

# BRIEFING PAPER



No. 12/2013

## Should India Join the WTO GPA?

– Vinitha Johnson\*

*The Briefing Paper suggests that India may consider two premises before acceding to the WTO Government Procurement Agreement (GPA): firstly, the 'indicative' market access figures that member-countries of the WTO GPA posit to provide are, in practice, whittled down through carve-outs for specific goods, sectors, non-tariff barriers and through exceptions; and secondly, the WTO GPA while regulating transparency in procurement does not adequately address socio-economic facets of the responsibility of procuring entities, neither does the text of the agreement contain provisions/waivers for developing countries. Owing to this, countries which undergo the process of accession to the WTO GPA may have to justify the usage or procurement as a socio-economic policy tool to the existing member-countries.*

*Apart from the WTO GPA being driven by terms agreed upon between the parties, it is also highly resource-intensive. Hence, negotiations to accede to the WTO GPA would skilled preparation, and understanding of the various facets of procurement policy which may be obtained by evolving a coherent procurement policy which delineate how discordant objectives can be reconciled and achieved.*

### Introduction

In 2010 India attained an Observer status in the WTO GPA. The decision to accede to the WTO GPA has received attention owing to the slowdown in world trade, increase in current account deficits and burgeoning 'buy local' policies which have altered the global landscape of procurement policy.

In India, there is a general consensus that the public procurement system needs revamping. Not only should the procurement system be transparent *per se* with attributes of good governance but should also help in stimulating the domestic economy, a practice adopted by countries across the world.

Undoubtedly, India seems to subscribe to the good governance aspects of the WTO GPA as is evident from recent discourses by government officials. However, it appears to be cautious in its approach, and accords due significance to the economic benefits of an accession. The government procurement market in India is considerable and

placed at about 30 percent of its gross domestic product of US\$1.946tn at nominal prices; thus, the size of this market could be as much as US\$584bn.

Secondly, Indian companies are increasingly exploring the possibility of accessing markets for government procurement in other countries. In this context, the WTO GPA accession seems to be influenced quite substantially by market access considerations, both for domestic and foreign suppliers, rather than transparency and good governance concerns.

Importantly, the revised WTO GPA, was adopted on March 30, 2012.<sup>1</sup> Two-thirds of the parties to the agreement are required to ratify the agreement for it to come into force, and it is hoped that the members will ratify it in time for the Bali Ministerial in December 2013.

This Paper will attempt at answering the question on whether or not India should enter the WTO GPA. It

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amply considers the fact that ‘market size’ is a vital determinant of the negotiating capital of a country. In the process of answering this question, the Paper also evaluates the challenges and opportunities created by such an accession to the WTO GPA as that would have a significant influence in India’s decision to join the WTO GPA.

### The WTO GPA Framework

In order to decide on the issue of accession, any country including India would need to understand the WTO GPA framework, the way in which it operates *vis-a-vis* market access provided by the Agreement.

Firstly, obligations which are undertaken in this agreement depend on which entities are submitted under the Appendices by a negotiating country. As per the GPA, the Appendices to the agreement constitute an integral component of the agreement (Table 1).<sup>2</sup>

Secondly, costs incurred in negotiating the WTO GPA, need to be estimated. Members are allowed to accord differential treatment between the other members within the WTO GPA. Consequently, agreement requires a negotiating country to be aware of the amount of procurement which is undertaken by every government entity. As a result, every new entrant would need to assess, prior to commencing negotiations to enter the WTO GPA, whether it has undertaken enough preparation to initiate negotiations into the WTO GPA.

Further, accession negotiations are highly cost-intensive. Accession into the WTO GPA generally entails the following costs:

- Preparation for the negotiations by conducting feasibility studies, etc.
- Ensuing losses to domestic suppliers if governments bodies find foreign suppliers cost effective
- Cost of harmonising domestic legislation with the WTO GPA and other international instruments pertaining to procurement
- Instituting, and maintaining systems to satisfy requirements posited by the WTO GPA, especially with respect to statistical reporting, judicial mechanisms, etc.

