

POTENTIAL ACCESSION TO THE GPA: COST-BENEFIT ANALYSIS ON VIETNAM

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ABSTRACT. Vietnam joined the World Trade Organization (WTO) in January 2007 but opted not to be a signatory to the Government Procurement Agreement (GPA). Currently, Vietnam is reported to be interested in applying for Observer status to the WTO GPA and it is actively involved in negotiations for procurement liberalisation under the Trans-Pacific Partnership. This case study presents an insight into Vietnam's current procurement framework, and comments on potential benefits and challenges of its GPA accession. Findings reveal that the existing public procurement system has shortcomings, which include a fragmented legal structure, low transparency and capacity constraints such as inadequate procurements expertise and database, an inefficient state sector, and high levels of corruption, that are major challenges and impact on Vietnam's ability to negotiate procurement liberalisation under the GPA.

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INTRODUCTION

Government procurement is used interchangeably with public procurement and covers procurement of goods or services by a state agency, purchases by public utilities and state owned enterprises (SOEs). In developed economies, government procurement accounts for a large proportion (10-15 per cent) of total government expenditure (European Commission, 2004; Audet, 2003). In Vietnam, government expenditure on public procurement is 22 percent of total gross domestic product (GDP) in 2010, up from 7 percent in 2007 (Ministry of Planning, 2010). The increasing significance of public procurements, complemented by Vietnam's rapidly growing economy, makes it an attractive market for potential suppliers from developed countries. At present, Vietnam is not a member of the World Trade Organization (WTO) Government Procurement Agreement (GPA) (WTO, 1994). Vietnam is actively engaging in procurement liberalisation negotiations under the Trans-Pacific Partnership (TPP), for which ten rounds of talks have so far been held.² Vietnamese authorities are convinced of the benefits of joining the GPA and have expressed their opinion that "...[....] offers Vietnam a chance to gain an understanding of GPA and its effects on developing countries, as well as paving the way for Vietnam's accession to the Agreement" (Vietnam Plus, 2011). Whilst Vietnam's participation in TPP has evinced considerable public interest, this has also highlighted the need for a transparent and internationally compliant procurement system.

This case study presents an insight into Vietnam's procurement framework, comments on potential benefits and challenges in the case of likely future accession to the GPA and

² Countries negotiating the TPP include: New Zealand, Chile, Singapore and Brunei Darussalam, Peru, United States, Australia, Malaysia and Vietnam. Viet Nam hosted the seventh round of talks in Ho Chi Minh City in July 2011. Ten rounds of talks have been held so far with the eleventh round planned for March 2012 in Australia. See 'Vietnam, U.S. to actively participate in TPP negotiations' *People's Daily Online* (11.07.2011). Available on <<http://english.peopledaily.com.cn/90001/90777/90851/7021333.html>>; 'The Trans-Pacific Partnership: Golden Chance for Vietnam Economy' *Viet Nam Business Forum* (03.07.2011) <http://www.vccinews.com/news_detail.asp?news_id=23573>

suggests the way forward. The paper is organised as follows: Section 2 discusses key features of the GPA. Section 3 is a case study on Vietnam that provides information on the value of public procurements and elaborates on current procurement rules and procedures. This also discusses how legislative multiplicity leads to an ineffective implementation of rules in Vietnam. Section 4 presents potential benefits and challenges of GPA accession for Vietnam. Section 5 concludes with a discussion on the way forward.

THE WTO GPA: AN OVERVIEW

Public procurement liberalisation falls under the WTO GPA, which is a plurilateral agreement that applies to the WTO Member countries that choose to be Parties to it. The GPA was negotiated in 1994 in parallel with the Uruguay Round, and entered into force on 1 January 1996. The GPA was under negotiation following a commitment to facilitate additional Parties' accession to the Agreement (WTO, 2010). Following renegotiations, the Parties reached an agreement in December 2011 on an updated set of rules and additional market access commitments, which is likely to enter into force in early 2013 (WTO, 2011). As a first step, this revised Agreement Protocol will be submitted to the Parties for ratification under each GPA Party's domestic approval procedures and will enter into force after two thirds of the Parties notify the WTO about the ratification of the Protocol. The current membership to this GPA stands at forty-two, with thirty-six developed and six developing countries.³ By early 2011, a total of twenty-three countries were granted Observer status to the WTO GPA, of which seven countries, including China, are currently negotiating accession.⁴ In addition, countries such

³ Developed country members comprise: the European Communities including its 27 member States, Canada, Iceland, Japan, Switzerland and the United States. Developing countries that are members to the GPA include: Aruba (of the Kingdom of the Netherland), Hong Kong (China), Korea, Singapore, Israel and Chinese Taipei.

⁴ Countries seeking accession to the GPA include Albania, China, Georgia, Jordan, Kyrgyz Republic, Oman and Panama.

as Croatia, the Former Yugoslav Republic of Macedonia (FYROM), Mongolia, Saudi Arabia and the Ukraine have included provisions in their respective Protocols of Accession to the WTO which call for them to seek accession to the GPA. Major developing WTO Members such as India, Brazil, Mexico and South Africa are also suggested to be engaging in procurement liberalisation discussions. Vietnam, which became a member of the WTO (on 11 January, 2007), is also engaging in domestic discussions to discuss the possibility of making an application for Observer status to the WTO GPA.

