THE GLOBALIZATION & GOVERNANCE PROJECT, HOKKAIDO UNIVERSITY
WORKING PAPER SERIES

The Impact of the WTO Rules on the Public Procurement of the Sub National Government

--The Multi-Level Governance in Action--

IV－08

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＊ Paper for the Workshop *Local Governance in a Global Era –In Search of Concrete Visions for a Multi-Level Governance*, 7-8 December 2001

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1. Introduction

Under the trend toward globalization, the role of international public organizations such as WTO (World Trade Organization) is expanding. Correspondingly, the impact of the WTO on domestic policies is increasing rapidly. On the one hand, the scope of the WTO is expanded to include various policy areas in the name of NTBs (Non Tariff Barriers) or service trade. On the other hand, the enforcing power of the WTO is enhanced as the panel review system of the WTO was amended after the Uruguay Round Agreement at Marrakesh in 1994 (which was put into effect in January 1996).

In addition to that, the WTO rules have impacts not just on national governments, but also on sub national governments. But the implementation of the WTO rules at the sub national government level has its own difficulty. As the parties to the WTO rules are national governments, national governments have to play important roles to implement the WTO rules at the sub national level. But because of the principle of local autonomy or federalism, sub national governments sometimes do not follow the guidance of the national governments. It is true that the WTO can be a good excuse for national governments to intervene into the activities of sub national governments, as the recent Chinese central government's fight against local protectionism under the accession to the WTO shows. But the effort of the central government is not always effective.

So the analysis of the implementation of the WTO rules at the sub national level seems to be a good case study to understand the real nature of the multi level governance, that is, the interaction between the international organizations, the national governments, and the sub national governments.

There are various WTO rules that have impact on the sub national government such as the Subsidy Code and the TBT (Technical Barrier to Trade) agreement. Here I would like to focus on the implementation of the GPA (Agreement on Government

Procurement). The GPA is interesting because the public procurement is the traditionally important government instrument (that is, the financial power is the traditional core of government function, and the procurement is the important instrument for promoting industries) and involves the politically sensitive area especially at the sub national government level.

In the following sections, I would like to analyze how the GPA is implemented at the sub national level, what is the real dynamism for the enforcement, and the difference among countries concerning the implementation. I will use Japanese and the US cases for analyzing the different national response to the GPA.

2. Structure of WTO GPA Rules

Before analyzing the implementation of the GPA, I would like to describe the background and the contents of the WTO GPA.

In 1994, after more than ten years of the Uruguay Round negotiation, the agreement was reached at Marrakesh. Appendix 1A (including subsidy code and SPS agreement), appendix 1B, appendix 2, and appendix 3 of the Agreement have to be adopted as package. Appendix 4 includes components that are adopted separately by interested countries. The GPA is one of those components in the appendix 4. The original GPA was adopted in 1979. But it did not apply to the sub national governments. The new GPA amended in 1994 includes sub national governments as the target for the first time. Article 1 of the new GPA stipulates that this agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this agreement, as specified in Appendix 1. And apppendix 1 has 5 annexes; Annex 1 contains central government entities; Annex 2 contains sub central government entities; Annex 3 contains all other entities that procure in accordance with this provision of this Agreement.

Main articles of the GPA are following.

Article 3: National treatment and Non-discrimination; 1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each party shall immediately and unconditionally to the products,

services and suppliers of other Parties, treatment no less favourable than (a) that accorded to domestic products, services, and suppliers; and (b) that accorded to products, services and suppliers of any other Party. 2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure: (a) that its entities shall not treat a locally-established supplier less favourable than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and (b) that its entities shall not discriminate against locally-established supplier on the basis of the country of production of the good or services being supplied, provided that the country of the production is a Party to the Agreement in accordance with the provisions of article 4

Article 6: Technical Specification; 1. Technical specification laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. 2. Technical specifications prescribed by procuring entities shall, where appropriate (a) be in terms of performance rather than design or descriptive characteristics; and (b) be based on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes.

