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Article

Opening market access in government procurement through India-UAE FTA

By Aayush Rastogi and Ashutosh Arvind Kumar

In March 2022, India and UAE entered into a Free Trade Agreement. This Agreement is known as ('CEPA'). Among different aspects of trade and investment that were negotiated and incorporated under this agreement, the chapter on government procurement stands out. Under the WTO Treaty Regime, trade in government procurement markets is governed through the Agreement on Government Procurement ('GPA'). GPA is a plurilateral agreement which means that all WTO members are not parties to it. Presently, it has 48 members and 11 observers. In 2010, India also decided to become an observer member of the GPA, however, as of now India has no plans on entering the GPA.

Before the India-UAE CEPA, India has entered into several other FTAs with ASEAN countries, Japan, Mauritius, Malaysia, Singapore and Sri Lanka. In all these agreements India never took any specific obligation to open its government procurement market for foreign producers and service providers. For the first time under CEPA India has entered a market access arrangement with any country.

Features of the chapter on government procurement

Chapter 10 of CEPA covers trade in government procurement market of goods, services or their combination. It includes contractual procurement including those for purchase, rent or lease. Just like the GPA, under CEPA, obligations for government procurement

market are hinged on two basic concepts namely: National Treatment and Non-Discrimination. National Treatment means that both India and UAE have agreed to treat suppliers from the other country no less favorably than their local suppliers. Non-Discrimination means that both the countries would not discriminate between their local suppliers merely because they are procuring goods or services from the other party to the agreement. All these obligations would only apply if the value of government procurement is more than the threshold agreed by India and UAE in their schedules of commitments.

These commitments are also subject to certain exceptions. Both countries are free from obligations regarding government procurement if such procurement is necessary for protecting their essential security interests. This includes procurement for national security or national defense purposes. Further, the chapter on government procurement has also incorporated exceptions stated under Article XX of the General Agreement on Tariffs and Trade (GATT), 1994. These exceptions include steps taken for protection of human, life, or animal health or for protection of public morals.

Under this Agreement, both countries have agreed to open government procurement undertaken by Central Government entities. Further, India has specifically removed procurement by subordinate departments of

central government ministries and procurement by government owned entities.

Benefits of inclusion of a government procurement chapter

The inclusion of this chapter will lead to equal opportunities in government tenders in both India and UAE. Additionally, since commitments on national treatment and non-discrimination are now applicable in government procurement, Indian suppliers cannot be discriminated in UAE based on their nationality or foreign affiliation. Further, both countries have also taken obligations to enhance transparency in government procurement market. A more transparent and accountable bidding system in government procurement would attract foreign investors in India.

The schedule of commitments agreed by UAE, covers government procurement by 41 central government entities. These entities include the Ministry of Health and Prevention, Energy and Infrastructure, and the UAE Space Agency to name a few. Indian industries would now be allowed to participate in procurement undertaken by these entities. It is estimated that the size of Government Procurement in UAE is around USD 6.8 billion at federal level. This would open doors for Indian suppliers in several sectors like pharmaceuticals, medical facilities and services, and infrastructure.

India in its schedule of commitments has also opened government procurement for UAE suppliers in 34 central government entities including Ministry of Economic Affairs, New and Renewable Energy, power etc. but has excluded subordinate entities to central government ministries and government owned companies. Procurement related to health care sector and agricultural products has also been excluded.

Thus, this agreement has not only opened new opportunities for the Indian industries in the UAE but has also increased the competition in government procurement in India.

Safeguarding the Indian interests

While opening its government procurement market, India has also been cautious of protecting the interests of its domestic producers and suppliers and especially the MSMEs. India has set a high threshold for opening its government procurement market. India's commitment *vis-a-vis* government procurement are only limited to cases where procurement value of goods, services, or construction services is more than INR 200 crores. On the other hand, UAE has retained the threshold at much lower level and its commitments would cover all government procurement above INR 1.6 crore for goods and services and INR 60 crore for construction services. Thus, the MSME sector in India is safeguarded from the big UAE players as they won't be able to participate in contracts where procurement value is less than INR 200 crore. The Indian schedule also makes it clear that procurements under Public Procurement (Preference to Make in India) Order 2017 will not be covered under the CEPA. Thus, even with the increasing competition, the Indian industry falling under this category will be preferred and has a chance to get alluring government tenders. No such limitations are present in the UAE's schedule. Thus, this may prove to be more beneficial to the Indian players than UAE's.

