

Ukraine's Potential Accession to the WTO Government Procurement Agreement:

What are the pros and cons?

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Abstract- The present paper is dedicated to the problem of accession to the WTO Agreement on Government procurement (GPA) for Ukraine as well as for other acceding countries and the existing Parties of this Agreement. In the light of the recent decision of Ukraine to join GPA, the paper gives an appraisal of its opportunities concerning the accession to the Agreement and puts forward the critical assessment of such decision. Special attention is given to current Ukrainian legislation on government procurement and the main obstacles to Ukraine's accession to the GPA. The article presents an in-depth analysis of problems and threats in the WTO public procurement system which may affect the functioning of the public procurement market of Ukraine as well as other acceding countries, especially domestic manufactures, and may cause the imbalances in the world trading system. Furthermore, the present article provides the latest statistics, provisional estimates, and framework for WTO Members considering accession.

Keywords- government procurement; WTO; SWOT analysis; suppliers, preferential policy.

I. INTRODUCTION

Although government procurement often accounts for 10–15% of national GDP, it has tended to be under-regulated in international agreements. For example, its regulation was not originally included in the main multilateral trade rules on open market access agreed by the World Trade Organization (WTO) nor was there any key national obligation in the WTO's General Agreement on Tariffs and Trade. More recently, its regulation was also omitted from the main commitments of the WTO's General Agreement on Trade in Services. These absences in WTO agreements constitute a significant gap in the multilateral trading system.

Although government procurement is used in a number of countries to support national interests, it is still perceived as the main barrier to the development of free trade. Therefore, the WTO Agreement on Government Procurement (hereafter GPA) was introduced to liberalize the government procurement market. Proponents of liberalized government procurement believe that discriminatory policies prevent the inefficient allocation of resources and limit the benefits that may be derived from free trade, such as increased competition, job creation and budgetary savings [1]. However, despite these clear advantages, the majority of WTO members (in the main, developing countries and

transitional economies) have not yet endorsed the GPA, leaving it supported mainly by developed countries such as the United States, Japan and Canada.¹

While Ukraine is not a GPA member, it has been an “observer government” on the GPA committee since 29 February 2009. Further, the Ministry of Economic Development and Trade started negotiations on Ukraine's accession to the Agreement in August 2012, so Ukraine has to prepare its initial coverage offer. Estimates show that government procurement in Ukraine is increasing year by year. According to official statistics, the total value of government procurement in 2010 was UAH 172 billion (USD 21.5 billion),² which ballooned to UAH 325 billion (USD 41 billion)³ and UAH 428 billion (USD 53 billion)⁴ in 2011 and 2012, respectively. These data prove that Ukraine is an attractive market for potential suppliers from developed countries searching for additional markets. Based on this potential, the present study uses a SWOT analysis (strengths, weaknesses, opportunities and threats) to determine the positive and negative consequences of GPA accession for Ukraine's system of government procurement. This business tool has been adapted to evaluate the strategic strength, weaknesses, opportunities and threats if Ukraine were to liberalize its procurement market.

¹ As of May 2014, there were 14 Parties in the GPA (the European Union is a separate entity). Developing countries that are members of the GPA are Aruba (of the Kingdom of the Netherlands), Hong Kong (China), Korea, Singapore, Israel, Chinese Taipei and Armenia. Most of these are developed “developing countries”.

² State Statistics Service of Ukraine, Procedures for purchasing goods, operations and services through the state funds, in Ukraine for January-December 2010' <http://www.ukrstat.gov.ua/operativ/operativ2010/fin/zakup/zakup_u/zak410_u.htm> (accessed 20 June 2014).

³ State Statistics Service of Ukraine, Procedures for purchasing goods, operations and services through the state funds, in Ukraine for January-December 2011 <http://www.ukrstat.gov.ua/operativ/operativ2011/fin/zakup/zakup_u/zak411_u.htm> (accessed 20 June 2014).

⁴ State Statistics Service of Ukraine, Procedures for purchasing goods, operations and services through the state funds, in Ukraine for January-December 2012 <http://www.ukrstat.gov.ua/operativ/operativ2012/fin/zakup/zakup_u/zak412_u.htm> (accessed 20 June 2014).

Since there are a lot of scientific papers and articles on Ukraine's accession to the WTO [2, 3], there is still lack of literature and research on consequences of WTO accession for Ukraine's system of government procurement. This makes the study on potential advantages and disadvantages of Ukraine's joining to the GPA more relevant and urgent.

II. GENERAL PROVISIONS OF THE GPA

Although the GPA was adopted in 1994 and entered into force in 1996, since then it has constantly been under negotiation in order to improve and update its provisions. The Parties reached agreement in December 2011 on a revised set of rules, and the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the GPA was confirmed on 30 March 2012. Finally, the revised GPA came into force on 6 April 2014.

