Trade Effects of Rules on Procurement for Commonwealth ACP Members

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Executive Summary

The overall objective of this analysis is to assess the potential trade effects of rules on procurement policies on Commonwealth ACP members. The main objective is to facilitate the understanding of Commonwealth ACP members on the effects on their economies of negotiating rules on government procurement policies in regional and international trade agreements and to therein determine strategies that will best advance their development-interests in these fora.

As a result of the confusion which exists concerning terminology and the scope of the issues being negotiated in the context of procurement related trade arrangements, this report begins by seeking to provide a clear and concise explanation of some of the issues and terms used in the context of public procurement regulation. In particular, it considers the terms ‘transparency’ and ‘market access’ (also referred to as ‘liberalisation’). Significant confusion arises in practice because a transparent domestic procurement system is seen as a pre-condition to membership of a regional or international organisation which then imposes market access conditions and discussions relating to membership of such an organisation will address the questions of transparency and market access more or less simultaneously.

The key point of departure of this report is to explain by illustration and by reference to relevant literature that the benefits of a sound domestic procurement system (in other terms, a ‘transparent’ procurement system) arise independently of any market access conditions imposed by or granted to bidders from third countries. They are two separate issues: first, the creation of a sound domestic system and, second, where it is desired, the opening up on a reciprocal basis of the domestic procurement market relying on non-discrimination principles such as ‘national treatment’. It is this latter step, of accepting market access conditions that may well have an effect on the makeup of the domestic procurement market, on the identity of the bidders and on existing trade flows. These may be termed the ‘trade effects’ of the international procurement regulation since it may be the market access conditions of the agreement which produce these effects.

In addition to considering transparency and market access, we also seek to clarify other topics, notably international competition and regulation. It is important to recognise that international trade or competition is not the result of any international agreement on market access. Whenever a country needs to purchase something it does not produce or manufacture, it is obliged to seek providers from outside its borders and to import its requirements. The global economy is, for good or bad, a reality. The question is how it can be managed from the perspective of a domestic market. We consider attempt to control or manage the effects of international trade and to gain the maximum benefit from the advantages it has to offer, by the many governments that have opted to create regional or international regulatory systems whose aims are to garner these advantages by creating a level playing field between the participants. The rules which they adopt reflect the belief that free international trade (or regional trade) will provide increased social benefits to the members of the different groupings. To achieve those benefits, national objectives need, to the extent possible, to be limited such that they do not create or maintain obstacles to the achievement of freer trade.
Under such systems, we explain that national objectives are not prohibited as such and members will usually be allowed to maintain national policies which are designed to protect matters which fall pre-eminently within the ambit of the exercise of national sovereignty such as national security, public health, national heritage and so forth. However, we also recognise that governments are content to subscribe to such systems not only because they seek to develop their own domestic markets through competitive forces but because they see advantages for their own suppliers in having access to the markets of third countries. They see access as a means of maximizing their comparative advantage. We point out that it is not only developing countries, for example, that benefit from exceptions to the WTO’s procurement system. Industrialised countries which otherwise openly welcome free access to their procurement markets, have also negotiated a significant list of areas of procurement that are either excluded from the general provisions because they fear difficulties as a result of their comparative disadvantage or which are subject to policy considerations which they are reluctant to give up.

Given the prevalence of national protective measures, we also consider the issue of domestic price preferences as the most frequent type of protective measure, even though they are often used without any well-articulated economic justification for preference. We consider the economic literature describing the use of such preferences and conclude that there is some doubt as to the efficacy of domestic preferences at all and that they have no effect on trade, i.e. does not reduce imports or increase domestic price, output or employment. To operate optimally, price preferences would have to apply on an industry by industry (or product by product) basis according to the relative cost advantages between domestic and foreign suppliers and, if carried out properly, would even militate in favour of a price preference for foreign goods where they have a comparative cost disadvantage. The absence of trade effects rests on the premise that government demand does not account for all purchases and that there is a sufficiently large private market for the same (substitutable) goods. In these circumstances, discriminatory price preferences which shift the demand of the government buyer towards domestic products will generate an equal and opposite shift in private consumer demand towards imports, because the private sector can buy the identical (or substitute) product at the same price on the world markets. This is does not always hold true but, even then, the economic literature finds negligible effects. In conclusion, the beneficial effects of price preferences remain dubious while their costs for the country applying them and for international trade remain certain.

Following the preliminary clarifications, we turn to the issue of transparency. We point out that where any country is seeking membership of a regional or international economic organisation in respect of procurement, its membership will depend on the quality and level of transparency of that system. A country seeking membership of a trade arrangement will need to be aware of the adequacy of its own procurement system. In this regard, we consider five core transparency mechanisms in turn, expanding on the general introduction to explain what is involved at the level of the legal framework. These are publication of legal framework; publication of procurement opportunities; procedural transparency; transparency of contract awards; transparent dispute settlement. We will then, in turn, consider the benefits of improved TGP and the costs of improving TGP. In this exercise, we also incorporate some of the findings of the country assessments in respect of the sample countries (Dominica, Nigeria, Samoa and Tanzania) to provide an idea of the level of transparency they might achieve. Since information has been collected from secondary sources which are often out of date and has been no possibility of verifying the findings on site or with the authorities of the countries in question,
this cannot be a definitive assessment given the constraints of the study. The reports do, however, enable us to draw some general conclusions.

We start from the premise that the benefits of transparency or, perhaps more precisely, the degree of transparency, are intimately linked with the benefits of an effective and efficient procurement system. It is not surprising that the most frequently stated benefit of TGP is increased competition. This reflects the common belief held by those operating within a market economy that competition is what produces the optimal result in terms of efficiency. We also recognise that one of the by-products of transparency in the domestic context will be to highlight the existence of inefficient firms. If companies (bidders) do not produce efficiently and cannot match the prices of their competitors (i.e. offer higher prices than the prevailing market prices), then they would, in theory, lose out. If their situation is irredeemable, they may well be forced to close. This issue clearly comes to a head in the context of discussions aimed at trade liberalisation. Where markets are opened to international competition, there is a fear that such competition will be so efficient as to force competing domestic industries to close. The choice facing the government is the same: to protect inefficient domestic industry and pay too much or accept the competition and risk seeing some domestic companies fail.

Economic theory is used to explain other benefits of transparency. This rests on the principal/agent theory which explains that the relationship between the government (principal) and the procurement officer (agent) gives rise to a problem of information. In terms of procurement, the agent is closer to the procurement process and will consequently have more information available with regard to the market and the suppliers. This creates an informational asymmetry between principal and agent which may, where their interests diverge, allow for exploitation by the agent. This poses an immediate threat to the procurement process in terms of market purchases. We explain how procurement regulation is used to redress the information imbalance by providing a means of controlling the procurement agent so that the principal can verify where necessary the procurement actions and decisions of the agent and make sure that he is indeed acting in the real interests of the government and, by extension, the country. It is thus a tool used by the government to guarantee knowledge of the facts for the purposes of verification and administrative control. In this way, we explain how, in economic terms, TGP is used to rein in the corrupt, incompetent, careless or wasteful procurement agent and ensure that he conducts the procurement function in the interests of the Government.

We also consider the benefits and costs of transparency. Despite the difficulty is obtaining hard empirical evidence of the cost savings is due mainly to the difficulty in obtaining accurate and reliable data, we rely on studies carried out in EU, by the World Bank and by OECD. These suggest that overall saving are in the order of 30% which would represent significant budgetary savings in most developing countries. In terms of costs, any country negotiating access to an international procurement agreement will also need to be aware of the costs of making the necessary improvements. In this respect, they may benefit from financial assistance in making those improvements. The costs will not be negligible but the costs of implementing the specific transparency tools identified in the report may be quantified. The second cost issue concerns the broader costs, including the ‘cost’ of not applying TGP. Since the transparency tools are linked to the underlying system, the failure of the system is reflected in the lack of transparency and the costs of such a system will be the failure of the government to make any of the expected budgetary savings.
Turning to the question of market access, it is not possible in the context of this report to consider the approach of all potential trade agreements. However, the emerging trend is for trade agreements to follow the model of the GPA, at least in structure. As a result we have taken the GPA as an example of the way in which international procurement agreements have been negotiated. The history of the GPA serves this purpose well since it highlights very clearly the difficulties and pitfalls of the negotiating process and offers some lessons for aspiring members. This will allow us to investigate the potential trade effects and possible policy decisions to be taken.

In particular, we consider the central debate over the definition of government (federal, central, sub-central etc.) which, in reality, related to concern of the negotiators to ensure that any agreement would bring trade advantages to all the signatories and that these advantages would be of equivalent value. The key was the achievement of reciprocal trade advantages. Linked to this was the question of financial thresholds. The lower the threshold, the more contracts and entities would be covered. The higher the threshold, the fewer there would be and this could well affect the net value of the ‘contribution’ of the different parties. We explain that developing countries present at the negotiations favoured lower thresholds since this would enhance their prospects of gaining access to the procurement markets of developed countries by enabling them to compete for the lower value and less sophisticated contracts.

The history of the negotiations highlighted the tensions between the various parties also explains the specific characteristics of the current GPA. They demonstrate very clearly the limitations placed on the GPA which result from the contracting parties’ desire not to create a model international procurement system but to extract the maximum benefit for their nationals by guaranteeing access to the procurement markets of other contracting parties and granting access to their own markets only on a reciprocal basis. Whilst ostensibly based on the non-discrimination principles of MFN and national treatment, we see that these principles are in fact qualified by the negotiated market access provisions of the GPA.

There is also a lack of hard data relating to the actual trade effects created by membership of any international agreements which apply market access conditions in respect of procurement. There would appear to be consensus (and some economic evidence) that a sound domestic procurement system will lead to welfare benefits, mainly based on increased competition. To the extent that transparency provisions also encourage international competition (irrespective of any mandatory market access conditions), they will also have trade effects in the sense that they will facilitate the cross border provision of goods and services. From the perspective of a party’s negotiating position, therefore, it may well be that the primary benefits from entering into a procurement related trade agreement will result from the inevitable pre-condition of attaining acceptable transparency of the national procurement system. The effort required to bring the country’s procurement system ‘up to speed’ is more likely to bear fruit than the following market access negotiations.

