

## Integrity Pacts and Public Procurement Reform in India: From Incremental Steps to a Rigorous Bid-Protest System<sup>†</sup>

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### Abstract

Integrity Pacts (IPs) have been adopted in a number of countries as an instrument for greater public oversight over possible corruption in government organisations, with application both in defence as well as in civilian purchases. In addition to their anti-corruption objectives, these pacts could also potentially enhance citizen participation in government contracting activities, while allowing dissatisfied bidders a forum in which to protest seemingly arbitrary and unfair agency actions. India has witnessed the introduction of these pacts in its public procurement regulations right since 2006; and with her joining recently as an observer to the plurilateral *Agreement on Government Procurement*, the need for a robust domestic review procedure for bidder grievances assumes an even greater importance. An in-depth examination of Integrity Pacts as legal tools for ensuring greater transparency and competition in the award of government contracts is yet to be conducted in India; and this paper aims to reduce the gap in academic research by undertaking a detailed examination of important dimensions of IPs as implemented in India. After a short analysis, it concludes with suggestions for strengthening and for transforming the IP mechanism into a tool for effective, comprehensive and independent oversight of domestic public contract-award decisions.

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## I. Introduction

Availability of *Domestic Review Procedures*—timely and effective administrative or judicial fora where bidders can challenge contract-award decisions of public procuring agencies on grounds of alleged lack of fairness or non-compliance with procurement rules—have been a significant component of international frameworks on transparency in public procurement. Known also as *bid-challenge* or *bid-protest* procedures, these find important mention both in the plurilateral *Agreement on Government Procurement (GPA)*<sup>1</sup> and in the UNCITRAL's (United Nations Commission on International Trade Law) *Model Law on Procurement of Goods, Construction and Services*,<sup>2</sup> as well as in expert academic literature on the subject.<sup>3</sup> In particular, the GPA requires member-states to set up non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge suspected breaches of explicit or implicit duties of fair and equal treatment.<sup>4</sup> Such challenges are required to be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement; and the members of such a review body need to be secured from external influence during their term of appointment.<sup>5</sup> Article XVIII of the *Revised Text*<sup>6</sup> requires the setting-up of timely, effective, transparent, and non-

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<sup>1</sup> World Trade Organisation (WTO), *Agreement on Government Procurement* (1996), Article XX (Challenge Procedures), available at [http://www.wto.org/english/docs\\_e/legal\\_e/gpr-94\\_02\\_e.htm](http://www.wto.org/english/docs_e/legal_e/gpr-94_02_e.htm).

<sup>2</sup> United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment* (1994), available at <http://www.uncitral.org/pdf/english/texts/procure/ml-procurement/ml-procure.pdf>. Particular attention is invited to Chapter VI of the Text (Articles 52-57) and Chapter VI of the "Guide to Enactment."

<sup>3</sup> Daniel I. Gordon, *Constructing a Bid-Protest Process: Choices Every Procurement Challenge System Must Make*, 35 Pub. Cont. L.J. 3 (2006); see also Sue Arrowsmith, John Linarelli, & Don Wallace, Jr., *Regulating Public Procurement: National and International Perspectives*, Kluwer Law International (2000), Chapter 12, "Enforcement and Remedies."

<sup>4</sup> WTO, *supra* note 1, Article XX(1).

<sup>5</sup> *Id.*, Article XX(6). Further, a review body which is not a court shall either be subject to judicial review or shall have procedures which provide that (1) participants can be heard before an opinion is given or a decision is reached; (2) participants can be

discriminatory administrative or judicial review procedures; with largely similar obligations for domestic review bodies, and for the availability of rapid interim measures and options for corrective action.

On its part, India has hitherto been generally reluctant to formally introduce independent review procedures for challenge of government contract-award decisions,<sup>7</sup> over and above the opportunities already available to bidders to make representations before the appropriate administrative authority of the purchasing Ministry/department in case they feel that a proper procurement process is not being followed and/or their tenders have been rejected wrongly.<sup>8</sup> This followed a collective sense amongst developing countries that developed countries (as existing parties to the GPA) were merely interested in greater market access,

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represented and accompanied; (3) participants shall have access to all proceedings; (4) proceedings can take place in public; (5) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions; (6) witnesses can be presented; and (7) documents are disclosed to the review body. In addition, Article XX(7) requires that Challenge procedures to provide for: (1) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities; (2) an assessment and a possibility for a decision on the justification of the challenge; and (3) correction of the breach of the Agreement or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

<sup>6</sup> WTO, *Revision of the Agreement on Government Procurement as at 8 December, 2006* (2006), available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDdocuments/t/PLURI/GPA/W297.doc>.

<sup>7</sup> See generally, Anwarul Hoda & Suchi Bansal, *Transparency and Government Procurement* 3, 52-54 (ICRIER Working Paper No. 129, 2004), available at <http://www.icrier.org/pdf/wp129.pdf>; Bisweswar Bhattacharyya, *Transparency in Government Procurement in the Context of The Doha Development Agenda*, in UNESCAP, *The Doha Development Agenda: Perspectives from the ESCAP Region* 134-135 (2003), available at [http://www.unescap.org/tid/publication/chap7\\_2278.pdf](http://www.unescap.org/tid/publication/chap7_2278.pdf).

<sup>8</sup> Government of India (GoI), *Manual on Policies and Procedures for Purchase of Goods* para. 11.12, at 95-96 (2006), available at [http://finmin.nic.in/the\\_ministry/dept\\_expenditure/GFRS/MPProc4ProGod.pdf](http://finmin.nic.in/the_ministry/dept_expenditure/GFRS/MPProc4ProGod.pdf). Definition of "goods" under this manual appears to exclude services and public works, see para. 1.4 at 5.

without concomitant reciprocal benefits either in the context of the GPA itself or by providing suitable concessions in other WTO agreements.<sup>9</sup> Some of India's market access concerns continue to remain unresolved in ongoing negotiations of bilateral free trade agreements between India and some other countries and trading blocs in so far as proposals on government procurement are concerned;<sup>10</sup> but India's current negotiating strategy appears to be oriented towards increasingly active engagement,<sup>11</sup> as signalled through her admission as an "Observer" to the GPA on February 10<sup>th</sup>, 2010.<sup>12</sup> Should India choose to seek formal entry into the GPA as a party to this agreement, it may become important for her to present an efficient and credible domestic review procedure as a condition precedent to such entry.

Yet another occasion for India to move forward could come out of the proposed modifications to procurement guidelines of The World Bank, which are expected to be made applicable shortly for all Bank-financed

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<sup>9</sup> GoI, *Why India is opposing negotiations on new issues* (November 7, 2001), available at [http://commerce.nic.in/pressrelease/pressrelease\\_detail.asp?id=771](http://commerce.nic.in/pressrelease/pressrelease_detail.asp?id=771); see also The Federal Trust, *Expanding WTO Rules: Should there be WTO Rules on competition, investment, trade facilitation and transparency in government procurement?* 21 (2003), available at <http://www.fedtrust.co.uk/admin/uploads/FedT%20-%20Sing%20Issues%20Report.pdf>; and CUTS, *Transparency in Government Procurement* para. II, at 1 (2004), State of Play—Issue Paper No. 9, available at <http://www.cuts-international.org/CUTS-TGP.pdf>.

<sup>10</sup> See, e.g., Amiti Sen, *India to keep EU-Japan out of government procurement*, The Economic Times, May 8, 2010, available at <http://economictimes.indiatimes.com/news/economy/foreign-trade/India-to-keep-EU-Japan-out-of-govt-procurement/articleshow/5904901.cms>; Asit Ranjan Mishra, *India reluctant to relent on greater market access to EU*, The Mint, February 4, 2010, available at <http://www.livemint.com/2010/02/04224938/India-reluctant-to-relent-on-g.html>.

<sup>11</sup> K. G. Narendranath, *Foreign Firms could get access to government contracts*, Financial Express, November 3, 2009, available at <http://www.financialexpress.com/news/foreign-firms-could-get-access-to-govt-contracts/536335/>.

<sup>12</sup> See WTO, *Parties and Observers to the GPA*, [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm#memobs](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#memobs), (last visited May 29, 2010).

projects.<sup>13</sup> These proposed modifications include new requirements for borrowing countries to ensure that an effective and independent bid-protest process, capable of handling bidder complaints in a timely manner, is in place when borrowers undertake national competitive bidding.<sup>14</sup> This change in the Bank's procurement framework is of immense relevance for India and would require her to put in place efficient review procedures, even if she were to negotiate permissible exceptions and delayed operationalisation for developing countries that are available under the GPA.<sup>15</sup> Should the Bank's proposals on its procurement guidelines be implemented without changes, they are also likely to have a significantly *deeper* impact on the Indian public procurement system

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<sup>13</sup> The World Bank (WB), *Guidelines Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits by World Bank Borrowers-Draft March 2010* (2010), available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProposalRevisionPRGLsMarch2010trackmode.pdf>.

<sup>14</sup> *Id.*, Revised para. 3.4.

<sup>15</sup> Article V of the GPA contains provisions for special and differential treatment for developing countries, which remains largely unchanged in Article IV of the *Revised Text*. However, these exceptions are tailored to specific circumstances, and it is unlikely that an exception to the availability of domestic review mechanisms will be easily accepted by GPA member-states. For instance, in the case of China's accession to the GPA, the availability and nature of bid-protest systems have continued to remain a key demand from GPA member-states. Domestic Review Procedures thus remain a key area of trade negotiations on the GPA; see, for example, Robert D. Anderson, *The WTO Agreement on Government Procurement (GPA): The Process for Accession to the Agreement and Related Issues and Developments* para. C at 3-5 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1136357](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136357); Christopher R. Yukins, *Promises to keep: Bid Challenges and China's Accession to the WTO Government Procurement Agreement* para. B at 3-12 and 3-13 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1136357](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136357); Dr. Ping Wang, *China's Government Procurement Policy at the Crossroad* (2008), available at [http://www.nottingham.ac.uk/pprg/documents/fulltextarticles/ping\\_wang\\_-\\_policy\\_paper\\_on\\_china\\_s\\_gpa\\_accession\\_dec\\_2008.pdf](http://www.nottingham.ac.uk/pprg/documents/fulltextarticles/ping_wang_-_policy_paper_on_china_s_gpa_accession_dec_2008.pdf); APEC, *GPEG Non-Binding Principles on Government Procurement* para. 66, [http://www.apec.org/apec/apec\\_groups/committee\\_on\\_trade/government\\_procurement/resources/overview.MedialibDownload.v1.html?url=/etc/medialib/apec\\_media\\_library/downloads/committees/cti/pubs/2003.Par.0003.File.v1.1](http://www.apec.org/apec/apec_groups/committee_on_trade/government_procurement/resources/overview.MedialibDownload.v1.html?url=/etc/medialib/apec_media_library/downloads/committees/cti/pubs/2003.Par.0003.File.v1.1).

as compared to the GPA, since a majority of World Bank loans are directed towards project proposals formulated and implemented by state governments in India.