Article 8: Qualification of Suppliers; In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification shall be consistent with the following: (a) any conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate…;(b) any condition for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfill the contract in question. Any 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. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that supplier's global business activity as well as of its

activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations.

Article 9-8: Official Language; For each case of intended procurement, the entity shall publish a summary notice in one of the official languages of WTO.

Article 11-2: Deadline; Except in so far as provided in paragraph 3, (a) in open procedures, the period for the receipt of tenders shall not be less than 40 days from the date of publication referred to in the paragraph 1 of Article 9.

Article 15: Limited Tendering; The Provisions of Article 7- Article 14 governing open and selective tendering procedures need not apply in the following conditions, provided that limited tendering is not used with a view to avoiding maximum possible competition or in a manner which would constitute a means of discrimination among suppliers of other Parties or protection to domestic producers or suppliers: Concrete conditions for limited tendering are specified in (a) – (j).

Article 20-6: Challenge Procedures; Challenge shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the terms of appointment. This is the legal basis for the establishment of government procurement complaints committee.

3. Japan

3-1 Scope and Process of Adoption

Appendix1 Japan Annex 2 stipulates that the GPA is applied to all prefectural governments and 12 designated cities in Japan. But there was no prior in depth consultation between the central government and local governments before the adoption of the GPA.

The thresholds of the GPA application are following. For supplies and other services, the GPA is applied to the procurement above 200,000 SDR. For construction services, the GPA is applied to the procurement above 15,000,000 SDR. For architectural, engineering and other technical services, the GPA is applied to the procurement above

1,500,000 SDR.

One of the major characteristics of the Japanese scope of application is the special treatment of the construction services of local governments in Japan. In Japan, even though the threshold of the central government construction services is 4,500,000 SDR, the threshold of local government construction services is more than three times higher than 4,500,000 SDR, that is, 15,000,000 SDR. The special treatment of the construction services of local governments in Japan is more clearly understood when the Japanese treatment and the foreign treatment are compared. The threshold in Japan is 15,000,000 SDR. But the threshold of construction services in sub national governments of the EU and the US is one third of 15,000,000 SDR, that is, 5,000,000 SDR. This special treatment of the construction services of local governments in Japan may reflect the special importance (financially and politically) of the construction services of local governments in Japan.

3-2 Implementation Mechanism

In Japan, the substantive rules were changed at the national level to ratify the GPA. There was no change of Local Autonomy Act. But the Cabinet Order Stipulating Special Procedure for Local Government Entities Procurement of Goods and Specified Services (Special Cabinet Order) was established as a special rule to the Implementing Cabinet Order of Local Government Act. The Special Cabinet Order was applied to the special procurement under the scope of the GPA.

The Contents of the Special Cabinet Order are following. The Article 4 requires the annual public notice of qualification requirement. Article 5 stipulates the prohibition of the restriction of tendering qualification on the basis of the places of business offices. This article is the modification of the general rule that permits the restriction of tendering qualification on the basis of the places of business offices, stipulated in the Implementing Cabinet Order of Local Autonomy Act Article 167-5-2. Article 10 demands the restriction of non-competitive procurement (Zuiikeiyaku). This is to implement the GPA article 15 concerning the limited tendering and is a special rule that modifies the Implementing Cabinet Order of Local Autonomy Act Article 167-2. This Article 10 has a very detailed structure. It incorporates the conditions of Implementing Cabinet Order Article 167-2-1-3, 6, 7, as those are corresponding conditions (a)(c) of the GAP Article 15. But it removes the conditions of the Implementing Cabinet Order Article 167-2-1-1, 2, 4,

5 because those are too broad compared to the conditions of the GPA. Instead, it sets conditions of Special Cabinet Order Article 10-1-1, 2, 3, 4, 5, 6, that are corresponding to conditions (b)(d)(e)(f) (g)(j) of the GAP Article 15. In addition, it removes the conditions (h)(i) of the GPA Article 15 as those are useless.