The existing studies which seek to identify the benefits to be gained from introducing TGP or improving the existing procurement systems are invariably linked to the savings to be made based on the size of the procurement market at issue but there appears little to suggest that the state procurement markets of much of the developing world are large enough to attract the attention of international bidders. Moreover, we explain that it is not just the size of the market that matters but also its susceptibility to foreign competition. This involves a consideration of
entity coverage in terms of the identity of the purchasing entities subject to the transparency provisions (whether central or regional/local and the position of sub-federal States) and the question of threshold values. In addition to the size distribution of contracts (smaller contracts tend not to be attractive to foreign firms), it will also concern the share of government services that are ‘contracted out’ to the private sector. The share of expenditures financed through development assistance funds that are tied to sourcing of goods and services from the donor country is also a contributing factor.

We point out that the potential trade effects will depend very largely on the individual situation of the negotiating party. Clearer predictions would require an in-depth study of the country circumstances although research and existing literature does provide some basis from which to make this analysis. In the case of market access, the key for the parties (in the GPA at least) was to ensure that any agreement would bring trade advantages to all the parties and that these advantages would be of equivalent value. The potential trade effects must, therefore, be assessed from two perspectives: that of the domestic industry and that of the foreign competition. In the first place, it would require an assessment of the strengths of the domestic industry since reciprocal market access would, in theory, present domestic industry with increased opportunities for export business. This in turn depends on what is produced by the domestic market and whether the country (or its industry) has a comparative advantage.

The issues to be considered by negotiating parties are clear but the policy options that are available will depend on the situation of the country in question. There are two main concerns: transparency and market access. The primary benefits of entering into trade arrangements which liberalise procurement markets are felt in the domestic market. This presupposes, however, that there is a domestic procurement system which is able to accommodate effective competition. Such a system is a prerequisite for membership of such organisations in any event.

The first option, or rather opportunity, given to negotiating parties is therefore to bring their domestic systems up to an acceptable level. As stated above, this may well be of benefit to the wider membership of the organisation where market access conditions are accepted but the greatest results will be for the domestic market. This provides an opportunity for the negotiating parties to secure technical and financial assistance for the development of their national systems with a view to generating the welfare effect resulting from a sound and transparent procurement system. Even if the negotiating country ultimately decides not to enter into market access commitments, the benefits of more transparent government procurement will already have been achieved.

Once the transparency position is resolved, the remaining options relate very much to the specificities of the country in question. This will be a question of assessing the nature of the domestic market, its strengths and weaknesses. These are a function of the size of the market, the identity of the procuring entities, the applicable thresholds, the size distribution of contracts, the value of procurement financed by donors and subject to tied aid, the current trade flows and the strengths and weaknesses of the country’s sectoral markets. The results of an investigation into these issues will dictate the policy options available.

It has not been possible to consider all types of trade agreements but the GPA has, for the reasons stated above, been used as the primary example. In respect of developing countries, the GPA currently contains some specific provisions which will assist developing countries in
negotiating preferential access to the agreement. For example, the GPA maintains provisions which seek to establish special and differential treatment for developing countries. This will include tolerance of certain preferences, at least as a temporary measure. There are other concessions which will be given to negotiating parties from developing countries as well as the exemptions that may be negotiated to coverage similar to those already accepted for the benefit of current members. This process will also be reflected in other trade groups. Once they have made the required market analysis, these are the provisions that should be exploited by the negotiating parties if they are to benefit from membership.
Trade Effects of Rules on Procurement for Commonwealth ACP Members

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Introduction

One of the challenges for those negotiating trade agreements affecting government procurement is the confusion which exists concerning terminology and the scope of the issues being negotiated. As a result, the first task of this report is to provide a clear and concise explanation of some of the issues and terms used in the context of public procurement regulation. This is not a purely academic exercise; it is also important because the primary task of this report is to assist the negotiating parties. They need to understand fully the benefits and costs of both a transparent procurement system and, separately, the effect of trade agreements containing procurement rules on their economies. It should be emphasised at the outset that when we talk of a procurement ‘system’, we are referring to whatever laws, regulations, decisions, procedures and practices are in place in any given country to regulate public procurement. The precise legal and regulatory framework will differ from country to country so that the term ‘system’ will be used as shorthand to cover all eventualities.

The key point of departure is understanding that the benefits of a sound domestic procurement system (in other terms, a ‘transparent’ procurement system) arise independently of any market access conditions imposed by or granted to bidders from third countries. They are two separate issues: first, the creation of a sound domestic system and, second, where it is desired, the opening up on a reciprocal basis of the domestic procurement market.

In part, the confusion arises in the course of international trade negotiations because a transparent domestic procurement system is seen as a pre-condition to membership of a regional or international organisation which then imposes market access conditions. Thus discussions relating to membership of such an organisation will address the questions of transparency and market access more or less simultaneously. Market access cannot be assured in the absence of a sound domestic procurement system of the country seeking membership. But these issues need to be understood as separate and sequential. The existence of a satisfactory national procurement system is a pre-requisite but it is also stand-alone and could be all that is required. The benefits of such a system for the country in question are significant and, from a country’s perspective, it may be that no more is needed. Where that country participates in regional or international economic organisations, it is possible (but not inevitable) that it may be obliged to ensure access to its procurement markets for bidders from other members of that organisation in return for the right of its own bidders to have the same access.

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2 This was perhaps one of the mistakes made by the WTO negotiators who subsequently split the discussions into separate negotiations on (i) transparency and (ii) market access.
to the markets of the other members. This condition of market access comes after and on top of its own domestic procurement system and may also bring additional benefits in terms of increased competition.

Guaranteed market access may well have an effect on the makeup of the domestic procurement market, on the identity of the bidders and on existing trade flows. These may be termed the ‘trade effects’ of the international procurement regulation since it may be the market access conditions of the agreement which produce these effects. All known international agreements which concern procurement are based on reciprocal market access arrangements, i.e. the bidders from one of the members will have access to the markets of the other members to the extent that their own country grants similar access. The trade effects will also, therefore, potentially flow both ways. Bidders from one member country will face increased competition from bidders from other member countries but will also be able to compete themselves in the procurement markets of other member countries. The extent to which they are able to do this (in terms of financial and technical capacity) will also determine, in part, whether the overall trade effects are positive or negative for the country in question. This will also depend on the economy as a whole and on the import/export flows.

Assessing the potential trade effects will depend on the availability of information relating to these and other issues. The effects will inevitably be country specific and must be seen in context. It is not possible to conduct such an exercise in the abstract and, for the purposes of this report, four countries have been identified for preliminary examination: Dominica, Nigeria, Samoa and Tanzania. As will be seen from the report and its annexes (which contain the country specific reports), considerably more information is needed before the likely trade effects can be gauged with any precision. The report does, however, indicate what further information would be needed to identify the likely trade effects in any given country.

The policy options open to ACP countries negotiating access to trade agreements which contain procurement provisions will, in part, be determined by the potential trade effects of those agreements on the domestic procurement market. Whilst we can point to the likely general trade effects of membership of such agreements and, therefore, of the general policy options open to the negotiating parties, the best options will need to be based on the potential trade effects likely to be encountered in a specific country. Determining those likely trade effects will in turn depend on sufficient knowledge of the economy in question.

As a result, this report will be divided into five parts to address each of these issues in turn:

1. Definitions and Clarifications
2. Transparent Government Procurement
3. Market Access
4. Potential Trade Effects
5. Policy Options

Since this report is intended as a tool for a variety of readers in the ACP countries some of whom will be part of the negotiating process, an attempt is made to be as comprehensive as possible making appropriate reference to the relevant literature (mostly in footnotes) whilst avoiding, to the extent possible, overly technical terms and language.
1. Definitions and Clarifications

Before turning to the substance of the report, it is important to shed some light on the terminology used in the context of procurement and international trade. The terminology is not standard and many people will use terms differently (which is part of the problem). Whatever terms are used, however, it is critical to understand what is meant by them in order to appreciate the significance of what is being discussed or negotiated. For the purposes of this report, we will be using the following terms:

1.1 Transparency

The word ‘transparency’ is heavily misused but it is mostly used as a shortcut to refer to a transparent domestic legal framework for procurement. In this case, ‘transparent’ is used as an euphemism ‘good’ or ‘acceptable’. It is frequently used in the expression Transparent Government Procurement or TGP. As a word, it simply means that something is not opaque, i.e. that it is possible to see through it but that does not provide an adequate explanation of what is meant by the expression.

In the procurement context, it may be useful to consider the peculiarities of the Government purchaser so that the critical role played by the concept of transparency can be appreciated. The government is not an individual but a collectivity of individuals who generally hold hierarchical positions within that collectivity. The relationship between these individuals is governed by the institutional arrangements of government. In general terms, it may be that the purchasing policy of the government is set by the elected Government, but the execution of that policy (i.e. the purchases) is carried out by the bureaucracy (civil service) operating as agents of the Government. From that perspective, the actions of the agent may be invisible (opaque) since, unless there is any mechanism to hold the procurement agent accountable, his actions will be out of sight or may be concealed. Indeed, the agent controls the flow of information concerning the subject of the purchase, the procedures, the bidders and the result of the procurement.

As far as the government/public purchaser is concerned, its interest will be to ensure that it knows what its agent does in terms of procurement in order to satisfy itself that the agent is acting in the interests of his employer, is achieving the goals set by his employer, does not make a personal benefit from any procurement transaction and otherwise conducts the procedure in an efficient manner. The personal interest of the procurement agent may well be something

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3 Companies are also not individuals but different conditions apply. These are outside the scope of this Report which considers government as opposed to private procurement.

4 And these may, for our purposes, be supposed to be acting in the interests of the electorate and/or taxpayers. In some respects, the taxpayer might be considered to be the ultimate ‘principal’.