The GPA establishes an agreed framework of rights and obligations among its Parties with respect to their national laws, regulations and procedures on government procurement. Non-discrimination and national treatment are core principles of the WTO GPA and for all procurements covered by the Agreement Parties are required to accord “no less favourable” treatment to any other Parties’ suppliers than they allow to their domestic products, services and suppliers (Article III: 1a).. It also requires no discrimination among goods, services and suppliers of other Parties (Article III: 1b). In addition, each Party is required to ensure that its entities do not treat domestic suppliers differently on the basis of a greater or lesser degree of foreign affiliation or ownership and that there is no discrimination against domestic suppliers because their good or service is produced in the territory of another Party (Article III: 2). Obligations undertaken by Parties to the Agreement apply only to procurements made by procuring entities listed by each Party in its Appendix I Annexes.⁵ For Annex 1 entities, the common specified threshold is of SDR 130,000 for goods and services. For Annex 2 and 3 entities, threshold values of SDR 200,000 and SDR 400,000, respectively apply though variations are evident. For construction services, the thresholds

⁵ Each Party's Appendix I Annexes specify the entities and threshold value above which individual procurements are covered by the Agreement. Appendix I includes Annexes such that Annexes 1-3 specify the central and sub-central government entities as well as other entities, such as public utilities, that each Party has committed to complying with the Agreement. As a general rule, all goods are covered by the GPA, while Annexes 4 and 5 to Appendix I specify each Party's covered services and construction services. Appendix I also include ‘Notes’ and ‘General Notes’ which qualify the coverage accorded under the Agreement.

adopted are substantially higher, at SDR 5,000,000. Effectively all goods procured within the specified threshold levels are covered by the GPA, unless a Party has secured exemptions during negotiations and listed these under General Notes at the end of its schedule.

The GPA explicitly recognises the needs of developing countries and includes specific special and differential (S&D) provisions (Articles V and XVI). Aspects of S&D currently under renegotiation in the revised GPA text, that will apply to new accessions, include provisions for transitional measures on (a) price preference programmes for acceding developing countries (Article V: 3a) (b) offsets (Article V: 3b) (c) phased-in addition of specific entities and sectors (Article V: 3c); and, (d) higher thresholds than the permanent level based on development needs for a 'transitional period' and agreed to by all GPA Parties (Article V: 3d). The revised text also allows developing countries to negotiate for delayed application of specific obligations as required under the GPA for a period up to three years (Article V: 4b). Least-developed countries are provided with an added special allowance and can delay the application of specific obligations, for up to five years, as long as these countries grant equivalent treatment to other GPA Parties (Article V: 4a).

VIETNAM'S PROCUREMENT FRAMEWORK

In 2010, the total value of public procurement by Vietnam was estimated at VND 334,097 billion (US\$ 23.05 million), which represents a share of 22 percent of Vietnam's GDP (Ministry of Planning and Investment, 2007- 2010).⁶ Economic statistics issued by the Ministry of Planning and Investment for 2007-10 show that Vietnam's GDP has grown over 2007-10, from US\$71 billion to US\$105 billion, but the value of government procurement has increased three-fold, from nearly 9 per cent to 22 per cent of the GDP during this period. Total procurement contracts awarded have risen as well as the total value of

⁶ The figures in the table is converted at US\$1 = VND 19,495 on 31 December 2010, based on Vietcombank Vietnam's Exchange Rate.

contracts awarded with the latter increasing substantially, from 90 billion VND (US\$6.22 billion) to 334 billion VND (US\$22.04 billion) during 2007-10.

The Law on Procurement (Law no.61 /2005/QH11), promulgated by the National Assembly in 2005 which came into effect on 1 April 2006, derives rules and regulations from various pieces of legislations enacted after 1996 (Article 77). This is the core and primary legislation and covers Build-Operate-Transfer⁷ (BOT), Build-Transfer-Operate⁸ (BTO) and Build-Transfer⁹ (BT) investors. The approved the Law on Procurement on 29 November 2005 (which came into effect on) that The Law (2005) regulates all procurement activities which includes procurements by central government ministries (18), ministry-level agencies (4), the National Assembly Office, the Prime Minister's Office, provincial local authorities, also called Peoples Councils and

⁷ BOT contract (Build-Operate-Transfer Contract) means a contract entered into by a competent State authority and an Investor(s) for construction and commercial operation of an infrastructure facility for a certain period of time; upon the expiry of such period, the Investor(s) shall transfer, without compensation, such facility to the State of Vietnam. See Decree 108/2009/ND-CP dated 27 November 2009, Article 2: 1.

⁸ BTO contract (Build-Transfer-Operate Contract) means a contract entered into by a competent State authority and an Investor(s) for construction of an infrastructure facility; upon the completion of such facility, the Investor(s) shall transfer such facility to the State of Vietnam. The Government shall grant the Investor(s) the right to commercially operate such facility for a certain period of time in order to recover the investment capital and earn profit. See Decree 108/2009/ND-CP dated 27 November 2009, of the government 'On investment in the forms of Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO) and Build-Transfer (BT) Contracts' Article 2: 2.