There are changes of rules also at the local government level, such as the changes of Special Financial Regulation of local governments to supplement the Special Cabinet Order. This Regulation is under the jurisdiction of local governments, but national government sets the notice (administrative guidance) that identifies the items to be included in the Special Financial Regulation. Special Financial Regulation Notice has the following contents. The Article 2 of the Special Financial Regulation Notice requires the public notice at least 40 days before the procurement. This is to implement the Article 11-2 of the GPA. The Article 4 of the Special Financial Regulation Notice requires the public notice of the procurement summary in official languages, that is, English or French or Spanish. This is to implement the Article 9-8 of the GPA.

In addition to the Special Financial Regulation, there is a local administrative guidance document (Youkou) to set up a local government procurement complaint committee. This local administrative document is based on the central administrative guidance document, that is, N.O. 78 notice (1995) of Ministry of Home Affairs concerning the setting up of a local government procurement complaint committee.

The characteristic of this implementation mechanism in Japan is that some parts of the GPA rules (including substantive rules) are incorporated into the Cabinet Order at the central government level, but the other parts of the GPA rules are incorporated only into the administrative guidance documents at the central government level or not clearly written. So it is very hard to enforce the second part because it is only the administrative guidance and the central government has no power to enforce it.

3-3 Practices of Local Governments and Complaint Cases

There are two channels to bring complaints for foreign governments. One is the normal diplomatic channel. Foreign governments (sometime by the pressure of foreign firms) bring complaints to the Japanese Ministry of Foreign Affairs. Foreign Ministry brings the cases to the attention of local governments in Japan through the Ministry of General Management. The other is the direct channel to the local governments in Japan.

Foreign governments (or firms) can bring complaints to local government procurement complaint committees or local government offices in charge of procurement directly.

We see the increasing cases of foreign complaints toward the procurement practice of local governments in Japan. There was only one complaint case each year in 1997 and 1998. But there were 8 complaint cases in 1999 (and there were 3 cases at least in 2000). Those cases before 1999 were brought to the attention of local governments through the diplomatic channel. In addition to that, in April 2000, the formal complaint case was brought to the Osaka prefectural government complaint committee. This was the first case in which the direct channel to the local government was used. So far no case was brought to the formal mechanism of the WTO. From the enforcement perspective, this is a very selective process that pays attention to cases conflicting with the rules only when there are firms which have substantial interests to raise the cases.

There are basically two categories of complaints cases brought to the attention of local governments.

First category is the case where the technical specification becomes an issue. The Article 6 of the GPA requires that (1) technical specification laying down the characteristics of the products or services to be procured shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade and (2) technical specifications prescribed by procuring entities shall be in terms of performance rather than design or descriptive characteristics and be based on international standards, where such exist. But a local government sometimes set technical specification which requires the adoption of a specific technology. One such case was the case of the procurement of the comprehensive disaster information system by Aomori prefectural government in 1999 (Yomiuri newspaper, 7/13/1999). Aomori government required the use of specific software for which the NEC had monopoly sales license. After the consultation with the Ministry of Foreign Affairs, Aomori government cancelled the contract with the NEC and set a new technical specification.

The second category is the case where the non-discrimination and the national treatment becomes an issue. Article 3 of the GPA requires that each party shall immediately and unconditionally to the products, services and suppliers of other Parties, treatment no less favourable than that accorded to domestic products, services, and suppliers and that accorded to products, services and suppliers of any other Party. The

restriction of tendering qualification on the basis of the places of business offices is the typical example which is in conflict with the principle of the non-discrimination. But there are vast vague areas where formally non-discriminatory rules can have discriminatory effects.

Typical cases about which many foreign parties raise complaints are requirement of higher Management Items Review score by local governments. The Management Items Review is a system to evaluate the performance of construction firms (It is written in Construction Industry Act Article 27). The Management Items Review calculates a specific score to a specific firm, paying considerations to the various aspects of a construction firm. Areas of considerations include the size (45%), the financial conditions (20%), the technical capability (20%), the social aspects etc (labor welfare, safety, etc.)(15%). In the qualification of procurements of the national government, Management Items Review score 1250 points are usually required. But some local governments require more points than 1250, such as 1500 and 2000, without enough justification. Some foreign firms and governments claim that those practices have de-fact discriminatory effects.