5 One of the most important developments in economic theory from the point of view of public procurement is that, conceptually, such an institution can conveniently be divided into two: the government (represented by the politicians) and the bureaucracy (represented by the government’s procuring agencies/procurement officers). These stand in an agency relationship, the government as principal, the bureaucrat as agent. See, for example, Laffont & Tirole, *A Theory of Incentives in Procurement and Regulation* (MIT, 1993).

6 In economic terms, the principal/agency relationship creates ‘informational asymmetries’.
Transparency is used as a means of controlling the procurement agent so that the principal can monitor the procurement actions and decisions of the agent and make sure that he is indeed acting in the real interests of the government and, by extension, the country. It is thus a tool used by the government to guarantee knowledge of the facts for the purposes of verification and administrative control.

The procurement officer/agent also stands at a disadvantage in respect of the tenderers because it is the tenderers that possess the relevant information both about market conditions and about their own products and costs. The transparency provided by advertising provides the agent with the tool he needs to conduct the search. In this respect, the agent can use (and the Government can make sure he uses) advertising as a means of collecting (and recording) price and product information allowing him to make the best purchasing decision, untainted by his own personal preferences.

The transparency of the competitive process itself provides the tenderers with an incentive to act as 'honest brokers' and to disclose to the agent, through appropriate tenders, the information which is otherwise unknown to him, i.e. competition forces bidders to offer their best prices since, where competition exists, this is the only way to be successful. The tenderers themselves need to have confidence in the procurement system, notably in the commitment of the purchaser/agent to follow the stated procedures (to act fairly). The transparency afforded by public tender opening, availability of records and notification and explanation of results ensure that tenderers will have such confidence. In addition, tenderers require confidence in the implementation of the procedures and in their ability to enforce them in the event of deviation. This, in turn, requires transparent enforcement mechanisms.

Transparency also has a role to play at the level of international organisations but the substance of the provisions does not change; only the objective changes. For international regulators, transparency is a mechanism used to ensure that the benefits of competition are made available to all of those tenderers who are entitled to benefit under the international system at issue. The imposition of transparent procedures, the advance setting and notification of selection and award criteria and the requirement to define specifications in advance by reference, where possible, to recognised standards are mechanisms used to avoid the possibility of overt discrimination. The transparency tools used, however, will be the same. It is the access conditions and thus the objective pursued through the use of the transparency tool that will differ.

The term transparency has only been used in a formal way in a few fora. The WTO has, since the Singapore Ministerial Declaration of 1996, been seeking to negotiate an Agreement on

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7 Of course, the convenience of the government/procurement officer embodiment of the principal/agent relationship should not conceal the fact that the politicians that make up the 'government' may also be tempted to pursue their own personal interests which are not those of the taxpayers. Their interest in re-election at any cost lays them open to regulatory capture and some are also simply just corrupt. But since this approach allows us to explain the problems which flow from the principal/agent relationship, we will maintain this characterisation of the government as principal and procurement officer as agent.

8 The use of the term 'monitor' here does not mean that all actions are monitored individually, although that was the effect of the now mostly discredited practice of direct supervision. This function has now mostly been replaced by bidder driven review mechanisms and the bidders act, in effect, as the monitors of procuring entities and agents on behalf of the Government.

9 Of course, the award may be based not only on price but on a mix of price and product quality.
Transparency. This is now explicitly made separate from the market access negotiations also being conducted at WTO level. A transparency principle has also emerged from the work of the APEC Government Procurement Experts Group and figures among the list of the APEC non-binding principles on Government Procurement. In the European Union, transparency has recently emerged as a new fundamental principle of the Treaty through a series of judgments delivered by the European Court of Justice. Apart from this latter EU principle which is rather specific, these principles of transparency provide examples of how the principle may be applied and implemented in practice in a regional or an international context. The core transparency tools envisaged under the auspices of the WTO and APEC are broadly similar and reflect the practice which has emerged over time in all developed procurement systems. The wheel has not been re-invented. These principles have emerged over many years in a domestic context; they are not the product of international agreements. The principles may conveniently be reduced to five core mechanisms: publication of legal framework; publication of procurement opportunities; procedural transparency; transparency of contract awards; transparent dispute settlement. Seen in this way, the transparency principles conveniently cover most fundamental aspects of a procurement system. The degree of transparency is thus a means of measuring the state of the procurement system as a whole and, for the most part, this is the way in which it has been used.

As a result of the above and for the purposes of this report, we will use the term transparency or TGP to refer to the transparency of the legal framework for procurement within a given country. The level of transparency will be measured against the five core transparency tools referred to in the preceding paragraph. These will be used to measure the degree of transparency achieved in the focus countries (Dominica, Nigeria, Samoa and Tanzania) for the purposes of this report.

We will repeat here, however, that the issue of TGP is independent of the question of market access.

1.2 Domestic and International Competition

It is also important to recognise that international trade or competition is not the result of any international agreement on market access. It exists in any event. Regardless of the existence of a global economy (whether we like it or not) which has facilitated commercial exchanges between distant countries, not all countries can produce all they need or want; they are not self-sufficient. Whenever a country needs to purchase something it does not produce or manufacture, it is obliged to seek providers from outside its borders and to import its requirements. That is international trade and it is likely to be prevalent in some developing countries which do not have the capacity to manufacture high end products or carry out technologically complex projects. Where the country wishes to benefit from the best international prices, it would be advised to ensure that those foreign suppliers compete to provide those requirements on the best terms. That is international competition. This has nothing to do with market access granted in the context of an international agreement (see below) but the operation of the theory of comparative advantage (section 1.5 below).
In practice, domestic procurement rules will generally simply require some form of competition to take place. For the most part, it makes no difference whether or not the products and/or the suppliers are domestic or foreign. If there are no domestic suppliers or bidders, the governments will clearly accept/open their procurement to foreign bidders or suppliers if they want to meet the needs of their citizens. They are obliged to buy foreign products. The procurement rules that apply are generally the same. It is extremely rare to see a national system which excludes foreign bidders or competition. That is not to say that Governments will not attempt to condition foreign participation in some way or to protect domestic industry where there is some domestic production (see 1.4 below) but the point here is that it is unrealistic to assume that there is no international trade or competition in domestic procurement markets already. Where a country needs foreign competition, it exists and it is welcome.

The question is what happens when it considers that it may not need it. Where there is a domestic supply base, some countries may choose to prefer domestic suppliers over foreign suppliers. Possibly the starkest example of how this may come about is found in the Indian federal procurement rules contained in the General Financial Rules (GFR) where foreign bids may be entertained only when those goods are not available in the country. In most cases, however, the mechanism used in the procurement context, is to apply some form of domestic preference. These measures are designed to reduce the impact of foreign competition on domestic production by placing obstacles in the way of foreign goods and services.

When it comes to international economic organisations, therefore, the challenge is not to introduce international competition (which exists anyway when required) but to reduce or eradicate those obstacles which may have been created by national governments to protect domestic industry in those situations where there is both domestic and international supply. This then becomes an issue of market access involving the removal of obstacles with a view to creating equal access opportunities to national and foreign bidders alike, eliminating discrimination in favour of national and between foreign suppliers (usually referred to as the principles of National Treatment and Most Favoured Nation).

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11 Many of the multilateral development banks (MDBs) such as the World Bank, the Inter-American Development Bank or the African Development Bank have introduced some confusion by making an artificial distinction between what they call national competitive bidding (NCB) and international competitive bidding (ICB) as if these were different types of competitive bidding. At country level, it is usually the same rules that apply; the only difference is the identity of the bidders. For the MDBs, of course, they would expect to see the applicable procurement rules contain provisions which facilitate international competition which is why they have, to date, always imposed their own Guidelines for ICB even though there is a current move to reliance on country systems. But, at national level, there is mostly only one set of procurement rules applying to both national and international bidding.

12 No market economy does so and even hard-line communist States such as North Korea cannot do without some foreign imports, however hard they try.

13 The word ‘may’ is used advisedly. As discussed further below, restricting foreign competition will probably have a negative economic impact, even if it may gain political votes. In economic terms, a country probably does need international competition to strengthen its domestic industry; there may be other social or political goals which a country wishes to pursue for non-economic reasons. That is the government’s choice but it is crucial to recognise that this involves a trade-off between economic gains and other socio-political objectives.

14 For example, section 150 of the Federal GFR but this is replicated in all the Indian States and applied vigorously.

15 Of course, outside the procurement context, countries may also impose import quotas, customs duties and other trade barriers to inhibit the import or increase the cost of foreign products.
1.3 Market Access

Woolcock\textsuperscript{16} made a distinction between framework rules, which we define here generally as transparency rules or TGP, and liberalisation. By liberalisation he meant the bilateral and multilateral commitments made by the members to a trade agreement involving procurement and based on reciprocity. He also recognised, however, that improved transparency was also liberalising in the sense that it enhances competition and procurement results (i.e. transparency rules are necessary to render effective the non-discrimination/liberalising provisions). In order to avoid the confusion explained in the introduction between improved procurement rules and ‘liberalisation’, we will here prefer the term ‘market access’ where Woolcock used the term liberalisation.

We use the term because it conveniently and rather precisely describes the intention of, for example, the commitments undertaken by the WTO members who have joined the plurilateral Government procurement Agreement (GPA) and which are reflected in the Annexes to the GPA. Whilst the text of the GPA describes the commitments with regard to the legal framework (the transparency provisions), the annexes set out in detailed terms the market access conditions which apply between the members, e.g. which contracts are covered and not (scope and value), which procuring entities are obliged to grant access, together with any exemptions or reciprocity conditions which apply between some or all of the members.

As stated in the introduction, the quality of the national legal or regulatory framework (its level of transparency) is in most cases a pre-requisite for membership of an economic organisation dealing with procurement. Where it is not satisfactory, it would need to be improved. This could have two different but potentially dual purposes. From the country’s perspective, it has the purpose of improving the national procurement system to deliver better quality, quicker and cheaper procurement results. It may also have the purpose of enabling the country to seek membership of a regional or international economic organisation. From the perspective of the regional or international economic organisation, the purpose will be primarily to assist the putative member in attaining an acceptable level of TGP to enable it to join, thus paving the way for reciprocal market access.