The main principles of the GPA are non-discrimination and national treatment, and Parties are required to accord no less favourable treatment to any other Parties' suppliers than they do to their domestic products, services and suppliers for all procurement covered by the Agreement.

However, it should be noted that the Agreement does not automatically apply to all government procurement by members. Firstly, the coverage of the Agreement is determined for each Party in the Appendix I Annexes, which covers only those entities listed in Appendix I to the Agreement. Each Party's Appendix I contains separate coverage Annexes. Annexes 1 and 2 specify the central and sub-central government entities whose procurement is covered by the Agreement, while Annex 3 contains all other entities covered. Annexes 4 and 5 specify each Party's covered services and construction services. Appendix I also includes Notes and General Notes qualifying the coverage accorded under the Agreement.

Secondly, coverage depends on whether the procurement value is above the designated GPA threshold, which differs depending on the type of procurement and government level making the purchase. For Annex I entities, for example, the GPA threshold is typically 130,000 special drawing rights (SDRs) for goods and services, while threshold values of 200,000 and 400,000 SDRs apply for Annex 2 and 3 entities, respectively, although some variations apply. Moreover, a separate threshold of 5,000,000 SDRs is applicable to construction services procured by all entities.

Finally, the Agreement allows members to use open, selective and limited tendering procedures. The GPA recognizes the development, financial and trade needs of developing countries, in particular least-developed countries, and provides special treatment to allow them to meet their specific development objectives.

III. UKRAINE'S PROCUREMENT FRAMEWORK

The main legal act that regulated the relationships formed in the process of acquiring goods, works and services for state funds was the Law of Ukraine "On Government Procurement" adopted in 2010. However, in the context of signing of the European Union-Ukraine Association

Agreement and Ukraine's potential accession to the GPA the new Law of Ukraine "On Government Procurement" was adopted in April 2014. This Law defines the legal and economic principles that apply to the procurement of goods, works and services by government officials, provided that the cost of procurement is at least UAH 100,000 (USD 12,500) and UAH 1 million (USD 125,000) in the case of works.

It should also be noted that while adopting the Law "On Government Procurement", Ukraine completely abandoned the preferential policies in the sphere of public procurement, motivating this by the need to bring the domestic legislation into line with the EU standards and commitments undertaken to join the GPA in the near future, the basic principle of which is non-discrimination. According to Article V of the Law, national and foreign bidders must participate in government procurement procedures on a *pari passu* basis. Therefore, procuring entities must ensure equal access for all bidders to relevant government procurement information.

The Law also requires suppliers to use one of the following six procurement procedures:

1. Open tendering, which is a procurement method whereby all interested suppliers may submit a tender proposal;
2. Two-stage tendering, which can be applied under the following conditions: a) the procuring entity cannot determine the necessary technical and qualitative specifications of the goods (works) or the types of services, or if making an optimal procurement decision, the procuring entity needs to carry out preliminary negotiations with participants; or b) the procurement is for scientific research, R&D, design or construction works;
3. Request for price proposals, where the procuring entity carries out procurement by requesting price proposals for goods and services in an active market, provided that their value does not exceed UAH 300,000 (USD 37,500);
4. Preliminary participant qualification, which is used when it is necessary to determine the qualification conformance, financial state and technical and organizational capacities of the participant;
5. Negotiated procedure, where the customer concludes a procurement agreement with one or more participants after negotiations and after acceptance of the winning bidder's offer.

Negotiated procedures require detailed justification for why it is not in the public interest to procure the items in question through an open tender process. However, using negotiated procedure is allowed in a wide range of circumstances. These include cases where there is a lack of competition, cases of urgency/emergency, and for additional deliveries by the original supplier where a change of supplier would cause significant inconvenience or substantial duplication of costs for the procuring entity.

When procuring goods, works and services traded in constantly operating markets and which are manufactured, carried out or provided not according to the specific terms of reference, the only assessment criterion for bids is price. In the case of complicated or case-specific procurement (e.g.,

consulting services, technical studies, R&D), however, bids are assessed by price and a number of other criteria, including quality, payment conditions, time to completion, warranty maintenance and service costs. If non-price criteria are used to assess bids, the tender documentation must reflect their value equivalent or the specific weight of such criteria in the overall assessment (no less than 50%).

An important event in the history of public procurement was the adoption by the Verkhovna Rada of Ukraine (Ukraine's legislative body) of the new Law 'On the peculiarities of Government Procurement in Certain Spheres of Economic Activity', which established the procedure for the procurement of entities operating in the areas defined by this Law, namely, in such areas as water, post, energy and transport.

