT OF JAPAN, ESTABLISHMENT OF THE OFFICE OF GOVERNMENT PROCUREMENT REVIEW (Dec. 1, 1995) [hereinafter OGPR ORDER] (Cabinet Decision) *translated in* WORLD TRADE ORGANIZATION, INTERIM COMMITTEE ON GOVERNMENT PROCUREMENT, ESTABLISHMENT OF THE OFFICE OF GOVERNMENT PROCUREMENT REVIEW, Doc. GPA/IC/W/37 (Dec. 22, 1995) § 1 [hereinafter WTO COMMUNICATION] (Communication from Japan) (copy on file with author).

<sup>296</sup> See OGPR Order, *supra* note 295, § 2.

<sup>297</sup> See GOVERNMENT OF JAPAN, OFFICE OF GOVERNMENT PROCUREMENT REVIEW, COMPLAINT REVIEW PROCEDURES FOR GOVERNMENT PROCUREMENT (Dec. 14, 1995) [hereinafter OGPR PROCEDURES] (Decision of the OGPR) *translated in* WTO COMMUNICATION, *supra* note 295, at 4-10.

<sup>298</sup> See OGPR ORDER, *supra* note 295, § 1(1).

<sup>299</sup> *Id.*

<sup>300</sup> See *id.* § 1(2). The Deputy Chief Cabinet Secretary and the Administrative Vice Minister of the Economic Planning Agency are the two Deputy Heads of the OGPR. See *id.*

<sup>301</sup> See *id.*

Agency, and the Science and Technology Agency.<sup>302</sup> The OGPR is under the jurisdiction of the Prime Minister's Office,<sup>303</sup> with the Economic Planning Agency responsible for its administration.<sup>304</sup>

### 3.5.2.3. *Government Procurement Review Board*

The GPRB is responsible for reviewing complaints filed by suppliers with regard to procurements by central government entities and central government-related entities.<sup>305</sup> The head of the OGPR appoints the members of the Board, who must be "scientists, scholars, and other members with experience in government procurement."<sup>306</sup> The OGPR authorizes the Board to establish subcommittees for specific product or service areas.<sup>307</sup>

The Board must conduct its review in an independent and impartial manner,<sup>308</sup> with the further condition that any Board member "deemed to have a conflict of interest in the complaint" must not participate in the review of that complaint.<sup>309</sup> Reviews of complaints are required to be based on the procurement procedures set forth in the GPA and applicable Designated

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<sup>302</sup> See *id.* The head of the OGPR can appoint other members as necessary. See *id.*

<sup>303</sup> See *id.* at 2.

<sup>304</sup> See *id.* § 3. An official of the Economic Planning Agency serves as the Chairman of the Executive Committee of the OGPR. See *id.* § 1(3).

<sup>305</sup> See *id.* § 2(1).

<sup>306</sup> *Id.* § 2(2). The seven member Board includes four university professors and one lawyer, who serves as chairman. See ECONOMIC PLANNING AGENCY, GOVERNMENT OF JAPAN, A GUIDE TO THE NEW SYSTEM OF COMPLAINT REVIEW PROCEDURES FOR GOVERNMENT PROCUREMENT 15 [hereinafter EPA GUIDE]. The Board has fourteen special members, ten of whom come from the academic community, including six from the prestigious University of Tokyo. See *id.*

<sup>307</sup> See OGPR PROCEDURES, *supra* note 297, § 1(3). The Chairman of the GPRB appoints subcommittee chairs. See *id.* § 1(4). The GPRB established six subcommittees to cover the six sectors subject to bilateral procurement agreements (supercomputers, computers, satellites, public works, telecommunications, and medical technology). See EPA GUIDE, *supra* note 306, at 16. Regular members of the Board chair the subcommittees and professors comprise two-thirds of the subcommittee members. See *id.*

<sup>308</sup> See OGPR Order, *supra* note 295, § 2(1).

<sup>309</sup> OGPR Procedures, *supra* note 297, § 1(2).