Thirdly, stakeholder’s interest in the WTO GPA is an important constituent of the decision to accede the Agreement. Any country including India which wants to decide if it should join the WTO GPA should look at the interest of mainly two stakeholder groups:

1. The domestic government (Central government, state government, public sector entities): What is the current procurement profile? Is value for money obtained? Is the achievement of socio-economic objectives being furthered through procurement? Is transfer of technology likely to be facilitated through procurement from foreign suppliers?
2. The domestic industry: What will be loss incurred by domestic suppliers to the domestic government? What may be the gains for the domestic industry which is supplying to foreign markets? Which are the small and medium sized enterprises which may be disadvantaged as a result of such procurement?

Furthermore, some considerations on following aspects of procurement need to be borne while

**Table I: Annexes in Appendix I**

| Components of Appendix I | Coverage  |
|--------------------------|---|
| Annex 1                  | Central Government entities whose procurement is under the purview of the agreement                 |
| Annex 2                  | Sub-central entities whose procurement is covered by this agreement                                 |
| Annex 3                  | All other entities whose procurement is covered by the agreement – includes state-owned enterprises |
| Annex 4                  | Goods covered by the Agreement  |
| Annex 5                  | Services, other than construction services covered by the Agreement                                 |
| Annex 6                  | Construction Services covered by this Agreement   |
| Annex 7                  | Any General notes   |

*Source: Article II(4) of Revised GPA Agreement*

making the accession decision:

- Which entities (Central level, state level and public sector enterprises) undertake the most procurement, and are likely to be identified by other negotiating parties?
- Further, trends pertaining to ‘Buy National’ aspects and existing NTBs should be studied.
- Evolving a procurement policy will help India to undertake better preparation for bilateral and multilateral negotiations pertaining to government procurement (as suggested in Part IV).

### **India’s Bilateral Trade Negotiations on Government Procurement**

Whether India should join the WTO GPA as member is further relevant in light of its current bilateral negotiation propositions. Though a chapter on government procurement has been included in the Indo-Japan Comprehensive Economic Partnership Agreement, it only presents ‘best-endeavour’ clauses where the goods, services and suppliers of one party are not subject to discriminatory treatment. Actual negotiations on coverage are intended to be drawn out after India expresses the intent to become party to the GPA.

However, if India undertakes any commitments pertaining to government procurement through its others bilateral agreements (such as the EU-India Free Trade Agreement), it can be assumed that in the future if India explores WTO GPA accession, the members of the WTO GPA may expect more than what has been committed in a bilateral FTA.

### **Market Access Perspective**

The frequently cited ‘market access’ figures (US\$2.3tn in the European Union<sup>3</sup>) are indicative of the *contestable* market access opportunities in a given country and does not necessarily warrant enhanced or improved market entry conditions if a

country accedes to the WTO GPA. It is noteworthy that certain developed country governments like the EU undertake the bulk of their procurement from other developed country markets.

Thus, WTO GPA may provide legal right to access member’s government procurement market; however it needs to be assessed in a dynamic context, taking due account of India’s ongoing internal initiatives to improve governance, its growing market competitiveness and other related factors. Market access in the WTO GPA depends on the negotiating prowess of a country. Negotiating prowess, in turn, depends on both the political clout of a country and the market access extended.

Hence, even amongst the members of the WTO GPA, access to markets could be limited because of following factors which are covered in detail:

1. Exclusion of procurement in specific sectors (generally related to provision of utilities)
2. Exclusion of specific goods
3. The operation of Buy National policies which do not contain a waiver for GPA members
4. Operation of exceptions and exclusions, such as national security, operational safety of transportation etc.
5. The operation of NTBs, such as Sanitary and Phytosanitary (SPS) measures, Technical Barriers to Trade (TBT) etc

**Special Goods:** Special industry machinery, automatic data processing equipment, software, supplies, support equipment, office machines, electric motors, generators etc. are specific goods the procurement of which is excluded by countries like Israel and the EU. This is a strategy similar to maintaining tariff peaks in select goods where the goods which may be subject to maximum procurement are reserved for domestic suppliers.