IV. CHALLENGES AND RISKS OF UKRAINE'S POTENTIAL GPA ACCESSION

This section contains a SWOT analysis of Ukraine's possible accession to the GPA. According to this method, strengths and weaknesses are factors internal to an object (i.e., factors that Ukraine can control), whereas opportunities and threats are external factors beyond its control. Strengths here indicate the competitive advantages of accession; weaknesses are the qualities that make accession less attractive than alternative actions, which can undermine any of the advantages; opportunities relate to the chance of obtaining certain benefits; and threats are barriers to success.

A SWOT analysis is used here because of its simplicity in providing a quick evaluation of the strategic position of the object of analysis compared with similar assessment tools (e.g. PEST analysis, SNW analysis). PEST analysis allows researchers to estimate how the main external factors (economic, political, social) affect the object of analysis. SNW analysis can define the strengths and weaknesses of the object of analysis; however, only the internal environment is evaluated. Therefore, only SWOT analysis allows researchers to comprehensively assess both internal and external factors.

This method is used primarily by enterprises to formulate strategy. However, since SWOT analysis contains no specific economic categories, it can be applied to all organizations, individuals and countries to develop strategies in all areas of activity. We herein apply a SWOT analysis in order to evaluate the legal regulation of relationships in the field of public procurement in Ukraine (the 'object' of the analysis).

Given Ukraine's intentions to join the GPA, the SWOT analysis presented herein allows us to define the following areas:

- ▲ The *strengths* of Ukrainian legal regulation, namely to what extent national legislation complies with the main provisions of the GPA;
- ▲ The *weaknesses* of the Ukrainian legal regulation, particularly the imperfection and contradiction of certain provisions of the domestic legislation and its incompatibility with the requirements of the GPA.

- ▲ The *positive consequences* for the legal regulation and for domestic suppliers;
- ▲ The *threats*, especially related to the WTO public procurement system, which may affect the functioning of the public procurement market of Ukraine in the case of its liberalization;
- ▲ Finally, Ukraine's *strategy* for accession to the Agreement.

A. Strengths

The adoption of the Law 'On Government Procurement' is a positive step towards the state regulation of procurement.

The Law aims to establish a competitive environment for government procurement and promote the efficient and sustainable use of state funds. In particular, it outlined the importance of such principles as fair competition, efficiency and cost-effectiveness, transparency at all stages, a non-discriminatory approach to participants, the objective assessment of tender bids and the prevention of fraudulent actions.

Open tendering, which is recognized to be the main procurement procedure, is strongly regulated by the Law in terms of transparency requirements and making procurement information available to the public. Customers must publish on the National Procurement Network without charge the following notifications of government procurement: 1) notification of tendering; 2) notification of the acceptance of an offer; and 3) notification of the procurement results. In addition, notification of government procurement and a summary of its results must be published in English if the expected procurement costs exceed EUR 200,000 for goods, EUR 300,000 for services or EUR 500,000 for works.

The Law takes into account recent advances in IT by including regulations for e-procurement. For instance, according to the Law of Ukraine "On Government Procurement" bid announcement, issuance of bidding documents shall be done on the National Procurement Network.

The Ministry for Economic Development and Trade has also adopted a government procurement monitoring procedure that aims to ensure compliance with procurement regulations, the efficient use of state funds and the maximization of cost savings in line with customer requests or at the Ministry's own discretion. The Ministry is authorized to check whether there are reasonable grounds for the use of the procurement procedure initiated by the customer and to ensure that the customer's documentation complies with government procurement regulations and procedures.

B. Weaknesses

Even though the Law sets up-to-date standards for government procurement, Ukraine's government procurement system has revealed numerous problems.

Firstly, the procurement legislation is inconsistent with the continual amendments being made to change the rules

on the purchase of goods, works and services, creating significant complications for both government entities and participants in the government procurement market. For example, since the previous Law was adopted four years ago, it had been amended 29 times.

Furthermore, a developing trend in Ukraine is to avoid the need for tendering altogether by prioritizing negotiated procedure, namely single source procurement. For example, the proportion of single sourced tenders in Ukraine grew markedly from 5% in 2010 to 40% in 2012, compared with a global average of less than 25%. Over the same period, open tender agreements fell from 67% to 53% (Table 1).

TABLE 1.

Number of procurement contracts signed in 2010–2012			
<i>Year</i>	<i>Total number of contracts</i>	<i>Contracts based on open tenders</i>	<i>Contracts based on single source procurement</i>
2010	55,188	37,230 (67%)	3,018 (5.4%)
2011	79,139	63,223 (79%)	6,186 (7.8%)
2012	103,052	54,911 (53%)	40,799 (40%)

In addition, government procurement in Ukraine is extremely corrupt. According to the President, approximately 10–15% of the budget (USD 4–7 billion) is pocketed by state officials in the course of procurement.