Existing complaint procedures in India generally require proof of criminal behaviour on part of government officials in award of government contracts, and the only other options for disappointed bidders are either to pursue remedies by complaining to government departments themselves, or to bring in litigation before courts.<sup>16</sup> While the first option may not be entirely impartial and independent; the second option—that of seeking a judicial review—can suffer from protracted litigation and high costs<sup>17</sup> that make it a rather unattractive forum in which to pursue complaints against contract-award decisions of public entities. In addition,

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<sup>16</sup> For a more detailed description of remedies and enforcement issues in public procurement, see Asian Development Bank (ADB)/ Organisation for Economic Co-operation and Development (OECD), *Anti-Corruption Policies in Asia and the Pacific: Thematic Review on provisions and practices to curb corruption in public procurement—Self-assessment report India* para. 29-30, available at <http://www.oecd.org/dataoecd/51/7/36759785.pdf>. See also Legalink, *Public Procurement Law: Guidelines for Contracts with Public Authorities* para. 14, at 121 (2009), available at <http://www.legalink.ch/xms/files/Publications/Legalink-Public-Procurement-Law-3rd-edition-final.pdf>; Amit Kapur & Vishnu Sudarshan, *India*, in Global Legal Group, *The International Comparative Legal Guide to Public Procurement 2010* para. 5, at 129-130, available at <http://www.iclg.co.uk/khadmin/Publications/pdf/3336.pdf>; Sumeet Kachwaha, *India: Public Procurement* para. 35-44 (2009), available at <http://www.mondaq.com/article.asp?articleid=80200>; GoI, *supra* note 8, para. 11.12, at 95-96; Transparency International (TI), *National Integrity Systems: Country Study Report-India 2003* 74-85 (2004), available at <http://www.transparency.org/content/download/1652/8377/file/india.pdf>.

<sup>17</sup> Sunil Sondhi, *Combating Corruption in India: Role of the Civil Society* 12 (2000), available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019103.pdf>. See also International Finance Corporation, *Doing Business 2010 India* 40 (Enforcing Contracts), <http://www.doingbusiness.org/Documents/CountryProfiles/IND.pdf>. See also, Michael Gasiorek & Others, *Qualitative Analysis of a Potential Free Trade Agreement between the European Union and India-Annex 3-Regulatory Issues* para. 1.1.1, at 8 (2008), available at <http://www.cuts-citee.org/pdf/EU-IndiaStudyAnnex3May01.pdf>.

there is a lack of procedural clarity and finality in decisions on complaints: these could be made simultaneously to various administrative levels within the procuring entity, or to a designated Chief Vigilance Officer (CVO), the concerning administrative department or directly to the Finance Ministry, in addition to other political executives such as the Minister concerned. Both in theory and in practice, each one of these offices could start independent assessments and reach widely differing conclusions: a situation that can be somewhat cumbersome.<sup>18</sup> External oversight bodies suffer from similar jurisdictional overlaps and apparent lack of finality: the Central Vigilance Commission (CVC) can make recommendations at best in cases of corruption; the Central Bureau of Investigation (CBI) conducts its own criminal investigations requiring conviction in a court of law; while the office of the Comptroller and Auditor General (CAG) conducts mostly post-hoc audits with non-binding observations that are placed before the Public Accounts Committee of the Indian Parliament.<sup>19</sup>

There is, however, a recent, and a comparatively more focussed alternative that now is available to dissatisfied bidders in the context of public procurement in India, namely, the “Integrity Pact” (IP). IPs were autonomously introduced as an incremental oversight and anti-corruption tool in the year 2006 into the Indian public contracting scenario; and they may constitute the *first*, if not the most efficient, forum for bidders to bring in complaints regarding agency procurement decisions. This paper attempts to examine the relevant regulatory position in India, together with a detailed examination of the provisions of an IP itself, in order to ascertain the suitability of the IP mechanism as a GPA-compliant “Domestic Review Procedure”; and to see what, if any, modifications may be required to this oversight scheme so as to strengthen India’s chances of eventual success in her GPA negotiations.

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<sup>18</sup> See, e.g., Sandeep Verma, *E-Buying: The Works*, The Economic Times, February 2, 2006.

<sup>19</sup> For an illustrative list of government offices involved in accountability and anti-corruption efforts, see OECD, *Implementing the Anti-Corruption Action Plan for Asia-Pacific: Reforms and Anti-Corruption Resources India 1* (2008), available at <http://www.oecd.org/dataoecd/8/0/40528776.pdf>.

## II. A Brief Outline and History of Integrity Pacts

The “Integrity Pact” (IP) was designed and launched by Transparency International in the 1990s with the primary objective of safeguarding public procurement from corruption by building transparency into the procurement system.<sup>20</sup> It is a voluntary pact between the public buyer (sometimes referred to as the “Principal”) and the seller(s) (bidders and contractors) to eliminate corrupt practices, and helps to build public trust in government contracting.<sup>21</sup> Key elements of the IP include:<sup>22</sup>

- (1) A pact between the public buyer—the public entity inviting public tenders for supply, construction/public works, consultancy or other service contract, including government licenses or concessions—and those companies submitting a tender in response to such an invitation;
- (2) An undertaking by the Principal that its officials will not demand or accept any bribes, gifts, *etc.*, with appropriate penalties for violation; and that its actions will be fair<sup>23</sup> and free from bias;<sup>24</sup>

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<sup>20</sup> UN-HABITAT, *Tools to Support Transparency in Local Governance* para. 2.19, at 96 (2004), available at <http://ww2.unhabitat.org/publication/TOOLKITGOVERNANCE.pdf>.

In some countries, the Integrity Pact did not include anti-corruption commitments, and the latter set of promises formed a separate set of documents as a “*Declaration of Payments*,” see, for instance, Transparencia por Columbia & Transparency International, *An Independent Review of the procurement of Military Items and the Use of Integrity Pacts in those Contracts* para. 2.3, at 3 (2006), available at <http://www.defenceagainstcorruption.org/publications/all-publications/2006/65-defence-procurement-and-integrity-pacts-in-colombia-report-1/download>.

<sup>21</sup> Transparency International India (TII), *Presentation on Integrity Pact Programme* (September 2009), available at [http://www.transparencyindia.org/Presentation on Integrity Pact.ppt](http://www.transparencyindia.org/Presentation%20on%20Integrity%20Pact.ppt).

<sup>22</sup> UN-HABITAT, *supra* note 20, at 97.

<sup>23</sup> Transparency International UK (TI-UK), *Integrity Pacts: The Experience So Far* 6 (2004), available at <http://www.defenceagainstcorruption.org/publications/all-publications/2004/81-integrity-pact-experience-so-far-concept-model-and-current-application/download>.

<sup>24</sup> The promise to follow an *unbiased approach* in contractor selection on part of the buyer, distinct from *lack of corruption* in such selection, is an important aspect of buyer’s obligations in Indian IPs.



- (3) An undertaking by the bidders that they have not paid/will not pay bribes *etc.*, with appropriate criminal and contractual penalties; and
- (4) An undertaking by each bidder to disclose all payments made in connection with the contract.

The IP mechanism also encourages the institutionalisation of a “Company Code of Conduct” (CCOC) amongst private companies, together with the incorporation of corporate regulations to protect any insiders reporting corruption. Amongst bidders submitting such CCOCs, companies with outstanding compliance programmes are to be given positive points at the time of comparative bid-evaluation.<sup>25</sup> Another key element of the IP mechanism is the appointment of independent external monitors (IEMs) as “Ombudsmen” to review, inspect and monitor various aspects of the procurement process such as formulation of project proposals, bidding processes, contract-award, and inspections at the time of construction. IEMs are expected to organise public hearings at different stages of procurement, and demand corrective measures or audits on issues affected by unjust practices;<sup>26</sup> the latter set of functions transforming the institution of the IEM as the functional equivalent of a formal bid-protest system. Another key aspect of an IP is the added transparency through greater inputs from the public and civil society, enhancing confidence in the process.<sup>27</sup>

In essence, the IP mechanism thus performs three essential functions in the public procurement process: (1) As an *anti-corruption tool* for the government, by casting suitable responsibilities on the buyers and the sellers; (2) As a *bid-protest tool* for dissatisfied bidders, by embedding

<sup>25</sup> TII, *Integrity Pact*, [http://www.transparencyindia.org/integrity\\_pact.htm](http://www.transparencyindia.org/integrity_pact.htm) (last visited May 25, 2010). Indian IPs, however, do not contain any clauses operationalising this element granting preferences to bidders with CCOCs in place.

<sup>26</sup> *Id.* Once again, Indian implementations do not contain any provisions to operationalise the “public hearing” component of the IP mechanism.

<sup>27</sup> Mark Pyman, *Building Integrity and Reducing Corruption Risk in Defence Establishments: Ten Practical Reforms* 36 (Transparency International, 2009), available at <http://www.defenceagainstcorruption.org/publications/all-publications/2009/15-building-integrity-and-reducing-corruption-risk-in-defence-establishments-ten-practical-reforms/download>.

provisions regarding fair evaluation of bids; (3) As a *dispute-resolution tool* for the contractor at the contract-administration stage; and (4) As an *advocacy tool* for greater citizen participation, by allowing members of the public to closely observe the procurement process at various stages. It is the role of an IP as a bid-protest tool that is the focus of this research paper, while outlining most, if not all, legal dimensions of Integrity Pacts in India. The analytical frame of reference adopted in this paper for the purposes of examining the strengths of the IP mechanism, in so far as the bid-protest dimension is concerned, is the one proposed by Dan Gordon<sup>28</sup> in one of his authoritative works on the subject, where he identifies the following critical elements of an efficient bid-protest process: (1) location and perceived independence of the protest forum; (2) the extent of its vertical and horizontal jurisdiction; (3) authority of the protest forum to enforce its decisions/recommendations and to provide meaningful relief, including temporary hold or stay of the procurement decision during the pendency of a complaint; and (4) publication of decisions of the reviewing authority.

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<sup>28</sup> See, generally, Daniel I. Gordon, *Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make*, 35 Pub. Cont. L.J. No. 3 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=892781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892781).

<sup>29</sup> Transparency International Korea (TIK), *Survey on Integrity Pacts in the Public Sector para. 1*, at 3 (2003), available at <http://www.defenceagainstdisruption.org/publications/all-publications/2003/89-survey-on-korean-experience-of-integrity-pacts-in-the-public-sector/download>.

<sup>30</sup> TI-UK, *Defence Integrity Pacts* (2007), available at <http://www.defenceagainstdisruption.org/publications/all-publications/2007/30-defence-integrity-pacts/download>.

<sup>31</sup> Defence Against Corruption (DAC), *Defence Integrity Pacts*, <http://www.defenceagainstdisruption.org/tools-and-techniques/defence-integrity-pacts?task=view> (last visited May 11, 2010).

<sup>32</sup> TI-UK, *Application of Integrity Pacts (IPs) in the Public Sector in Mexico – How They Work para. 1*, at 1 (2006), available at <http://www.defenceagainstdisruption.org/publications/all-publications/2006/58-application-of-integrity-pacts-in-the-public-sector-in-mexico-how-they-work/download>.

<sup>33</sup> TI-UK, *Experiences of Integrity Pacts in Latin America para. 2* (2006), available at <http://www.defenceagainstdisruption.org/publications/all-publications/2006/61-experience-of-integrity-pacts-in-latin-america/download>.

<sup>34</sup> *Id.*, para. 3.