Measures,<sup>310</sup> as well as the complaint review procedures adopted by the OGPR.<sup>311</sup>

#### 3.5.2.4. Complaint Review Process

The OGPR's Complaint Review Procedures for Government Procurement ("OGPR Procedures") outline the process that the Board must follow when it reviews complaints.<sup>312</sup>

##### 3.5.2.4.1 Filing of Complaints

Under the new Japanese complaint mechanism, any supplier may file a complaint with the GPRB when it believes that a central government entity or central government-related entity has conducted a procurement in a manner that is inconsistent with a provision of the GPA or applicable Designated Measures.<sup>313</sup> Suppliers eligible to challenge a procurement are "those who supplied, or were capable of supplying the product or service when the procuring entity procured the product or service."<sup>314</sup>

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<sup>310</sup> See OGPR ORDER, *supra* note 295, § 2(1). The Designated Measures are the U.S.-Japan bilateral procurement agreements and unilateral action plans that provide for a complaint mechanism. See GOVERNMENT OF JAPAN, OFFICE OF GOVERNMENT PROCUREMENT REVIEW, DESIGNATION OF APPLICABLE MEASURES ON GOVERNMENT PROCUREMENT, (Dec. 14, 1995) [hereinafter DESIGNATED MEASURES] (Decision of the Head of the OGPR) *translated in* WTO COMMUNICATION, *supra* note 295, at 11-12.

<sup>311</sup> See OGPR ORDER, *supra* note 295, § 2(1). The Procedures apply even if a party has filed a lawsuit involving the procurement. See OGPR PROCEDURES, *supra* note 297, § 4(7)(ii).

<sup>312</sup> See OGPR PROCEDURES, *supra* note 297, at 4-10. In the event that the OGPR Procedures conflict with the complaint procedures in the bilateral agreements covering supercomputers, satellites, or computers, the sectoral provisions apply. See *id.* § 9(2).

<sup>313</sup> See *id.* § 2(2). Suppliers are "encouraged to seek resolution" of their complaints initially with the procuring entity. *Id.* In such cases, the entity must enter into consultations promptly and "make efforts to resolve the complaint." *Id.* § 2(3). Suppliers must file complaints, in a prescribed form, with the OGPR's Secretariat, located in the Office for Government Procurement Challenge System in the Economic Planning Agency. See EPA GUIDE, *supra* note 306, at 3. The required information includes the tender bidding number as announced in the *Kanpō*, a description of the complaint, and a statement of whether the supplier consulted with the procuring entity. See *id.*, Attachment 1, at 7.

<sup>314</sup> OGPR PROCEDURES, *supra* note 297, § 2(1)(i). This definition applies to all procurements, except procurements of construction services and design and consulting services in public works where separate definitions apply. See *id.* § 2(1)(ii)-(iii). In such procurements, definitions have been incorporated

Other suppliers may also participate in a complaint review if they "have interests in the procurement subject to the complaint."<sup>315</sup>

While suppliers may file a complaint at any time during the procurement process, they must file it within ten days after they knew or reasonably should have known the facts forming the basis of the complaint.<sup>316</sup> After a supplier files a complaint, the GPRB reviews it,<sup>317</sup> and under certain conditions, may dismiss it.<sup>318</sup> To dismiss a complaint, the Board must find that it was not filed in a timely manner,<sup>319</sup> is not subject to the GPA or Designated Measures,<sup>320</sup> is "frivolous or trivial,"<sup>321</sup> is not submitted by a supplier, as defined by the GPRB Procedures,<sup>322</sup> or is "otherwise inappropriate for review by the Board."<sup>323</sup> When the Board finds that a complaint is proper, it must immediately give a written notice to the complaining supplier, as well as the entity whose procurement is subject to review, and publicly announce its decision in the *Kanpō*.<sup>324</sup>

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from the complaint mechanism in the U.S.-Japan 1994 Public Works Agreement ("1994 Public Works Agreement"). The 1994 Public Works Agreement is comprised of an exchange of letters between the Japanese Ambassador to the U.S. and the U.S. Secretary of Commerce (Jan. 19, 1994). See Letters between Takakazu Kuriyama, Japanese Ambassador to the U.S., and Ronald H. Brown, U.S. Secretary of Commerce (Jan. 19, 1994) Annex 4, § 2 [hereinafter 1994 Public Works Agreement] (copy on file with author).