There are relatively many such cases. Many foreign parties (especially Korean government and firms) raise complaint cases relating to the requirement of the Management Items Review scores. For example, in 1999, Wakayama prefectural government required 2000 points as a qualification concerning the tendering for the construction of a prefectural hospital. But after the complaint and the consultation between the preferectural government and the central government, the required score was reduced to 1500 points (Kensetsu Kogyou newspaper, 7/13/1999). Similar complaints were raised concerning a football stadium construction, a museum construction, a city / prefectural government hall construction, and a dam construction, etc.

After the series of complaints relating to the Management Items Review scores, the Joint notice (administrative guidance) by the Director of Construction Industry Division of Ministry of Construction and the Director of International Affairs of the Ministry of Home Affairs was established in February 2000. It demands the adequate requirement of Management Items Review score by local governments, referring to the practice of central government agencies requiring 1250 points, and the preparation of reasonable explanations for the Management Items Review scores requirement to perform the

contracts.

3-4 Enforcement Mechanism – Major Concern of the National Government

As analyzed in 3-2, some part of the GPA rules are incorporated into the Special Cabinet Order at the central government level, but the other part of the GPA rules are incorporated only into the administrative guidance documents at the central government level at best in Japan. So it is very hard to enforce the second part because it is only the administrative guidance at best and the central government has no power to enforce.

There are some rules of the GPA that are written clearly in Special Cabinet Order. For example, the GPA Article 15 is incorporated clearly in the Special Cabinet Order Article 10. In those cases, the central government can take series of steps to enforce the GPA. First, the central government can give advices and recommendations based on Local Autonomy Act Article 245-4-1. Second, the central government can request the amendments of administrative actions that are in conflict with national law and order based on Local Autonomy Act Article 245-5-1. Third, if the local government does not agree with the request, it can bring the case to the Committee to Settle Disputes between Central and Local Governments based on the Local Autonomy Act Article 25-13-1. Then if the central or local government agree with the decision by the Committee to Settle Disputes between Central and Local Governments, each can bring the case to the court.

But there are other rules of the GPA that are not written in the Special Cabinet Order even though there are administrative guidance documents in some cases. For example, Article 3 (only prohibition on the basis of places of business offices is written in the Special Cabinet Order), 6, 8 of the GPA is not written into the Special Cabinet Order. Concerning the Article 3 (non-discrimination and national treatment) of the GPA, it was claimed that the sprit of the Local Autonomy Act is non-discrimination and national treatment, but no clear sentences are written in the Act. In those cases, the central government can take only limited steps to enforce the GPA. First, it is OK to give advices and recommendations based on Local Autonomy Act Article 245-4-1. Second, but there is a doubt whether it is possible for the central government to request the amendment of administrative actions that are in conflict with the GPA or administrative guidance documents based on Local Autonomy Act Article 245-5-1. The

legal conditions of the application of Local Autonomy Act Article 245-5-1 are 1) conflict with national laws & orders, and 2) clear violation of public interest. The first condition is not met and it is hard to say that the second condition is met.

In case when rules of the GPA that are not written in the Special Cabinet Order, the only possible way to use is the direct implementation of the GPA by central government. From international legal theory perspective it is said that it is possible to enforce international treaties directly in the domestic legal system. But the domestic legal practice is generally different. The other related possible way for enforcement is to apply Special Cabinet Order Article 1 which stipulates that this order sets items necessary to enforce the GPA that was adopted at Marrakesh on 15 April 1994. Some legal scholar mentions the possibility of this interpretation but it does not seem that the central government takes this position.

As the analysis above shows, there is not an adequate system of enforcement of the GPA in Japan, if local governments do not follow the GPA rules voluntary. Historically there is no need for such system in Japan because of the centralized structure of Japan. But now the situation is changing under the decentralization and the central government officials are worrying about the difficulties of enforcement if local governments do not follow the GPA rules voluntary

4. US

4-1 Scope and Process of Adoption

Appendix1 the US Annex 2 stipulates that the GPA is applied to 37 states (no municipal governments). Compared to Japan, there was the intensive and careful consultation between the federal government and the state governments before the accession to the GPA. Several institutions were involved in the process of consultation such as the IGAPC (Intergovernmental Policy Advisory Committee), National Governors Association, National Conference of State Legislators, National Conference of Mayors, and NASPO (National Association of State Procurement Officials).