The chapter is only applicable to the Central Government Ministries and Departments and is not applicable on State and Local entities. Thus, the players from UAE will only be able to compete in tenders at the central level, and at local level, the interest of the Indian industry is largely safe.

India is not a party to the GPA but with the beginning of incorporation of government procurement chapters in its FTAs, India has now opened a gateway to ignore the plurilateral commitments in the WTO Agreement and has shifted its focus towards specific commitments. This allows India to take a more targeted approach on what sectors it wants to open on non-discriminatory basis and to whom they open these sectors. Through negotiations, the participating countries can also tweak their own commitments and decide their own level of commitments.

The road ahead

Though the chapter on government procurement has opened the UAE markets for India, there are certain provisions that will be revisited in the future. For now, Dispute Settlement provisions are not applicable on obligations undertaken for government procurement. However, this shall be revisited after 3 years from the date of entry into force of the CEPA.

We must also keep in mind that since India has incorporated government procurement in this FTA, future FTA negotiations will also be impacted. Other countries such as the UK and Customs Unions such as the EU shall also be keen on incorporating government procurement in their FTAs with India. Countries with whom

India already has an FTA, may also demand access to government procurement market in the near future. Under India-Japan CEPA, India had agreed to re-enter into negotiations with Japan, on its request, if India provided market access in government procurement to any other country including its FTA partners. In negotiations with larger trading partners such as the EU, it is essential for India to carefully carve out the obligations under the government procurement chapter as impacts of the same shall be bigger than the CEPA with UAE.

Conclusion

The India-UAE CEPA is the first time India has agreed on specific commitments on government procurement. Though this has opened both Indian and UAE markets, the extent to which they have opened would become clear in the near future. Both the countries have safeguarded their interests, be it the exclusion of constructions projects or pharmaceuticals. The impact of this facilitation of government procurement on India's economy and future negotiations will be keenly watched.

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Trade Remedy News

Trade Remedy actions by India

Product	Country	Notification No.	Date of notification	Remarks
Aluminium foil of thickness ranging from 5.5 micron to 80 micron	China PR	F. No. CBIC-190354/21/2022-TO(TRU-I)-CBEC	13 June 2022	Finance Ministry decides not to impose ADD as recommended by DGTR.
Clear Float Glass	Bangladesh and Thailand	F. No. 6/10/2021-DGTR	29 June 2022	Anti-dumping duty recommended to be imposed
Electrogalvanized Steel	Korea RP, Japan and Singapore	F. No. 6/7/2021-DGTR	27 July 2022	Definitive anti-dumping duty recommended to be imposed
High Tenacity Polyester Yarn	China PR	F.No.7/9/2022-DGTR	27 July 2022	Anti-circumvention investigation initiated for anti-dumping duty
Hydrogen Peroxide	Bangladesh and Thailand	F. No. CBIC-190354/271/2021-TO(TRU-I)-CBEC	22 June 2022	Finance Ministry decides not to impose ADD as recommended by DGTR
Polytetrafluoroethylene (PTFE)	China PR	F. No. CBIC-190354/168/2022-TRU	18 July 2022	Finance Ministry decides not to impose anti-dumping duty as recommended by DGTR
Saccharin	Thailand	F.No. 07/05/2022-DGTR	26 July 2022	Anti-circumvention investigation – CVD, as imposable on goods from China PR, recommended to be imposed on goods from Thailand
Saturated Fatty Alcohols	Indonesia, Malaysia and Thailand	23/2022-Cus. (ADD)	12 July 2022	Amendment in the anti-dumping rates (Rate prescribed for a specific producer)
Styrene Butadiene Rubber	EU, Korea RP and Thailand	F. No. 7/31/2021-DGTR	29 July 2022	Anti-dumping duty recommended to continue after sunset review
Ursodeoxycholic Acid (UDCA)	China PR and Korea RP	F. No. 6/15/2021-DGTR	30 June 2022	Provisional anti-dumping duty recommended