<sup>315</sup> OGPR PROCEDURES, *supra* note 297, § 3(1). To participate in a complaint review, a supplier must notify the GPRB of its intent to participate within five days after it receives public notice that the Board has accepted the complaint. See *id.* §§ 3(3), 4(5). References to days mean calendar days unless otherwise specified. See *id.* § 3(3).

<sup>316</sup> See *id.* § 4(1).

<sup>317</sup> The Board must review the complaint within seven working days after the supplier files it. See *id.* § 4(3). Working days are days that are not Japanese Government holidays. See *id.*

<sup>318</sup> See *id.* The GPRB will not accept complaints involving procurements that are not subject to the GPA. See *id.* § 4(2).

<sup>319</sup> See *id.* § 4(3)(i). The Board may accept complaints not filed in a timely manner, if it finds reasonable cause. See *id.* § 4(4).

<sup>320</sup> See *id.* § 4(3)(ii).

<sup>321</sup> *Id.* § 4(3)(iii).

<sup>322</sup> See *id.* § 4(3)(iv).

<sup>323</sup> *Id.* § 4(3)(v). The Board must present its reason for dismissal in writing. See *id.* § 4(3).

<sup>324</sup> See *id.* § 4(5); EPA GUIDE, *supra* note 306, at 4. The entity which carried out the procurement subject to review must participate in the review process. See OGPR PROCEDURES, *supra* note 297, § 3(2).

#### 3.5.2.4.2. *Suspension of Procurement Process*

Within ten days after a supplier files a complaint, the Board generally must request that the procuring entity suspend either: (1) the award of the contract, in the case of a pre-award complaint;<sup>325</sup> or (2) the performance of the contract, in the case of a post-award complaint,<sup>326</sup> pending resolution of the complaint.<sup>327</sup> When the GPRB requests suspension, the procuring entity is obligated to suspend the award or performance immediately, unless the head of the procuring entity determines that “urgent and compelling circumstances” or “national interests” preclude it from complying with the request.<sup>328</sup> When a procuring entity does not comply with a suspension request, it must notify the Board immediately of its decision and set out “the factual circumstances on which it is based.”<sup>329</sup>

#### 3.5.2.4.3. *Review of Complaints*

The Board must base its review of a complaint on the briefs, pleadings, and other documentation that it requests the complainant and procuring entity to file.<sup>330</sup> The OGPR procedures direct the procuring entity to submit to the Board a written report that includes the specifications of the product or service to be procured and other relevant documentation.<sup>331</sup> The report must fully respond to the complaint with all relevant facts, findings, actions, and the entity’s recommendations.<sup>332</sup> After receiving the report from the procuring entity, the Board is

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<sup>325</sup> See OGPR PROCEDURES, *supra* note 297, § 4(6)(i). A pre-award complaint seeks review of a procurement before the selection of a winning supplier and the award of a contract. See *id.*

<sup>326</sup> See *id.* § 4(6)(ii). A post-award complaint involves review of a procurement after the award of a contract. See *id.*

<sup>327</sup> The Board is not obligated to request suspension if it finds that “urgent and compelling circumstances” exist. *Id.* § 4(6)(iii). In such cases, the Board must immediately notify the complainant and the OGPR in writing of its determination and rationale. See *id.*

<sup>328</sup> *Id.* § 4(6)(iv).

<sup>329</sup> *Id.*

<sup>330</sup> See *id.* § 4(7)(i).

<sup>331</sup> See *id.* § 4(8)(i). Within two weeks after the Board sends the complaint to the procuring entity, the entity must submit its report. See *id.*

<sup>332</sup> See *id.*

required to provide the complainant and participants with an opportunity to review and submit comments on the entity report.<sup>333</sup>

In the Board's review of a complaint, both the complainant and the procuring entity are accorded certain rights. Those rights include: (1) the right to attend meetings of the Board accompanied by representatives;<sup>334</sup> (2) the right to present arguments and the testimony of witnesses before the Board;<sup>335</sup> (3) the right to hear the statements of opposing parties at Board meetings, unless the Board determines that such a practice would be "inappropriate;"<sup>336</sup> and (4) the right to request public hearings on the merits of the complaint.<sup>337</sup> The Board may also "hear the views of technical experts and others with knowledge or experience relating to the procurement under review."<sup>338</sup> When a supplier provides the Board with trade secrets, manufacturing processes, intellectual property, or other confidential commercial information, the Board may not disclose such information to third persons without the supplier's consent.<sup>339</sup>