NASPO is a national association of state procurement officials and it played a very important role in the actual process leading to the adoption of the GPA. Key person in NASPO is Ms. Paula Moskowitz in the NY state government and she has participated

in the various important meetings relating to the GPA for long time. After the intensive consultation, final decisions were made by governors voluntary and 37 states agreed to be included in the list of application of the GPA. Because of the federalism, it was not possible for the federal government to enforce the GPA on states.

There were various opinions among states. Some states such as NY and California that had large export industry showed positive attitudes to the GPA, but other states in mid western region, for example, showed negative attitudes. Different opinions were identified not only among states, but also among various departments in states. Procurement departments generally showed positive attitudes because they had interests to reduce costs through competitive procurements. So NASPO officially supported the GPA. On the other hand, trade departments, especially in not so developed areas, showed negative attitudes because they would like to use government procurements as instruments of industrial policy.

The thresholds of the GPA application are following. For supplies and other services, the GPA is applied to the procurement above 355,000 SDR. For construction services, the GPA is applied to the procurement above 5,000,000 SDR. For architectural, engineering and other technical services, the GPA is applied to the procurement above 355,000 SDR. Concerning construction services, there is no difference of thresholds between the central and the local government. The threshold of the US and Japanese sub national governments are 5,000,000 SDR and 1,500,000 SDR respectively, and it seems to mean that the relative political importance of construction services is smaller in the US.

What is most interesting about the delineation of the scope in the US is the way exemptions are written into the Agreement. Specific products (steel, motor vehicles and coal) and programs (programs promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women) are written down for exemptions. Those are the items and programs that are important in the domestic politics of the US.

Notes to Appendix 1 the US Annex 2 are following. (1) For those states marked by an asterisk with pre-existing restrictions (Delaware, Florida, Illinois, Iowa, Maine, Maryland, Michigan, New York, New Hampshire, Oklahoma), the Agreement does not apply to procurement of construction-grade steel, motor vehicles and coal. (2) The Agreement shall not apply to preferences or restrictions associated with programs

promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women. (3) Noting in this annex shall be construed to prevent any state entity from applying restrictions that promote the general environmental quality in that state, as long as such restrictions are not disguised barriers to international trade. (4) The Agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects.

In addition to that appendix 1 the US general notes stipulates that notwithstanding the above, this Agreement will not apply to set asides on behalf of small and minority businesses.

4-2 Implementation Mechanism

In the US, at the federal government level, the 1994 Uruguay Round Agreement Act (H.R. 5110) was introduced to implement the Uruguay Round Agreement including the GPA. But it was mainly about the procedural aspects and no substantive laws and regulations were changed because it was very difficult for the federal government to intervene directly into state affairs under the federalism.

What the 1994 Uruguay Round Agreement Act (H.R. 5110) did was the strengthening the coordination and the conflict resolution system between the federal and the state governments. The 1994 Uruguay Round Agreement Act (H.R. 5110) SEC. 102 (b) stipulates the following matters concerning a federal and state consultation.

(A) IN GENERAL- Upon the enactment of this Act, the President shall, through the IGPAC (intergovernmental policy advisory committees) on trade established under section 306(c)(2)(A) of the Trade and Tariff Act of 1984 (19 U.S.C. 2114c(2)(A)), consult with the States for the purpose of achieving conformity of State laws and practices with the Uruguay Round Agreements.

