

## **Executive Summary**

### **Introduction**

CUTS International, with support from the British High Commission, New Delhi, under the Prosperity Fund of the Foreign & Commonwealth Office of the United Kingdom Government, has conducted a project titled “Government Procurement: An emerging tool for global integration & good governance in India”.

In 2012, a study entitled *Government Procurement in India – Domestic Regulations & Trade Prospects*, dealt with sectoral analyses on health, the railways sector and information technology which assessed market access opportunities and alignment of domestic legislation with mandated requirements as per the Plurilateral Agreement on Government Procurement of the World Trade Organisation. It assessed the overall government procurement scenario in India, gauged its level of readiness for undertaking international commitments and focused on the values of transparency and good governance. An extensive analysis of the 2012 Public Procurement Bill of India vis-à-vis the provisions in the WTO GPA and UNCITRAL model law on public procurement was undertaken.

The current study undertakes an assessment of opportunities and challenges which India is expected to encounter if in case it decides to negotiate to accede to the WTO Plurilateral Agreement on Government Procurement.

The study presents factors which could inform decision-makers and other stakeholders of public procurement while making the crucial decision on when accession into the WTO GPA should be undertaken (if at all), and the manner in which welfare objectives can be imbued in the negotiation process. An economic analysis indicates market access opportunities in GPA member-countries, and some non-GPA member countries.

Further, an anatomisation of the commitments undertaken by member-countries of the WTO GPA presents insights on nuances in making commitments which can add value to an acceding country. Expectations about a new entrant’s entity offer has been opined to be based on ‘economic equivalence’ owing to which we seek to understand the weight of an entity offer in Annex I, Annex II, and Annex III.

### **Key Findings**

The study analyses India’s market Access opportunities in GPA and non-GPA countries. Even amongst GPA member countries, it is apparent that the figure pertaining to ‘potential market access’ is starkly different from the ‘above-threshold’ contracts which are actually granted. Furthermore, it is evident that procurement undertaken by certain developed countries is focussed on the imports of other developed countries only.

Procurement undertaken by most countries is significant in areas of construction services and general services. There is a marked demand for computer-related services. Amongst goods, many countries exhibit a market demand for pharmaceutical products.

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**Table 1: Top 40 GPA and non-GPA countries based on GDP<sup>1</sup> and size of Government Expenditure<sup>2</sup>**

GPA countries				Non-GPA countries			
Rank/Country (2011)	GDP (US\$ mn)	Govt. expenditure (% of GDP)	Est. govt. expenditure (US\$ mn)	Rank/Country (2011)	GDP (US\$ mn)	Govt. expenditure (% of GDP)	Est. govt. expenditure (US\$ mn)
1 United States	1,50,94,000	42.2	6369668	2 China	73,18,499	23	1683254.8
3 Japan	58,67,154	42	2464204.7	6 Brazil	24,76,652	38.8	960940.98
4 Germany	35,70,556	47.5	1696014.1	9 Russian Federation	18,57,770	41.1	763543.47
5 France	27,73,032	56.2	1558444	10 India	18,47,982	29	535914.78
7 United Kingdom	24,31,589	51.2	1244973.6	13 Australia	13,71,764	33.1	454053.88
8 Italy	21,94,750	51.8	1136880.5	14 Mexico	11,55,316	26.9	310780
11 Canada	17,36,051	44.1	765598.49	16 Indonesia	8,46,832	16.7	141420.94
12 Spain	14,90,810	45.8	682790.98	18 Turkey	7,73,091	37.2	287589.85
15 Korea, Rep.	11,16,247	33.1	369477.76	20 Saudi Arabia	5,76,824	45.7	263608.57
17 Netherlands	8,36,257	51.4	429836.1	25 Argentina	4,45,989	37.9	169029.83
19 Switzerland	6,35,650	33.7	214214.05	27 South Africa	4,08,237	30.6	124920.52
21 Sweden	5,38,131	55.2	297048.31	28 UAE	3,60,245	25.8	92943.21
22 Poland	5,14,496	44.6	229465.22	29 Thailand	3,45,649	20.4	70512.396
23 Belgium	5,11,533	54.1	276739.35	31 Colombia	3,31,655	29.4	97506.57
24 Norway	4,85,803	46.4	225412.59	32 Iran, Islamic Rep.	3,31,015	27.8	92022.17
26 Austria	4,18,484	53.1	222215	33 Venezuela, RB	3,16,482	33	104439.06
30 Denmark	3,32,677	58.4	194283.37	35 Malaysia	2,78,671	30.3	84437.313
34 Greece	2,98,734	52.9	158030.29	37 Chile	2,48,585	24.4	60654.74
36 Finland	2,66,071	56.2	149531.9	<b>Total</b>	<b>2,12,91,258</b>	<b>29.6</b>	<b>62,97,573</b>
38 Hong Kong SAR, China	2,43,666	17.3	42154.218	Note: Out of top ranked 40 countries in terms of GDP, 18 are not GPA members. GDP of these countries are more than 50 percent of combined GDP of 22 GPA countries. More interestingly government expenditure constitutes nearly 30 percent of GDP and amounts to more than one-third of combined government expenditure of 22 GPA member countries.			
39 Israel	2,42,929	44.3	107617.55				
40 Singapore	2,39,700	17	40749				
<b>Total</b>	<b>4,18,38,320</b>	<b>45.1</b>	<b>1,88,75,349</b>				

Both developed and developing country participants are considering accession into the WTO GPA. The *factors* impacting decision-making for these players include the following:

- transparency and good governance;
- market access: new opportunities and perceived warranted entry (through insulation from burgeoning ‘Buy Local’ laws) to the markets of member countries;
- political influence and being able to influence the development of modalities of the WTO GPA and terms of accession for new entrants.