IPs appear to have been developed in the mid 1990s by Transparency International to increase transparency in the public sector, although the first documented use appears to be in 1999 in local/district offices in South Korea.<sup>29</sup> Over a period of time, they have been adopted in various formats in Argentina, Columbia, Germany, Chile, Italy,<sup>30</sup> Poland, Latvia,<sup>31</sup> Mexico (since 2002),<sup>32</sup> Peru,<sup>33</sup> Ecuador,<sup>34</sup> Pakistan, and in Nepal.<sup>35</sup> The introduction of IPs in the defence sector in India began with the promulgation of Defence Procurement Procedure—2006, where IPs were made mandatory in purchases of defence capital equipment above a specified financial threshold. A year earlier, ONGC Limited—a central government supported corporation active in the oil and gas exploration sectors—had become the first government organisation in India to adopt the IP in civilian purchases.<sup>36</sup> Later, pursuant to a recommendation made by the 2<sup>nd</sup> Administrative Reforms Commission,<sup>37</sup> the Central Vigilance Commission in India applied the IP mechanism in December 2007 to purchases by government organisations, essentially the central public sector units (CPSUs), which are autonomous and usually corporate bodies under the government.

IPs are stated to reduce corruption and enhance transparency in the public procurement process, as noted in research originating from Transparency International and its various national chapters.<sup>38</sup> But enquiries into effectiveness of the IP mechanism have not really been of an independent nature, and assertions of significant savings as a result of introduction of IPs<sup>39</sup> appear to be largely anecdotal, unverified by rigorous

<sup>35</sup> TI-UK, *Integrity Pact Experience So Far: Concept, Model and Current Application* 14 (2004), available at <http://www.defenceagainstcorruption.org/publications/all-publications/2004/81-integrity-pact-experience-so-far-concept-model-and-current-application/download>.

<sup>36</sup> TII, *National Workshop on Integrity Pact 1* (2010), available at <http://www.transparencyindia.org/Minutes%20-%20National%20Workshop%20on%20Integrity%20Pact%2023%20Jan%202010.pdf>.

<sup>37</sup> 2<sup>nd</sup> Administrative Reforms Commission (2ARC), *4<sup>th</sup> Report on Ethics in Governance Recommendation#6.6.4(a)*, at 143 (2007), available at <http://arc.gov.in/4threport.pdf>.

<sup>38</sup> A representative list of reports and papers on the subject, published under the aegis of TI, is available at <http://www.defenceagainstcorruption.org/publications>, the website of “Defence Against Corruption,” a TI programme.

<sup>39</sup> TII, *supra* note 25 (on the impact of adoption of Integrity Pacts in Pakistan).

academic research. At least in one case in Germany, efforts to introduce an IP in the construction of a public airport were rejected by officials as unnecessary, even though IPs were subsequently implemented in the railways and in other areas.<sup>40</sup> User feedback from consultations in India reveals a complicated, if not confusing picture, with respect to benefits of IPs, with stakeholder comments ranging from, *inter alia*: (1) a complete lack of complaints from bidders<sup>41</sup> (more specifically, their lack of participation, implying little value-addition to the process); (2) lack of civil society monitoring<sup>42</sup> (pointing to the absence of one of the critical elements of the IP mechanism); (3) the impracticality of requiring bidders to obtain integrity commitments from their sub-contractors in place before submitting their bids;<sup>43</sup> (4) lack of informed exchanges between IEMs<sup>44</sup> (a situation which would hamper growth of common law principles); (5) delays in grievance-redressal, on account of IEM review panels being located at multiple venues;<sup>45</sup> (6) a clear and persistent danger of the IP being reduced to a mere administrative procedure instead of being part of the overall anti-corruption strategy;<sup>46</sup> and (7) improved vendor satisfaction and lowered costs of procurement.<sup>47,48</sup> One thread of consistent and unanimous discussion in these consultations has been the need for an in-depth study of the IP mechanism,<sup>49</sup> a gap that this research paper aims to reduce by undertaking a review of legal dimensions of the IP

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<sup>40</sup> TI-UK, *supra* note 35, at 14-15.

<sup>41</sup> TII, *Round Table Meeting on Strengthening Integrity Pact* (2010), available at <http://www.transparencyindia.org/Minutes%20of%20Round%20Table%20Meeting%20on%20Strengthening%20IP%2017%20Feb%202010.pdf>

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> TII, *supra* note 36, at 6.

<sup>45</sup> *Id.*, at 10.

<sup>46</sup> TII, *Implementation of Integrity Pact in CPSUs* (2009), available at [http://www.transparencyindia.org/pdf/integrity\\_pact/experiences-integrity.pdf](http://www.transparencyindia.org/pdf/integrity_pact/experiences-integrity.pdf).

<sup>47</sup> *Id.*

<sup>48</sup> A survey on Integrity Pacts in the public sector in Korea yielded similar apprehensions about the effectiveness of the mechanism, such as: (1) IPs being reduced to a mere formality; (2) doubtful influence of punitive provisions on corruption levels; and (3) little encouragement of bidder ethics; see TIK, *supra* note 29, para. IV.1 to IV.7, at 17-19.

<sup>49</sup> See, e.g., TII, *supra* note 36, at 7; TII, *supra* note 41, at 2.

mechanism in India and an analysis of its strengths and deficiencies with a view to fine-tune this instrument.

### III. Legal Dimensions of IPs in India

#### A. Coverage and Applicability

##### 1. Institutional and Sectorial Applicability

Civilian IPs in India apply to all major procurements of government organisations right since 2007, when the CVC initially recommended their adoption and implementation.<sup>50</sup> However, the terms “major” and “government organisations” itself were not defined by the CVC in its first Office Memorandum (OM) on the subject. From a close reading of the regulatory language, it appears that the CVC had intended its recommendations to be adopted only by Public Sector Units (PSUs), Public Sector Banks (PSBs), public insurance companies and financial institutions, since in one of its subsequent OMs,<sup>51</sup> it limits itself to PSUs while discussing the norms for appointment of IEMs.<sup>52</sup> Also, by this OM dated August 5<sup>th</sup>, 2008, the CVC ended up exempting PSBs, public insurance companies and financial institutions from the need of adopting an IP. The CVC’s latest OM dated May 18<sup>th</sup>, 2009 also refers to major Government Departments/organisations,<sup>53</sup> without clearly defining neither “major” nor “organisation”, although there is some idea about what may constitute a “major” procurement as will be explained in a latter section of this paper. A closer examination reveals, yet again, the CVC’s intent to cover PSUs alone, since it limits itself to such public entities while discussing the terms and conditions of appointment of IEMs.<sup>54</sup> As on date, a total of 39 important Central PSUs have adopted

<sup>50</sup> Central Vigilance Commission (CVC), *Office Order No. 41/12/07 Dated December 4<sup>th</sup>, 2007*, <http://cvc.nic.in/41122007.pdf>.

<sup>51</sup> CVC, *Circular No. 24/8/08 Dated August 5<sup>th</sup>, 2008*, <http://cvc.nic.in/008vgl00108.pdf>.

<sup>52</sup> CVC, *supra* note 51, para. 2(iv) and (v).

<sup>53</sup> CVC, *Circular No. 10/5/09 Dated May 18<sup>th</sup>, 2009*, <http://cvc.nic.in/008crd013210509.pdf>.

<sup>54</sup> CVC, *supra* note 53, para. 5.02, 5.03, 5.06 and 5.07.

the IP in their procurement activity;<sup>55</sup> and all of these PSUs are engaged in civilian (non-defence) sectors.

In so far as defence procurement is concerned, the Defence Procurement Procedure - 2006 (DPP-06) made an IP compulsory for all capital procurement schemes above Rs. 100 crores.<sup>56</sup> This pact was made equally applicable to capital procurements under fast-track procedures<sup>57</sup> while relaxing other contract formation procedures.<sup>58</sup> The scheme was continued in the 2008 edition of the Defence Procurement Procedure (DPP-08) with the modification that defence PSUs (DPSUs) were made exempt from signing an IP, but they were nevertheless required to enter into IPs with their sub-contractors for sub-contracts exceeding Rs. 20 crores.<sup>59</sup> The IP is equally applicable to *revenue* procurements in the Ministry of Defence, right since the issue of Defence Procurement Manual – 2006<sup>60</sup> to the current 2009 edition,<sup>61</sup> but DPSUs do not appear to be exempt from the signing of an IP unlike the case with capital procurements. A recent government memorandum issued by the Government of India<sup>62</sup> advocated the adoption of IPs in procurements undertaken by State Public Sector Enterprises (PSEs), but IPs are yet to

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<sup>55</sup> TII, *List of PSUs who have adopted Integrity Pact*, [http://www.transparencyindia.org/list\\_psu\\_mou.htm](http://www.transparencyindia.org/list_psu_mou.htm) (last visited May 3, 2010). CVC's website does not contain details of government organisations that have adopted the IP mechanism into their procurement processes.

<sup>56</sup> Ministry of Defence (MoD), *Defence Procurement Procedure – 2006* para. 61, at 21, [http://www.buylawsindia.com/DPP%20\(2006\).pdf](http://www.buylawsindia.com/DPP%20(2006).pdf).

<sup>57</sup> *Id.*, para. 31 at 195.

<sup>58</sup> The *Defence Procurement Procedure - 2006* or its later editions do not cover procurement of medical equipment or procurements by the Defence Research and Development Organisation (DRDO), the Ordnance Factory Board (OFB), and by Defence PSUs (DPSUs). The latter three organisations are permitted to follow their own procedures for procurement; see MoD, *supra* note 56, para. 3 at 6.

<sup>59</sup> MoD, *Defence Procurement Procedure – 2008* para. 18.1, at 108, [http://www.buylawsindia.com/DPP%20\(2008\).pdf](http://www.buylawsindia.com/DPP%20(2008).pdf).

<sup>60</sup> MoD, *Defence Procurement Manual – 2006* para. 10.13.1, <http://www.buylawsindia.com/DPM2006.pdf>. Unlike the case with capital procurement, it appears that these regulations governing revenue procurements also apply to the OFB (see para. 1.14 and 1.15).

<sup>61</sup> MoD, *Defence Procurement Manual – 2009* para. 10.13.2, at 11, <http://www.buylawsindia.com/DPM2009.pdf>.

be approved by any of the state governments in India.<sup>63</sup> Accordingly, IPs currently do not cover procurements by State PSEs or by any other state entities, including state government departments.

## 2. *Extension of IPs to Sub-Contracts*

The SAIL IP—a *Model IP* advocated by the CVC—requires the prime contractor to demand from all sub-contractors a commitment similar to the main IP, and to submit it to the Principal at the time of contract-signing;<sup>64</sup> but it is unclear whether the prime contractor is required to merely submit an *undertaking* to demand such commitment from its sub-contractors at the time of contract-signing, or if the prime contractor is required to submit *actual* commitments from *known* sub-contractors at

<sup>62</sup> Department of Personnel & Training, *Letter No. 372/13/2009-AVD-III Dated June 16<sup>th</sup>, 2009* para. 4,

[http://www.transparencyindia.org/pdf/integrity\\_pact/dp\\_t\\_for\\_states.pdf](http://www.transparencyindia.org/pdf/integrity_pact/dp_t_for_states.pdf). Interestingly, this department does not have any legal authority over public procurement either at the federal or the state level. This letter acknowledged that the Government of India was yet to conduct any study of the effectiveness of IPs already implemented—the suggestion for an IP in states was based on a recommendation made by the Second Administrative Reforms Commission (2ARC) in its 4<sup>th</sup> Report on “Ethics in Governance” [2ARC, *supra* note 37, Recommendation#6.6.4(a) at 143]. A closer scrutiny of this report, however, reveals that the recommendation came with a caveat, namely, *that the Ministry of Finance (Government of India) was to constitute a task force with representatives of the Ministries of Law and Personnel to identify the types of transactions requiring such pacts and to provide for a protocol for entering into such a pact. It was required, in particular, to recommend whether any amendment in the existing legal framework, such as the Indian Contract Act and the Prevention of Corruption Act, was required to make such agreements enforceable [emphasis added]*. It appears that no such task force has been constituted, and that therefore, this letter appears to have been issued without following the procedural formalities required by the 2ARC itself as recorded in its recommendation.