#### 3.5.2.4.4. *Board Findings and Recommendations*

At the culmination of its review and within ninety days after a party files the complaint, the Board is responsible for preparing a written report of its findings.<sup>340</sup> In formulating its report, the Board may consider factors in addition to whether the entity

<sup>333</sup> See *id.* § 4(8)(ii). The Board must give these parties seven days to comment on the entity's report. See *id.* Instead of filing comments on the report, the parties may request that the Board make findings and recommendations on the basis of the report. See *id.*

<sup>334</sup> See *id.* § 4(7)(iv). Lawyers may serve as the parties' representatives. See EPA GUIDE, *supra* note 306, at 3. Parties may also hire technical experts. See *id.*

<sup>335</sup> See OGPR PROCEDURES, *supra* note 297, § 4(7)(iii)-(vi).

<sup>336</sup> *Id.* § 4(7)(v).

<sup>337</sup> See *id.* § 4(7)(viii). As an alternative, the Board may hold a public hearing on its own initiative. See *id.*

<sup>338</sup> *Id.* § 4(7)(ix). Such technical experts and others must not have "any substantive interests in the procurement." *Id.*

<sup>339</sup> See *id.* § 4(8)(iii).

<sup>340</sup> See *id.* § 5(1). When the complaint involves a public works procurement, the Board has up to 50 days to submit its report. See *id.* The 1994 Public Works Agreement provides for this deadline. See 1994 Public Works Agreement, *supra* note 314, Annex 4, § 5(1).

complied with the GPA or Designated Measures.<sup>341</sup> The factors that the Board may consider include:

the seriousness of any deficiency in the procurement process, the degree of prejudice to all or any suppliers, the degree of impediment to the integrity and effectiveness of the Agreement or other Measures, the good faith of the complainant and the entity concerned, the extent of performance of contract to which the procurement relates, the cost of the recommendations to the Government of Japan, the urgency of the procurement, and the impact of the recommendations on the operations of the entity.<sup>342</sup>

In its written report, the Board must state the basis for its findings, determine the validity of the complaint, and ascertain whether the procurement conflicts with specific provisions of the GPA or Designated Measures.<sup>343</sup> When the Board finds that the procurement was not conducted in accordance with the GPA or Designated Measures, it is required to recommend appropriate remedies.<sup>344</sup> The Board may recommend that the entity: (1) issue new tender documentation; (2) seek new offers or tenders without changing procurement conditions; (3) re-evaluate the offers; (4) award the contract to a different supplier; or (5) terminate the contract.<sup>345</sup>

The Complaint Procedures anticipate that the procuring entity will normally implement the recommendations of the Board.<sup>346</sup> If the entity decides not to comply with the recommendations, it must report to the Board and the OGPR with the reasons for its non-compliance within ten days of its receipt of the Board's

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<sup>341</sup> See OGPR PROCEDURES, *supra* note 297, § 5(3).

<sup>342</sup> *Id.*

<sup>343</sup> See *id.* § 5(1).

<sup>344</sup> See *id.* § 5(2). The written recommendations must accompany the Board's report. See *id.*

<sup>345</sup> See *id.* Immediately upon completion, the Board must send its report and recommendations to the entity, complainant, and other participants. See *id.* § 5(4).

<sup>346</sup> See *id.* § 5(5). It states that "[t]he entity concerned will, in principle, and as its own decision, duly follow the recommendations of the Board." *Id.*

recommendations.<sup>347</sup> The Complaint Procedures are silent as to the circumstances in which the entity may choose not to follow the Board's recommendations.<sup>348</sup>

When the Board in its review of a complaint "finds evidence of misconduct or actions or behavior contrary to the law relating to the procurement," it must report the information "to the appropriate enforcement authorities for action."<sup>349</sup> The genesis of this provision is the bilateral complainant mechanisms<sup>350</sup> where a major concern was price discounting.<sup>351</sup>