⁹ BT contract (Build-Transfer Contract) is a contract entered into by a competent State authority and an Investor(s) for construction of an infrastructure facility; upon the completion of such facility, the Investor(s) shall transfer such facility to the State of Vietnam; The Government shall facilitate implementation of other project(s) by the Investor(s) in order to recover the investment capital and earn profit or shall make payments to the Investor(s) under the agreement in the BT contract. Ibid, Art 2: 3; Decree 24/2011/ND-CP on modifications of some provisions under Decree 108/2009/ND-CP; Circular 03/2011/TT-BKH dated 27 January 2011 that guides Decree 108/2009/ND-CP dated 27 November 2009.

Peoples Committees (63), SOEs¹⁰, political and social organisations, and the national armed forces (Article 1). The Public Procurement Agency within the Ministry of Planning and Investment is the lead government agency responsible for drafting laws, Decrees and Circulars that complement the Law on Procurement and provide information on the coverage and scope of coverage and entities.

In addition to the Law on Procurement (2005), there is secondary legislation in the form of Decrees enacted by the national and local governments as well as their agencies. An example of secondary legislation is the Decree (85/2009/ND-CP) entitled 'Guiding the Bidding Law and the Selection of Construction Contractors under the Construction Law'.¹¹ This provides guidance to the Law on Capital Construction Investment that contains legislation on procurement decentralisation as well as elaborates on the rights and responsibilities of Competent Person¹², Investment Owners¹³ and Procuring Entities¹⁴ (Article 4:8,9,10). This legislation also provides guidelines on direct appointment tenders (i.e. limited tendering) and lists detailed modalities for tender approval (Law, Article 2). Moreover, ministerial-level agencies, central agencies and Provincial

¹⁰ SOE are defined as 'an enterprise of which 50% of total capital is owned by the State'. See Law No: 60/2005/QH11 issued by The National Assembly of the Socialist Republic of Vietnam, Legislature XI, 8th Session referred to as Law on Enterprise 2005, Article 4: 22

¹¹ Decree 85/2009/ND-CP dated 15 October 2009 "Guiding the bidding law and the selection of construction contractors under the construction law" guides the implementation of the Law on Procurement and modalities for the selection of construction bidder in accordance with the Law on Construction.

¹² "Competent Person is a person who is authorised to make decisions on project in accordance with applicable legislations." (Law on Procurement 2005, Article 4: 8)

¹³ "Investment Owner is the owner of funds, or who is authorised to represent the funds owner, or a borrower who directly manages and administers the projects [...]." (See Law on Procurement 2005, Article 4: 9)

¹⁴ "Procuring Entity" means the Investment Owner or a professional organisation with sufficient capacity and experience to be used by the Investment Owner to organise procurement in accordance with the legislations on procurement" (See Law on Procurement 2005, Article 4: 10).

People's Committees are competent within their respective scope of administration to provide detailed guidance on Decrees, if necessary, though these should not contravene the Law on Procurement (Decree, 2009). For instance, the MPI¹⁵, Ministry of Finance (MOF)¹⁶, Construction¹⁷, Petroleum¹⁸ and Health¹⁹ have enacted related supplementary legislation. Supplementary legislation has also been issued by the province of Ca Mau²⁰ and Ho Chi Minh City²¹ to give guidance on Decisions circulated by the MPI and MOF.

The current procurement legislative framework has evolved over time and is derived from regulations promulgated since 1996 through Decrees 43/CP²² and 93/CP²³. In 1999,

¹⁵ See Decree 85/2009/ND-CP dated 15 October 2009.

¹⁶ Decision 2368/QD-BTC dated 20 September 2010 on promulgating the Regulation on Procurement of goods, consulting services and construction in administrative organisations under the Ministry of Finance, Available

<http://www.mof.gov.vn/portal/page/portal/mof_vn/1371593/1371599?pers_id=2177074&item_id=24104896&p_details=1>

¹⁷ Law on Construction, Decree 48/2010/ND-CP dated 7 May 2010.

¹⁸ Law on Modifications and Supplements to the Petroleum Law 2000; Law on Modifications and Supplements to the Petroleum Law 2008; Decree 48/2000/ND-CP dated 12/9/2000 guiding the Petroleum Law; Decree 34/2001/ND-CP dated 6/7/2001 on Procurement Regulations of petro exploration and exploitation projects. Decree 115/2009/ND-CP dated 24/12/2009 on Modifications and Supplements to Decree 48/2000/ND-CP and Decree 34/2001/ND-CP.

¹⁹ Circular 10/2007/TTLB- BYT- BTC dated 10 August 2007 of Ministry of Health and Ministry of Finance on Guidance for procurement of medicine in public health services

²⁰ Decision 05/2011/QD-UBND dated 23 March 2011 of the Ca Mau People's Committee on the Regulation on Procurement of Market Business and Management Services in Ca Mau. Available <<http://www.thuvienphapluat.vn/archive/Quy-dinh/Quy-dinh-05-2011-QD-UBND-Quy-che-dau-thau-kinh-doanh-khai-thac-va-quan-ly-vb123087t17.aspx>>

²¹ Decision 216/2004/QD-UB dated 15 September 2004 of the HCMC People's Committee on the Regulation on Procurement of 2nd and 3rd grade-Market Business and Management Services in HCMC. Available <<http://www.trade.hochiminhcity.gov.vn/data/vbpq/docs/20041013-qd-tm-in-216.htm>>

²² Decree 43/1996/ND-CP dated 16 July 1996 of the Government on promulgation of Procurement Regulations.