(B) FEDERAL-STATE CONSULTATION PROCESS- The Trade Representative shall establish within the Office of the United States Trade Representative a Federal-State consultation process for addressing issues relating to the Uruguay Round Agreements that directly relate to, or will potentially have a direct effect on, the States. The Federal-State consultation process shall include procedures under which--(i) the States will be informed on a continuing basis of matters under the Uruguay Round

Agreements that directly relate to, or will potentially have a direct impact on, the States;(ii) the States will be provided an opportunity to submit, on a continuing basis, to the Trade Representative information and advice with respect to matters referred to in clause (i); and (iii) the Trade Representative will take into account the information and advice received from the States under clause (ii) when formulating United States positions regarding matters referred to in clause (i).

4-3 Practices of States and Complaints Cases

In the US each state has its own procurement system. There is no common nation-wide framework such as Management Items Review score system used to assess the performance of construction firms, that is extensively used in the central and the local governments in Japan.

In the states and the local governments, there are various programs of preference to specific kinds of firms in the US. First kind of the preference system is the preference concerning small business. Small businesses are treated favorably in the tendering process. But the definitions of small businesses are different depending on states. For example, the threshold is 2 million USD / year sales in Massachusetts, 100 employee in NJ, and both 10 million USD and 100 employee in California. Second kind of the preference system is the preference concerning minority & women businesses. Minority and women businesses are treated favorably in the tendering process. In both cases, the preference is awarded in the form of the procurement's specific ratio allocated to target firms or in the form of price the preference (specific percentage of price is added to the tendering price of non-targeted firms). As shown in 4-1, those programs are exempted in the GPA Appendix 1 the US.

There are also local preference programs such as buy state and buy American in various states. For example, buy state programs are identified in Alaska, Hawaii, Iowa, Michigan, Montana, New Mexico, NY, South Carolina, South Dakota, Wyoming, etc., and buy American programs are identified in California, Iowa, Louisiana (concerning vehicles, etc.). Local preference programs are generally in conflicts with the GPA and only specified programs are permitted in the GPA appendix 1 the USA as exemption (Notes to Appendix 1 the US Annex 2 stipulate that for those states marked by an asterisk with pre-existing restrictions (Delaware, Florida, Illinois, Iowa, Maine, Maryland, Michigan, New York, New Hampshire, Oklahoma), the Agreement does not

apply to procurement of construction-grade steel, motor vehicles and coal). So there is a potential of GPA violations in Hawaii, Louisiana, Wyoming, etc. In those states there are preference programs and those states are not mentioned as exemptions in the GPA. Violations happen if the GPA member countries are not specifically exempted in state practices. But generally there are trends to decrease preference programs because of procurement reform to reduce financial costs, for example, in Massachusetts and California.

In addition to those above, there is discrimination in procurement as diplomatic sanctions. The most famous case was the Massachusetts Burma Law which was enacted in June 1996. In the law, firms doing business with Burma were treated unfavouably in the tendering process. That is, 10% of the offered price was added to the tendering price offered by firms doing business with Burma and this addition had a negative impact on the competitive position of the firms doing business with Burma. In addition to the Massachusetts Burma case, there are many similar laws at local government level, for example, in NY city and Berkley California. Those laws are targeted to the firms doing businesses in Burma, Nigeria, Tibet. Furthermore there is a law against firms using child labor in California. One of the biggest issues in those diplomatic sanction programs is the inadequate system for monitoring. It is very hard for states and, even more, local governments to have accurate information about the human right situation in the targeted countries, and they have to depend on the dissemination of information by NGOs that are sometimes not credible enough.

The case of Massachusetts Burma Law actually caused international conflicts. This issue was raised in the WTO consultation mechanism by EU in June 1997 and by Japan in July 1997. In September 1998 it was decided to set up the panel. But in February 1999 the process was stopped after the local court judgment below had declared that the Massachusetts Burma Law was illegal.

The case was brought to the domestic court by a US organization, NFTC (National Foreign Trade Council) which had an interest in promoting international trade, in April 1998. In November 1998 the local court delivered judgment and the domestic process for resolving conflicts predominated after that, instead of the WTO process. The case was brought to the higher courts, the first circuit judgment was delivered in June 1999, and the supreme court gave final judgment in June 2000, both claiming that the Massachusetts Burma Law was illegal.