The aforementioned procurement practices do not correspond to the main WTO public procurement principles of transparency and equal of treatment which could be the obstacle to the signing of the GPA.

Often without justification, there was also a tendency to exclude different business sectors from the provisions of the Law, despite a clear commitment towards transparency and the full and public availability of procurement information. For example, the previous Law listed 35 general exceptions and 12 types of activities, 13 types of goods, the procurement of which was regulated by specific laws. The first edition of the Law, by contrast, listed only five exceptions. Certain types of procurement activities have gradually been excluded from the scope of the Law. For example, almost immediately after the previous Law was adopted, it was amended to exempt all procurement associated with preparations for the Euro 2012 football championship, with the urgency of the preparation cited as the reason. At the same time, 18.8 billion UAH (USD 2.3 billion) of public funds was found to be used in a non-transparent and ineffective way during procurement activities for this event.

However, the new Law “On Government Procurement” aims at increasing transparency in government procurement. Thus, the list of aforementioned exclusions from the scope of the Law was substantially reduced. This indicates a positive

trend in ensuring integrity and transparency in Ukraine's government procurement.

C. Opportunities

GPA-related research shows that the main incentive for joining the GPA is a guarantee of access to the procurement markets of other GPA member states [4]. According to the available statistics, the global government procurement market in 2008 was estimated to be worth USD 1.6 trillion, representing 2.7% of global GDP. Moreover, the accession of Chinese Taipei to the Agreement in 2009 created additional procurement opportunities valued at an estimated USD 20 billion [5]. Furthermore, Armenia became another GPA member on 15 September 2011.

Some authors believe that another advantage of joining the GPA is increased competition (including international competition) and better governance for domestic government procurement markets [4].

In addition, unified and understandable government procurement procedures increase the effectiveness of this process, thereby releasing resources to finance other state programs. Further, transparent and open government procurement procedures can reduce obvious corruption [4]. 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 [6]. In this respect, GPA provisions on the national procedures of appeals and the WTO dispute settlement mechanism serve as important tools for Parties to promote fair and non-discriminatory conditions and eliminate corrupt practices in government procurement [4].

In this manner, transparency in procurements will enable Ukraine to obtain better value for money in contracting and purchases, reduce corruption, improve governance and lead to sustainable public finance management.

There are several other advantages of accession to the GPA, however. Firstly, GPA accession can improve the coordination of domestic policy by introducing mandatory requirements for the transparency of procurement processes. Secondly, GPA membership may be considered to offer international “approval”, which might encourage inward foreign direct investment for companies engaged in government procurement. Thirdly, it provides an opportunity to participate and influence the future development of the Agreement [4].

D. Threats

As stated above, one of the main advantages of accession to the Agreement is the possibility for domestic suppliers to gain access to the government procurement markets of member states and compete with foreign suppliers on equal terms. However, although the GPA-wide government procurement market will theoretically become open for Ukrainian suppliers, the possibilities are rather limited in the following five specific directions. These limitations result from the following: 1) setting high thresholds; 2) the large number of government procurement contracts that are below the SDR

thresholds; 3) using a “positive list” when determining the scope of the Agreement; 4) preferential policy in government procurement; 5) strictly applying the principle of reciprocity when determining the coverage of the GPA; and 6) restricting access to procurement information on GPA Parties. These limitations are discussed in the subsections that follow.

1) *Setting high thresholds.*

First, the access of Ukrainian suppliers to the government procurement markets of GPA members is limited because of the thresholds set by the Parties to the Agreement. These quantitative thresholds trigger the opening of a tendering process. In other words, if a customer achieves a certain threshold amount, they should declare a tender.

The thresholds of the Parties are considered to be quite high by Ukrainian suppliers. For example, the threshold for central government entities is SDR 130,000, which is approximately USD 195,000 or UAH 1.6 million. For Annex 3 entities, this threshold rises to SDR 400,000 (approximately USD 600,000 or UAH 4.8 million). However, the highest thresholds are set for the cost of works carried out by suppliers. Thus, the majority of the Parties set a threshold of SDR 5 million (approximately USD 7.5 million or UAH 60 million), limiting the access of Ukrainian suppliers to foreign government procurement markets.