The *costs of accession* into the WTO GPA include the following:

- losses to domestic suppliers;
- aligning the domestic legislation to international legislations;
- costs of aligning the procurement system;
- costs of creating institutional mechanisms to satisfy the requirements posed by the WTO GPA (statistical reporting, judicial mechanisms);
- costs of conducting feasibility studies, dealing with stakeholders, etc.

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Entry into the WTO GPA is no longer entirely voluntary. Conditions in protocols of accession for new entrants entering the WTO and preconditions to obtaining normal trade relations with the United States (in the case of Russia and Moldova) are examples. In certain cases, these pre-conditions result in reducing the costs of accession owing to previously achieved stability as in the case of the countries which conclude stabilisation and association agreements with the European Union.

### *Profile of Procuring Entities: Estimating Weight of an Entity Offer*

The Annexes (Annex 1- central entities, Annex 2 – sub-central entities, Annex 3- ‘other entities’ engaged in procurement, Annex 4- Goods, Annex 5- Services, Annex 6 – Construction Services, Annex 7 – General Notes) submitted by member countries constituting Appendix I constitute a part of every country’s treaty obligation. A ‘covered entity’ or a ‘procuring entity’ for the purpose of application of the disciplines of government procurement is defined by the contours in these Annexes.

Different annexe entities of different countries entail the maximum level of procurement. Decentralisation of procurement activity, centre-state relations and the evolving nature of federal obligations, and the extent to which procurement by public-sector enterprises is pervasive influences this discrepancy. Within the European Union, Annex 1 procurement is maximum in case of United Kingdom, Spain, the Netherlands, Portugal, Greece and Luxembourg. However, in certain countries like Italy and Finland, procurement by Annex 2 entities accounts for more than 86 per cent. Procurement undertaken by Annex 3 entities is maximum in case of Greece and Finland.

### *Key Issues in the Negotiation Process*

The two aspects of the accession negotiations include framing and presenting an ‘entity offer’ which enlists the entities which an accession-country submits to the disciplines of the WTO GPA. The second aspect is that of ensuring the consistency of legislation with the WTO GPA. The process of negotiation to enter the WTO GPA includes both plurilateral discussions with all the member countries of the WTO GPA, and bilateral meetings with individual member countries.

Listing entities in ‘entity offers’: Country members can either list the entities explicitly through a positive list, or exclude entities or sectors through a negative list. They can also refer to sub-ordinate entities through reference to its procurement legislation or indicate an entity by using a description.

Thresholds: While developing countries may be allowed to utilise a phasing-in approach to gradually decrease the thresholds above which procurement is submitted to the disciplines of the WTO GPA, largely, countries seem to have uniform thresholds. In case of procurement at sub-national level, the United States and Canada have a significantly higher threshold compared to the others.

Offsets: Israel is the only country which has been permitted to use ‘offsets’. The use of offsets is to be gradually phased out by Israel over a period of 16 years.

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Countries seeking accession into the WTO GPA most frequently encounter requests to include government entities/projects (such as the Panama Canal Authority) which undertake bulk of procurement.

The Annex which amounts for bulk of procurement in every country varies based on factors such as extent of decentralization, whether the state is unitary or federal, the role of public sector enterprises, etc. Discerning the value of an 'entity offer' demands an understanding of how public expenditure is incurred in a country.

### *Scope and Coverage*

Two vital issues which can arise in terms of a country's accession are: inclusion of sub-central entities in countries which are federal, or are becoming increasingly more federal in operation, or the exclusion of procurement pertaining to provision of certain critical utilities like transport and telecommunications. For example, by its Annex 3 (procurement by public sector enterprises), the European Union exempts procurement entities in water and energy sectors and by its Annex 2 (procurement by sub-national entities) Switzerland exempts procurement pertaining to water, energy, transport and telecommunications. Notably, even the United States does not list all of its 50 states, and Canada had initially desisted from listing its sub-central entities.

Certain products the procurement of which is excluded from the scope of the disciplines of public procurement are special industry machinery, automatic data processing equipment, software, supplies and support equipment, office machines, communication, protection and coherent radiation equipment, air traffic control equipment, electrical transformers, plugs, switches and insulated cables, etcetera. Certain excluded sectors include 'shipbuilding and repair', 'urban rail and transportation systems'.