<sup>63</sup> The federal structure in India does not permit automatic application of rules and regulations on public procurement framed by the Central Government to state procurement activities. Under Article 299 of the Indian Constitution, states are free to regulate their own government contracts, subject to constitutional protections of fairness and equality.

<sup>64</sup> Steel Authority of India Limited (SAIL), *Integrity Pact* sectionsection6(1) and 6(2), at 3, <https://www.sailtenders.co.in/dynamicpages/linkpages/FileDP270717.pdf>.

the time of contract-signing. If the former interpretation is correct, then it appears that specific timeframes have not been mandated under the IP system for the prime contractor to submit actual evidence of such commitments from all its sub-contractors, whether known at the time of contract-signing *or* from those selected subsequently.

In some cases, however, CPSUs appear to have exempted sub-contractors from the purview of IPs due to operational difficulties;<sup>65</sup> although a complete list of such government organisations is not available. It is also interesting to note that the model IP expects *all sub-contractors* to sign an IP with the prime contractor prior to bidding, *irrespective of the value of the sub-contract*, whereas the IP between the Principal and the bidders is required to be signed by a prime contractor/bidder only if the main procurement contract is above a certain threshold value. This requirement for the prime contractor to obtain IP-like commitments from its sub-contractors, either before or after contract-signing, is absent in defence IPs.

### 3. Coverage by Contract Value

The initial OM dated December 4<sup>th</sup>, 2007,<sup>66</sup> while advising the adoption of IPs in “major” government procurement activities, did not specify this term; and this definitional ambiguity continued even in the subsequent OM dated August 5<sup>th</sup>, 2008.<sup>67</sup> In the latest OM dated May 18<sup>th</sup>, 2009, the CVC at one instance specifies that the threshold (monetary) value for the contracts to be covered through an IP should be fixed so as to cover 90-95% of the total procurements of the organisation,<sup>68</sup> which implies that even low-value procurements could be required to be brought under IP coverage. At another instance in this OM, however, the CVC states that “...apart from *high value* contracts (*emphasis added*), any contract involving complicated or serious issues could be brought within the ambit of an IP...”,<sup>69</sup> implying that generally speaking, only high value contracts are meant to be covered by IPs.

<sup>65</sup> TII, *supra* note 41.

<sup>66</sup> CVC, *supra* note 50.

<sup>67</sup> *Id.*

<sup>68</sup> CVC, *supra* note 53, para. 3.02.

<sup>69</sup> *Id.*, para. 3.03.



This lack of a clear-cut monetary threshold has meant that different PSUs have set different limits above which they apply the IP concept. The ONGC, for instance, has set a threshold limit of Rs. 1 crore only (which appears rather too low as compared to the defence counter-part figure of Rs. 100 crore); whereas the HPCL has set this limit at Rs. 10 crore.<sup>70</sup> The latter agency appears to follow a rotational “roster” system for application of the IP, but no further information is publicly available regarding the exact manner of its application.<sup>71</sup> The NDMC also has a limit starting at Rs. 10 crore,<sup>72</sup> but this limit implies that only about 50% of all contracting activity is covered under the IP, against the minimum 90% mandated by the CVC. As for defence procurements, the DPP-06 and DPP-08 allowed a bidder to submit a certificate in lieu of an IP, in case his commercial offer was below the Rs. 100 Crore limit;<sup>73</sup> but this exemption has now been done away with and IPs are mandatory for a scheme exceeding Rs. 100 crore, irrespective of the actual commercial offers made at the time of bidding.<sup>74</sup>

#### 4. *Contract Types Covered*

As stated elsewhere, the DPP covers capital procurement excluding medical equipment, while the DPM covers revenue procurement in the nature of equipment, stores and services acquisition.<sup>75</sup> Public works in the nature of construction of defence facilities are however not covered by either the DPP or the DPM; and sales of store items are similarly not covered. Hence, application of the mandatory IP clause in the defence sector appears to be limited to pure “purchase” contracts including leasing of equipment and stores, but excluding public works contracts, immovable property leases, contracts for purchase of medical equipment, and suchlike.

<sup>70</sup> TII, *supra* note 46.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> MoD, *supra* note 60, para. 16(a) at 67.

<sup>74</sup> MoD, *Defence Procurement Procedure – 2008 (Amendment – 2009)* Revised para. 16(a), [http://www.buylawsindia.com/Amendment%20-%202009%20\(October%2029,%202009\).pdf](http://www.buylawsindia.com/Amendment%20-%202009%20(October%2029,%202009).pdf).

<sup>75</sup> MoD, *supra* note 60, para. 1.1 read with para. 1.5.

In the civilian sector, the rules are primarily set by the CVC. Even though the CVC OMs do not appear to exclude public works contracts, it appears that PSUs, in practice, are applying the IP concept only for contracts for the purchase of goods and services, excluding the procurement of public works.<sup>76</sup> The applicability of CVC OMs is unclear as regards to public-private partnership (PPP) contracts, agreements for privatisation of PSUs, or contracts for sale of goods through auctions or otherwise, even though the former two categories of contracts are generally extremely high-value contracts, and the last one could be a high-value contract under certain circumstances. Some government organisations appear to have done away with the requirement of signing an IP where the source-selection is made on a nomination basis instead of limited or full and open competitive procedures,<sup>77</sup> although such exemption is not specifically permitted under CVC guidelines.

#### 5. *Operation of an IP and Stages of Procurement Actions Covered*

An IP entails responsibilities on both partners not to exercise any corrupt influence on any part of the contract, and remains in effect from the stage of invitation of bids (IFB) till the complete execution of the contract.<sup>78</sup> This position has been further clarified in subsequent OMs by requiring that the IP cover all phases of the contract, *i.e.*, from the stage of the Notice-Inviting-Tender (NIT)/pre-bid stage to the stage of last payment or a still later stage, covered through warranties and guarantees.<sup>79</sup> The IP is required to be signed at the time of submission of bids/tenders, and is a preliminary qualification to bid, for both civilian procurements<sup>80</sup> as well as defence procurements.<sup>81</sup>

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<sup>76</sup> It appears that at least one PSU—the Shipping Corporation of India Limited (SCIL)—has not extended the application of IPs to procurement of services. For the relevant speech by SCIL's Chairman & Managing Director at the National Workshop on Integrity Pacts 2010, see TII, *supra* note 36.

<sup>77</sup> TII, *supra* note 41, at 4.

<sup>78</sup> CVC, *supra* note 50, para. 2; see also CVC, *supra* note 53, para. 2.02.

<sup>79</sup> CVC, *supra* note 51, para. 2(ii); see also CVC, *supra* note 53, para. 3.07.

<sup>80</sup> CVC, *supra* note 50, para. 2; see also CVC, *supra* note 53, para. 2.01.

<sup>81</sup> MoD, *supra* note 59, para. 5(h) at 62.

However, the SAIL IP—a *Model IP* advocated by the CVC in its Office Memorandum (OM)/Office Order dated December 4<sup>th</sup>, 2007—differs from the CVC OMs in that the SAIL IP remains in force in case of the winning bidder from the date of its signing till twelve months after the last payment under the contract,<sup>82</sup> and for all other bidders six months after the contract has been awarded. If a claim is made/lodged during this time, the IP continues to be valid unless the claim is discharged or finally determined by the Chairman. Also, the SAIL IP requires a declaration from a bidder that no previous transgressions occurred in a period three years before the signing of an IP with any other company in any other country conforming to the “anti-corruption approach” or with any other PSEs in India that could justify his exclusion from the tender process<sup>83</sup>, thus potentially extending to greater time-period that envisaged under the main OMs.

IPs in defence procurement similarly remain in force for the winning bidder until the contract has been fully executed;<sup>84</sup> but they extend for up to 5 years of the date of signing of an IP in case the time-period between the date of signing of the IP and the date of complete execution of the contract to the satisfaction of both the buyer and the seller is less than

<sup>82</sup> SAIL, *supra* note 64, section 9 at 4.

<sup>83</sup> The exact meaning of the phrase—an “anti-corruption approach”—is unavailable in the text of the SAIL (Model) IP (see SAIL, *supra* note 64, section 5.1 at 3). CVC’s Circular dated May 18, 2009 contains a similar provision requiring bidders to disclose any transgressions with any other company that may impinge on the “anti-corruption principle”, but once again, the meaning or scope of this phrase has not been defined (see CVC, *supra* note 53, para. 2.01).

<sup>84</sup> MoD, *supra* note 56, para. 18(e) at 95 *read with* para. 4.1 at 97-98; see also MoD, *supra* note 60, para. 18(e) at 107. The phrase “Pre-Contract Integrity Pact” appearing in defence regulations appears to be a misnomer: defence IPs and obligations of the parties appear to remain in force well into the contract-administration phase. The difference between civilian and defence IPs is that IEMs under defence IPs may be responsible only for pre-contract monitoring of obligations, and post-contract monitoring may lie solely with the concerned Acquisition Wing in the Ministry of Defence (MoD, *supra* note 56, para. 62 at 21, para. 34(b)(i) at 196; See also MoD, *supra* note 59, para. 62 at 18, para. 34(b)(i) at 197). On the other hand, in case of civilian IPs, the IEMs are clearly responsible for monitoring observance of party obligations *both* during the contract-formation as well as the contract-administration phases.

five years.<sup>85</sup> In addition, a bidder's conduct during a three-year period before the signing an IP at the time of bid-submission for a particular tender must be free from any of the transgressions in respect of corrupt practices covered by an IP with any company in any country or with any PSE or any government department in India that could justify the bidder's exclusion from the tender process.<sup>86</sup>

## B. *Commitments of Parties to an IP*

### 1. *Obligations of the (Government) Principal*

In the Indian context, the Principal to an IP commits to treat all bidders with equity and reason, and in particular, to provide all bidders with the same information, and not provide any bidder confidential or additional information that could be used by such bidder to obtain a comparative advantage in the tender process or in contract execution.<sup>87</sup> The Principal also undertakes to exclude all known prejudiced persons<sup>88</sup>—essentially a “conflict-of-interest” (COI) removal clause. Additionally, the Principal commits that no employee of the Principal, either personally or through family members, will demand, take a promise for or accept, for self or third person, any material or immaterial benefit which the person is not legally entitled to.<sup>89</sup> Para 2.01 of the OM dated May 18<sup>th</sup>, 2009 echoes the same commitments on behalf of the Principal as “essential” ingredients of an IP, though the COI-removal clause is absent in this latter OM.

In the case of defence IPs, the Principal makes similar commitments to treat all bidders alike, to provide equal information to bidders, and to withhold information to a particular bidder that may lead to a comparative advantage *vis-à-vis* other bidders.<sup>90</sup> Additionally, the Principal commits that none of its officials connected directly or indirectly with the contract,

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<sup>85</sup> MoD, *supra* note 56, para. 16.1 at 103; see also MoD, *supra* note 60, para. 16.1 at 114-115.

<sup>86</sup> MoD, *supra* note 56, para. 7.1 at 99; see also MoD, *supra* note 60, para. 7.1 at 111.

<sup>87</sup> SAIL, *supra* note 64, section1(1)(b) at 1.

<sup>88</sup> *Id.*, section1(1)(c). The term “prejudiced person” has not been defined in CVC circulars.