In addition, the main export earnings of the 143 countries classified by the International Monetary Fund as ‘transitional economies and developing countries’ originate from primary goods, which have a lower market value compared with most of the manufactured goods exported by developed economies. Therefore, while developed economies benefit from higher threshold values, emerging markets and developing countries need lower thresholds in order to become competitive in markets where they have a comparative advantage [7]. The Ukrainian economy is dominated by industries that extract raw materials or that manufacture and export products that have a low degree of processing. Ukrainian production capacity utilization is dependent on the external demand. Today, Ukraine exports about 80% of primary goods and semi-finished products.

2) *The large number of low SDR contracts.*

To evaluate the opportunities for domestic producers arising from GPA accession, we must analyze the size of the government procurement market, number of procurement contracts above the threshold and number of foreign suppliers that could participate in such contracts. However, although Article XIX:5 of the Agreement states that Parties must submit this information annually, most do not comply. For instance, the EU last reported on its government procurement in 2007, Canada in 2009 and Switzerland in 2003, while Israel and Iceland have never provided any figures.⁵ Therefore, the information available is limited and does not

allow potential Parties to evaluate all the advantages and disadvantages of joining the Agreement.

However, some efforts were made to summarize the below-threshold government procurement contracts (i.e., those not covered by the Agreement). In this context, it should be noted that those Parties that report the amounts of such contracts usually do so only for central government entities (Annex 1). As a result, the information is incomplete. However, these statistics still offer us a broad-level view of the overall situation in the WTO government procurement sector. In this regard, the share of government procurement contracts below the thresholds signed by central and sub-central government entities in the EU in 1997–2007 was 84%. As for Japan, 67% of the contracts signed by the central government were below the threshold in 1997–2010 [8]. Along with the USA, the EU and Japan are the main supporters of the open government procurement market, because they wish to increase market opportunities for their companies and to be able to bid in foreign markets. At the same time, while they demand during bilateral negotiations that other countries open their markets as much as possible, their domestic markets are rather limited.

For instance, the aggregate procurement of Japanese central government entities in 2010 (Annex 1) was SDR 21.8 billion, of which SDR 14.8 billion was below the threshold. Among them, 213 contracts were signed by foreign suppliers, totalling just SDR 149 million. The largest number of purchases (105) was made by the USA for SDR 72.5 million, while the EU made 72 purchases for SDR 62.2 million.

In terms of the total procurement amount covered by the Agreement, tenders for SDR 1.7 billion were conducted using the restricted procedures. Among them, only 20 procurement contracts (value SDR 26.2 million) were signed with foreign suppliers. The US purchased goods and services worth SDR 11.3 million, while the figures for the EU and Switzerland were SDR 14.5 million and SDR 356,000, respectively (Table 2).

TABLE II.

Procurement by central government entities in Japan (in accordance with Annex 1) in 2010		
Total procurement in 2010 (SDR ‘000)	Procurement covered by the GPA (SDR ‘000)	Procurement not covered by the GPA (SDR ‘000)
21,824,045	6,964,773 (32%) including with foreign suppliers: 149,258 (2%)	14,859,272 (68%)
	Procurement made under the restricted procedure according to the GPA: 1,756,958 (25%) including with foreign suppliers: 26,242 (1.5%)	

As Table 2 shows, procurement covered by the GPA accounted for only 32% of total central government

⁵ WTO, ‘Statistics reports under Article XIX:5 of the GPA’

<http://www.wto.org/english/tratop_e/gproc_e/gpstat_e.htm> (accessed 29 May 2013).

procurement. Moreover, a significant proportion of tenders (25%) were held under restricted procedures, namely where the supplier is specifically invited by the procuring organization, which greatly limits the opportunities for Ukrainian suppliers.

The same applies in South Korea. The total amount of central government procurement in 2010 was KRW 11,897,672 million (USD 10,588,928). GPA-covered procurement was only KRW 1,552,989 million (USD 1,397,829) or 13% of the total amount procurement in 2010. Further, 61 contracts (KRW 47,793 million; USD 43,018,000) were signed under the restricted procedure according to the GPA (Table 3).

TABLE III.

Procurement by central government entities in South Korea (in accordance with Annex 1) in 2010		
Total procurement in 2010 (KRW million)	Procurement covered by the GPA (KRW million)	Procurement not covered by the GPA (KRW million)
11,897,672	1,552,989 (13%)	10,344,689 (87%)
	Procurement made under the restricted procedure according to the GPA: 47,793 (3%)	

However, the picture is somewhat contrary for Annex 3 entities in South Korea. The total procurement of such entities in 2010 was KRW 18,570,370 million, including KRW 14,551,370 million covered by the GPA. However, a large number of contracts (KRW 1,344,356 million) were signed under the restricted procedure. Unfortunately, no data are available on the number of contracts signed with foreign suppliers (Table 4).

TABLE IV.

