5
Policy Options

Based on the above analysis, the issues to be considered are clear, but the policy options that are available will depend on the situation of the country in question. There are two main concerns: transparency and market access.

5.1 Transparency options

From the transparency perspective, there is no doubt that any trade negotiations will focus first on the state of the national procurement system. While less an option than a requirement, any country negotiating a procurement related trade agreement needs to have a thorough understanding of its own national system and its weaknesses. Where it has not already done so, it is advisable for the country to undertake an objective assessment based on tools such as that offered by the OECD/DAC, which will measure the legal and institutional framework. Implementation is only partially captured by this tool in its present form. The intent was always to develop, test and introduce such measures, some of which are currently being piloted. In the short term, therefore, the country will need to undertake further monitoring to ascertain its level of implementation. This is also an area where international organisations can assist, especially where there is encouragement both for national procurement development and for wide participation in regional or international procurement communities.

Where it is clear that improvements are necessary, negotiating countries should ascertain what assistance is available from the organisation itself for the improvement of its national system. The GPA, for example, explicitly provides for such assistance. For example, Articles V: 8–11 provide for technical assistance to be given to developing countries. Each developed country party is required, upon request, to provide all technical assistance which it may deem appropriate to developing country parties in resolving their problems in the field of government procurement. This assistance, which is to be provided on the basis of non-discrimination among developing country parties, will relate, *inter alia*, to the solution of particular technical problems relating to the award of a specific contract, as well as to any other problem which the party making the request and another party agree to deal with in the context of this assistance. This technical assistance is to include translation of qualification documentation and tenders made by suppliers of developing country parties into an official language of the WTO designated by the entity, unless developed country parties deem translation to be burdensome; in that case, an explanation must be given to developing country parties upon their request, addressed either to the developed country parties or to their entities.

Other economic organisations will also provide similar assistance. In the case of the EU, the European Commission earmarks significant funds (both from the budget and

from the European Development Fund for the benefit of ACP countries) for the improvement of domestic procurement legislation in preparation for trade agreements; this funding and assistance continues well after the agreements have been signed. The EU is known to provide assistance for the development of complete procurement systems, including preparation of legal frameworks, implementation measures such as bidding documents, and the creation of procurement regulatory authorities and review bodies. Donors and MDBs provide similar assistance, although these are not directly linked to potential membership of trade arrangements.

As discussed at length above, notably in Chapter 4, the primary benefits of entering into trade arrangements which liberalise procurement markets are felt in the domestic market. This presupposes, however, that there is a domestic procurement system which is able to accommodate effective competition. Such a system is a prerequisite for membership of such organisations in any event.

The first option, or rather opportunity, given to negotiating parties is therefore to bring their domestic systems up to an acceptable level. As stated above, this may well be of benefit to the wider membership of the organisation where market access conditions are accepted, but the most significant results will be for the domestic market. Even if the negotiating country ultimately decides not to enter into market access commitments, the benefits of more transparent government procurement will already have been achieved.

5.2 Market access options

Once the transparency position is resolved, the remaining options relate to the specificities of the country in question. This will be a question of assessing the nature of the domestic market and its strengths and weaknesses. It will also require an assessment of the markets of the other members to provide a measure of the potential benefits that may be accrued by domestic producers. In this regard, the GPA also provides some assistance. Developed country parties are required to establish, individually or jointly, information centres to respond to reasonable requests from developing country parties for information relating to, *inter alia*, laws, regulations, procedures and practices regarding government procurement, notices about intended procurements which have been published and addresses of the entities covered by the agreement. In particular, they should provide information on the nature and volume of products or services procured or to be procured, including available information about future tenders.

Using the issues discussed in section 4.3 as a baseline, a negotiating party needs to assess the size of its procurement market and the scope of public procurement contracts available for competition, basing itself on the level of public contracting, the identity of the contracting entities covered by the legislation, the number and value of the contracts awarded and the extent of donor assistance which is subject to tied aid. Apart from giving the negotiating party an understanding of its negotiating position, the collection of such information will be necessary in respect of setting out any market

access conditions. In the case of the GPA, for example, all these issues are covered in the relevant annexes. Similar approaches are used in FTAs and in the context of EPA negotiations, even if precisely the same annexes are not used.

In addition to the general procurement market, the negotiating party also needs to be fully aware of its own markets and comparative advantages. It should investigate which of its sectors are strongest and where its most capable companies and potential exporters are found. To the extent that such companies can benefit from assistance, the country should also consider what means of support, e.g. subsidies, it can provide. Similarly, the negotiating party needs to try to identify the markets of its potential competitors so that it can gauge the likely effect of granting market access. For this, it will need to consider its own import/export statistics, but will also need to approach the other negotiating parties. As indicated above, the GPA sets up an information sharing system which allows negotiating parties to gather such relevant information, at least in respect of GPA membership.