### 3.5.3. *Potential Consequences of the Complaint Mechanism*

Fulfillment of the GPA directive to provide a bid challenge system<sup>352</sup> will enable suppliers to challenge tendering procedures and contract awards, and thus enhance the enforcement of the GPA. This is particularly true for signatories, such as Japan, that lack a tradition of bid protest systems. The potential of the GPA-mechanism, however, will be realized only if suppliers use the system and the system is fair. The reviews requested by suppliers must be conducted in a manner that gives participants confidence that their disputes receive full and fair hearings and are properly resolved on the merits.<sup>353</sup>

Since the pre-GPA complaint mechanisms have been used only once in Japan, it is difficult to draw firm conclusions. Nonetheless, the import of that one case cannot be ignored. Because lingering concerns with the case appear to contribute to the

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<sup>347</sup> See *id.* Where the complaint involves public works, the entity concerned has 60 days to provide reasons for non-compliance. See *id.* "Public works" refers to procurements of construction services, and design and consulting services by governmental entities and government-related entities. See 1994 Public Works Agreement, *supra* note 314; USTR, 1996 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 189-90 (1996).

<sup>348</sup> The Procedures include an Express Option, which allows for an expedited review of a complaint at the discretion of the Board, if so requested by the complainant or the procuring entity. See *id.* § 6.

<sup>349</sup> *Id.* § 5(7).

<sup>350</sup> See, e.g., 1990 Supercomputer Agreement, *supra* note 284, § (III)(4.7).

<sup>351</sup> See Grier, *supra* note 2, at 29.

<sup>352</sup> See *supra* note 107 and accompanying text.

<sup>353</sup> In addition, suppliers may be reluctant to use the new system if there is a perception that they may be penalized in future procurements by a procuring entity if they protest a procurement conducted by that entity.



disincentive of foreign firms to use complaint mechanisms in Japan, it must be considered as part of this Article's assessment of the potential for success of Japan's new complaint mechanism.<sup>354</sup>

In 1992, a U.S. firm, Cray Research, Inc. ("Cray"), participated in a procurement for a supercomputer conducted by the National Institute of Fusion Sciences ("NIFS"), which is an entity under the Ministry of Education. NIFS awarded the contract to a Japanese supercomputer manufacturer, NEC Corporation ("NEC"). When NIFS announced the award, Cray resorted to the complaint mechanism in the 1990 Supercomputer Agreement and filed a complaint with the Supercomputer Procurement Review Board ("Supercomputer Board").<sup>355</sup>

Cray sought review of several aspects of the procurement. First, Cray challenged the NIFS evaluation as unfair, favoring the winning Japanese system, in particular with regard to its point allocation and scoring of performance evaluation standards.<sup>356</sup> Second, Cray claimed that the abnormal matching of the NEC proposed system with the comprehensive evaluation standards set by NIFS raised the question whether NEC had prior information

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<sup>354</sup> In this Article, treatment of the complaint is necessarily brief. A detailed assessment of the allegations made by the complaining firm, the merits of the Board's decision, and the criticism surrounding it are beyond the scope of this Article.

<sup>355</sup> See Letter from Tokyo Aoyama Law Office, Representatives for Petitioner, Cray Research, Inc., to Supercomputer Procurement Review Board (July 9, 1992) (Petition of Complaint) (copy on file with author); USTR, Press Statement, *Hills Calls for Consultations in Wake of Japanese Supercomputer Decision* (Oct. 8, 1992) [hereinafter USTR's NIFS Statement].

<sup>356</sup> See Letter from Tokyo Aoyama Law Office, Representatives for Petitioner, Cray Research, Inc., to Supercomputer Procurement Review Board, § 1, at 3-7 (July 16, 1992) (The Detailed Contents of the Grievances Stated in the Petition of Complaint Dated July 9, 1992) [hereinafter Cray's Detailed Petition] (copy on file with author). NIFS used three benchmarks to measure the performance of the supercomputer of each supplier. See *id.* On two of them, NIFS gave Cray and NEC the same score, even though the Cray system "significantly outperformed" the NEC system. See Letter from John A. Rollwagen, Cray Research Chairman and CEO, to Barbara Franklin, U.S. Secretary of Commerce (June 30, 1992) [hereinafter Rollwagen Letter] (copy on file with author). Cray complained that NEC executed the third benchmark on a single processor, even though NIFS was procuring a multi-processor system. See Cray's Detailed Petition, *supra*, §§ 1-5, at 6. Because Cray's system included sixteen processors and NEC's only two, the Cray system would have outperformed the NEC system had the evaluation been conducted on all of the processors; instead the NEC system was awarded additional points based on the single processor evaluation. See *id.*; Rollwagen Letter, *supra*.