Decree 88/CP²⁴ replaced Decrees 43/CP and 93/CP and the new Decree was supplemented by additional Decrees 14/CP²⁵ and 66/CP²⁶. Amendments to templates, instructions on procurement modalities and implementation guidance are also issued from time to time and these too form part of the current legal framework. Other than procurement-specific laws and regulations, the existing procurement system incorporates laws of more general application, which include the following:

- a) Anti-Corruption Law (2005)
- b) Guidance on Anti-Corruption Law (2006)
- c) Implementing Anti-Corruption Law on roles and responsibilities of the civil society against corruption (2007)
- d) Law Amending and supplementing provisions of Anti-Corruption Law (2007)

A distinguishing feature of the current position is the prevalence of SOEs that form an integral part of government's state led development policy. Under the existing procurement regime there is lack of clarity on the coverage of such enterprises under the procurement rules. Vietnam has been engaged in transforming SOEs to 'Economic Groups' but the existing enterprises continue to remain inefficient which has slowed the pace of ongoing reforms (Financial Times, 2010).

²³ Decree 93/1997/ND-CP dated 28 March 1997 of the Government amending some provisions of Procurement Regulations promulgated along with Decree 43/CP.

²⁴ Decree 88/1999/ND-CP dated 01 September 1999 of the Government on promulgation of Procurement Regulations.

²⁵ Decree 14/2000/ND-CP dated 05 May 2000 of the Government amending provisions of Procurement Regulations promulgated along with Decree 88/CP.

²⁶ Decree 66/2003/ND-CP dated 12 June 2003 of the Government amending provisions of Procurement Regulations promulgated along with Decree 88/CP and Decree 14/CP.

Public procurement framework

1.1.1 Scope and coverage

The Law on Procurement (2005) applies to all goods²⁷, construction²⁸ and consulting services²⁹ with no specific thresholds, which effectively means that all procurements are covered. With regards to the coverage of entities, all central, other central level agencies, provincial, SOEs and state organisations are covered by the Law (2005). In Vietnam, covered procurements are classified into the following sub-heads:

- a) Procurement under specific projects with more than 30 percent of the total cost funded by State funds. These include development investments, assets procurements for re-construction or repair of invested equipment, production lines, civil works, and SOEs factories and production units (Law, Articles 1: 1,3).
- b) Procurements for daily operations by State agencies, political organisations, social

²⁷ Law on Procurement (2005) defines “Goods [...] machinery, equipment, fuels, materials, commodities and non-consulting services”.

²⁸ Decree 85/2009/ND-CP dated 15 October 2009, defines as: “works related to the process of construction and installation of equipment for projects and their components, as well as major reconstruction and repairs”. Bidding package for general construction includes the selection of a general contractor to undertake an engineering (E) bidding package; a construction (C) bidding package; an engineering and construction (EC) bidding package; an engineering, procurement and construction (EPC) bidding package; and the formulation of projects, engineering, procurement and construction (turn-key).

²⁹ Law on Procurement (2005) defines “*Consulting services* to include:

- a) Consultancies for project preparation, including preparation, appraisal of planning reports, general development outlines, architectural designs, pre-feasibility studies, and feasibility studies;
- b) Consultancies for project implementation, including surveying, designing, building total cost estimate, detailed estimates, preparing bidding documents, evaluating bids, supervising the construction and equipment installation; and
- c) Consultancies for project management, financial arrangements, training, technology transfer, and other consulting services”.

- organisations, professional organisations, or units of the national armed forces³⁰
- c) Procurement of goods and services for public services.³¹
 - d) Procurement of projects using land³²; BOT, BTO and BT project investors for the selection of and public-private-partnership (PPP) investors³³.
 - e) Centralised procurement of goods and assets from the state budget.³⁴
 - f) Procurement for petroleum exploration and exploitation services.³⁵

1.1.2 Tendering methods

Chapter 2 of the Law (2005) provides for seven different tendering methods. The main methods employed under the present framework include:

³⁰ Circular 63/2007/TT-BTC dated 15 June 2007 guiding the bidding for procurement of assets with state capital for maintaining regular operations of state agencies; Circular 131/2007/TT-BTC dated 5 November 2007 amending and supplementing the Finance Ministry's Circular 63/2007/TT-BTC of 15 June 2007 (these are under modification).

³¹ Decision 256/2006/QD-TTg dated 9 November 2006 of the Prime Minister on 'Procurement Regulation, Orders, Plan Assignments in order to produce and provide public goods and services' (these are currently under modification).

³² Circular 03/2009/TT-BKH dated 16 April 2009 of the Ministry of Planning and Investment 'Guiding the Investor Selection for the implementation of investment projects'.

³³ Decision 71/2010/QD-TTg dated 09 November 2010 of the Prime Minister 'On Issuance of Regulation on pilot investment using the Public - Private Partnerships model'.

³⁴ Decision 179/2007/QD-TTg dated 16 November 2007 of the Prime Minister 'Promulgating the Regulation on Centralised Procurement of assets and goods with the state budget' (these are currently under modification).

³⁵ Decree 34/2001/ND-CP dated 6 July 2001 on 'Procurement Regulations of petro exploration and exploitation projects'; Decree 115/2009/ND-CP dated 24/12/2009 on Modifications and Supplements to Decree no 48/2000/ND-CP dated 12 Sep 2000.

Open Tendering: This method is used for the selection of bidders from an unrestricted number of participating bidders.