This information is crucial if the negotiating party is to participate effectively in the negotiations. As discussed in section 3 above, countries negotiating trade agreements do not act out of pure altruism. They participate because they believe that their own companies will benefit and that those benefits are worth allowing in foreign competition. The negotiated annexes of the GPA demonstrate very clearly where current parties feel that their own markets are in danger. They have each listed a series of exceptions which remove certain sectors from the ambit of the GPA. All the annexes are different and reflect a series of bilateral negotiations between the parties. Any new member will have to go through the same process and will need to negotiate appropriate exemptions for itself. To do so, it needs to know its own markets and be aware of any protective measures already taken, e.g. the use of domestic preferences. These are often permitted to a certain extent,[105] even (if only for a limited period) within procurement-related trade agreements; the negotiating party will therefore need to ensure that any domestic preferences it applies can be accommodated within the current exceptions of the trade agreement at issue. As indicated in sections 1.4 and 4 above, the issue of preferences is often politically sensitive and will feature prominently in market access negotiations. However, the economic reality appears to be that such preferences ultimately have little, if any, effect on trade, but are likely to lead to inefficiencies and welfare losses at the domestic level.

As stated at the outset, it has not been possible to consider all types of trade agreements. The GPA has been used as the primary example since it has set the trend for most current agreements. The details will be different, but the approach will be similar. In respect of developing countries, the GPA currently contains specific provisions which will assist them in negotiating preferential access to the agreement. For example, it includes provisions which seek to establish special and differential treatment for developing countries. The objective of these provisions, contained in Article V, is to encourage the existing parties to take into account the development, financial and trade needs of developing countries, and in particular of LDCs, in the implementation

and administration of the agreement. These needs relate especially to the safeguarding of the balance of payments and to ensuring a level of reserves adequate for the implementation of economic development programmes; to promoting the establishment or development of domestic industries, including small-scale and cottage industries in rural or backward areas and economic development of other sectors of the economy; to supporting industrial units so long as they are wholly or substantially dependent on government procurement; and to encouraging economic development through regional or global arrangements among developing countries.

There is an obligation, for example, for the parties to the GPA, in the preparation and application of laws, regulations and procedures affecting government procurement, to facilitate increased imports from developing countries, bearing in mind the special problems of LDCs and of countries at low stages of economic development. In addition to general assistance and information sharing, Article V provides for the considerations listed above to be taken into account in negotiations on the procurement of developing countries to be covered by the provisions of the Agreement, with a view to ensuring that developing countries are able to adhere to the GPA. Thus, developed countries, in the preparation of their coverage lists under the provisions of the GPA, must endeavour to include entities procuring products and services of export interest to developing countries. In addition, Article V foresees a number of permitted exclusions during accession negotiations. A developing country may negotiate with other participants mutually acceptable exclusions from the rules on national treatment with respect to certain entities, products or services that are included in its coverage lists, having regard to the particular circumstances of each case. In these negotiations, account will again be taken of the needs identified above. A developing country participating in regional or global arrangements among developing countries may also negotiate exclusions to its lists, having regard to the particular circumstances, taking into account, *inter alia*, the provisions on government procurement provided for in the regional or global arrangements concerned and, in particular, products or services which may be subject to common industrial development programmes.

After entry into force of the Agreement, a developing country party may also modify its coverage lists in accordance with the GPA's provisions for modification of such lists,[106] having regard to its development, financial and trade needs, or it may request exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists. A developing country party may also request the committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries. Each request to the committee by a developing country party relating to modification of a list must be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter. These provisions apply *mutatis mutandis* to developing countries acceding to the Agreement after its entry into force.

Article V:12 also contains provisions which grant special treatment for LDCs

based on paragraph 6 of the decision of the contracting parties to GATT (1947) of 28 November 1979 on differential and more favourable treatment, reciprocity and fuller participation of developing countries.[107] Under this provision, special treatment is granted to LDCs and to the suppliers in those parties with respect to products or services originating in those parties, in the context of any general or specific measures in favour of developing country parties. A party may also grant the benefits of the Agreement to suppliers in LDCs which are not parties, with respect to products or services originating in those countries. Each developed country party must also, upon request, provide assistance which it may deem appropriate to potential tenderers in LDCs in submitting their tenders and selecting the products or services which are likely to be of interest to its entities, as well as to suppliers in LDCs. It must also help them comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

As a result, even within the apparent confines of a procurement-related trade arrangement, there are mechanisms which allow a negotiating party from a developing country to negotiate some preferential access to the agreement, enabling it to accede to the agreement while maintaining some exemptions or provisions which will provide some protection to its procurement markets and to its economy generally. What those possibilities are will depend entirely on the agreement in question and on the ability of the aspirant country to negotiate those exceptions and preferences. The provisions on special and differential treatment, however, make it all the more important that negotiating parties in developing countries should first assess their real needs and level of economic development before determining their approach. Such an approach should be predicated on the precise terms of the trade agreement in question (GPA or specific regional trade agreement (RTA)), since these various agreements will offer different possibilities in this regard.