Procurement by entities in South Korea (in accordance with Annex 3) in 2010		
Total procurement in 2010 (KRW million)	Procurement covered by the GPA (KRW million)	Procurement not covered by the GPA (KRW million)
18,570,370	14,551,370 (78%)	4,019,000 (22%)
	Procurement made under the restricted procedure according to the GPA: 1,344,356 (9%)	

These data allow us to conclude that GPA members apply a large number of restrictive procedures, such as the procuring entity contacting the supplier directly or using one tender procedure. Typically, the supplier in question is a domestic supplier, while access to procurement for foreign bidders is limited.

For the USA, the most active proponent of the WTO government procurement market extension, the share of procurement below the threshold was low (3.27%) [8]. However, this information is based on 2008 statistics for Annex 1 entities, because the USA has submitted no data since then. Such a low percentage is explained by the fact that total government procurement in the USA is the highest in the world. Indeed, the total procurement of goods and works above the threshold by Annex 1 organizations in 2008 was worth almost USD 380 billion and USD 279 billion, respectively (unfortunately, there are no data on foreign suppliers who participated in procurement in the USA).

However, the value of some of the procurement contracts signed in 2008 by central government entities in the USA is very high. For example, the Executive Office of the President signed one contract for the purchase of goods for USD 3 million; the Department of Health and Human Services signed one contract for works amounting to USD 14 million; the Department of Homeland Security signed five contracts for works worth USD 140 million; and the Department of Energy signed 31 contracts for goods worth USD 21 billion.⁶ In view of the above, we can conclude that the values of contracts covered by the GPA in the USA are very high not only for Ukrainian producers, but also for other transitional economies and developing countries, thereby limiting their opportunities of accessing the procurement market in the USA. Thus, while the size of the market is indeed significant for GPA members, which is deemed to be the main advantage of GPA accession, in practice not all countries have unrestricted access to it.

The most interesting country for Ukrainian producers in terms of its experience with the GPA is Chinese Taipei, an emerging economy. Typically, accession to the GPA is a difficult decision for most developing countries because of the fear that it could lead to economic losses. However, in this instance, Chinese Taipei's trading partners required its accession to the GPA as a precondition for its accession to the WTO [9]. Therefore, it had little say in this decision and was obliged to start GPA negotiations. The same is true for Ukraine, which has committed to accessing the GPA when it becomes a member of the WTO.

For central government entities in Chinese Taipei, the cost of procurement covered by the GPA accounted for 58% of total procurement in 2011 (i.e., 42% not covered). Meanwhile, the share of foreign suppliers who participated in central government procurement was 3.4% of the total amount covered by the GPA (Table 5).

TABLE V.

Procurement by central government entities in Chinese Taipei (in accordance with Annex 1) in 2011		
Total	Procurement covered by the	Procurement not

⁶ Statistics for 2008 reported under Article XIX:5 of the Agreement, Report by the United States, GPA/102/Add.3. For further information, see <http://www.wto.org/english/tratop_e/gproc_e/gpstat_e.htm> (accessed 29 May 2013).

<i>procurement in 2011 (TWD)</i>	<i>GPA (TWD)</i>	<i>covered by the GPA (TWD)</i>
234,158,694,311 (approximately USD 7.5 billion)	136,297,779,619 (58%) (approximately USD 4.5 billion) including foreign suppliers - 4,601,894,793 (3.4%) (approximately USD 158 million)	97,860,914,692 (42%) (approximately USD 3 billion)
	Procurement made under the restricted procedure according to the GPA: foreign suppliers - 4,601,894,793 (4.4%) (approximately USD 200 million)	

However, the contrary situation for Annex 3 entities in Chinese Taipei raises great scholarly interest as well as some concerns. Procurement by domestic suppliers accounted only for TWD 65 billion (approximately USD 2 billion) of the total amount of TWD 208 billion (approximately USD 7 billion); the remaining two-thirds was procured by foreign suppliers. For instance, Japan supplied goods, services and works worth TWD 112 billion (almost USD 4 billion), while the figures for the EU and the US were TWD 14 billion (USD 512 million) and TWD 7 billion (USD 241 million), respectively. These data show that Chinese Taipei's government procurement market is dominated by foreign suppliers (Table 6).

TABLE VI.