Once this is achieved, then the parties will be able to negotiate market access conditions concerning the extent to which they will offer reciprocal access for the benefit of their bidders to the procurement markets of each other. This is a distinct process from improving transparency.

Most trade agreements\textsuperscript{17} will follow the same path or involve the same issues: they will deal with the quality (transparency) of the procurement framework and the degree to which bidders from all parties will be able to get access to each others procurement markets.


\textsuperscript{17} See 3 below.
1.4 Domestic Preference

We have already indicated that foreign competition will exist in all countries to a greater or lesser degree. Where that international competition is significant, countries will often have in place measures which seek in some way to protect domestic industry. These measures include local content rules or rules of origin which establish a preference for locally produced goods; price preferences for local goods and labour; requirements to use local labour either imposed on the main contractor or his sub-contractors; the set aside of contracts or of a percentage of contracts by means of quota for the benefit of regional or local firms or of privileged firms such as small businesses or those which are owned and operated by minority groups or disadvantaged groups\(^\text{18}\); preferences, other than price preferences, which operate to favour specific groups in the event of the submission of equivalent bids; the possibility given to privileged groups of matching what is otherwise the most competitively priced bid (often referred to as a ‘purchase’ preference) and any other measure whose object or effect is to prefer a certain category of firm. These preferences may be applied at different stages of the procurement process and will not always appear at the bidding stage. They may be applied, for example, as conditions of eligibility, or statutory or contract compliance, during the selection process or at the stage of the award of the contract.

Whilst it is frequent to see such preference measures, experience shows that governments do not, on the whole, have a well-articulated economic justification for preference policies, i.e. they do not always have a well thought out reason for applying them. The application of domestic preferences may result in immediate visible effects, e.g. increased prices obtained for domestic goods; larger numbers of contracts awarded to local suppliers and fewer to foreign suppliers but little though is given to any consequent welfare effects on the actual benefit supposedly achieved for domestic industry.

One argument is that preferences can be effective in the case of an "infant industry" that needs assistance to enable its development to viable commercial performance. If there was substance in such a justification a rational approach would dictate that the protection involved (akin to a tariff but more limited in application) would be reduced as the industry developed. That rarely happens. Justification for preference is more likely to be about maintaining jobs (an unlikely outcome in many instances) or ensuring that national producers obtain a ‘fair share’ of government business. This is not the same thing as increasing economic welfare. It is more obviously related to social or political objectives, as in the US with the residual Buy American Act and various special set-aside or preferential schemes for small and disadvantaged suppliers. Another common theme is that preference margins are needed because all other countries had them, whether explicitly or not, so we need to match them. The Tanzanian preference, discussed below in the context of financed procurement, has shades of such an argument. Whatever the motivation, real or imagined, there is no doubt that they are used in practice.

One preliminary point to bear in mind is that, if the intention is to seek to protect domestic industry, then the preference will need to apply to goods of domestic origin or to national labour. The practice in some countries of providing a preference to national companies or individuals has nothing to do with protecting national industries. It is a mechanism for financially

\(^{18}\) The preferences for small businesses or those which are owned and operated by minority groups or disadvantaged groups are not explicitly (though they can be) directed towards national companies but the effect is often the same.
benefiting individuals, usually strong interest groups within the country. A preference for a national company does not necessarily guarantee or even encourage the use of domestic goods or labour. A national company can sell on imported goods or use foreign labour as easily as anyone else. It merely provides the company with guaranteed government income. To be effective in benefiting domestic industry (which is a legitimate objective), therefore, any domestic preference would need to attach to the product or labour in question.

In the context of the general country assessments carried out as part of this report, it would seem that Tanzania is following this path. Article 25 of the Procurement Guidelines appear to allow procuring entities, when procuring goods, works, or services by means of international and national competitive tendering, to grant a margin of preference for the benefit of tenderers for certain goods manufactured, mined, extracted or grown in Tanzania, or works by Tanzanian contractors provided that this is clearly stated in the tender documents. The Guidelines go on to say that suppliers contractors, service providers or buyers of assets who are citizens of Tanzania shall be eligible to be granted a margin of preference provided they meet the nationality criteria given in section 49 of the Public Procurement Act and are registered... When foreign suppliers participate in tenders (for goods, services or works contracts) there is a maximum margin of price preference that can be granted. Further, section 49 of the Act provides that where financial resources are exclusively provided by a Tanzanian public body, each procurement of works goods or services that has a value not exceeding a threshold specified in the Regulations shall be reserved exclusively for local persons or firms. Tanzania thus appears to adopt a double obstacle: a preference for national products and labour supplied by national firms or individuals. This is reinforced by a set aside provision (i.e. the practice of allowing only domestic bidders or a section of domestic bidders to bid), although this only applies to domestically funded portions of a contract where the procurement is otherwise financed by donors which apply tied aid practices. In this way, it may be seen as no more than a quid pro quo.

Having made this preliminary point, there is some doubt as to the efficacy of domestic preferences at all. In this context, we will discuss only price preferences which are perhaps the most common form of domestic preference used in a procurement context. Set asides are also frequent, of course, and are also used as exceptions to international agreements such as the GPA. For example, the US maintains the infamous set aside for minority owned companies. It is also a mechanism used in South Africa to provide a preference to companies owned by the people disadvantaged by the previous apartheid regime. As mentioned in the previous paragraph, Tanzania also employs set asides as some form of quid pro quo in the case of procurement financed by donors. Nonetheless, price preferences as the most obvious form of protection have attracted the most attention and there is thus more economic literature available for analysis.

Price preferences have been and are used extensively in the context of public procurement and they seek to grant limited protection to domestic industry by giving local goods or local suppliers a price preference which operates by artificially increasing the costs of (foreign) competing

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19 This will usually be defined by reference either to local content requirements or to rules of origin and may include some foreign component.

products. The prices of the imported products are not actually increased and paid, as with tariff restrictions, but are increased by a certain percentage for evaluation purposes - it is an accounting method only. The expressed aim is not to protect inefficient suppliers but to allow efficient suppliers to develop and emerge in the domestic market. The argument is that to allow unrestricted access for third country suppliers to markets in the early stages of their development\(^\text{21}\) may give governments access to cheaper products but at the cost of the development of a domestic supply base and of impoverishing the national economy.

The price preference is a limited restriction based on a preference for purchasing the domestic firm's products provided the increased cost involved in buying the domestic product does not exceed the cost of buying the foreign product by a certain fixed percentage\(^\text{22}\). It is based on the notion that the domestic bidder should be compensated for its cost disadvantage and the price preference thus benefits the domestic firms who have a cost disadvantage by allowing the government to opt for the higher priced bid. The benefit to the government is that the profit made by the domestic supplier re-enters the national economy thereby increasing social welfare\(^\text{23}\). To operate optimally, however, such price preferences would have to apply on an industry by industry (or product by product\(^\text{24}\)) basis according to the relative cost advantages between domestic and foreign suppliers and, if carried out properly, would even militate in favour of a price preference for foreign goods where they have a comparative cost disadvantage. Such an analysis would be gargantuan, however, and most countries which operate such a system, evidently not only developing countries, have opted for single fixed preference levels across the board\(^\text{25}\).

These do not accurately reflect the cost advantages and disadvantages and will serve to achieve the stated results only in those sectors where the percentage chosen fortuitously matches the domestic firms' cost disadvantages. The result would be, in those cases where the domestic firm has a comparative advantage, simply to increase the procurement cost to the government buyer without creating any particular efficiency benefit to the domestic supplier which is able simply to increase its price. Whilst the domestic supplier is able to increase its benefit at the expense of the foreign supplier and, inevitably, at the expense of the government buyer, it is open to question whether the resulting benefits are indeed passed on to domestic consumers and whether social welfare is, in fact, enhanced\(^\text{26}\). Certainly, the domestic firm or firms remain protected from competition and, with guaranteed government markets and guaranteed high profits, would have no incentive to improve its or their economic efficiency.

\(^{21}\) The real problem, of course, is that the protection is usually extended well beyond infancy of the industry so that its continuing inefficiencies are merely prolonged at the expense of the country.


\(^{23}\) In cases where the domestic firm has a cost advantage, however, this would simply serve to increase the cost to the government unnecessarily for, even without the price preference, the local supplier would have won the bid.

\(^{24}\) This appears to be the route taken in Samoa, one of the sample countries, where the Tenders Board has the power to approve on a case-by-case basis a margin of preference for domestic manufactured goods and domestic works contractors.

\(^{25}\) For example, the U.S. applies a basic 6% price preference under the Buy America Act, Canada 10%, Australia 20%.

It has been suggested\(^\text{27}\) that price preferences may, paradoxically, serve to achieve one of the goals of procurement regulation, viz. to reduce the price to the government. Whilst recognising that the existence of such preferences is not motivated by this goal, but by political ‘protectionist’ or interest group objectives, their application may nonetheless operate to achieve the goal. As indicated above (under transparency), one of the problems faced by the government as buyer is information (or the lack of it). The government does not know the expected costs of any firm; if it did, there would be no need to organise competitive bidding and the government would simply order from the lowest cost supplier. In comparing domestic and foreign bids, the government is at a further disadvantage because it will not know the extent of the effect on costs of the comparative advantage held by the competing firms. In the absence of price preferences, the foreign firm which has a comparative advantage may decide to exploit the domestic firms' comparative disadvantage by bidding at a price which is marginally below the price a domestic firm would offer but which would be significantly higher than its own cost, thus increasing its profit. By favouring a domestic bidder with a price preference, the government would force the foreign bidder to reappraise the situation. In order to win the contract, it would have to reduce its price not to the price that would be offered by the domestic supplier but to that price plus the percentage of the price preference. The price preference thus serves to lower the bid of the comparatively advantaged supplier even further.