What is very interesting is that there is working domestic legal system to review state laws. In the series of judgments and comments on those, following doctrines were used. (1) The Foreign Affairs Power of Federal Government (which prohibited state governments intervene into the inherent power of the federal government). (2) Federal Preemption or Implied Preemption. (3) Foreign Commerce Clause or Interstate Commerce Clause (that prohibit practices that became obstacles to trade internationally and domestically). (4) Market Participant Theory (that permits discriminatory procurements because governments are just market participants in the context of procurements). Among the four doctrines above, the first two are used by the supreme court and the third (Foreign Commerce Clause) was used at the First circuit court.

4-4 Enforcement Mechanism

The 1994 Uruguay Round Agreement Act (H.R. 5110) was introduced in the US to implement the Uruguay Round Agreement including the GPA. But, as analyzed in 4-2, it was mainly about the procedural aspects because it was very difficult for the federal government to intervene directly into state affairs under the federalism.

Procedures when complaints happen were formally specified in the following ways.

FEDERAL-STATE COOPERATION IN WTO DISPUTE SETTLEMENT (1994 Uruguay Round Agreement Act (H.R. 5110) Sec 102. (b)(1) (C)): (i) When a WTO member requests consultations with the United States under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes referred to in section 101(d)(16) (hereafter in this subsection referred to as the `Dispute Settlement Understanding') concerning whether the law of a State is inconsistent with the obligations undertaken by the United States in any of the Uruguay Round Agreements, the Trade Representative shall notify the Governor of the State or the Governor's designee, and the chief legal officer of the jurisdiction whose law is the subject of the consultations, as soon as possible after the request is received, but in no event later than 7 days thereafter. (ii) Not later than 30 days after receiving such a request for consultations, the Trade Representative shall consult with representatives of the State concerned regarding the matter. If the consultations involve the laws of a large number of States,

the Trade Representative may consult with an appropriate group of representatives of the States concerned, as determined by those States. (iii)The Trade Representative shall make every effort to ensure that the State concerned is involved in the development of the position of the United States at each stage of the consultations and each subsequent stage of dispute settlement proceedings regarding the matter. In particular, the Trade Representative shall--(I) notify the State concerned not later than 7 days after a WTO member requests the establishment of a dispute settlement panel or gives notice of the WTO member's decision to appeal a report by a dispute settlement panel regarding the matter; and (II) provide the State concerned with the opportunity to advise and assist the Trade Representative in the preparation of factual information and argumentation for any written or oral presentations by the United States in consultations or in proceedings of a panel or the Appellate Body regarding the matter. (iv) If a dispute settlement panel or the Appellate Body finds that the law of a State is inconsistent with any of the Uruguay Round Agreements, the Trade Representative shall consult with the State concerned in an effort to develop a mutually agreeable response to the report of the panel or the Appellate Body and shall make every effort to ensure that the State concerned is involved in the development of the United States position regarding the response.

LEGAL CHALLENGE (1994 Uruguay Round Agreement Act (H.R. 5110) Sec 102. (b)(2)): (A) IN GENERAL- No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid. (B) PROCEDURES GOVERNING ACTION- In any action described in subparagraph (A) that is brought by the United States against a State or any subdivision thereof (i) a report of a dispute settlement panel or the Appellate Body convened under the Dispute Settlement Understanding regarding the State law, or the law of any political subdivision thereof, shall not be considered as binding or otherwise accorded deference; (ii) the United States shall have the burden of proving that the law that is the subject of the action, or the application of that law, is inconsistent with the agreement in question;
(iii) any State whose interests may be impaired or impeded in the action shall have the unconditional right to intervene in the action as a party, and the United States shall be entitled to amend its complaint to include a claim or cross-claim concerning the law of a State that so intervenes; and (iv) any State law that is declared invalid shall not be

deemed to have been invalid in its application during any period before the court's judgment becomes final and all timely appeals, including discretionary review, of such judgment are exhausted. (C) REPORTS TO CONGRESSIONAL COMMITTEES- At least 30 days before the United States brings an action described in subparagraph (A), the Trade Representative shall provide a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate--(i) describing the proposed action; (ii) describing efforts by the Trade Representative to resolve the matter with the State concerned by other means; and (iii) if the State law was the subject of consultations under the Dispute Settlement Understanding, certifying that the Trade Representative has substantially complied with the requirements of paragraph (1)(C) in connection with the matter. Following the submission of the report, and before the action is brought, the Trade Representative shall consult with the committees referred to in the preceding sentence concerning the matter.