Procurement contracts signed with foreign suppliers in Chinese Taipei				
<i>Total procure ment value in 2011 (TWD)</i>	<i>Procure ment value by domestic suppliers (TWD)</i>	<i>Procure ment value by US suppliers (TWD)</i>	<i>Procurement value by EU suppliers (TWD)</i>	<i>Procurement value by Japanese suppliers (TWD)</i>
208,084,216,276 (ca. USD 7 billion)	64,689,754,235 (31%) (ca. USD 2.2 billion)	7,820,366,218 (3.7%) (ca. USD 270 million)	14,848,546,642 (7%) (ca. USD 512 million)	111,952,150,786 (53%) (ca. USD 3.8 billion)

As shown in Table 6, the majority of government procurement by Annex 3 entities in Chinese Taipei was from foreign suppliers. Indeed, between 2005 and 2007 foreign suppliers won 27% of all procurement projects in the country [9]. This high proportion poses a potential threat for Ukraine in opening up its government procurement market, because developed economies may use it as just another sales market for their goods and services, whereas developing countries will be unable to compete on equal terms.

3) Using a 'positive list' when determining the scope of the Agreement.

Another limitation that Ukrainian producers may face when entering the WTO government procurement market is the positive list principle used to determine the scope of the GPA. The positive list principle means that the Agreement covers only those goods and services listed in the Annexes of the Parties. This principle therefore significantly narrows the coverage of the Agreement in contrast to the negative list principle, when the Annex lists goods and services not covered by the Agreement. According to some authors, the Agreement covers only those sectors that interest developed countries and overlooks the major export industries of developing countries. Additionally, from the perspective of a small economy, this approach makes it more difficult to convince developed countries to include sectors or entities of interest to them, because developing countries have limited bargaining power during negotiations [7].

Furthermore, as a transitional economy, Ukraine is not entitled to the differential treatment that the Agreement offers to developing countries, such as a transition period to allow the gradual building of a domestic government procurement market, the setting of high thresholds and the exclusion of a number of sectors from the scope of the GPA.

4) *Preferential policy in government procurement:* Although the GPA prohibits members from applying preferences to government procurement, Canada, the USA and South Korea all support domestic small-to-medium-sized enterprises by excluding them from GPA coverage. Such a provision was included as a general exclusion from the Agreement during the accession negotiations of these countries. This is yet another factor that limits the size of the GPA government procurement market.

Japan also actively implements a similar albeit indirect preferential policy in the field of public procurement. Local governments are important players in Japan's public sector procurement market, accounting for approximately 80% of public works undertaken. Before Japan joined the GPA, it operated a direct preferential policy at the local government level that favoured domestic suppliers based on discriminatory eligibility criteria. Foreign suppliers were required to maintain a branch or headquarters within the local jurisdiction in order to be eligible to participate in local procurement. One example is Akaho City, which awarded 80% of its 200 contracts to approximately 70 local firms [10].

Although, as noted earlier, the GPA prohibits such a preferential policy, local governments in Japan continue to give preference to domestic suppliers. This preference is confirmed by the statistics provided by Japan under Article XIX of the GPA. In 2010, aggregate procurement by Japanese sub-central government entities was worth JPY 866 billion. However, procurement by foreign suppliers (mostly from the USA, the EU and Canada) accounted for a paltry JPY 23 billion, or only 2.7%. Moreover, a significant proportion (158 billion; 18%) of procurement in Japan is still carried out under the restrictive single source procedure at the local level. The amount of such purchases amounted to JPY 158 billion in 2010. A large proportion of this single source procurement was based on the need for additional deliveries by the original supplier in circumstances where a change of supplier would compel the

entity to procure equipment or services not meeting the requirements of interchangeability with existing equipment or services (Article XV(d) of the GPA). Such original suppliers are typically domestic organizations.

5) *Strict application of the principle of reciprocity.*

Apart from the cases, defined by each Party, when the Agreement is not applicable, there is another significant constraint on market access for other countries, namely the strict application of the reciprocity principle. The Party's agreed coverage is the result of bilateral negotiations guided by the principle of strict reciprocity. This means that one Party only provides concessions to another that is offering identical concessions. As pointed out by Wang, although a most favored nation (MFN) obligation is clearly provided in the GPA (Article III) for covered procurement, MFN is not a basis for agreeing which entities and types of procurement contracts are covered in the first place. In other words, the GPA does not restrict Parties' discretion to make various types of party-specific derogations departing from MFN during negotiations [11]. Arrowsmith notes that this strict reciprocity approach can become an obstacle to liberalization [12].

As a consequence, the Annexes of members' GPA coverage are filled with provisions that require them to provide reciprocal access to entire industry sectors as well as to specific goods, works and services. For example, the EU and Iceland Annexes indicate that the Agreement does not apply to the following areas: "1) Procurement by procuring entities operating in the field of airport facilities with regard to suppliers and service providers from the United States and Korea; 2) procurement by procuring entities operating in the field of urban railway, tramway, trolleybus or bus services with regard to suppliers from the United States; 3) procurement by procuring entities operating in the field of railways with regard to goods, suppliers, services and service providers from Armenia, Canada, Japan, the USA, Hong Kong, Singapore and Chinese Taipei; [and] 4) procurement by procuring entities operating in the field of bus services with regard to suppliers from Israel; until EU accepts that the Parties concerned provide satisfactory reciprocal access to EU goods, suppliers, services and service providers to their own procurement markets".