This results in increased social welfare to the extent that the government has reduced the rent obtained by the foreign supplier and lowered its procurement cost. The limitations of such unexpected benefits arising from the imposition of price preferences are the same as above. In order to work optimally, the preferences would need to be fixed by industry and by product in order to reflect accurately the precise cost advantages which prevail. In any event, the benefits, where they exist, are accidental and not the primary reason for the price preferences.

In addition to achieving such unexpected benefits, it has also been suggested that the existence of price preferences actually has no effect on trade, i.e. does not reduce imports or increase domestic price, output or employment\(^\text{28}\). This finding rests on the premise that government demand does not account for all purchases and that there is a sufficiently large private market for the same (substitutable) goods. In these circumstances, discriminatory price preferences which shift the demand of the government buyer towards domestic products will generate an equal and opposite shift in private consumer demand towards imports, because the private sector can buy the identical (or substitute) product at the same price on the world markets. The effect of an increase in government demand for domestic output will be to leave unaffected the domestic price and displace private buyers onto the international market. Analytically, the price preference is simply a transfer from the government to domestic producers, akin to a subsidy.

In many cases, however, particularly in the case of economies in transition and some developing countries which have been and are politically or geographically isolated, demand for many


products emanates almost exclusively from the government. Where this approximates total demand, the government will end up as the only buyer of the domestic product and, if it applies the price preference, will pay a higher price than if it had been willing to buy product supplied through imports from foreign producers\textsuperscript{29}. Where government demand cannot be satisfied by domestic supply, then domestic preferences will tend to reduce imports and lower national welfare as a result of the captive domestic prices paid by the Government, at least in the short run; the long run effects will depend on other variables (notably the exit and entry possibilities) but it is quite possible that there would be no significant effect\textsuperscript{30}. Where this protection is not merely a question of cushioning a comparative disadvantage but a means of creating or maintaining a domestic industry where none would otherwise exist, then the cost of that protection to the country and to the social benefit of its citizens is dramatically increased.

Further, purchasing decisions are rarely restricted to price. Governments as well as other buyers will take into account a number of different factors such as quality, life of the product and concomitant services such as after-sales services or training. In these cases, price becomes less critical and, to have a significant effect, the price preference would have to be fixed at a high level. This, of course, would merely exacerbate the cost implications for the purchaser and commensurately decrease the economic efficiency of the domestic firms.

The concrete effect of price preferences will also have much to do with the prevailing market structure. Where the local suppliers are few (or where there is only one monopoly supplier) or are heavily cartelised, then the price preference will merely succeed in exacerbating the lack of competition and efficiency. Faced with protected markets (especially in the context of a dominant public buyer), the local suppliers will have no incentive to improve their efficiency or seek to innovate or invest in new technologies. Complacency replaces rivalry, inefficiency replaces competitiveness with potentially devastating effects for economic progress and development.

The precise effects of price preferences are difficult to assess. What may be said, however, is that in a perfectly competitive world, there may be no significant effect on trade or at least an effect which is benign. There is no economic support for the argument that they do unequivocally assist domestic industry\textsuperscript{31}. Since we do not live in a perfectly competitive world, the only conclusion that can be drawn is that the beneficial effects of price preferences remain dubious while their costs for the country applying them and for international trade remain uncertain.

\subsection*{1.5 Regional and International Procurement Regulation}

No country can escape the reality of the global economy and no country can isolate itself from international trade. When goods and services are not produced at home, they must be purchased from abroad. The world's economies are becoming increasingly interdependent both as a result of technological advances as well as of political initiatives. But this interdependence brings vulnerability as well as advantage. Whilst cross-border transactions become easier to

\textsuperscript{29} Hindley, 'The Economics of an Accord on Public Procurement Policies' (1978) The World Economy 279, 282.

\textsuperscript{30} Evenett and B. Hoekman (n 28 above).

\textsuperscript{31} It is, of course, a ‘political’ claim that is made constantly.
effect and more difficult to control, difficulties arise as a result of the various economic cultures involved, their regulatory systems and their ‘domestic’ policies which have the effect of protecting the domestic market\textsuperscript{32}. In such circumstances, the task of governments is where possible to manage operation of the global market to their benefit.

In an attempt to control or manage the effects of international trade and to gain the maximum benefit from the advantages it has to offer, many governments have opted to create regional or international regulatory systems whose aims are to garner these advantages by creating a level playing field between the participants. This may be a purely economic initiative and one intended to improve in one way or another the available benefits, mainly by cutting out attempts to distort trade, the most obvious example being the World Trade Organisation. It may also have a political motivation intended to consolidate specific regions and to optimise the operation of international trade within that region. Here, the European Union is a good example, although there are many others: the European Free Trade Area, the North American Free Trade Agreement, the Asia Pacific Economic Cooperation Forum which all exhibit similar intentions, subject to the degree of integration envisaged.

The benefits to be expected from international trade and, therefore, those to be maximised/managed by all governments affected by it, are based on the theory of comparative advantage, first espoused by the economist David Ricardo\textsuperscript{33}. It is a theory based largely on the premise that each country is blessed with different endowments of land and natural resources, labour and capital and that, depending on how efficiently these are combined, some countries will be able to produce some products more cheaply than others. By concentrating on the production of products which they can produce more cheaply (i.e. where they have an absolute advantage), a country will be in a position to exchange those products for others which are produced more cheaply elsewhere. Thus trade is beneficial because the allocation of resources is inefficient or, to put it another way, different countries begin with different resources. Two countries, for example, are able to benefit from trade because they each have an absolute advantage in the production of one of two goods, i.e. the cost of producing the product in one society is cheaper than the cost of producing the product in the other. However, the theory also postulates that both will also benefit from trade if one has a comparative advantage in the production of the good. Thus, even where one society is better at producing all products, it will be better off in specialising in those products where it has a comparative advantage and trading that product for others.

The basic premise is that, based on comparative advantage, free trade will lead to increased global welfare because resources will be allocated efficiently so that production is carried out in the most efficient manner (location) possible and the output is distributed according to demand by way of efficiency in exchange. In a perfectly competitive world, this will lead to a single equilibrium price which pertains when the quantity demanded equals the quantity supplied. All attempts at creating free trade systems (at whatever degree of integration) are based on the theory of comparative advantage.

\textsuperscript{32} Even where that is at a cost to the country.

The regional and international organisations referred to above exhibit various objectives from the trade liberalisation of the WTO to the market integration of the EU. The free trade agreements seek to liberalise trade within a given region or between identified countries and other groupings such as the Asia Pacific Economic Cooperation Forum (APEC) offer a set of non-binding principles which are designed to encourage freer trade between the parties. Whatever the precise motivation, each of these cooperative efforts exhibit a number of similar characteristics. The rules which they adopt reflect the belief that free international trade (or regional trade) will provide increased social benefits to the members of the different groupings. To achieve those benefits, national objectives need, to the extent possible, to be limited such that they do not create or maintain obstacles to the achievement of freer trade.

All Governments possess sovereign powers which enable them, within the confines of their territory, to determine their own policies and objectives and to adopt all measures for their implementation. However, as an actor in the international arena, international law may place limits or conditions on the pursuit of such national objectives and on the application of implementing measures where these may have an extra-territorial effect on other States. Where States voluntarily adhere to some form of cooperative international regulation, they concomitantly accept restrictions to their freedom of action in respect of those matters which are so regulated. In other words, if they join the club, they are expected to adhere to the rules of the club and do nothing which harms the club.

National objectives are not prohibited as such and members will usually be allowed to maintain national policies which are designed to protect matters which fall pre-eminently within the ambit of the exercise of national sovereignty such as national security, public health, national heritage and so forth; they are, however, otherwise prohibited to the extent that they cause injury to the trading (or domestic) interests of the other members. The aim is to ensure non-discrimination between the members of the club based on the free trade principles of MFN and national treatment. Membership of the grouping/organisation requires acceptance of the rules it has developed to guarantee the achievement of the benefits of membership, though there may be exceptions, over a transitional period, for those economies which need to adjust to those rules. The same is true of the procurement rules of these organisations where they exist. They are designed to regulate the free trade between the procurement markets of the members.

However, it is important not to lose sight of the reality of the situation. Even free trade has a political dimension. In terms of procurement, it may be naive to suggest that procurement systems based on free trade principles are motivated purely by economic altruism. Governments are content to subscribe to such systems not only because they seek to develop their own domestic markets through competitive forces but because they see advantages for their own suppliers in having access to the markets of third countries. They see access as a means of maximizing their comparative advantage. That membership of such a system implies reciprocal access merely indicates the belief that their own domestic markets are sufficiently strong enough to withstand such competition.

It is not only developing countries, for example, that benefit from exceptions to the WTO’s procurement system. Industrialised countries which otherwise openly welcome free access to their procurement markets, have negotiated a significant list of areas of procurement that are either excluded from the general provisions because they fear difficulties as a result of their
comparative disadvantage or which are subject to policy considerations which they are reluctant to give up. The Annexes to the GPA which set out such exceptions are an integral and essential part of the whole system. They highlight very clearly the tensions between free trade in procurement and national interest. Parties negotiating access to the GPA (and similar organisations) would thus be well advised to study such annexes (or market access conditions) carefully since they disclose the real scope of free trade in procurement. MFN and national treatment will often be set aside in the face of particular national interests.

New members will also be expected to negotiate their own annexes which detail the market access conditions which will apply. They should thus be informed by the existing annexes to ensure that they gain no less protection than the current membership. The GPA contains provisions providing special and differential treatment for developing countries which are thus able to limit market access to some extent. These will also provide additional protection to new members and should be relied upon for the benefit of the negotiating party.

2. Transparent Government Procurement

As indicated in the introduction, we propose to consider the issue of TGP independently of market access. Whilst increased market access may improve procurement results by providing a greater pool of national and international bidders and a larger variety of products and prices, the real benefits in procurement are to be found in a sound and transparent national procurement system, regardless of whether foreign bidders are given privileged access to the domestic procurement market. Where any country is seeking membership of a regional or international economic organisation in respect of procurement, its membership will depend on the quality and level of transparency of that system. For the purposes of establishing a negotiating position, it is therefore necessary for a country seeking membership or association to be aware of the adequacy of its own procurement system. That will be the first issue for discussion. The question of market access comes later.