Limited Tendering: This method is similar to selective tendering and applies only to a limited number of specified bidders that are invited to participate. This form of tendering can be applied in the following cases: first, at the request of foreign donor whose funds are being used for the procurement package; and, second, for technical, experimental or research packages for which specific requirements can be fulfilled by a limited number of bidders (Article 19). Under this method, the Investment Owner approves the list of bidders and a minimum of five bidders, qualified and capable of participation, are invited to participate in the tendering process. In the event of there being less than five bidders, the Procuring Entity is required to report to the Investment Owner for the final decision.

Direct appointment: This involves direct procurement from a single source involves the appointment of a contractor with required qualifications and capacity to implement the procurement package. This method is applicable under specific circumstances which include *force majeure* as a result of natural calamities and others disasters. For small procurement packages, these procurements are less than 3 billion VND for consulting services, 5 billion VND for civil works, 2 billion VND for goods, or less than VND 100 million for goods packages in connection with projects or cost estimates using recurrent expenditure.

Repeat order: This method allows the Investment Owner to invite a previously selected contractor to carry out specific but similar procurements. The main conditions for applying this method include: (i) the unit price for items that comprise a repeat procurement package must not exceed the unit price for corresponding items of a similar package covered by an earlier signed contract; (ii) open or limited tendering was conducted for the previous procurement package; and, (iii) the first contract was awarded in the past six months and the repeat order belongs to the same or another similar project (Article 21).

Shopping: This method applies in cases when the estimated procurement value is less than two billion VND and standardised supplies are available in the market. The application of this method requires a minimum of three quotations from three different bidders (Article 22).

Force account: This method applies when the Investment Owner has the required capability and experience to implement the project package under its own management which includes the use of labour and equipment for project implementation (Article 23).

Bidder selection in special cases: This is used as a method only in the event of specific requirements under which it might not be possible to use any other methods for bidder selection. The Investment Owner is required to submit a proposal with details of bidders for approval of the Prime Minister. This is applied for specialised procurements, an example being the Omon power plant project (Article 24).

Among these methods, repeat order and shopping apply to goods while the other methods apply to goods, consulting services and construction. Under the current law, procedures for procuring goods and construction services include tender preparation, evaluation, submission, appraisal and approval of results, as well as publication of results, contract negotiation and finalisation. For consulting services, an additional procedure of contract negotiation applies for the selection of consultants.

1.1.3 De jure preferences

The existing legislation in Vietnam allows preferences and “[suppliers]....eligible for preferences in international bidding include:

- a) *A bidder who is established and operates in Vietnam in accordance with the Law on Enterprises and the Law on Investment;*
- b) *A joint venture a member of which is a bidder as described in paragraph 1 of this Article and assumes responsibility for work valued at over 50 percent of a procurement package for either consulting services, civil works or Engineering, Procurement and Construction (EPC); or*
- c) *A bidder who participates in a procurement package for goods of which the domestic production represents 30% of the cost or more.*

The Government will provide detailed guidelines on

preferences in international bidding (Law on Procurement, Article 14)."

Detailed modalities for allowing preferences in international bidding are classified on the basis of coverage. The relevant rules include the following:

- a) Consulting services: the consultant eligible for the preference is awarded an additional 7.5 percent total points which are added to the final points awarded. In cases of a high-level technical package, technical points are credited with 7.5 percent of the total points.
- b) Works: the evaluated price submitted by bidders not eligible for the preference is added 7.5 percent of the total bid price after the correction of the arithmetical errors and deviation adjustments.
- c) Goods: the evaluated price of bids submitted by bidders not eligible for preference is added a value equal to import taxes and related charges payable but this cannot exceed 15 percent of the total price. No preferences are applicable to goods subject to import tax or import related charges and fees.
- d) For selection of general bidder(s) in an engineering package, preference is determined in accordance with (a) above. For other packages that relate to the selection of general construction bidder(s), preference allowed is determined in accordance with (b) above. (Article 4, Decree 85/2009/ND-CP)

1.1.4 Procurement procedure and award criteria

With regards to the procurement procedure, Vietnam employs one-envelope, two-envelope and two-stage bidding procedures.

Under the one-envelope bidding procedure, the bidder is required to submit a bid that includes both technical and financial proposals in a single-envelope. This is applied for open and

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limited tendering for goods, civil works and EPC contract packages.

Two-envelope bidding procedure involves separate submission of technical and financial proposals and is applicable to open and limited bidding for consulting services procurements.

Two-stage bidding is applied for goods, works or EPC packages with complex technical requirements that are procured through open and limited bids. Technical proposals are submitted in the first stage and bidders are invited to submit financial proposals which include details on bid price and security deposit in the second stage (Article 26).

Contract award criteria in Vietnam are as below:

- a) For procurement of goods (using shopping), the lowest evaluated price is the basis for contract award but bidders are also required to submit quotations on the technical criteria (Decree 2009, Article 43).
- b) For construction works, the lowest evaluated price method is the basis for contract award. This price includes operation fees, maintenance, and any other fees relating to the schedule, quality and origin of goods or civil works during the life-cycle period (Law on Procurement, Article 4:3 and 29:3).
- c) For consulting services, a points-based method is employed for technical evaluation such that whilst preparing the evaluation criteria, the minimum technical requirements should constitute no less than 70 percent of total technical points (Law on Procurement, Article 29:3). The criterion for ranking bids is that bidders with the highest combined score are ranked first. For consulting services requiring specialised technical requirements, the technical score is ranked followed by the financial proposal before negotiations commence.