<sup>89</sup> *Id.*, section1(1)(a).

<sup>90</sup> MoD, *supra* note 56, para. 4.2 at 98.

will demand, take a promise for or accept, directly or through intermediaries, any bribe, consideration, gift, reward, favour or any material or immaterial benefit or any other advantage from the Bidder, either for themselves or for any person, organisation or third party related to the contract in exchange for an advantage in the bidding process, bid evaluation, contracting or implementation process related to the Contract.<sup>91</sup> However unlike the SAIL IP, neither of the defence IPs (covering capital and revenue procurements) contains clauses to address COI-removal commitments on part of the Principal.

## 2. *Bidders' Obligations*

On their part, bidders commit to refrain from making offers, promises, or giving material or other benefits to any of the Principal's employees or any third persons that they are not legally entitled to, in exchange for any advantage during the tender process or during contract-execution.<sup>92</sup> Bidders also undertake not to enter into undisclosed agreements with other bidders, in particular relating to prices, specifications, subsidiary contracts and suchlike that may restrict competition or introduce cartelization in the bidding process.<sup>93</sup> They also undertake not to commit any offence under the Indian Penal Code or the Prevention of Corruption Act; and not to use improperly any information provided by the Principal.<sup>94</sup> The bidders also undertake not to instigate third persons to commit the aforesaid offenses or be an accessory to such offences,<sup>95</sup> and to abide by the guidelines on Indian agents/representatives of foreign suppliers.<sup>96</sup>

Under defence IPs, the bidders similarly commit themselves to take all measures necessary to prevent corrupt practices, unfair means and illegal activities during any stage of their bids or during any pre-contract or post-contract stage in order to secure the contract.<sup>97</sup> The defence IPs,

<sup>91</sup> *Id.*, para. 4.1 at 97-98.

<sup>92</sup> SAIL, *supra* note 64, section2(1)(a) at 1.

<sup>93</sup> *Id.*, section2(1)(b) at 2.

<sup>94</sup> *Id.*, section2(1)(c) at 2.

<sup>95</sup> *Id.*, section2(2) at 2.

<sup>96</sup> *Id.*, section2(1)(d) at 2.

<sup>97</sup> MoD, *supra* note 56, para. 6 at 98.

however, contained more detailed provisions as compared to the CVC guidelines. For instance, they require bidders to: (1) not offer any bribes, gifts *etc.*, either directly or through intermediaries, to any government official or to any other person, organisation or third-party in connection with the award; (2) not have given any bribes, gifts, benefits *etc.* to any official in connection with the instant or any other contract; (3) not collude with any other interested parties so as to impair the transparency, fairness or progress of the bidding process; (4) not accept any advantage in exchange for any corrupt practice, unfair means and illegal activities; (5) to not engage, pay or promise to pay any individual or firm or company to facilitate or to recommend contract award in its favour; (6) to disclose payments or intention to pay any officials or their family members, agents, brokers in connection with the contract; (7) not to use improperly any information provided by the Buyer; (8) refrain from filing complaints without presenting full and verifiable facts; and (9) not to instigate any third person to commit any of these actions.<sup>98</sup> Interestingly, notwithstanding this detailing, defence IPs do not seem to specifically cover collusive behaviour that may impair the *competitiveness* of the bidding process, unlike the case with CVC IPs.

### C. *Complaint and Dispute Resolution Provisions*

#### 1. *Appointment of IEMs*

The IP system envisages a panel of independent external monitor (IEMs) approved for the organisation, who independently review parties' compliance with their obligations under the IP. They are approved by the CVC out of a panel of names submitted by government organisations. The initial OM required the submission of the panel of names through the concerned government Ministries,<sup>99</sup> a provision that was subsequently relaxed and government organisations were allowed to make direct submissions to the CVC.<sup>100</sup> The qualifications prescribed for appointment

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<sup>98</sup> *Id.*, para. 6.1 to 6.9, at 98-99. See also MoD, *supra* note 60, para. 6.1 to 6.9.

<sup>99</sup> MoD, *supra* note 56, para. 4.

<sup>100</sup> CVC, *Office Order. No. 43/12/07 Dated December 28<sup>th</sup>, 2007* para. 3, <http://cvc.nic.in/007vgl033.pdf>.

as IEMs are somewhat overly broad: (1) adequate experience in the relevant fields; and (2) high integrity and reputation.<sup>101</sup> It appears that there is an inherent preference for retired senior government officials, and the CVC requires the detailed bio-data of panellists to include, *inter alia*, postings during the last ten years before the superannuation of persons proposed as IEMs in case the names relate to persons having worked in the government sector.<sup>102</sup> This preference has been formalised recently through a CVC stipulation that it would consider only such persons for appointment as IEMs who have retired from senior management positions in the Government of India or PSUs.<sup>103</sup> Exceptions are however permissible for eminent persons and executives from the private sector of considerable eminence.<sup>104</sup>

The terms and conditions of appointment of IEMs, including their remuneration payable, are not a part of the IP and are separately communicated.<sup>105</sup> They are entitled to compensation on the same terms as being extended to independent directors in the organisation (the CPSU), to be paid by the procuring organisation itself.<sup>106</sup> The normal term of appointment of an IEM is three years, subject to renewal by the CVC thereafter;<sup>107</sup> and their maximum tenure has recently been fixed at five years in a particular government organisation.<sup>108</sup>

There is no prescribed minimum number of IEMs for each government organisation, but in practice, only a few CPSUs have

<sup>101</sup> CVC, *Circular No. 18/05/08 Dated May 19<sup>th</sup>, 2008* para. 2, <http://cvc.nic.in/008vgl00108.pdf>. See also CVC, *supra* note 53, para. 5.01-5.02.

<sup>102</sup> CVC, *supra* note 101, para. 3. Most of the IEMs listed on TII's website appear to be retired members of the executive or judicial arms of the government.

<sup>103</sup> CVC, *Circular No. 17/4/10 dated April 19<sup>th</sup>, 2010* para. 2, [http://cvc.nic.in/009vgl016\\_30042010.pdf](http://cvc.nic.in/009vgl016_30042010.pdf).

<sup>104</sup> *Id.*

<sup>105</sup> CVC, *supra* note 50, para. 4. See also CVC, *supra* note 53, para. 5.08.

<sup>106</sup> SAIL, *supra* note 64, section 8(7) at 4. See also CVC, *supra* note 51, para. 2(v), and CVC, *supra* note 53, para. 5.07.

<sup>107</sup> CVC, *supra* note 53, para. 5.09. The renewal after the three-year period would possibly be made based on, *inter alia*, a report from the Chief Vigilance Officer of the government organisation itself.

<sup>108</sup> CVC, *supra* note 103, para. 3.

appointed one person as an IEM, two or three IEMs being the norm.<sup>109</sup> A maximum of three IEMs are allowed to be appointed in Navratna<sup>110</sup> PSUs, and up to 2 IEMs in other PSUs. For PSUs with a large territorial spread or having several subsidiaries, the CVC can consider approving a larger number of IEMs, though an upper limit of two IEMs applies to every subsidiary organisation.<sup>111</sup> A person can be appointed as an IEM in a maximum of two government organisations;<sup>112</sup> but there is a bar on appointment as an IEM in the same organisation where s/he may have worked previously as a full-time government official.<sup>113</sup> There appears to be a practice of appointing a *dedicated* IEM for tenders valued at Rs. 150 crore and above,<sup>114</sup> although not specifically mandated under CVC guidelines.

IEMs in defence IPs are appointed by the Ministry of Defence in consultation with the CVC,<sup>115</sup> but no further detail is available on the terms and conditions of appointment, or the number of IEMs to be appointed. It could, however, be fairly assumed that the same restrictions and conditionalities as imposed by the CVC in the case of civilian IPs would apply, *ad verbatim*, to defence IPs as well.

## 2. Powers and Functions of IEMs

IEMs can submit their reports on complaints either to the CEO of the organisation, or directly to the Chief Vigilance Officer (CVO) and the CVC in the event of suspicion of serious irregularities attracting the provisions of the Prevention of Corruption Act.<sup>116</sup> The CVC, on its part,

<sup>109</sup> Statement based on the strength of IEM panels (number of members) available on TII's website.

<sup>110</sup> "Navratna" is an official nomination/selection process for Indian PSUs by which the top well-performing entities are conferred a special status, allowing them greater autonomy to compete in the global marketplace. For further details, see <http://en.wikipedia.org/wiki/Navratna>.

<sup>111</sup> CVC, *supra* note 50, para. 2(iv). See also CVC, *supra* note 53, para. 5.03 and 5.06.

<sup>112</sup> CVC, *supra* note 53, para. 5.05.

<sup>113</sup> CVC, *supra* note 50, para. 2.

<sup>114</sup> TII, *supra* note 41, at 5. Indian Rs. 150 crore is approximately equivalent to USD 33 million or GBP 23 million.

<sup>115</sup> MoD, *supra* note 56, para. 12.1 at 102.

<sup>116</sup> CVC, *supra* note 50, para. 3. See also CVC, *supra* note 53, para. 4.03.



can have a complaint received by it investigated through its own agencies, rather than through the agency of the IEM.<sup>117</sup> The role of the Central Vigilance Officer (CVO) of the organisation remains unaffected by the presence of the IEMs;<sup>118</sup> and a matter being examined by the IEMs can simultaneously be investigated by the CVO in terms of the provisions of the CVC Act or the Vigilance Manual, if a complaint is received by him or directed for examination by the CVC.<sup>119</sup>

Initially, the CVC desired that the recommendations of IEMs be made binding through the insertion of appropriate contractual provisions,<sup>120</sup> something that was clearly outside the legal framework for oversight of government contracts in India, since the CVC itself can only make non-binding recommendations to government departments and agencies.<sup>121</sup> It is therefore not surprising that the latest OM on the subject clearly records that recommendations made by IEMs would only be in the nature of an advice and of a non-binding nature.<sup>122</sup> In particular, IEMs cannot demand, that any party act in a specific manner, or that the parties refrain from a certain action; even though they are under obligation to request the Principal to discontinue the procurement or to take corrective and other relevant action if they believe that any provisions of the IP have been violated.<sup>123</sup>

At least one IEM needs to be cited in the Notice Inviting Tender, however, for the purposes of requisite transparency and objectivity, any

<sup>117</sup> CVC, *supra* note 51, para. 3-4.

<sup>118</sup> Chief Vigilance Officers (CVOs) are government officials appointed on deputation as observers of the CVC to oversee anti-corruption and vigilance matters in government organisations, invariably PSUs. For guidelines on their appointment, see Department of Personnel and Training, *Office Memorandum Number 372/8/99-AVD.III Dated January 18, 2001*, <http://persmin.nic.in/cvo/CvoIntro.html>.

<sup>119</sup> CVC, *supra* note 53, para. 4.06.

<sup>120</sup> CVC, *supra* note 50, para. 4. This mandate is however contrary to section 8(5) of the Model (SAIL) IP, since the Model IP's provision states that the recommendations of the IEM are non-binding in nature.

<sup>121</sup> Section 17(3) of The Central Vigilance Commission (CVC) Act, 2003 (Act No. 45 of 2003).

<sup>122</sup> CVC, *supra* note 53, para. 4.05.