on the point allocation.<sup>357</sup> Finally, Cray questioned whether the winning Japanese system could meet all of NIFS's specifications, particularly the requirements of an external mass storage system and an automated parallelization function.<sup>358</sup>

In reviewing the complaint, the Supercomputer Review Board followed the process set out in the Supercomputer Agreement, which is very similar to Japan's GPA mechanism. The review process included the submission of written explanations and data by NIFS and Cray, a hearing by the Board in which the interested parties participated, and the preparation of a written report by the Board.<sup>359</sup>

Based on its review of the complaint, the Supercomputer Review Board concluded that there were no significant problems in the conduct of the procurement,<sup>360</sup> and that it was "unable to recognize the validity of Cray's claims."<sup>361</sup> The Board limited its scope of review to a determination of whether the procurement had been conducted as prescribed by the procedures in the Supercomputer Agreement.<sup>362</sup> The Board did not attempt to

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<sup>357</sup> See Cray's Detailed Petition, *supra* note 356, § 2, at 7-9. For example, Cray pointed to the fact that with regard to storage time, the NEC proposal received a perfect score even though NIFS had not disclosed publicly the point allocation for the comprehensive evaluation standards until the day that bids were due. See *id.* at 3, 8. Under the 1990 Agreement, the overall evaluation of bids must be "conducted in a manner that ensures equal treatment of all bidders and full transparency." 1990 Supercomputer Agreement, *supra* note 284, § II(3.7)(1).

<sup>358</sup> See Cray's Detailed Petition, *supra* note 356, §§ 2.2, 3.1, at 8-10; Rollwagen Letter, *supra* note 356. Under the Supercomputer Agreement, a supplier may bid a "paper machine," that is, one that has not been produced at the time of the bidding, provided that the supplier is able to deliver the promised machine by the announced delivery date; if not, "the entire procurement will be subject to rebidding." 1990 Supercomputer Agreement, *supra* note 284, § III(3.6)(2)(c).

<sup>359</sup> See Cable 16925 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce, Wash., D.C. (Oct. 7, 1992) [hereinafter Supercomputer Board Report] (translating the Supercomputer Review Board Decision) (copy on file with author).

<sup>360</sup> See Cable 16926 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce (Oct. 14, 1992) [hereinafter Chairman's Statement] (incorporating Draft Opening Statement of Committee Chairman Tejima, Oct. 7, 1992) (copy on file with author); Supercomputer Board Report, *supra* note 359.

<sup>361</sup> Chairman's Statement, *supra* note 360.

<sup>362</sup> See *id.* For example, the Board stated that it would not declare NIFS benchmarks unacceptable as long as they were not "irrational." Supercomputer Board Report, *supra* note 359; Chairman's Statement, *supra* note 360. Under

address the merits of the competing supercomputers.<sup>363</sup>

When the Board issued its report, the U.S. government immediately expressed "serious concerns,"<sup>364</sup> noting that the review process represented "an important test of the Japanese government's resolve to fully implement the provisions of the 1990 Supercomputer Agreement."<sup>365</sup> The United States also expressed concerns with the Board's "extraordinarily narrow interpretation" of its mandate, and registered its dissatisfaction with the manner in which NIFS subsequently "conducted verification procedures in determining that two features promised by the successful bidder actually were present in the machine delivered."<sup>366</sup>

While the duties of the Supercomputer Review Board do not include conducting a *de novo* review of a procurement subject to a bid challenge, it must review "any aspect of a procurement" subject to a complaint.<sup>367</sup> The Board must "specify whether the procurement process or award was inconsistent with *the intent or specific provisions*" of the Agreement.<sup>368</sup> Accordingly, the Board was obligated to determine whether the procuring entity followed the required procedures in a manner that ensured selection of the bid "that best enables [the entity] to perform its mission"<sup>369</sup> and

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the 1990 Supercomputer Agreement, entities must select benchmarks that are "representative of the anticipated workload of the entity." 1990 Supercomputer Agreement, *supra* note 284, § II(1.5)(2)(c).