Consideration of the national procurement system is of itself a valuable exercise in the course of trade negotiations since the wider membership of the economic organisation in question will be keen to welcome more members. If the procurement systems of potential members are inadequate, the existing members may well provide technical and financial assistance in improving that national system. Thus, the very act of participating in negotiations may lead to improved procurement regulation at national level which will bring the majority of the benefits to be expected from TGP. Broader (international) competition may enhance the results but the core mechanism for national savings and efficiency is the adoption and implementation of an adequate procurement system.

In this section, we will consider the five core transparency mechanisms referred to in section 1.2 above, namely, publication of legal framework; publication of procurement opportunities; procedural transparency; transparency of contract awards; transparent dispute settlement. We will then, in turn, consider the benefits of improved TGP and the costs of improving TGP.

2.1 Core Transparency Tools

We consider the five core mechanisms in turn, expanding on the general introduction to explain what is involved at the level of the legal framework. In setting out any ‘preferred’ solutions,
these will be derived from the OECD/DAC baseline indicators\textsuperscript{34}. We will also summarise the findings of the country assessments in respect of the sample countries to provide an idea of the level of transparency they might achieve. This cannot be a definitive assessment given the constraints of the study. Information has been collected from secondary sources which are often out of date\textsuperscript{35}. There has been no possibility of verifying the findings on site or with the authorities of the countries in question. The reports do, however, enable us to draw some general conclusions.

2.1.1 Publication of Legal Framework

(a) Benchmarks

This is a question of ensuring that the legal and regulatory framework is known. This would include any Law\textsuperscript{36}, regulations (and implementing regulations or procedures), directives, administrative decisions or circulars, mandatory bidding and contract documents and any other binding text which affects the conduct of government procurement in the country. Knowledge and awareness of the legal framework may be effected through publication in official gazettes or bulletins, for example, or by a specific publication of an agency responsible for procurement. It may be done through physical means or by electronic means such as through a dedicated government website. The objective of such transparency is to ensure that the applicable rules are known and, hopefully, understood by procurement officers and potential bidders so that all participants know the ‘rules of the game’.

This is important first and foremost to all national bidders but will also be of benefit to potential foreign bidders where these are admitted to the domestic market. Without such knowledge they may be wary of participating and the government would lose the confidence that is necessary for any competitive system to operate optimally. At the level or regional or international economic cooperation, transparency of the national procurement system is generally the \textit{sine qua non} of engagement. It is the first requirement, for example, for entering into GPA accession negotiations.

Such transparency is also beneficial to the general public and civil society. As taxpayers they need to be satisfied that the bureaucracy will be held accountable for expenditures from the public purse.

(b) Achievement Level

Among the sample countries, only Samoa and Tanzania would appear to meet the required levels of transparency. In the case of Samoa, statutory provision for the regulation of public procurement is contained in the Public Finance Management Act 2001 supplemented by two new Procurement and Contracting Guidelines adopted in 2006 covering the procurement of

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{34} Developed by the Joint Venture for Procurement of the OECD’s Development Aid Committee (DAC).
\item\textsuperscript{35} This is particularly true of Nigeria where legislation was in the process of being passed at the time of the last available reports.
\item\textsuperscript{36} Whether it is a law, regulation or other administrative instruction that regulated procurement is generally a matter for the national system although hierarchically superior legislative acts are generally preferred on grounds of legal certainty.
\end{itemize}
\end{footnotesize}
goods and works (including also the category of ‘non-consulting services’) and the procurement of consulting services. These are closely aligned to the World Bank’s own Guidelines. At the time of drafting the 2003 Guidelines which have been replaced by the new 2006 Guidelines were still displayed on the Ministry of Finance website along with their replacements, which were still marked as drafts. The Ministry of Finance, however, has confirmed orally that the new Guidelines have now been trialled and finalised and the 2003 version superseded.

In respect of Tanzania, the legal texts are all publicised and easily accessible via the internet. Standard documents are prepared by Public Procurement Regulatory Authority. All the relevant procurement information is gathered in a manageable format, there are guidelines and a great effort appears to have been made to disseminate this information. This is the result of the significant efforts underwent in recent years to reform the procurement system aided by the strong presence of multilateral and bilateral donors such as the Public Financial Management Reform Programme (PFMRP) funds.

The situation of Dominica and Nigeria is less clear. In the case of Dominica, there appears to be no legal or regulatory requirement to publicise procurement related legal texts. There is also no comprehensive piece of legislation with the applicable rules being scattered among various texts of differing authority. The Ministry of Finance is responsible for making financial and procurement regulations and issuing directions for the procurement of goods, works and services by tender or direct purchase but these do not appear to be published. It seems that most of the players involved in the public procurement process, both from the public and private sector, are not aware of the procedures.

Nigeria is currently difficult to assess. At the date of the last available assessment, there was no coherent legal framework for procurement but a number of disparate circulars and regulations, although a comprehensive new Public Procurement Act and supporting documentation was adopted in 2007. The Public Procurement Act 2007 is a significant improvement, which once it is fully implemented should provide a much more solid basis for Nigeria’s public procurement.

2.1.2 Publication of Procurement Opportunities

(a) Benchmarks

This is a question of publishing procurement opportunities, i.e. advertising the procurement. Most procurement systems are based on the idea of competitive tendering and, in order to succeed, need to find a way of attracting competition. What for the procurement officer is a market search mechanism becomes an exercise in disseminating his requirements as widely as possible.

Traditionally, advertising has taken the form of advertisements placed in mass circulation newspapers, in trade or other specialised journals, broadcast on the radio, posted on notice boards or sent to selected locations, including in some cases, to the embassies of foreign countries for further dissemination. The advent of electronic media, notably the internet and world wide web, has transformed the landscape by offering increasingly cost-effective means of advertising with much greater coverage than ever before. Almost all reform countries are now in the process of introducing electronic publicity systems.
This concept will also cover the degree of transparency of the procurement procedures actually employed, i.e. the degree to which procedures other than open competitive bidding are used. Whilst most procurement systems allow the use of alternative procedures (such as direct contracting/sole source or negotiated procedures, or procedures for low value contracts) they are usually subject to very strict conditions. Even if they are justified on efficiency grounds, these procedures also remain opaque so the conditions of use must also be made transparent.

In a purely domestic context, the prudent government should be concerned if the level of alternative (i.e. non-transparent) procedures used is excessive. It may be that procurement officers are using less competitive procedures (which are, by definition, exceptional) where they should not. It may be that contracts are being artificially split up into a series of smaller contracts with a view to avoiding the application of the applicable rules. From an international perspective, trade negotiators would be inclined to see the high level of non-transparent procedures in a negative light either because it (i) demonstrates the lack of commitment of the government to TGP or because (ii) the national rules, even where appropriate and acceptable, are not being implemented.

(b) Achievement Level

Both Samoa and Tanzania appear to meet the requisite levels of transparency. In Samoa, the procurement Guidelines require that all invitations to pre-qualify or to bid in open procedures and other procurement notices be advertised in ‘a widely circulated newspaper’, and internationally where required by a donor or financier, or where that is advisable in the interest of maximizing competition. There does not appear, however, to be a requirement to advertise internationally over a certain threshold. There is a risk that no foreign bidders would be invited even where that would be desirable. This does not affect the level of transparency at domestic level but would probably need to be addressed in the context of any procurement related trade negotiations. More generally, the rules also provide for a variety of methods in the procurement of goods and works and outlines the circumstances in which they may be applicable. The Tenders Board must approve the procurement method to be used in each case.

As far as advertising is concerned, Tanzanian rules ensure a high level of transparency. Procuring entities need to prepare and advertise a tender notice before carrying out any of the open tendering procedures available. Tender opportunities are advertised on the Tanzania official procurement journal which is available on line. Further, when tenders are open to international competition, the invitation to tender has to be advertised in an international newspaper. The legislation does not specify the name of the international journal/newspaper where to advertise the tender which could cause some uncertainties; the provision should probably clarify that the international newspaper should be of wide internationally circulation. At the wider level, competitive tendering is the preferred procurement method but derogations to this principle apply and public authorities can use alternative methods provided that they respect certain thresholds and the conditions laid down in the regulation are respected. Further, the general monitoring mechanisms continue to be in place (for example approval by the tender board needs to be sought); records need to be kept and rules are also provided for avoiding splitting up of contracts so to lower the value of the procurement.

The situation is more mixed in the case of Dominica. There is a legal requirement to advertise contract opportunities. This is generally done through the Gazette, local press and by way of
radio announcement. The Gazette is published regularly and is available to the public. For the procurement of works, in practice works projects are advertised and contractors can be invited to pre-qualify depending on the complexity of the project. Projects are advertised in local newspapers, with larger projects being advertised in international newspapers, as well as in the Gazette and in the broadcast media. It seems, however, that selective tendering, with a request of a minimum of three quotes, is usually preferred to open tendering. This would need to be addressed in the context of any negotiations. In the case of Nigeria, the existing reports suggest that how and when advertisements should be posted is not clearly spelled out in the Financial Regulations. In some States and federal Ministries bidding opportunities are seldom posted. The Official Government Gazette is not published on a regular basis.

2.1.3 Procedural Transparency

(a) Benchmarks

Procedural transparency is a critical element of any system of TGP and refers to the procedural aspects of the legal framework, i.e. how procurement is conducted. In the broad sense, this refers to the conditions of bidding (when, where and how to submit bids and the time allowed for submission), bid opening and of the ultimate contract. In a narrower sense, this will include:

- the technical specifications;
- the eligibility\(^ {37}\) and qualification/selection criteria to be applied;
- the award criteria to be used in comparing the bids.