<sup>123</sup> SAIL, *supra* note 64, section 8(5) at 4.

complaint arising out of a tendering process are required to be referred to the full panel of IEMs who are further required to give joint findings.<sup>124</sup> For this purpose, the IEMs are entitled to access to all contract documents,<sup>125</sup> including access to documentation available with sub-contractors. Information and documentation provided by bidders, contractors and sub-contractors is required to be treated with confidentiality by the IEMs.<sup>126</sup>

Defence IPs do not have similar detailing about the powers and functions of IEMs, except that if they could be treated as an “agency” of the buyer, IEMs may perhaps be entitled to examine the books of accounts of bidders in cases of allegations of violations of the provisions of the IP or the payment of commission.<sup>127</sup> This would however be permissible only if the IEM can be treated as such an agent of the Buyer, with obvious implications on the neutrality and independence of defence IEMs.

### 3. *IEM Review Procedures*

In the case of civilian IPs, IEMs are not subject to instructions by representatives of either party to the IP, and are required to perform their

<sup>124</sup> CVC, *supra* note 51, para. 2(iii). See also CVC, *supra* note 53, para. 4.04.

<sup>125</sup> CVC, *supra* note 53, para. 4.01. See also SAIL, *supra* note 64, section8(3).

<sup>126</sup> SAIL, *supra* note 64, section8(3) at 3-4. This provision appears to provide an extra degree of (blanket) protection to information and documentation submitted by bidders, *over and above* what is available under the “Right to Information” (RTI) Act in India (Act No. 22 of 2005). section8(1)(d) of the RTI Act states that there is *no obligation* to provide information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, *unless* the competent authority is satisfied that larger public interest warrants the disclosure of such information. Further, section 8(1)(h) of this Act states that there is no obligation to provide information which would impede the process of investigation or apprehension or prosecution of offenders. Public disclosure of such information is permissible only if a public authority allowing access to information determines that public interest in discourse outweighs the harm to protected interests (section 8(2) of the RTI Act). Thus, if a complaint before an IEM merely relates to *unfair treatment*, *without* making allegations of corruption, the IP would require related information and documents to be treated as confidential, while the RTI Act would appear to permit the public disclosure of such information.

<sup>127</sup> MoD, *supra* note 56, para. 13 at 103.

functions neutrally and independently.<sup>128</sup> As noted earlier, they have powers to access, without restrictions, all documentation with bidders and with the Principal, including project documentation available with sub-contractors.<sup>129</sup> The IEM also has an option to participate in all meetings between parties *related to the project*, provided such meetings have a bearing on the contractual relationship between the Principal and the contractor,<sup>130</sup> implying thereby that the IEM could exercise this option in respect of third-parties such as other government departments who may not be a procuring entity themselves, but still may be in a position to influence the outcome of a particular procurement action. IEMs are required to submit a written report to the Principal within 8-10 weeks from the date of reference or intimation to the IEM from the Principal.<sup>131</sup> No period has, however, been prescribed for disposal of a complaint by an IEM that has been submitted by a bidder or a contractor/sub-contractor; nor has any period been notified for making a submission or a complaint by any private parties to the IP regarding alleged unfair or illegal action by the Principal or his agents.

In so far as defence IPs are concerned, they only required the IEM to inform the Head of Acquisition Wing in the Ministry of Defence upon noticing any violation of the IP.<sup>132</sup> No further guidance was available regarding review procedures before defence IEMs under relevant regulatory provisions of the governing procurement code, or any of the clauses in the prescribed "*Pre-Contract Integrity Pact*" for defence purchases. The position has recently been amended, and buying government agencies are mandated to refer complains regarding IPs to IEMs for their comments/enquiry.<sup>133</sup> IEMs are now authorised to call for records of the buyer, if deemed necessary, and submit their final reports to the Ministry of Defence for a final and appropriate decision.<sup>134</sup>

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<sup>128</sup> SAIL, *supra* note 64, section8(2) at 3.

<sup>129</sup> *Supra* note 125.

<sup>130</sup> SAIL, *supra* note 64, section8(4) at 4.

<sup>131</sup> *Id.*, section8(6) at 4.

<sup>132</sup> MoD, *supra* note 59, para. 12.2 at 102; MoD, *supra* note 61, para. 12.2 at 114.

<sup>133</sup> MoD, *supra* note 74, para. 12.1-12.4.

<sup>134</sup> *Id.*, para. 12.5-12.6.

#### D. *Transparency and Citizen Participation Provisions*

As noted above, information and documentation provided to the IEMs by bidders/contractors and sub-contractors need to be treated as confidential. Similarly, the advice or recommendations made by IEMs are not disclosed in a public forum. These are available, as a matter of law, only to the government organisation (the Principal/CPSU) and the CVC; and as a matter of practice, also to the CVO and the concerned administrative Ministry. It is only the IEM that has been granted a right to participate in meetings related to a particular procurement action,<sup>135</sup> and citizen participation is neither permitted in law nor observed in practice, either with civilian IPs or with defence IPs. Till date, there is no civil society monitoring in India related to an IP.<sup>136</sup>

#### E. *Penal Provisions and Disqualifications*

##### 1. *Contract Disqualifications and Exclusion*

Section 3 of the SAIL IP entitles the Principal to disqualify bidders/contractors from the tender process or take action as per standard operating procedures (SOPs) outlined in “Guidelines for Banning of Business Dealings” (BBD Guidelines)<sup>137</sup>. The BBD Guidelines allow the Principal to: (1) in minor misconduct cases, impose restrictions against a bidder/contractor to participate in future “limited tender enquiry” (LTE) cases,<sup>138</sup> and (2) in all cases, suspend/disqualify such parties from all future procurements. The grounds for imposition of these restrictions are broad, including justification for believing malpractices such as bribery and

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<sup>135</sup> SAIL, *supra* note 64, section 8(4) at 4.

<sup>136</sup> TII, *supra* note 41, at 7.

<sup>137</sup> SAIL, *Guidelines for Banning of Business Dealings* 7-17, <https://sailtenders.co.in/dynamicpages/linkpages/FileDP270717.pdf>.

<sup>138</sup> For a brief note on Limited Tender Enquiry (LTE), see Sumeet Kachwaha, *Getting The Deal Through* para. 19, at 2 (2008), available at [http://www.kaplegal.com/articles/Getting\\_the\\_Deal\\_Through\\_Public\\_Procurement\\_2008.pdf](http://www.kaplegal.com/articles/Getting_the_Deal_Through_Public_Procurement_2008.pdf).

See also ADB/OECD, *supra* note 16, para. 7 at 6; and Mark J. Riedy, *Public Procurement in India* 8 (2008), available at

[http://www.andrewskurth.com/media/pressroom/1425\\_Public%20Procurement%20In%20India.pdf](http://www.andrewskurth.com/media/pressroom/1425_Public%20Procurement%20In%20India.pdf).

corruption by bidders, non-refund of Principal's dues, and employment of a person convicted for listed offenses;<sup>139</sup> and closer examination reveals that these grounds are, in fact, much more extensive than the limited bidder obligations covered under the IP system where, in addition, the transgression is required to be of a nature so as to put a bidder's/contractor's reliability or credibility in question.

Powers to place these restrictions in place, including appeals against such restrictions, appear to remain with internal government authorities competent to do so under the guidelines, and not with the IEMs appointed under the IP. Also, while the BBD Guidelines themselves do not define the term "disqualification" as contained in the IP, it appears that the intention is to exclude LTE exclusion, suspension and banning of business dealings from the meaning of the term "disqualification." In that sense, the term "disqualification" appears to imply the exclusion of a bidder from an instant procurement activity, undertaken prior to contract award.

## 2. Compensation for Damages

In a civilian IP, disqualification of a bidder from the tender process prior to contract award (on account of violation of bidder commitments) results in Principal's entitlement to demand and to recover the damages equivalent to the Earnest Money Deposit (EMD) or the Bid Security.<sup>140</sup> The EMD/Bid Security clause thus expands normal powers of the Principal to forfeit this amount, which can be resorted to only in case the bidder withdraws his bid during the bid-validity period.<sup>141</sup>

Termination of a contract (in exercise of powers under clause 5.3 of the BBD Guidelines *read with* section 4(2) of the IP) in cases of violation of contractor obligations under an IP results in Principal's entitlement to impose liquidated damages *or* the amount equivalent to Performance Bank Guarantees.<sup>142</sup> Interestingly, the IP termination clause

<sup>139</sup> The complete list of grounds for suspension, disqualification and LTE exclusion are available at para. 6 of *supra* note 137.

<sup>140</sup> SAIL, *supra* note 64, section4(1) at 2.

<sup>141</sup> SAIL, *Standard Bidding Document—Revision May 09* para. 11.6, at 11, <https://www.sailtenders.co.in/dynamicpages/linkpages/FileDP270721.pdf>.

<sup>142</sup> SAIL, *supra* note 64, section4(2) at 2-3.

does not cover exercise of the “risk-purchase” option, a facility normally available to the Principal under the general conditions of contract<sup>143</sup> in case the full/part contract has to be re-tendered for delivery failures on part of the original contractor. The IP termination clause therefore does not appear to fully cover the Principal for unwarranted costs arising out of a contractor’s failure to discharge its obligations under the IP.

### 3. *Civil Sanctions under Defence IPs*

Defence procurement regulations allow for the following set of sanctions to be imposed on a bidder/contractor for any violation(s) of its commitments under the IP:

- (a) Denial or loss of contract;
- (b) Forfeiture of performance bond and bid security;
- (c) Liability for damages to the principal and to competing bidders;  
and
- (d) Debarment of the violator for an appropriate period of time.<sup>144</sup>

The sanctions permissible under the *Pre-Contract Integrity Pact* for defence contracts are wider in their application, allowing the principal to also: (1) recover all sums already paid, together with interest; (2) recover any sums paid by the bidder to any middleman, agent or broker with a view to securing the contract; and (3) be compensated for loss or damages resulting from rescission of a contract because of monetary dealings or transactions between bidders and employees of the Principal.<sup>145</sup>

Given that the aforesaid sanctions can be imposed concurrently, defence IPs appear to be broader in their application and effects as compared to civilian IPs. It may be noted, however, that while the governing procurement regulations provide for recovery of damages to

<sup>143</sup> SAIL, *General Commercial Terms and Conditions for Purchase Contracts* para. 10.0(i) and (ii), <https://www.sailtenders.co.in/dynamicpages/linkpages/FileDP270708.pdf>.

<sup>144</sup> MoD, *supra* note 56, para. 18(g) at 95-96; see also corresponding para. 10(i), (ii), (iii), (v), (vi), (vii), (ix) and (x), at 101-102.

<sup>145</sup> *Id.*, para. 10(iv), (viii) and (x), at 101-102.

the principal and to competing bidders, the actual IP itself does not contain any provision for recovery of damages by competing bidders, and the IP also limits compensation for loss or damages only to cases resulting from rescission of a contract because of monetary dealings or transactions between bidders and employees of the Principal.

#### 4. *Penalties and Consequences of Criminal Offences*

The IP mechanism, being an agreement between parties merely of a civil nature, neither creates any new criminal penalties, nor amends either the Indian Penal Code or the Prevention of Corruption Act. The corresponding provisions in both civilian and defence IPs therefore merely reiterate the obligations of bidders not to commit any offenses under either of these Acts.<sup>146</sup>

Defence IPs, in addition to initiation of criminal proceedings, specifically allow the Principal to impose all civil sanctions enumerated in the previous section in cases of commission of any offence by a bidder under the Indian Penal Code and the Prevention of Corruption Act.<sup>147</sup> Arguably, even in the case of civilian IPs, similar civil sanctions can be imposed in cases of criminal offences by bidders, as they would amount to a violation of bidder commitments as contained in the IP.<sup>148</sup> The civilian IP mechanism also allows IEMs to transmit information related to substantiated suspicion of an offence under either of the criminal acts to the CVC,<sup>149</sup> while defence IEMs appear to be constrained to transmit any such information only to the acquisition wing of the Ministry of Defence.<sup>150</sup>

<sup>146</sup> For civilian IPs, see SAIL, *supra* note 64, section2(1)(c); and for defence IPs, see MoD, *supra* note 56, para. 6, at 98-99.