1.1.5 Bid challenge and domestic review

With regards to bid challenge it is the responsibility of the Procuring Entity, Investment Owner and Competent Person to settle bidders' complaint in varying time periods allowed to challenge the decision, which are from five, seven and fifteen

days, respectively (Law on Procurement, Article 73:1). If the complaint is not settled within the time limit by the Procuring Entity and Investment Owner, the bidder can request the Consulting Council to review the complaint. The Council can also propose a solution to the complaint.

The lack of an independent judicial review body to address complaints is a serious limitation of the current system. Since the Procuring Entity, Investment Owner and Competent Person are involved both in procurement decisions and bid challenge in essence this means that there is no independent bid challenge mechanism. Another related issue is that there are no clear guidelines on how to award damages and whether compensation should include costs towards tender preparation, challenge or any other related activities. In practice, suppliers prefer not to be involved with bid challenge despite obvious infringements. This calls into question the effectiveness of the domestic review procedure provided by Vietnam. Under the existing dispute settlement mechanism, article 73 of the Law on Procurement allows bidders the right to bring a procurement complaint to the court and also provides for the proposal to be submitted to the Competent Person for decision (Law on Procurement, Article 73: 2). If the settlement offered is not to the bidder's satisfaction, the bidder has the right to approach the court again. However, such challenges are rare in Vietnam and there are hardly any instances of bidders going to court even in instances of infringement because of the fear of jeopardising future business opportunities. With regards to a mechanism for redress of bidders' grievances, a formal complaint settlement mechanism is provided under the Vietnamese system but it lacks an independent administrative body for the settlement of procurement complaints. The complainant also has no right to obtain an assessment and decision which makes it difficult to evaluate the usefulness, efficiency, and fairness, as well as transparency and impartiality, of the settlement process.

1.1.6 Transparency

Existing regulations highlight the importance of transparency (Law on Procurement, Articles 4: 2,11,12). However, there is no explicit reference to transparency except in the chapter on 'Objectives' which states "competitiveness, fairness,

transparency, efficiency and economy” as underlying procurement aims (Law on Procurement, Article 4: 20).

1.1.7 E-procurement

The Law (2005) provides for e-procurement and a pilot project is being implemented under the current framework. Article 30 states: “E-procurement shall be conducted via the internet. Bid announcement, issuance of bidding documents, bid submission, evaluation and notification of the selection results shall be done on the National Procurement Network built and managed by the State administrative body in charge of procurement”.

POTENTIAL COST-BENEFIT ANALYSIS OF VIETNAM ACCEDING TO THE GPA

This section presents benefits and costs or challenges to Vietnam's potential accession to the GPA. This is based on the concept of Cost Benefit Analysis (CBA), which is an idea of economic accounting, and as the name suggests, is a technique that simply assesses results from a planned action.³⁶ Table 1 assesses the advantages and challenges that Vietnam is likely to confront on its path to future GPA membership.

Table 1: Cost Benefit Analysis of procurement liberalisation: Vietnam

Benefits	Challenges
<p>General</p> <p>Pave the way for GPA Observer status</p> <p>Feed into TPP negotiations</p>	<p>Existing legislative framework</p> <p>Corruption</p> <p>High costs of negotiating accession</p>
<p>Political</p> <p>Higher transparency</p> <p>Political commitment to reform</p>	<p>Impact on government policies for balanced regional development</p>
<p>Economic</p> <p>Enhanced market access</p> <p>Open up the domestic</p>	<p>Capacity constraints</p>

³⁶ The CBA estimates and totals up the equivalent money value of the benefits and costs to the community of public projects to establish whether they are worthwhile. Jules Dupuit, a French engineer, coined this and the British economist, Alfred Marshall, formulated some of the formal concepts that are at the foundation of CBA. The practical development of CBA came as a result of the impetus provided by the Federal Navigation Act of 1936.

procurement market	
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1.2 Benefits of potential GPA accession

Economic Benefits for Vietnam: The underlying rationale for procurement liberalisation by Vietnam is based on the economic consideration that enhanced market access and non-discriminatory policies lead to an efficient allocation of resources through higher competition, which leads to better quality procurements at lower costs (Falvey, 2009; Cecchini, 2002). From an economic perspective, Vietnam's GPA membership will allow its exporters to gain access into GPA Parties' markets, which so far were not open to Vietnam. Given Vietnam enjoys a comparative and competitive advantage as a supplier of textile and clothing in the world market, the main benefit for Vietnam will come from enhanced market access allowed to its exporters, which will enable them to consolidate their presence in international market this sector. In this manner, liberalising public procurement through future GPA membership could provide additional business opportunities for competitive Vietnamese firms in the global procurement market.

Second, this will provide a means to open up the domestic procurement market of Vietnam to competition through legally enforceable provisions. Negotiating accession to the GPA will mean that commitments on non-discrimination will apply to all covered procurements, subject to terms set out in the commitments. Thirdly, this will enable the Vietnamese government to procure goods from competitive suppliers international suppliers, which will lead to savings and the benefits of low cost procurements can be passed on to the taxpayers. In light of extant literature, potential membership to the GPA will exert pressure on local Vietnamese firms to increase competitiveness to survive in an efficient business environment and be more competitive in the longer term (Dischendorfer, 2009). In addition to budgetary savings from allowing access to low cost suppliers, liberalisation will have a positive impact on overall employment in Vietnam, that is likely to attract foreign

investment inflows and result in growth and innovation which will benefit both businesses and consumers.