The most obvious purpose of such transparency is to enable the potential bidders to know what it is they are bidding for and how the bidding process is to be conducted. This will allow them to decide whether or not they are in a position to bid. Clearly, they will need to know what products, works or services are required (as well as the date of delivery), the quality and quantity that needs to be delivered, what qualifications bidders must have, on what basis their bids will be compared and whether they can accept the terms and conditions offered\(^ {38}\). Only then will they be in a position to bid. This is coupled with the notion of fairness and equal treatment to the extent that these various specifications, conditions and criteria need to be made clear (transparent) at the outset to all bidders (and at the same time) and applied to them equally. If anything should change during the course of the procedure, then a transparency obligation would require simultaneous disclosure of those changes to all the bidders.

Public bid opening procedures, where they are applied, are an additional means of providing transparency by requiring procuring entities to disclose the identity of bidders and bid prices. They provide an additional check of conformity of the procedure with the rules and enhance the confidence of the procedure by allowing bidders to identify any subsequent irregularities, e.g. appearance of new bidders, award on the basis of prices different to those initially disclosed etc.

From the government’s or the regulator’s point of view, procedural transparency is the critical component of administrative control. In order to be sure that the procuring officer is acting in

\(^ {37}\) Including any applicable local preferences.

\(^ {38}\) Most of this will be set out in the bidding documents.
the interest of the government according to the rules and instructions imposed on him, the
government needs to be able to verify (should it so wish) that the officer has acted in
accordance with those rules and instructions. It is a question of verifiability and the government
needs to see how well the instructions have been complied with.

These two complementary objectives, the promotion of objective and fair competition and the
ability to exercise administrative control are essential tools used for the benefit of the
government. They form the core elements of the efficiency of the national procurement system.

From an international perspective, their importance is one of degree. An international trade
partner or international regulator will be interested in the same issues since they affect the
effectiveness of the national system as a whole. In addition, however, they would also be keen
to ensure that the system does not operate in a biased or discriminatory way to the detriment
of foreign bidders.

(b) Achievement Level

Samoa and Tanzania are again the most transparent. The assessment shows, for example, that
the level of procedural transparency in Tanzania is acceptable. In particular, it is clear that
Tanzanian measures on technical specifications, the provisions on qualification criteria and
award criteria all comply with international standards. Subject to the preference rules applied
there is little risk of discrimination.

In Samoa, the Guidelines provide that government procurements are ‘normally open to all
qualified and eligible bidders regardless of nationality and without restriction as to the origin of
their inputs’. The Guidelines make extensive provision for the content of bidding documents,
including the use of standard bidding documents required by donors or financiers as appropriate
and the use of Government standard bidding documents for self-financed procurement, subject
to any exemptions approved by the Tenders Board. None of the provisions relating to bidding
documents discriminates against foreign suppliers. Prequalification of bidders is used for works
contracts and for supply of technically complex equipment where the expected value is above
$500,000. Prequalification must be based entirely on the ability to perform the relevant work or
supply the goods required, taking account of experience and past performance, capabilities and
financial position. There is no limitation on the numbers of prequalified bidders and all of them
must be invited to bid. Post-qualification is applied in a similar manner to verify the capability of
the lowest bidder where prequalification does not apply.

For works and goods and non-consulting services the rule for the selection of the first ranked
tender is essentially that it should be the lowest responsive technically compliant offer within
the maximum available budget. Technical compliance is assessed on a pass/fail basis and not
scored. The standard bidding period is 30 days or 45 days when international bidding is
anticipated and extension of the bidding period is foreseen where that would result in greater
competition.

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39 See section 1.4 above.
Much improvement would seem to be needed in Dominica to render the transparency level acceptable. There are a number of obvious problems. There are no legislative guidelines on qualification criteria but contractors appear to be listed in an unofficial register, which is not updated on a regular basis. There is no statutory requirement to include evaluation criteria in bidding documents. The bid evaluation and contract award criteria are not fully provided to the bidders and, where they are, tend to be vague. Procuring entities do not consider themselves bound to give reasons for not accepting the lowest tender or any tender. A bid evaluation (as opposed to qualification) can take into account past dealings with the contractor, the past performance of the bidder and the completion date and price, among others. It appears that the bidding documents do not contain many formal instructions on the conduct of the procedure.

Nigeria’s system also appears, from the reports, to be in need of improvement, although the situation may well have changed following the 2007 Act. Current information indicates that the description of what procurement methods should be used is very limited and there are no detailed rules on when or how they should be applied. The choice of method is left to the discretion of individuals to choose. In addition, there are other major weaknesses such as the lack of standard bidding documents; the absence of a requirement for or guidance on bid openings in terms of timing, location and participation; the lack of a requirement to include evaluation criteria in the bidding documents and the use of non-transparent criteria such as “reference price” and “profit margins” are often part of the evaluation and the standard use of negotiations.

2.1.4 Transparency of Contract Awards

(a) Benchmarks

The transparency of the award decisions is, in a sense, the corollary of procedural transparency. It is a method of ensuring that the stated requirements, specifications and criteria have been complied with and that decisions have not been made on any other grounds. It allows for further verification. It also serves the purpose of putting bidders on notice of the outcome so that they are in a position to react and launch a challenge where they perceive that a breach of the rules has taken place.

A frequent additional requirement is that bidders should not only be informed of the final decision but should also be notified when they have failed to qualify or where their bids have been rejected on other grounds and that they should be given the reasons for those decisions. Clearly, this provides further opportunities to check that the rules have been complied with and applied fairly but it also serves another purpose of encouraging the improvement of the supply base by indicating to failed bidders those areas where they need to improve, be it in respect of their qualifications, compliance with formalities or general terms of trading.

(b) Achievement Level

In Samoa, the legal provisions include requirements for the disclosure of relevant information to prospective bidders, for public opening of tenders and proposals and suppliers’ debriefing. There does not appear to be a requirement for the publication of a contract award notice. There is such a requirement in Tanzania although the practice does not seem to reflect the legislation.
in respect of notification of awards. The same appears to be the case in Dominica; contract information should be published in the Gazette but this is not done in practice. No mention of the publication of contract award appears to be made in Nigeria either. In each of these cases, therefore, it may be necessary to review the level of transparency more closely.

2.1.5 Transparent Dispute Settlement

(a) Benchmarks

The issue of dispute settlement is generally stated to be a matter of ensuring that bidders have and are seen as having enforceable rights in respect of any breaches of the procurement rules. The mechanism foreseen is the publication not only of the provisions relating to the availability of and the conditions for commencing review procedures (essentially part of the transparency of the legal framework) but also of the decisions of the competent authorities in respect of any bid challenge or complaint.

The transparency of the bid challenge procedures is a mechanism to ensure that verification can take place where required. The transparency of the ultimate decisions of the reviewing bodies provides evidence that bid challenges are possible and successful thus building the confidence of the bidders in the system itself. Unless bidders have confidence in the system they will not challenge inappropriate decisions and the government will not know whether its instructions are being followed. It will also not know whether the benefits it expects from having introduced procurement regulation will be achieved.

(b) Achievement Level

In Tanzania, the review mechanism largely follows the provisions of the UNCITRAL Model Law and complies with the recommendations of the CPAR. Samoa would also seem to provide similar procedures although these based on administrative rather than quasi-judicial solutions. Recourse to the courts remains a final option but the process is far from lean. In Samoa any bidder should first seek debriefing. If not satisfied the unsuccessful bidder may submit a written challenge to the procuring Ministry or Corporation, with a copy to the Secretary of the Tenders Board. If the challenge is unsuccessful bidder may submit a written request (with supporting reasons) for Tenders Board review. The Tenders Board is required issue a decision within thirty days of receipt of a bidder’s request. The decision of the Board will be final but if the bidder believes that such decision is not consistent with the Procurement Guidelines or is otherwise contrary to law, it may appeal to court within six months of its receipt of the Tenders Board’s decision.

In Dominica, there is no independent body to which a supplier or a contractor can address their complaints or report irregularities during a tendering procedure and no formal complaints procedure. Judicial review is possible but the procedure appears to take 5-7 years. In Nigeria, there is no well-defined structure for handling of complaints and appeal, much less an administrative body assigned to carry this process out that has been given proper authority and is properly staffed and funded. The system, at the time of the reports, currently establishes ad hoc committees to review complaints.
2.2 The Benefits of Improved TGP

The benefits of transparency or, perhaps more precisely, the degree of transparency, are intimately linked with the benefits of an effective and efficient procurement system. Where the system itself is sound, it may well benefit from improved transparency. That is to say, that where a system relies on, for example, open bidding, then it could be improved by moving from advertising by way of physical media to advertising by way of electronic media. This, however, presupposes that open bidding is the preferred method for procurement. If the procurement system in question does not provide for open bidding then the transparency issue goes far deeper. That is not a situation where improved means of advertising will bring any additional benefits; the very procurement system needs reform. The same may be true of the transparency of the legal framework: if there is a sound legal framework which is not widely known or understood because it is not readily available to the public, then the situation can be improved by ensuring that it does become widely accessible. If the lack of information with regard to the legal framework is the result, on the other hand, of the absence of a legal framework, then the issue is far more deep-rooted than deciding whether there is a sufficient degree of transparency.

In a sense, therefore, the concept of TGP presupposes that the underlying procurement system is sound so that ‘cosmetic’ improvements may be made through improved transparency tools. Thus, TGP is a sound procurement system which is transparent. It is not a poor procurement system which is made better through the application of transparency tools. A poor system needs improvement independently of any transparency tool but any improvements brought about to the system will be made more effective by being more transparent.

2.2.1 The Economic Rationale of TGP

It is not surprising that the most frequently stated benefit of TGP is increased competition. This reflects the common belief held by those operating within a market economy that competition is what produces the optimal result in terms of efficiency. In a market economy products are bought and sold on the basis of price. Leaving aside for the moment the question of the quality of products and services or the terms on which they are supplied, the interest of the buyer is to buy the lowest priced product. This is based on the assumption that price is an indicator or guidepost to the scarcity of a particular product in the market and the equilibrium price is the price which results from the operation of the laws of demand and supply. The ‘marvel’ of the price system is its efficiency in communicating information ‘in a system in which the knowledge of the relevant facts is dispersed among many people’. Determining that equilibrium market price depends, however, on perfect information and this is a difficulty faced by the government, and other buyers which will rarely, if ever, possess such information.