<sup>147</sup> MoD, *supra* note 56, para. 10.1 at 100-101.

<sup>148</sup> SAIL's Guidelines for banning of business dealings allow for suspension or banning of business dealings with bidders/ contractors even in cases of *suspicion* of commission of criminal offences, a feature not clearly available in the corresponding IP.

<sup>149</sup> SAIL, *supra* note 64, section8(8) at 4.

<sup>150</sup> MoD, *supra* note 56, para. 12.2 at 102.

### 5. *Penalties on the Principal and its Agents*

A defence IP imposes some new penalties for violation of its provisions by bidders, such as liability for damages to the Principal and to other bidders. However, neither a civilian IP nor its defence equivalent impose any new penalties on the Principal and its agents for violation of the Principal's obligations under an IP, even in the case of breach of the Principal's duty of treating all bidders with equity and reason or its duty to exclude all known prejudiced persons.

In the case of civilian IPs, the relevant regulations merely provide for initiation of disciplinary proceedings and/or launch of criminal investigations into the conduct of employees of the Principal wherever there is a likelihood of a violation of the Prevention of Corruption Act or the Indian Penal Code.<sup>151</sup> Interestingly, this provision appears to limit the Principal's options under an IP by allowing disciplinary proceedings only in cases of criminal conduct and not in cases of breach of equity responsibilities of its employees. Defence IPs, on the other hand, allow for launch of disciplinary proceedings and/or criminal investigations, wherever appropriate, for violation by government officials of any of the Principal's obligations under the IP.<sup>152</sup>

## **IV. Analysing Functional Effectiveness and Recommendations for Reform**

IPs have been acclaimed as an important instrument for enhanced accountability in government contracting, reduction in cost of procurement and building public trust in the procurement process.<sup>153</sup> However, as stated earlier, in the absence of relevant statistical information on resolution of bidders' grievances, and given the lack of publication in the public domain of IEM recommendations which may allow substantiation of quality aspects of this tool, the evidence remains largely anecdotal, in-house, and unverified by independent observers. One important way ahead for researchers to study the functional effectiveness

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<sup>151</sup> SAIL, *supra* note 64, section 1(2) at 1.

<sup>152</sup> MoD, *supra* note 56, para. 5 at 98.

<sup>153</sup> DAC, *supra* note 31.



of an IP, therefore, is to examine the extent to which the provisions in an IP are in compliance with the standard academic framework,<sup>154</sup> assuming that the *greater* such compliance, the *higher* would be the effectiveness of the IP as an instrument for ensuring accountability and meaningful oversight over public procurement decisions.

#### A. Contractual Oversight and CVC Jurisdiction

A seemingly residual but an extremely critical issue relates to the appropriate agency which should drive the IP mechanism in India. In this context, a closer look at the CVC Act reveals the essential purpose behind its constitution—the conduct of inquiry into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government and its agencies.<sup>155</sup> The CVC, in furtherance of this essential objective, has been empowered, *inter alia*: (1) to tender advice to the Central Government and its agencies on matters referred to it by such organisations;<sup>156</sup> and (2) to exercise superintendence over the vigilance administration of such organisations.<sup>157</sup> Such tendering of advice and supervision however does not confer power upon the CVC to issue directions relating to policy matters;<sup>158</sup> and the powers of the CVC to exercise anti-corruption supervision is further limited to members of All-India Services serving in the Central Government and its agencies<sup>159</sup> and to such other officers as may be notified.<sup>160</sup> On the other hand, as explained earlier, the IP mechanism covers a large number of contractual matters such as *fairness of tendering procedures* and *rights & obligations of bidders*—matters which have no, or at best marginal connection with commission of offences under the PC Act. Further, the IP system covers all contracting officers, much beyond the limited jurisdiction of the CVC over specified

<sup>154</sup> Per standard framework for effective bid-protest systems proposed by Dan Gordon, *supra*, note 3.

<sup>155</sup> See Preamble to The CVC Act, Act No. 45 of 2003.

<sup>156</sup> *Id.*, section 8(1)(g).

<sup>157</sup> *Id.*, section 8(1)(h).

<sup>158</sup> *Id.*, Proviso to section 18(1).

<sup>159</sup> *Id.*, section 8(2)(a).

<sup>160</sup> *Id.*, section 8(2)(b).

government officials. The IP mechanism also closely resembles a vigilance policy, something that would appear to be outside the CVC's subject-matter jurisdiction.

In a strictly legal sense, the CVC may therefore not be the most appropriate agency driving the IP mechanism in government contracts in India. As noted earlier, it already has had to retreat from its initial position (that IEM recommendations would be binding) subsequently to one where it recognised that the IEM's findings would merely be of the nature of an advice and therefore be of a non-binding nature—the latter position being consistent with its powers laid down under the CVC Act. In addition, all regulations made by the CVC require the prior approval of the Central Government<sup>161</sup> and all such regulations are required to be laid down before each House of the Parliament;<sup>162</sup> but it is not clear if the OMs issued by the CVC laying down the IP system fulfill either of these legally binding procedural requirements. It would be far more appropriate that the IP mechanism, covering both anti-corruption elements and obligations of fair treatment of bidders, is driven by the Ministry of Finance in the case of civil procurements, just as it is the Ministry of Defence that drives the IP mechanism in defence procurements in India.

#### B. *Enforceability of IEM Findings/Recommendations*

Since decisions/recommendations of IEMs on complaints received from bidders are neither publicly published nor reported, it is difficult to reach conclusions whether the IEM mechanism, as an essential ingredient of the IP system, can serve as an effective mechanism for redressal of complaints from bidders on alleged grounds of unfair treatment. But since IEM recommendations are just as recommendatory as those of the CVC itself, and since the IP mechanism works as a sub-set of the overall CVC system for government oversight, it may be worthwhile to look at some statistics regarding acceptance of CVC recommendations by executive agencies. In the year 2008, for instance, as many as 48 recommendations

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<sup>161</sup> *Id.*, section 21(1).

<sup>162</sup> *Id.*, section 22.

made by the CVC were not accepted by different ministries/departments of the Government of India,<sup>163</sup> with over 2300 pending cases of delay beyond six months for implementation of CVC advice.<sup>164</sup> Similarly, in the year 2007, there were 56 cases of non-compliance with CVC recommendations by executive agencies,<sup>165</sup> with over 2900 pending cases of delay beyond six months for implementation of CVC advice.<sup>166</sup>

In terms of percentages, it is likely that CVC advice in procurement actions is finally accepted in a majority of cases by the Government and its agencies, but the long periods of delay in acceptance thereof are likely to result in enhanced bidder concern over the ultimate fate of their representations, and therefore, serve to discourage bidders from filing complaints in the first instance, especially when the advice is merely of a recommendatory nature and not otherwise. If the percentage of acceptance of IEM/CVC recommendations on contract-award decisions is low amongst executive agencies, the IP mechanism may not adequately serve to bolster bidder confidence and participation. And if a large number of such recommendations are anyway being accepted by executive agencies, it stands to reason that making these recommendations legally binding, with suitable provisions for agencies to override IEM recommendations, may again bolster bidder confidence without placing heavy burdens on executive agencies.

That is, of course, not to suggest that a bid-protest function cannot be located in an agency with a merely recommendatory role. In the United States, for instance, one possible forum for filing a bid protest is the Government Accountability Office (GAO), which acts as an arm of the Congress. Even though the GAO is only empowered to make recommendations, the strength of congressional oversight over executive offices is such that there is rarely ever a case where executive agencies

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<sup>163</sup> CVC, *Annual Report 2008* para. 5.2, at 30, <http://cvc.nic.in/AR2008.pdf>.

<sup>164</sup> *Id.*, para. 5.12 at 40.

<sup>165</sup> CVC, *Annual Report 2007* 38, [www.cvc.nic.in/AR2007.pdf](http://www.cvc.nic.in/AR2007.pdf).

<sup>166</sup> *Id.*, at 45.

do not fully implement a GAO decision.<sup>167</sup> The situation could be very different in India, where CVC recommendations may not have similarly strong ratios of acceptance by executive agencies.

### C. *Implications of Focusing on Anti-Corruption Aspects*

Corruption in contract-award decisions is especially difficult to establish, and prosecution can be time-consuming and ineffective.<sup>168</sup> The focus that Integrity Pacts place on anti-corruption measures as *the principal means* of restoring bidder confidence and trust in the procurement process appears to be misplaced. Obtaining credible evidence (that can *prove guilt beyond all doubt* as required in criminal actions) with regard to financial transactions favouring government officials and/or their informal agents or associates requires dissatisfied bidders to set-apart significant financial and personnel resources to detect fraud—something bidders may not be easily willing to undertake. On the other hand, if the focus of an IP is shifted from *establishing corrupt behaviour* to *proving unfair treatment* of bidders, where dissatisfied bidders are merely expected to demonstrate biased specifications or evaluations or undue deviations from

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<sup>167</sup> Only one such case of non-acceptance of a GAO recommendation was reported in 2009, out of 71 decisions of the GAO which went against the procuring agency (*GAO's Annual Report to the Congress for Fiscal Year 2009*, <http://www.gao.gov/special.pubs/bidpro09.pdf>). There were no such cases on non-compliance of GAO recommendations for the fiscal year 2008 (*GAO's Annual Report to the Congress for Fiscal Year 2008*, <http://www.gao.gov/special.pubs/bidpro08.pdf>), and none in fiscal years 2007, 2006 and 2005 as well. Of course, this is not to imply that the GAO bid-protest mechanism is a perfect model for other countries to follow. For an interesting and in-depth analysis of the fairness of the GAO protest system and recommendations for reform, see, generally, Steven M. Maser & Vladimir Subbotin, *The Bid-Protest Mechanism: Effectiveness and Fairness in Defence Acquisitions?* (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1616424](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616424); see also Robert S. Metzger & Daniel Lyons, *A Critical Reassessment of the GAO Bid Protest Mechanism* (2007), Boston College Law School Legal Studies Research Paper No. 2007-01, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1543849](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1543849).

<sup>168</sup> The World Bank, *India Country Procurement Assessment Report 19* (2003), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/04/02/000012009\\_20040402111746/Rendered/PDF/278590IN.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/04/02/000012009_20040402111746/Rendered/PDF/278590IN.pdf).

established procurement rules, it would be far less resource-consuming for such bidders to bring in meaningful challenges to agency decisions. It is important to realize that corruption is only an end: defective processes and procedural/substantive digressions are the key means that sustain unscrupulous actions. In practice, bid protest systems can serve as an early warning system for corrupt or inept procurement,<sup>169</sup> thus reducing the need for governments to commit larger resources for mitigating corruption in public procurement. This alternate strategy is likely to lead to far greater stakeholder involvement with the IP mechanism, especially when a number of study reports acknowledge that the problems with public procurement in India really relate to biased specifications, faulty evaluation, deficient price analysis, and deviations from established rules.<sup>170</sup>

#### D. Transparency Issues with IEM Recommendations

Enhancing transparency forms a key objective of the IP mechanism.<sup>171</sup> This enhanced transparency is required to be ensured through a number of means, including, but not limited to the involvement of an ombudsman, adequate publicity at various stages of the procurement process, and an obligation to publish all findings of the IEM.<sup>172</sup> The last component is critical, since publication of IEM findings, over a period of time, helps build consistency and common law principles, thereby providing meaningful guidance to prospective challengers as to standards expected of the government and those expected of dissatisfied bidders themselves.