<sup>363</sup> See Chairman's Statement, *supra* note 360. The Chairman explained that the Board "did not make any special investigation of the allegation regarding the comparative merits of the two systems since that is not part of the role of this [Board]." *Id.*

<sup>364</sup> USTR's NIFS Statement, *supra* note 355.

<sup>365</sup> *Id.*

<sup>366</sup> USTR, 1993 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 153. Japan failed to satisfy either the U.S. government or Cray Research that NEC had in fact delivered a supercomputer system that met all of the specifications, as required by the Agreement. See *id.* In criticizing the NIFS decision, the U.S. government noted the other options available to the Review Board, including: (1) overturning the NIFS decision and awarding the contract to Cray Research; (2) requiring NIFS to start the procurement process over again; (3) asking suppliers to submit new bids for the procurement; and (4) re-evaluating the existing bids. See USTR's NIFS Statement, *supra* note 355.

<sup>367</sup> E.g. 1990 Supercomputer Agreement, *supra* note 284, § III(2.1).

<sup>368</sup> *Id.* § III(4.1) (emphasis added).

<sup>369</sup> *Id.* at 1.

whether the entity considered in its evaluation of bids "technical excellence, with overall system performance being of fundamental importance."<sup>370</sup> The Board was also required to consider "all the circumstances surrounding the procurement process or award,"<sup>371</sup> including whether the entity evaluated the bids based on achieving the overall greatest value.<sup>372</sup>

Such determinations raise difficult issues. Boards must confront such issues if they are to generate confidence that suppliers' claims will be fully and fairly considered, and will not be dismissed on narrow procedural grounds.

#### 4. CONCLUSION

Japan's implementation of the GATT Code in 1981 opened a new era of government procurement in Japan. The new era continued with bilateral procurement accords and culminated in the implementation of the GPA, which represents Japan's third set of international obligations. The latest step in the evolution of Japan's government procurement system is likely to have a significant, if less dramatic, effect on Japan's government procurement system than its GATT Code implementation.

The GPA's major implications for Japan are essentially three-fold: (1) extension of multinational disciplines to services, in particular public works, which constitute a significant portion of government procurement budgets; (2) broadening coverage to procurement by the most important sub-central entities, namely the forty-seven prefectures and twelve largest cities in Japan; and (3) creation of a new complaint mechanism.

The GPA covers government procurement of services for the first time. This fills what had been one of the major "gaps" in GATT Code coverage. This gap, particularly with respect to public works, was a major area of bilateral controversy and led to the negotiation of several bilateral accords.

Moreover, the GPA measurably increases the procurement opportunities available to foreign suppliers as it extends coverage to local governments which account for a significant portion of Japanese government procurement. The implementation of the

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<sup>370</sup> *Id.* § II(3.7)(1).

<sup>371</sup> *Id.* § III(4.3).

<sup>372</sup> See *id.* § II(3.4)(1); Grier, *supra* note 2, at 30, 64 (discussing the significance of the overall greatest value evaluation method).

GPA may be as revolutionary for many of the local governments in Japan as GATT Code implementation was for the central government fifteen years earlier. Compliance with the GPA should result in the removal of the more egregious local practices, namely the use of preferential local qualifications and the minimum price system. One can hope that as local governments realize the benefits of more fair, transparent, and competitive tendering procedures, they will apply those procedures to procurements outside the GPA.

Furthermore, Japan's adoption of a complaint mechanism that applies to all procurements covered by the GPA provides a new opportunity for suppliers to challenge procurements directly. Suppliers no longer need to rely on their own governments to raise their concerns with the Japanese government. Having established the system-wide mechanism, however, Japan must now ensure that the new system is implemented in a manner that will engender in suppliers the confidence that their complaints will be given a meaningful review and that they will not be subject to any form of retaliation if they use the mechanism. The first caution arises from Japan's very limited experience with complaint mechanisms and the perception that in the only complaint heard to date the Procurement Review Board defined its role too narrowly. The second relates to cultural tradition that discourage firms from challenging government decisions. The realization of the potential of the complaint mechanism will depend upon the Japanese government overcoming both hurdles.