**Table 2: Exceptions with Respect to Utilities**

| Country | Countries to whom Market Access is denied | Sectors in which Market Access is denied (Applies to specific annexes)   |
|---------|---|--|
| Canada  | All                                       | Procurement by sub-central entities and state-owned entities subject to negotiation of mutually acceptable commitments                       |
| Canada  | EC  | Drinking water, energy, transport, telecommunications  |
| US      | Japan                                     | State-owned entities engaged in generation or distribution of electricity  |
| EC      | All                                       | Contracts undertaken by sub-central entities for the following purposes: purchase of water, supply of energy or fuels, production of energy. |

Source: GPA Schedules of member countries

**‘Buy National’ Laws:** Currently, multiple countries seem to be resorting to protectionism as evident through burgeoning ‘Buy National’ laws. Some country representatives noted that they may be tempted to consider initiated accession if countries which used ‘Buy National’ laws entered the WTO GPA in order to avail of those otherwise excluded markets.

However, this is owing to the mistaken assumption that entering the WTO GPA grants a new entrant guaranteed access to tenders which are fenced off through the use of ‘Buy National’ policies. In truth, market access into these fenced off markets is dependent on whether or not that particular country government grants a waiver to a country to circumvent the effect of ‘Buy National’ laws.

**Exceptions/Exclusions:** The WTO GPA contains exceptions which can be used by a member when it undertakes procurement to limit market access opportunities to foreign suppliers. It is critical to note that there is no requirement to justify the use of exceptions under the agreement with a test akin to the ‘necessity test’ under the General Agreement on Tariffs and Trade (GATT). Some members use the existing exceptions in an excessive manner – for example, the US ceased procurement of Information Technology products from Huawei in China citing the ‘national security’ exception.

Further, the members of the GPA have routinely invented new exceptions which do not find a mention in the body of the text. An example is the use of an exception termed ‘operational safety of transportation’ by Japan, which we surmise refers to limiting procurement from foreign suppliers on account of incompatibility with existing local infrastructure.

**SPS/TBT Measures:** These involve the procuring country governments evolving specific conditions in the production of a good most of which increase the cost of production for foreign suppliers. An example is the high value of Maximum Residual Level in pesticides as stipulated by the EU (which is higher than internationally accepted standards).

As is evident from the five factors discussed above, the members of the WTO GPA are governed by the terms of agreement between them. Another striking instance is that of countries ‘denying’ each other access to challenge procedures when the demands

pertaining to sub-central procurement or preferential procurement are not satisfied.

This practice has not yet been challenged by any of the existing members, and is yet another instance of how being a part of the WTO GPA is similar to walking a tightrope. This is in striking contrast to other WTO agreements which provide ample disciplines – an apt example is resorting to the use of exceptions under GATT Article XX which requires the satisfaction of a ‘necessity test’.

Given the tenuous nature of negotiating within the agreement, it is advisable that a new entrant into the WTO GPA should explore accession only after undertaking adequate preparation as to be able to obtain the maximum possible gains from its negotiating capital.

### **Three Important Questions in Negotiations**

Having discussed how market access is whittled down, we now cover three questions which arise in every negotiation undertaken by a new entrant. The approach which is followed in the negotiations is to ‘claim’ as much market access as possible under the following three questions.

#### **Will sub-central entities be included?**

This question is especially significant because there are many federal governments in which the sub-central governments undertake more procurement than the Central government ministries.

In federal states, the governments may be hesitant to include their state governments as committed entities without their consent. For this reason, the US does not open up all of its 50 states to entail procurement disciplines under the GPA. North Carolina and South Carolina are noteworthy exceptions.

#### **What is the extent of coverage of procurement by state-owned enterprises providing utilities?**

In some countries, the bulk of the procurement is undertaken by state-owned enterprises which provide utilities like energy, transport, telecommunications, drinking water, electricity etc. Many governments are reluctant to submit these entities to the WTO GPA because they would rather reserve the opportunities to participate in such procurement for their own domestic suppliers.

### **What are the socio-economic policies which may interfere with market access?**

Currently, the various 'buy-local' provisions in multiple Indian policies, such as Manufacturing Policy, National Policy on Electronics, Telecom Equipment Manufacturing Policy, and Jawaharlal Nehru National Solar Mission contain a preference which accords preference to local manufacturers.