None of the Indian IPs, pertaining to civilian or defence procurement, contains provisions mandating publication of IEM findings

<sup>169</sup> Eli Whitney Debevoise & Christopher R. Yukins, *Assessing The World Bank's Proposed Revisions of its Procurement Guidelines* para. 180, at 3, 52 *The Government Contractor* 21 (2010).

<sup>170</sup> See, generally, CVC, *Common Irregularities/Lapses Observed in Stores/Purchase Contracts and Guidelines for Improvement in the Procurement System* (2002), available at <http://cvc.nic.in/vsevc/purguide.pdf>; see also Anwarul Hoda & Suchi Bansal, *Transparency and Government Procurement* 38 (2004), ICRIER Working Paper No. 129, available at <http://www.icrier.org/pdf/wp129.pdf>.

<sup>171</sup> TI-UK, *supra* note 35, at 10.

<sup>172</sup> DAC, *supra* note 30.

in a public forum or even to the complainants. IEMs are only required to make reports to the chief executive of the government organisation itself, and to the CVC in cases suspected of serious violations. Further, as noted in recent stakeholder feedback on IPs in India, regular communication or formal networks amongst IEMs in different organisations is absent.<sup>173</sup> The existing situation in India therefore does not appear to be conducive to growth of common law principles in so far as Integrity Pacts are concerned; and it is therefore difficult to accept the proposition that IPs, in their present form, can make significant enhancements to bidder confidence and trust in the public procurement process.

#### E. *Allocating Costs of Independent Oversight*

The cost of independent oversight, namely that of the IEMs, has been allocated in a number of different ways in other national jurisdictions. For instance, in the case of Mexico, *Transparencia Mexicana* applied four ways of funding the IEM (“Social Witness”): (1) payment exclusively by the State (roughly 70% of cases); (2) payment by successful bidders (about 25% of the cases); (3) payment out of a special fund created through contributions from the bidders and the government; and (4) costs borne by a civil society organisation.<sup>174</sup>

Costs in India are entirely borne by the particular government organisation appointing the IEMs, which may have its own implications for perceived fairness of the oversight system, particularly when the appointing organisation may have some say in extension of IEM tenures beyond the initial three-year period. Details of costs incurred on IEM oversight are not available, but it appears that IEMs are reimbursed on a “per sitting” basis. This type of reimbursement mechanism, together with geographical dispersion of IEMs and venues for their sittings, has the potential to result in enhanced transaction costs for dissatisfied bidders and complainant contractors.

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<sup>173</sup> TII, *supra* note 36, at 6.

<sup>174</sup> DAC, *Application of Integrity Pacts (IPs) in the Public Sector in Mexico-How They Work 2* (2006), available at <http://www.defenceagainstcorruption.org/publications/all-publications/2006/58-application-of-integrity-pacts-in-the-public-sector-in-mexico-how-they-work/download>.

A more efficient alternative could be to reconstitute the existing thousands of single/multi-member IEM panels into one or two specialised tribunals<sup>175</sup> whose costs is borne by the Government instead of individual PSUs, where the same IEMs could be designated as members. This transformation of the IEM component can have three distinct advantages as an effective, *GPA-compliant* bid-protest system over the existing one: firstly, a tribunal system distances the IEMs from the procuring entity, making them relatively independent both in practice and in perception; secondly, it forces strong networking amongst individual IEMs, resulting in faster development of common law principles for adjudication of disputes and similar treatment of similarly dissatisfied bidders; and thirdly, it reduces transaction costs for both the buying public entity as well as for individual bidders and contractors.<sup>176</sup>

#### F. *Breadth of IP-Applicability*

The depth<sup>177</sup> and breadth<sup>178</sup> of GPA-coverage of public contracts is negotiated individually by countries in the course of their accession. In case of the European Union member-states, the GPA applies to all national, regional and local/municipal government contracts;<sup>179</sup> whereas the United

<sup>175</sup> For instance, there could be specialised tribunal for defence procurement and another one for civil procurement. Tribunals could also be organised on a regional basis. To ensure that these tribunals do not suffer from jurisdictional overlaps with High Courts and the Supreme Court of India, the courts' jurisdiction to hear complaints from dissatisfied bidders would need to be left untouched.

<sup>176</sup> Personal interview with Prof. Christopher R. Yukins, Associate Professor, The George Washington University Law School, at New Delhi (December 15, 2009).

<sup>177</sup> "Depth" is used loosely here for the estimated value of individual contracts, which is anyway quite low under the IP system—roughly 1 crore above which the IP becomes mandatory, although the exact threshold varies from one PSU to the other PSU.

<sup>178</sup> "Breadth" here is used to describe the *horizontal* reach of public contracts—whether service contracts and public-private concessions are covered under the oversight mechanism; or whether government ministries and departments are covered in addition to contracts entered into by public sector units.

<sup>179</sup> See Annex 2 to the GPA relating to the European Communities, available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/ec2.doc](http://www.wto.org/english/tratop_e/gproc_e/ec2.doc).

States has exceptions for some of its states from GPA-coverage.<sup>180</sup> It is therefore difficult to predict what breadth and depth of coverage could be negotiated by India should it choose to enter into negotiations for formal entry.

India's IP system presently covers only contracting activity by public sector units, and above a different, much higher threshold, contracting activity by the Ministry of Defence. This position in India is quite different from existing practices in most other countries, where the norm is to provide greater oversight in respect of procurement by government ministries and departments, while attempting to exclude commercial entities of the government and defence procurement from such oversight.<sup>181</sup> It may be worthwhile for India to explore bringing government procurement by departments and ministries within the ambit of a bid-protest system by suitable modifications to the IP mechanism,<sup>182</sup> while excluding commercial entities in the nature of CPSUs. This would help not only in broadly aligning India's position with that of GPA member-states, but would also provide necessary flexibility to CPSUs to compete with private corporate entities by improving the speed of their decision-making in purely commercial transactions.

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<sup>180</sup> See Annex 2 to the GPA relating to the United States, available at [http://www.wto.org/english/tratop\\_c/gproc\\_e/usa2.doc](http://www.wto.org/english/tratop_c/gproc_e/usa2.doc).

<sup>181</sup> Exclusion of commercial entities may be necessary in order to ensure a level-playing field between public sector units and private corporate entities, as both compete really in the same or significantly overlapping product and service markets. Also, in so far as defence purchases are concerned, these usually strategic and involve important, long-term geo-political considerations; and defence procurement may therefore need to be exempted from external oversight through IPs. An administrative tribunal, as suggested, is of greater relevance to defence procurement in view of security and confidentiality considerations, in place of private oversight by IEMs.

<sup>182</sup> It appears that sometime during the Cancun WTO Ministerial, India was agreeable to bringing purchasing of goods by the central government within the purview of negotiations on transparency in government procurement; see Steve Woolcock, *The Singapore Issues in Cancun: a failed negotiation ploy or a litmus test for global governance?* 10 (2003), available at <http://www2.lse.ac.uk/internationalRelations/centresandunits/ITPU/docs/woolcocksingaporeissues.pdf>.



### G. *Harmonisation and Detailing of IP Provisions*

A detailed discussion of various provisions of IPs in India reveals a complicated and inconsistent position, as confirmed by user feedback from implementing PSUs. For instance, some PSUs exclude sub-contractors whereas other cover sub-contractors irrespective of the value of the sub-contract; and the thresholds for application of IPs for the main procurement contract differ across PSUs. Similarly, while principal procurement regulations allow for suspension or debarment of erring bidders/contractors at any point of time, the corresponding provisions in the Integrity Pact may appear to limit this authority during the currency of the IP itself. Such divergence in contractual provisions may lead to difficulties and disputes for government entities in the near future, should they choose to suspend or debar a contractor beyond the applicable IP time-horizons. The CVC mandate to include public procurement of services under the ambit of Integrity Pacts also merits serious reconsideration in view of India's reservations in respect of transparency negotiations and its negotiating positions both under the GPA as well as the *General Agreement on Trade in Services (GATS)*. Again, civilian IPs do not appear to allow for penalties against delinquent government officials for breach of equity and fairness responsibilities, whereas defence IPs place no such limitation of the procuring government entity. As shown in the detailed analysis in the relevant section of this paper, there is thus not only a substantial divergence between civilian and defence IPs, but *inter-se* divergence amongst civilian IPs themselves: a situation that may not provide adequate comfort levels to bidders, hampering their fullest participation in the procurement process. There is, therefore, a clear need for detailing and clarity in IP provisions, as also harmonisation between civilian IPs and defence IPs.

### V. **Conclusions**

Integrity Pacts, as they are currently structured, appear to have a limited value as an effective instrument of contractual oversight in India. This is evident both from the detailed analysis of legal provisions as contained in this paper, and from practicing stakeholder consultations on the working of the IP mechanism. Some of the prominent legal deficiencies appear to be as follows: (1) a misplaced focus on anti-corruption issues as opposed

to agency fairness in contract-awards; (2) problems associated with inadequate legal drafting; (3) absence of any new pecuniary or criminal penalties, either on the Principal or on bidders/contractors/sub-contractors; and (4) near-duplication of civil and criminal sanctions and related jurisdictional conflict with other laws and with other law enforcement bodies. At one level, while the IP mechanism could therefore appear to be a mere incremental step in the direction of procurement reform, the fact also remains that IPs have provided bidders in India access to a specific forum where they can file complaints relating to perceived lack of fairness and equitable treatment. In contrast, the pre-IP scenario in India has been quite complicated when it comes to challenging contract-award decisions of executive agencies—bidders could hitherto file such complaints only before independent agencies like the *Lokayukta* and the CBI *after coupling* them with complaints of corrupt behaviour on part of the principal or his agents; or before the courts with longer decision time-frames. Alternatively, they are eligible to make representations before the Government itself, but in the absence of clear procedural protocols, disposal of complaints can be quite complicated and chaotic.

The IEM mechanism envisaged under an IP creates the *first formal, relatively independent* bid-protest system in India for challenge of contract-award decisions. The system is most certainly in need of substantial refinement, detailing and consolidation, such as constitution of tribunals in place of single/multi-member IEM panels; enhancing and suitably modifying subject-matter jurisdiction of IPs over public works, construction and services contracts and by bringing procurement by government departments and ministries within their ambit; enhanced powers of staying contract decisions pending resolution of bidder complaints; and improved transparency through publications of decisions/recommendations of oversight authorities. Implementation of these suggested recommendations is expected to quickly transform the incremental steps taken so far, as embodied in the idea of an Integrity Pact, into a rigorous, *GPA-compliant* bid-protest system. While some external developments such as WTO trade negotiations or the proposed modifications in the World Bank's procurement guidelines may have a bearing on this transformation process, the fact remains that procurement

reform in India has been substantially driven autonomously, as a core element of the Central Government's agenda for implementation of good governance practices. It is therefore hoped that India shall continue to witness further strengthening and development of an efficient, IP+, bid-protest system for dealing with bidder complaints, while progressively moving towards enhanced transparency, competition and best-value decision-making in the public procurement process.