### *Factors Impacting Market Access*

The WTO GPA does not apply the Most-Favoured Nation principle resulting in a web of mutually discriminating arrangements between the member countries. These arrangements deleteriously impact market access opportunities for even those countries which do enter the WTO GPA.

'Buy National' policies, which are becoming increasingly common, are promulgated as a response to the current economic conditions and may or may not be reflected in the commitments of the members. Irrespectively, they impact market access opportunities for countries which are not granted a waiver to these policies (either through the terms of the WTO GPA itself, or by the grant of a waiver).

'Horizontal policies' are those impacting procurement by government bodies which seek to advance a social motive – examples include positive-discrimination in favour of small and medium sized enterprises, sustainable or green procurement, etc.

Exceptions are advanced at three levels in the annexes of WTO GPA member countries demonstrating the delegation of authority to decide conditions pertaining to public procurement:

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- General notes advance exemptions or exclusions at the level of a country – generally exceptions pertaining to reciprocity and exclusion of procurement pertaining to utilities is exempted at this level;
- Annex-level exemptions which deal with certain exemptions applicable to an entire level of procurement (central, state, ‘other entities) or goods, services, construction services; and
- Entity-specific exemptions allow state governments, or public sector enterprises to determine specific conditions which it can apply in its procurement to the benefit of the specific area/territory it operates in. Examples include South Dakota excluding procurement of beef, and the Port Authority of New York and New Jersey attributing the authority to include conditions in procurement to its Board of Directors.

Exceptions and exclusions are generally based on the following reasons:

- national security;
- derogations pertaining to a sector/product item based on socio-economic reasons;
- linkage with other international commitments (such as those made to the WTO General Agreement on Trade in Services);
- derogations based on domestic policy considerations;
- derogations which are based on reciprocity.

## **Learnings**

### *Quantification of Gains and Losses*

India possesses a substantial market which presents market access opportunities in government procurement. Statistics pertaining to government procurement indicating which body of the government is engaged in the purchase of what commodities and the quantum of procurement have to be collected. This is currently made possible through the mandate to list procurement opportunities on an electronic portal.

The horizontal policies, ‘Buy National’ policies and the exceptions/exclusions advanced at the three delineated levels in a country’s commitments adversely impact market access. Clarity on the exact amount will aid a new entrant to advance these figures during negotiations as opposed to using the statistics on the ‘size of available market’.

### *Negotiating Probable Accession to the WTO GPA*

- It has been opined that the expectations of the current members of the WTO GPA from countries like India, or for that matter any other developing country, are not identical. However, it may be reasonably assumed that any substantial commitments that India might have made to its partners of preferential trade agreements may result in creating certain obligations.
- An analysis of federal relations in India can provide multiple channels for including/excluding state governments’ participation in international procurement.
- Public Sector Enterprises which are autonomous in their operation may be permitted to determine the disciplines of the procurement undertaken by them – this extends to adducing welfare-inducing/economic-objective oriented exemptions and exclusions.

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- After identifying important welfare objectives, avenues to ‘create value’ through the WTO GPA can be explored. Public-private partnerships in sectors engaged in the provision of utilities, encouraging technology transfer, generating employment opportunities, forging channels for trade in environmental goods and services are a few examples.
- Exemptions to carve out goods produced by micro, small and medium enterprises and policies which encourage procurement from local industries may be negotiated by offering sufficient market access opportunities in the negotiations.
- Markets which are cut off to other WTO GPA members may be accessed separately by commencing and concluding independent negotiation processes where additional market access may be negotiated for.

India can attempt to use its position as ‘Observer’ in the WTO Committee on Government Procurement to obtain clarity on the scope/admissibility of certain exceptions/exclusions maintained by certain country members.

The available market access is starkly distinct from the market access which is available to WTO GPA members if we take into account non-tariff barriers, particularly those pertaining to standards. It is vital to include equivalence agreements with the countries which maintain such policies in order to ensure that suppliers are not denied market access. Alternatively, any new entrant to the WTO GPA should simultaneously explore other avenues such as the WTO Trade Policy Review Mechanism and other means of discussing a policy which impedes market access.

### **Key Messages**

- Extending the status-quo on abstaining from negotiations to enter the WTO GPA, or deciding to negotiate to enter the WTO GPA, is a decision which should be taken after quantifying and qualifying market access opportunities and challenges.
- As the WTO GPA, its disciplines and institutional mechanisms are evolving, it is critical to ensure that there is policy space to accommodate the concerns of a developing country based on welfare-inducing/economic-objective oriented exemptions and exclusions in the event a country like India contemplates negotiating accession to the WTO GPA at a later stage.
- The current negotiation process into the WTO GPA does not seem to have explored ample opportunities to ‘create value’. Research has to be done on procurement process and opportunities in order to identify issues for negotiation which should be aimed at adding value.
- If it reveals that there is a distinct market for certain goods exclusive to government purchase and where India has comparative and competitive advantage, it is critical that such possible opportunities are identified and explored. It should develop competencies and determine if any logistical impediments hinder its reaching out to new markets.