Similarly, Korea's Annex states that it will not extend the benefits of the Agreement with regard to the procurement by the Korea Railroad Corporation and the Korea Rail Network Authority to the suppliers and service providers of Norway and Switzerland until Korea accepts that those two countries offer comparable and effective access for Korean undertakings in their respective markets.

In the same vein, Norway's Annex 5 states that the services listed therein are covered with respect to a particular Party only to the extent that it has included these services in its Annex 5, while Canada's Annex 3 stipulates that for the EU, Iceland and Liechtenstein, this Agreement does not apply to procurement by entities listed in the Annex.

This degree of reciprocity allows us to conclude that if Ukraine becomes a GPA member, it would have access to the

markets of other Parties only to the extent that these Parties have opened such markets up. If Ukraine does not provide access to its government procurement market for certain types of goods and services, it will not have reciprocal access to the markets of its partners, limiting access opportunities and narrowing the size of the procurement market for Ukrainian suppliers further still.

6) *Restriction of access to procurement information on GPA Parties*

The participation of Ukrainian suppliers in GPA-wide government procurement is also restricted by a deliberate lack of access to relevant information on public procurement. According to Article IX of the GPA, entities must publish an invitation to participate in the tendering process in all cases of government procurement. Furthermore, the notice must be published in the appropriate publication listed in Appendix II. However, the majority of members, such as Liechtenstein, Norway, Japan and Iceland, do not provide such information online and simply publish the names of the national periodicals, most of which are published in the national language of the country, rather than in English.

For example, Japan states that procurement notifications must be published in the national newspaper *Kanpō*. How can Ukrainian supplier get access to the mentioned newspaper, and thus information on the procurement, planned and carried out in Japan?

In addition to the restricted access to the WTO government procurement market Ukraine has to deal with costs for the implementation of the GPA.

As pointed out by Choi in a case study on the Korean accession to the GPA there are two types of costs involved in this accession: one is the initial administrative cost associated with the process of gaining accession to the GPA. These are the cost of preparing for the negotiation (for example, the cost of collecting information about the GPA, the cost of studying the impact of accession on the domestic economy and institutional arrangements, and the cost of training necessary personnel); the cost of engaging in negotiations in the process of accession (for example, travel costs, legal fees); and the cost of bringing the domestic institutions and regulations into conformity to the GPA (e.g., the cost of making legislative changes). The other costs are the economic and social costs that may result from the accession. These costs include the economic cost of possible reductions in domestic procurement supplies and employment; and the administrative costs of maintaining many procedural requirements to ensure transparency and due process, and to collect and report procurement statistical data [13]. The Korean case demonstrates that countries have to bear significant costs before, during and after the conclusion of the accession process, and developing countries with a small economy usually have other priorities on which to spend their scarce financial resources [7]. A report by OECD recognised that such costs may be too high for developing countries to bear them by

themselves, and that support with building local capacity as well as technical assistance is needed ⁷.

V. CONCLUSIONS

The present paper analyzed Ukrainian legislation on government procurement and examined the main obstacles to Ukraine's accession to the GPA. Despite all the institutional and procedural changes to Ukrainian legislation on government procurement designed to liberalize it and harmonize it with the world's best practice in this regard, numerous issues and obstacles outweigh the associated benefits and opportunities.

The potential benefits of accessing the government procurement markets of GPA member countries are apparent; however, this study indicates that Ukrainian suppliers will most likely face certain limitations caused by the following six factors: 1) a large proportion of GPA contracts are below the agreed thresholds and therefore are not covered by the Agreement; 2) considerable procurement activities are carried out under restricted procurement procedures; 3) a "positive list" is used to determine the scope of the Agreement; 4) the reciprocity principle is strictly applied during negotiations; 5) certain Parties use preferential policies in government procurement; and 6) most GPA members restrict access to information about future procurement. In addition, Ukrainian suppliers are uncompetitive compared with foreign ones, because GPA members are mainly developed countries.

The foregoing analysis suggests that Ukraine is not yet ready for accession to the GPA and that careful planning is crucial before launching negotiations.

In terms of policy implications, it must start with a minimum offer list and then make adjustments depending on the responses made by other Parties. In this respect, Ukraine can refer to the experience of China, which is now in membership negotiations despite twice having its offer of minimum coverage rejected by the WTO committee because of its limited nature. This allows China to use its limited offer as a tool for obtaining additional time for making a proper solution concerning the accession.

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