Trade remedy actions against India

Product	Investigating Country	Document No.	Date of Document	Remarks
Fine Denier Polyester Staple Fiber	USA	2022-14898	13 July 2022	Determination that countervailable subsidies were provided above <i>de minimis</i> during 1 January 2020 till 31 December 2020
Frozen Warmwater Shrimp	USA	2022-15850	7 July 2022	ADD - Final results of the administrative review issued
Glycine	USA	2022-14489	7 July 2022	Affirmative preliminary determination of countervailing subsidies issued
Quartz Surface Products	USA	2022-14565	8 July 2022	Preliminary result of anti-dumping administrative review issued
Stainless steel flanges	USA	2022-14792	12 July 2022	Affirmative preliminary determination of countervailable subsidies
Sulfanilic Acid	USA	87 FR 39562	1 July 2022	Sunset reviews of ADD and CVD terminated



WTO News

G20 economies show restraint in use of trade restrictions

As per the 27th WTO Trade Monitoring Report on G20 trade measures issued on 7 July, G20 economies continued to exercise restraint in the use of trade-restrictive measures despite increasing economic uncertainty aggravated by the Covid-19 pandemic and the war in Ukraine. WTO Director-General in this regard called on

G20 countries and the WTO members at large to show that the international community can work together to de-escalate tensions and ensure a solid economic recovery.

Arbitration decision in US-Canada paper dispute circulated

On 13 July, a WTO arbitrator issued its decision on the methodology Canada may use to fix the level of suspension of concessions or other

obligations in the goods sector *vis-à-vis* the United States if, in the future, the US applies countervailing duties on Canadian goods based on a measure found to be inconsistent with the WTO rules. The decision stems from the dispute proceedings in “*United States — Countervailing Measures on Supercalendered Paper from Canada*” (DS505).

Tunisia launches safeguard investigation on iron or non-alloy steel wires for manufacture of furniture springs

On 21 July 2022, Tunisia notified the WTO’s Committee on Safeguards that it has initiated on 19 July 2022 a safeguard investigation on iron or non-alloy steel wires for the manufacture of furniture springs.



India Customs & Trade Policy Update

IGST exemption withdrawn on imports by Research Institutions, Government departments, Laboratories, IIT and Regional Cancer Institutes

The Ministry of Finance has withdrawn exemption from IGST on imports of specified goods by Research Institutions, Government departments, Laboratories, IIT and Regional Cancer Institutes. Imports of scientific and technical instruments, apparatus, equipment including computers, accessories, computer software, etc., are liable to IGST with effect from 18 July 2022. Notification No. 42/2022-Cus., dated 13 July 2022 amends Notification No. 51/96-Cus., for this purpose.

Defence imports – Exemption extended to imports by ‘any entity’

Exemption to import of specified defence equipment for the defence forces has been extended to imports by any other entity. Henceforth, the exemption was available only in respect of imports by Ministry of Defence or the Defence forces, or the Defence Public Sector Units or other Public Sector Unit. The change is

effective from 18 July 2022. Notification No. 19/2019-Cus., has been amended by Notification No. 41/2022-Cus., dated 13 July 2022 for this purpose.

Steel Import Monitoring System (SIMS) – Advance registration abolished

The DGFT has abolished the requirement of advance registration, under SIMS, of minimum 15 days from the expected date of arrival of import consignment of specified products of steel. The revised Policy Condition now only specifies that importer can apply for registration not earlier than 60 days before the expected date. Words ‘and not later than 15 days’ have been omitted by Notification No. 19/2015-20, dated 7 July 2022.