Political benefits from procurement liberalisation: Commitments to liberalise will contribute to transparency and improve governance within Vietnam's existing procurement framework. This will translate into additional benefits such as initiating steps to establish an efficient bid challenge regime, which is compliant with GPA rules. Most importantly, liberalisation commitments will generate clarity in tendering procedures which will firstly, attract larger number of domestic and foreign firms to bid for government contracts thereby fostering competition. Secondly, clear rules on tendering will discourage illegal payments to state officials and address corruption in procurements. Increased transparency in bidding procedures and award criteria will address the problem of rent seeking, support governmental initiatives to avoid conflict of interests between the procuring agencies and bidders. In this manner, transparency in procurements will enable Vietnam to obtain better value for money in contracting and purchases, reduce corruption, improve governance and lead to sustainable public finance management. An added benefit is that transparency in procurements will support Vietnam's proposed application for Observer status to the GPA, facilitate internal policy coordination accountability in government procurement, and reduce transaction costs associated with future GPA accession. The benefit of 'demonstration effect' is likely to spill-over to other areas of public regulation and policy affecting the private sector.

Political commitment to reform is imperative. Vietnam's participation in ongoing TPP negotiations, which aim to liberalise procurement at the bilateral level, clearly evinces political will and commitment to procurement liberalisation and reform process. The national government's commitment to address corruption is also a step in the direction of reinforcing its commitment to tackling the problem and ensuring reform of the current system.

1.3 Costs and challenges to potential GPA accession

Existing procurement framework: The biggest challenge in government procurement framework in Vietnam suffers from

multiplicity of regulations, and is characterised by a wide array of legislations enacted through Decrees, Circulars, and amendments. Furthermore, amendments are ongoing, and these add to the existing rules, and in instances supersede earlier rules, partly or wholly. For instance in construction services, the primary legislation i.e. Law (2005) applies but an additional set of rules, which decentralise procurements at the regional and local levels, also apply at the same time. The fragmented legislative system is complex, resulting in ineffective implementation of regulations, and supports high corruption levels (APEC, 2010). More fundamental problems emanate from institutional issues - the Ministry of Planning and Investment has the authority to “lead and coordinate with concerned agencies in conducting oversight and inspection in connection with procurement nationwide” but it lacks the enforcement powers (Law on Procurement, Article 67). Under the current system, there is no government institution that is independent from the procuring entities which is responsible for the enforcement of procurement laws (APEC, 2010).

Establishing a dispute settlement mechanism is another potential challenge. Under the current Vietnamese procurement framework, there are generic guidelines on dispute settlement policies with procedures providing for mutual consultation to redress bidders’ grievances. In the event of accession to the GPA, the present system will have to be replaced by WTO compliant dispute settlement mechanism. In addition, Vietnam will have to set up independent domestic review for bid challenge, which will add significantly to total accession costs.

Corruption: As in many developing nations, corruption remains a problem in Vietnam and Transparency International ranks Vietnam 112th out of 178 countries in its annual corruption perception index globally with a score at the lower end of 2.9 out of 10 points.³⁷ Reports also suggest that the Communist Party of Vietnam and the Vietnamese Government have publicly stated that corruption would threaten the existence of the current regime, and have taken steps to initiate a ‘National Anti-

³⁷ Transparency International ‘Corruption Perceptions Index 2011’ (2012) , http://cpi.transparency.org/cpi2011/in_detail/ (visited 19 February 2012)

Corruption Strategy Towards 2020'.³⁸ Vietnam has endorsed the United Nations Convention against Corruption as part of its strategy for combating or preventing corruption, as well as for strengthening integrity in numerous government activities. As a member of the Asia Pacific Economic Cooperation (APEC), Vietnam agreed to implement the APEC Transparency Standards on Government Procurement in 2004.³⁹ The World Bank's Doing Business Report 2011 ranked Vietnam 78 out of 183 countries.⁴⁰ The extent of corruption in Vietnam is also demonstrated by the Vietnam Development Report for 2010, which list firms' perceptions on commissions when contracting with the government, and shows that one in four of the firms interviewed said that they paid bribes.⁴¹ Public attention is increasingly being drawn to corruption and efforts are ongoing to address this problem.

Potential accession costs: In the event of Vietnam negotiating accession to the GPA, three categories of costs are likely to be incurred during this process: negotiating, implementation and firms' adjustment costs. These first two are direct costs of making commitments, which include the cost of preparing an offer through skilful planning and negotiating accession with other GPA Parties, and involve financial, administrative and legal costs. Examples of these costs include employing additional resources,

³⁸ 'Weak enforcement hampers Vietnam's anti-corruption efforts' *Trust Law* (19 September 2011), <http://www.trust.org/trustlaw/news/weak-enforcement-hampers-vietnams-anti-corruption-efforts/> (visited on 18 February 2012)

³⁹ See 'APEC Procurement Transparency Standards in Vietnam', available <http://www.cipe.org/publications/papers/pdf/TI-Report-Vietnam.pdf> (visited 18 February 2012).