The stipulation above means that there has to be close cooperation between the federal and the state governments when complaints cases happen, that the federal government can bring the state government to the court at the final stage when the federal government thinks that the state laws need to be modified to conform with the GPA, and that the Congress need to be involved in the process when the federal government brings the state government to the court. We can easily understand that the process leading to the court case against state governments is very complicated and it seems to be very hard to use this procedure.

Because of the complicated nature of the court procedure and the need of paying attention to the Congress under the 1994 Uruguay Round Agreement Act (H.R. 5110), the formal procedure above was never used in practice. It was true also in the case of the Massachusetts Burma Law. The federal government was very cautious to use legal measures against state government, and it was not the federal government but the private organization, NFTC (National Foreign Trade Council) that brought the case to the domestic court in the US.

5. Conclusion – Comparison and Analysis

The analysis above shows that there are impacts of international rules on sub central

governments even in the area of procurement that many people think lays in the area of exclusively domestic concerns. But it is also clear that (1) the enforcement is limited and selective, and that (2) forms of implementation are different depending on countries. Here I would like to analyze those two points using comparison between Japan and the US.

5-1 Limited and Selective Enforcement

WTO GPA rules are very strong on surface. But actual implementation is very selective in that enforcement actions are undertaken only when competitors (against the illegal bidder) have interests to raise issues and that because of issues of monitoring not all illegal cases are detected.

Selective nature becomes more acute especially when sub central procurement systems are targets. The issue is related to the difficulties of the central and the sub central relations concerning the enforcement of the GPA.

In Japan, some parts of the GPA rules are incorporated into the Special Cabinet Order at the central government level, but the other part of the GPA rules are not incorporated or are incorporated only into the administrative guidance documents at the central government level. So it is very hard to enforce the second part, because it is only the administrative guidance and the central government has no power to enforce it, or because it is very hard to enforce international law directly in domestic context in practice.

In the US the 1994 Uruguay Round Agreement Act (H.R. 5110) was introduced to implement the Uruguay Round Agreement including the GPA. But, it was mainly on procedural aspects because it was very difficult for the federal government to intervene directly into state affairs under the federalism. And because of the complicated nature of the court procedure (which the federal government can use to enforce the GPA against state governments) and the need of paying attention to the Congress under the Uruguay Round Agreement Act, it is very difficult to use this litigation procedures.

5-2 Different Forms and Dynamism of Implementation

The forms and the dynamism of implementation is different depending on countries.

First, mechanisms of implementation are different depending on countries. In Japan, central government laws & orders write down substantive rules (in addition to procedural rules) even though only parts of the GPA are clearly written into the laws and orders. In the US, the central government laws write down only procedural rules. Incorporation of substantive rules depends on the voluntary action of sub national governments. The federal government can only bring the case to the court to ask for specific modifications and the court procedure is complicated because the Congress is also involved in the process.

Second, the scope of implementation is different depending on countries. Japan worked hard to get concession concerning the threshold of constructions service. On the other hand, the US negotiation focus on getting concessions concerning specific items (coal, steel, vehicle) and various preference programs (for minorities, women, and small businesses).

Third, the forces for change in the dynamism of implementation are different depending on countries. Domestic forces of procurement reforms (for reducing procurement cost) are important in the US (Massachusetts and California cases). But international pressure seems to be very important in Japan. In the Japanese domestic legal system, requirement of local business office is permitted, and the domestic commerce clause does not exist in Japan. Anyway it can be said that the economic forces (trade in Japan or cost reduction in the US) can work together with the forces for transparency concerning the procurement in both countries. The political dynamism is similar to the dynamism that produced the Anti bribe treaty at the OECD.