Paper Import Monitoring System (PIMS) clarified

The DGFT has clarified that registration under PIMS is not required in case of DTA clearance of paper from SEZ or EOU provided no processing has taken place of paper that was already registered at the time of import by SEZ/EOU.

DGFT Policy Circular No. 41/2015-20, dated 5 July 2022 also states that in case of processing at SEZ/EOU leading to change in the HS Code at 8-digit level, then the DTA importer will be required to register under PIMS if the new item is covered under the new system.

Open Cells for use in manufacture of LCD and LED TV panels – Exemption during 1 January 2022 till 12 July 2022 clarified

The CBIC has clarified that the benefit of concessional rate of 5% BCD available under Sl. No. 515A of Notification No. 50/2017-Cus. is not to be denied during the period 1 January 2022 till 12 July 2022, to Open Cells for use in manufacture of LCD and LED TV panels. Instruction No. 15/2022-Cus., dated 20 July 2022 issued for the purpose notes that while as per the HSN effective from 1 January 2022, the classification should be Heading 8524, the notification carried the Heading 8529, though the description was correct.

Wheat flour – Export restrictions imposed

The Directorate General of Foreign Trade has revised the export policy of wheat flour (atta) with effect from 12 July 2022. Now, the export of wheat flour (atta) is subject to recommendation of Inter-Ministerial Committee (IMC) on export of wheat. Notification No. 18/2015-20, dated 6 July 2022 also states that the provisions under Para 1.05 of the Foreign Trade Policy, 2015-2020, regarding transitional arrangements, shall not be applicable under this notification. Further, as per DGFT Trade Notice No. 14/2015-20, dated 18 July 2022, for getting required NOC from IMC, the exporter would be required to submit their request in form ANF 2N online. The Trade Notice also clarifies that export of Maida and Samolina remains free without any condition.

Potato imports from Bhutan allowed without licence till 30 June 2023

The DGFT has extended the relaxation to import of potatoes, fresh or chilled (ITC Code 0701 90 00), from Bhutan. As per Notification No. 17/2015-20, dated 4 July 2022, import of potatoes from Bhutan is permitted freely, without any licence up to 30 June 2023. Hitherto, import without any licence was allowed only till 30 June 2022.

Motor gasoline and gas oil, including oils obtained from gas oil – Export conditions introduced

The DGFT has introduced a policy condition in case of export of motor gasoline classifiable under ITC Codes 2710 12 41, 2710 12 42, 2710 12 43, 2710 12 44 and 2710 12 49, and export of gas oil, including oils obtained from gas oil covered under Codes 2710 19 41, 2710 19 44 and 2710 19 49. According to Notification No. 14/2015-20, dated 30 June 2022, the exporter is required to submit a self-declaration to the Customs at the time of export, confirming that 50% of quantity mentioned in the shipping bill will be or has been supplied in the domestic market during the current financial year. However, the condition is not applicable in case of exports to Nepal and Bhutan and by EOU/SEZ unit. Exporters are also required to file quarterly returns to the Ministry of Petroleum and Natural Gas.

Lentils (masur) – Exemption from Agriculture Infrastructure Development Cess extended till 31 March 2023

The Ministry of Finance has extended the nil rate of Agriculture Infrastructure Development Cess (AIDC) on import of lentils (masur) till 31 March 2023. Notification No. 49/2021-Cus. has been amended by Notification No. 44/2022-Cus., dated 23 July 2023.

Cotton not carded or combed – Exemption from BCD and AIDC extended till 31 October 2022

The Ministry of Finance has extended the exemption of Basic Customs Duty and Agriculture Infrastructure Development Cess

(AIDC) on import of raw cotton (not carded or combed), till 31 October 2022. The exemption was earlier available only till 30 September 2022. Notification No. 38/2022-Cus., dated 4 July 2022 amends Notification No. 21/2022-Cus. for this purpose.