⁴⁰ International Finance Corporation and World Bank, *Doing Business Report 2011*, "Overview," available at <http://www.doingbusiness.org/reports/doing-business/doing-business-2011> (visited 18 February 2012).

⁴¹ "Vietnam Development Report, 2010: Modern Institutions" ("VDR 2010"), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/03/19/000333037_20100319004055/Rendered/PDF/535730WP0P11221ng0reduced0file0size.pdf (visited 18 February 2012).

expenses for staff training, costs for negotiating accession which will not only be in terms of setting up new bodies and training staff but also charges for printing forms as well as for publishing changes and information on the procurement system. In addition to financial costs, Vietnam will also have to bear institutional and transaction costs. These relate to the implementation of legislative requirements and commitments on scope and coverage of goods, services and construction services, entities as well as threshold values. Compliance costs are likely to be high in the beginning given Vietnam has limited administrative capacity and also in light of lack of professional staff with experience on public procurement procedures. Under the current Vietnamese procurement framework, generic guidelines exist on dispute settlement policies and procedures provide for engagement in mutual consultation to redress bidders' grievances. In the event of Vietnam's accession to the GPA, the present system will need to be replaced by a dispute settlement mechanism which is compliant with the GPA. Vietnam will have to set up independent domestic review for bid challenge, which will add significantly to total costs.

Finally, domestic firms in Vietnam will face adjustment costs. These costs will come about from changes that firms will be required to make to production structures primarily to increase efficiency. This will be necessary to compete with GPA Parties entities and such changes in competitive structures can have employment and economic effects for Vietnam. It is likely that the effects can be negative in the short run but will generate long run benefits when firms will adjust to higher levels of competitiveness, which will lead to higher employment in the economy. The protected firms and sectors in Vietnam, which are inefficient, will suffer the most and are likely to be unable to compete at internationally competitive prices to qualify for tender awards.

Impact on government policies for balanced regional development: The possible impact on Vietnam's ability to pursue industrial development policies, which under the present system is through SOEs, is an important challenge. Under the present system, SOEs are responsible for supporting the government to achieve socio-economic development goals that require large investments, in areas such as national defence and security, and in particular, in sectors in which the private sector is unwilling to

invest. Negotiating accession to the GPA could possibly result in a loss of government's discretion to use public procurement as a policy tool for Vietnam's development. An added challenge is that, despite efforts (since 1991) to reduce the dominance of SOEs in the economy, these continue to benefit from preferences which distort competition and generate overall inefficiency in procurement (Sjöholm, 2006). Political commitment is vital for SOE reform. Lack of political commitment and clarity on how to address prevailing SOE domination, complemented by complex procurement regime will need to be addressed before Vietnam can contemplate negotiating accession to the GPA.

Existing capacity constraints: Domestic capacity constraints in Vietnam include lack of trained manpower and detailed procurement statistics at the national and regional levels. Currently the procurements are managed by the PPA within the MPI and this does not have trained procurement professionals. Given these constraints, Vietnam might not be able to make informed decisions about opening up sensitive sectors or those that may not benefit from foreign participation. Other shortcomings are lack of an on-line facility at the national and regional level for tendering opportunities information.

CONCLUSIONS AND THE WAY FORWARD

Vietnam's participation in ongoing TPP negotiations, which aim to liberalise procurement with the US and other partners, evince political will and commitment to procurement liberalisation and reform. The commitment to address corruption is also a step to reinforce commitment to reform the current system. The analysis informs that Vietnam's national legislation on public procurement is characterised by complexity and lacks transparency in particular at the provincial levels. Vested interests, rent seekers, and current domestic constraints are other significant challenges to Vietnam's endeavour to liberalise its procurement market. In this case, if Vietnam decides to accede to the GPA transition and negotiation costs will be very high, which suggests that it might be premature for Vietnam to seek GPA membership. Ongoing domestic discussions to apply for Observer status to the GPA can be a stepping stone that is likely to generate momentum for initiating phased procurement liberalisation and also will signal political willingness and commitment to the reform process. Observer status can be an opportunity to enhance understanding about the Agreement and enable Vietnam to prepare for future accession without the pressure to apply for membership within a particular timeframe. The strongest case in support of Vietnam's application for Observer status is that this will provide necessary breathing space to implement institutional and procedural changes in line with the GPA requirements, initiate steps to enhance transparency and address obvious weaknesses and challenges that plague the present system.

As a first step to becoming Observer government to the WTO GPA, Vietnam can request for technical assistance from the WTO for organising training courses for procurement practitioners in ministries and other ministry-level agencies, at the national and regional levels. The organisation of such activities will ensure knowledge on GP provisions and provide training on negotiation skills to support negotiating accession in future. The next stage for Vietnam will be to identify central government entities that are likely to be liberalised in the event of future accession, in particular those that procure at higher threshold values. While Vietnam can draw on its experience from TPP negotiations, it this will need to be reform the legal framework to make it transparent

and accountable. Before Vietnam considers exercising its policy option of procurement liberalisation through GPA membership reform is required through legislation on a national code for rules and procedures, distribute powers between centre and local levels, set up a mechanism for debriefing unsuccessful bidders, allow for challenge of the decision on tender awards, offer dispute settlement mechanism and most importantly initiate measures for restructuring and equitisation of inefficient SOEs.

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