Under the Public Procurement Policy for Micro and Small Enterprises (MSEs), 20 percent of the total annual purchases of Central ministries, departments and public sector undertakings were reserved for procurement from MSEs. A share of four percent out of annual percent (20 percent of 20 percent) has been reserved for procurement by MSEs owned by Dalit and ST entrepreneurs.<sup>4</sup>

Negotiating on these three questions requires a country to have evolved a strategy to tackle these negotiations in order to obtain maximum value for its domestic business and governments. This preparation can best be achieved through a coherent procurement policy.

### **Need for a Procurement Policy**

The GPA embodies values of good governance and transparency in the entire procurement cycle, but its disciplines do not acknowledge and integrate the social-responsibility of a procuring government. Governments undertake procurement to incentivise production by socially disadvantaged classes, to encourage the use of certain local inputs in the value chain, and more recently to employ sustainable practices in production. Though such policies may be well-intentioned they may result in diminishing market access opportunities for foreign country suppliers, and may hence fall afoul of GP disciplines.

The GPA in itself does not oppose the application of such socio-economic principles in the process of procurement. As noted before, the GPA is almost entirely driven by terms crystallised on agreement between the parties to the GPA.

Owing to this, the question of whether or not a country can maintain such 'horizontal policies' is dependent on mutually agreed upon terms. These 'terms of agreement' are generally driven on the market access which a country/new entrant has to offer.

#### **Box I: The Queensland Procurement Policy**

The State Procurement Policy is built around three equally ranked objectives:

- Advancing priorities of the government
- Seeking value for money and probity
- Accountability of procurement outcomes

Other than the State Procurement Policy, the other related policies which deal with specific types of procurement such as the Local Industry Policy, the ICT SME Participation Scheme, the Quality Assurance Policy which have to operate coherently to facilitate achievement of procurement objectives.

The Queensland Procurement Policy identifies two different categories of beneficiaries with differing objectives:

1. Government Bodies: (i) Maximising value for money and reducing costs of procurement; (ii) Linking agency procurement activities with the priorities of the government; (iii) Procurement is focused on outcomes rather than process; and (iv) Encouraging development of strategic procurement expertise.
2. Industry and Community: (i) Requiring procurement officers to understand markets in which they buy and to be aware of opportunities for local suppliers and the industry; and (ii) Communicating anticipated future procurement requirements through Forward Procurement Schedules to assist local suppliers to identify opportunities to supply to the Queensland Government.

#### **Entity-Specific Policy (Queensland Rail)**

Further, the tenets of the policy are reflected in the independent procurement policy which are evolved by government bodies like Queensland Rail. The principles based on which Queensland Rail conducts its procurement activities are as follows: (i) to extract the best commercial value from procurement transactions; (ii) to effectively manage risk; (iii) to ensure probity transparency and accountability for outcomes.

*Source: Queensland Government: Procurement, available at <http://defa.qld.gov.au/procurement/>, last accessed on 29.05.2013.*

While countries with a significant amount of market access may be allowed to maintain these policies, countries which present lesser market access opportunities may be required to phase-out such preferential policies on accession into the WTO GPA.

Currently, a new Defence Production Policy has been revised to accord special status to domestic manufacturers to hedge against India's overdependence on imports.<sup>5</sup>

This is because a substantial amount of India's annual defence requirement is sourced from foreign suppliers. Using a policy to determine the objectives of procurement is definitely a step in the right direction.

Box 1 on Queensland's Procurement Policy illustrates how procurement objectives can serve multiple beneficiaries (both government bodies and the industry and the community) and be adapted by independent procuring entities like Queensland Rail.

Learning from how a policy enables coherent implementation of procurement-related objectives from both the Queensland Procurement Policy document and the incumbent defence procurement policy, a Procurement Policy could be passed prior to a law on public procurement. This is possible considering the Public Procurement Bill has not yet been passed by the Parliament.