Ratio Decidendi

Appeal to High Court against Tribunal order reversing DA's decision of non-continuation of anti-dumping duty after sunset review, maintainable

The Delhi High Court has, in an appeal filed before it, rejected the preliminary objection that appeal to High Court against the Tribunal order reversing Designated Authority's decision of non-continuation of anti-dumping duty after sunset review, is not maintainable. The Court rejected the plea that the appeal was not maintainable, as it concerned aspects veering around 'rate of duty' and its continued imposition, and therefore, an appeal against the impugned order would lie only with the Supreme Court under the provisions of Section 130E(b) of the Customs Act, 1962. The respondent here was also of the view that the sunset review carried out by DA and the decision taken to not continue with the imposition of ADD was an aspect relating to the rate of duty.

Observing that the decision to withdraw anti-dumping duty, while carrying out sunset review, concerns itself with only the impact it would have on the injury suffered by the domestic industry i.e., would it continue or recur, the Court was of

the view that this decision, at least at the stage of review, is not rate-centric.

The High Court in this regard also noted that if one were to simplistically equate trade remedial measures such as ADD with a duty imposed under the Customs Act, 1962, it would result in missing the wood for the trees. The ADD, being a trade remedial measure, in contradiction to the imposition of customs duty, has leeway with regard to the quantum or the rate at which anti-dumping duty may be imposed by the Central Government. [*Directorate General of Trade Remedies v. Jindal Saw – 2022 VIL 525 DEL CU*]

Standardised vanilla extract is classifiable under Heading 1302 and not as extracted oleoresins under Heading 3301

The Court of Justice of the European Union has held that a product consisting of approximately 85% ethanol, 10% water, 4.8% dry residue and having an average vanilla content of 0.5%, which is obtained by diluting in water and ethanol an intermediate product itself extracted from vanilla bean using ethanol, is classifiable under 1302 19 05 of the European Union's Customs

Nomenclature. Rejecting classification under Heading 3301 or 3302, the Court noted that the goods were obtained by technological extraction process and differ from extracted oleoresins (of Heading 3301) as contain ordinarily a far higher portion of other plant substances. The Court in this regard also observed that a diluted vegetable extract can still be classifiable under Heading 1302 as neither the CN/HS nor the Explanatory Notes set a maximum limit on quantities of other products which can be used to standardise the vegetable extract. [*Y GmbH v. Hauptzollamt* – Judgement dated 7 April 2022 in C-668/20, Court of Justice of the European Union]

Vehicle-mounted computers, tablet computers and mobile computers are classifiable under Heading 8471

The Customs AAR has held that vehicle-mounted computers, tablet computers and mobile computers with the principal function of barcode scanning and data processing for monitoring deliveries, tracking assets and managing inventory, are classifiable under Heading 8471 and not under Heading 8517 of the Customs Tariff Act, 1975. The Authority in this regard observed that other functionalities of said machines (communication capabilities) were not different from auxiliary functions that could be seen on any computer, such as desktop or laptop

computers. A classification opinion of the 68th session of the Harmonized System Committee of the WCO, which held to the contrary, was also distinguished by the AAR for this purpose. [In RE: *Brightpoint India Pvt. Ltd.* – 2022 VIL 56 AAR CU]

Populated Printed Circuit Boards for DWDM Equipment-Photonic Service Switch are classifiable under TI 8517 70 10

The CESTAT Mumbai has held that Populated Printed Circuit Boards for DWDM Equipment-Photonic Service Switch is classifiable under Tariff Item 8517 70 10 of the Customs Tariff Act, 1975 as part of machine and not under Tariff Item 8517 62 90 as contended by the revenue department. The department had contended that the goods were having independent function and hence need to be classified along with the main machine under TI 8517 62 70. Considering the product literature, terms of the headings of the Customs Tariff, description of the product given in the bills of entry and the ratio of the judgment in the case of *Modicom Network Pvt. Ltd.* [2005 (185) ELT 333 (Tri-Bang)], the Tribunal was of the view that the goods cannot be held to have independent function themselves. [*Commissioner v. Reliance Jio Infocomm Ltd.* – 2022 VIL 457 CESTAT MUM CU]

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