It is equally important to supplement a national-level procurement policy by evolving an entity-specific procurement policy in order to balance seemingly conflicting objectives like obtaining value for money and supporting achieving of socio-economic objectives.

## Observations and Conclusions

### On Market Access

Clearly, even though GPA members present impressive statistics on the amount of market access which is 'available', these statistics are not indicative of market access opportunities which are actually contestable. Further, studying statistics of procurement undertaken by a particular country may not be actually indicative of the potential to exploit market access opportunities. This is because the

statistical database which presents information on market penetration in government procurement by suppliers from abroad do not include foreign suppliers who have established a base in the country. Furthermore, the statistics do not capture the contribution made by different countries in the value chain.

The markets which India has deemed as being currently significant to its interests include the US market, the Association of Southeast Asian Nations' markets and the Chinese markets. However, by focussing on these markets, India should not be locked out of procurement markets which are currently being accessed by domestic businesses through evolving disciplines under the WTO GPA and country-practices evolved with a purpose to retain market access.

Setting off market access opportunities should occur concomitantly with deciding to desist from joining the WTO GPA. The cost of not joining the WTO GPA may be one which gets more pronounced over the years through the operation of 'Buy – National' policies, NTBs and other preferential procurement unless non-GPA members either negotiate bilateral agreements independently or explore alternate markets. Being armed with pertinent statistical information is critical to monitor the markets which are accessible to Indian suppliers.

### Statistical Requirements

Monitoring procurement trends by government bodies in India is critical. Currently, government entities are required to post tenders on the portal [www.eprocure.in](http://www.eprocure.in) in order to facilitate access to information pertaining to the tender process for all suppliers. Ideally, the information on this portal could have enabled data mining on information pertaining to procurement undertaken by government entities.

However, the data on the website may not lend itself data mining owing to two reasons:

- (i) archival information is not easily searchable, there is no option to view aggregated information about tenders which have been completed; and
- (ii) The goods and services which are provided in the search option are not listed under the HS Classification or any other recognised mode of listing.

It is recommended that the government bodies which undertake procurement take steps to ensure that they collect information on what goods are being procured for how much quantity from whom in order to guide strategic negotiations both at the WTO and to further bilateral negotiations.

### **Commencing Preparation through a Procurement Policy**

India should undertake enough preparation to be armed to undertake a negotiation which is capable of 'creating' value for all negotiating parties. This can be done by facilitating technology transfer in renewable energy, increasing employment opportunities, increasing investment into utilities which are not adequately funded etc.

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### **Endnotes**

- 1 'Liechtenstein first to ratify Amendment to the WTO Agreement on Government Procurement' May 02, 2013, available online at: [www.wto.org/english/news\\_e/news13\\_e/gpro\\_02may13\\_e.htm](http://www.wto.org/english/news_e/news13_e/gpro_02may13_e.htm)
- 2 Article XXII(15) of the Revised GPA
- 3 'Harper commits to job creating trade agreements' available at <http://hesconservative.ca/harper-commits-to-job-creating-trade-agreements/> accessed on May 29, 2013
- 4 Ministry of Micro, Small and Medium Enterprises, 'Public Procurement Policy for Micro and Small Enterprises MSEs) Order, 2012' order dated March 23, 2012 [http://eprocure.gov.in/cppp/sites/default/files/gos/imsme\\_FinalPressorder.pdf](http://eprocure.gov.in/cppp/sites/default/files/gos/imsme_FinalPressorder.pdf), last accessed on May 29, 2013
- 5 Press Information Bureau, April 20, 2013 'DAC Approves Major Changes in DPP to Encourage Indian Defence Industry', available at <http://pib.nic.in/newsite/erelease.aspx?relid=94799>, accessed on May 29, 2013

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This Briefing Paper is an abridged version of Research Report entitled 'WTO Plurilateral Agreement on Government Procurement: Market Access Opportunities and Challenges for India.' This paper is written for CUTS Centre for International Trade, Economics & Environment under the project 'A Government Procurement – An emerging tool of global integration and good governance in India' with the support from British High Commission, New Delhi, India. The views, expressed in this paper on those of the author and therefore in no way be taken to reflect that of the British High Commission, New Delhi.

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