Even in the case of perfectly homogenous products, supply and demand are constantly changing so that a given equilibrium price will only reflect supply and demand at a precise moment in

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40 This is also important in most cases since procurement generally takes place on the basis of a combination of award criteria based on quality and price. The lowest price is usually only appropriate for homogenous products such as commodities or standard off-the-shelf products.

time. A competitive market is, by its very nature, dynamic. The nature of economic competition is not ‘equilibrium’ but a perpetual state of change. As supply and demand changes, so too does the equilibrium price. Differences in prices will also result from the terms and conditions of sale as well as on the level of distribution (wholesale or retail). Each seller will offer different terms or different services or may carry larger or more varied stock and these will be reflected in the price.

Since the necessary underlying information will be unknown, the procurement officer needs to rely on the guidepost of price and, to do so, he needs to be able to identify the prevailing market prices. Competition operates as a discovery procedure by allowing different suppliers to communicate the prices at which products are available and which may be produced using different quantitative combinations of the various factors of production. In the absence of perfect information, identifying the market and/or prevailing prices requires a method of search.

This is where advertising comes in and the availability of printed media such as newspapers, journals and bulletins and the emergence of the internet as a tool of mass media have led to the availability of information which may be easily and broadly circulated. The most efficient modern method of undertaking a search of buyers, sellers and prices is by way of advertisement either in the printed or electronic media or both. Regulated procurement makes great use of advertising, requiring procurement contracts to be advertised so that all potential suppliers have the opportunity of identifying the potential buyers. Advertising enables the buyer to reach a broader audience, outside its immediate locality and, in the case of international procurement systems, advertising in a central organ, distributed throughout the relevant territory, or on a website to which access is unrestricted is a specific requirement.

Transparency of bidding opportunities thus has an important role to play in overcoming the informational disadvantage faced by the procurement officer and in ensuring, for the government, the widest possible choice and, therefore, the highest potential gain in terms of lower prices and higher quality. Clearly, the wider the choice, the greater the potential savings and this is one of the objectives of attempts to ‘internationalise’ procurement. Again, however, wider choice through international competition and negotiated access to foreign markets are quite separate issues.

One of the by-products of transparency in the domestic context will be to highlight the existence of inefficient firms. If companies (bidders) do not produce efficiently and cannot match the prices of their competitors (i.e. offer higher prices than the prevailing market prices), then they would, in theory, lose out. If their situation is irredeemable, they may well be forced to close. If, on the other hand, the government continues to buy from them at inflated prices then they will be protected and may be able to continue to operate. This does not mean that they will improve; indeed, they will probably get worse since they will benefit from a privileged position in which they are rewarded for their inefficiency. There is, in fact, no incentive to improve. The consequence for the government purchaser is that it pays a higher price for the same product it could get elsewhere from a lower priced company (bidder). It makes an economic trade-off: it pays a higher price for the benefit of protecting an inefficient company.

There may be political reasons why it would want to do this: fear of causing unemployment in a particular area or fear of losing votes in a particular area and of failing to get re-elected. These are all non-economic reasons, some of which may be legitimate, some of which may not be. The point, however, is to emphasise that the decision will involve an economic trade off. Where the inefficient solution is chosen, the national budget and, therefore, the taxpayer will lose.

This issue clearly comes to a head in the context of discussions aimed at trade liberalisation. Where markets are opened to international competition, there is a fear that such competition will be so efficient as to force competing domestic industries to close. The choice facing the government is the same: to protect inefficient domestic industry and pay too much or accept the competition and risk seeing some domestic companies fail. The economics are clear: protection will result in continued over-expenditure (losses) and will also probably condemn domestic companies to perpetual inefficiency since they will have no incentive to improve. The politics are less clear: it may be unacceptable for a government to be seen as failing to protect a domestic industry, even if that is a poor economic choice. This, however, is a political choice resulting in an economic trade off. It relates to market access conditions and not to transparency as such.

Economic theory is also important in explaining other benefits of transparency. As indicated above, the principal/agent relationship raises a problem of information. In terms of procurement, the agent is closer to the procurement process and will consequently have more information available with regard to the market and the suppliers. This creates an informational asymmetry between principal and agent which may, where their interests diverge, allow for exploitation by the agent. This poses an immediate threat to the procurement process in terms of market purchases.

The agency relationship provides many opportunities for exploitation both deliberate and unconscious. Corruption and bribery are obvious examples of deliberate exploitation for personal gain. The danger is that the goal of the agent is not to maximise social or economic welfare (the government’s assumed goal) but to maximise his own personal welfare or that of his department’s, i.e. increased personal income or departmental budget, better working conditions, job prospects etc. The agent’s goals are thus not necessarily co-extensive with the goals sought by the government and, to the extent that these personal goals conflict with the principal’s goals of social welfare, social welfare is correspondingly reduced43. The issue becomes one of control over the agent in an attempt to realign the goals or at least to provide incentives and penalties in such a way as to ensure that the agent performs in accordance with the goals of government.

The agency relationship may itself be responsible for waste and inefficiency even where the agent does not set out deliberately to exploit the situation and the lack of a common identity of purpose between the principal and agent can also give rise to less obnoxious but hardly less damaging inefficiencies. If the buyer were a private firm, its objective would be to maximise profits. The Government has no such profit motive and the absence of any comparable measure

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43 Of course, the politicians that make up the ‘principal’ in this characterisation of the relationship may also have their own personal interests so that the picture is not always as simple as it at first appears. Corrupt politicians and regulatory capture can also seriously affect the achievement of social welfare.
of efficiency will affect the agent. A reduction in his work effort or failures in his work may reduce a firm’s or the government’s efficiency but it does not directly affect the agent’s profit (income). Inefficient procurement rarely leads to the closure of the department (whereas a private firm may well suffer to the extent of bankruptcy) and only in cases where the lack of probity is proven, will it lead to redundancy. Further, knowledge of the procurement market is likely to be in the hands of the agent, not the principal, so that it may be difficult for the principal to recognise that there has been inefficiency.

As a result, it is often the case that agents buy goods and services without regard for the ‘profit’ (in terms of reduced expenditure) the government may be assumed to need for the pursuit of other socially desirable objectives. If there is no direct benefit from the increased profit assumed to result from the application of economically efficient procurement, there may be a tendency to ignore such efficiencies. The agent may also be concerned with the ‘profit’ of the bureaucracy rather than with the ‘profit’ of the government as a whole. Government departments tend to be run on the basis of annual budgets which are set according to the perceived needs of those departments. The greater the need, the greater the budget with consequent increases in size, manpower, power and prestige. Failure to spend the allocated budget will be seen as a reflection of decreased needs and will lead to a decreased budget with commensurate loss of manpower and prestige.

Notwithstanding any lack of probity on his or her part, the agent may simply become careless for he or she has no incentive to do otherwise. Equally serious is the agent who, far from being careless, has the public good at heart. He or she sees it as his/her duty to get the best results; the problem is that the ‘best’ result in his/her mind is the best product, almost invariably the most expensive. There is a danger here that contract specifications are overly optimistic (the problem of ‘gold-plating’) and that the government obtains products which are far above what is needed with the concomitant over expenditure and vulnerability to excessive long term costs. The lack of profit motive is reflected in the desire to provide the highest service regardless of the increased costs of doing so.

The economic rationale of TGP is, therefore, to rein in the corrupt, incompetent, careless or wasteful procurement agent and ensure that he conducts the procurement function in the interests of the Government. This is done by way of transparency controls and transparency tools which limit deviance and promote economic efficiency.

Economic theory also predicts that decisions are made by individual consumers and producers attempting to maximise utility and profits, respectively. Consumers (and, in terms of procurement, the government is nothing other than a consumer) are presumed to make purposeful choices so as to pursue consistent ends using efficient means. Assuming that consumers are able to process all the relevant information (which is a critical problem in this context) they will choose to consume according to maximum utility. It is a straightforward cost benefit analysis determined by the preferences (tastes) of the consumer. In non-scientific terms, the choice made expresses the ‘value for money’ obtained by the consumer, an assessment which is individual to that consumer because it reflects that consumer’s assessment of benefit.

However, the government is not a buyer like any other. It is a buyer which has simultaneous responsibility for the welfare of its people. The result of this responsibility is that, even in terms
of procurement, the pursuit of economic efficiency is unlikely to be its only function. It will have endowed itself with objectives of social as well as economic welfare; it will have political imperatives and priorities; it will want to ensure its position in the international arena. As a purchaser, the government’s preferences will also reflect those social and political (ethical) policies it has been elected to pursue. ‘Value for money’ will, as a result, incorporate a cost/benefit analysis which takes into account the achievement of such policy goals. These are all considerations which will have an effect on the objectives of its economic, social and political policies in relation to the economic efficiency pursued. These policies also imply a trade-off against economic efficiency.

Such objectives may, and currently often do, include policies such as promoting ‘green’ procurement (i.e. the purchase of products and services which cause least harm to the environment) and various social objectives such as the reduction of unemployment and the protection of minority interests. In the case of the United States, for example, preferences are given in the case of procurement to bidders which are owned by minority groups (based on gender or ethnicity) or people with certain disabilities. In the EC and under the WTO, preferences may be given to companies which employ prison labour or disabled workers. These are all issues which fall outside the transparency debate since they relate directly to the substance of the procurement rules in place. The role of transparency, however, remains the same. Whatever preferences are given or whatever economic trade-offs are made, TGP allows the correct use and implementation of the rules to be monitored, protects the competitive process (however circumscribed), provides confidence to bidders and enables the government to effect administrative control over the bureaucracy. From the point of view of assessment, transparency will also enable those looking at the systems to take a position on the acceptability of the rules in place.

2.2.2 Qualitative Benefits of Improved Transparency

This section effectively provides a summary of the previous sections indicating where and how the transparency tool enhances the benefits of a sound procurement system.

Publication of the legal framework will ensure the awareness of public procurement officers of their obligations to conduct efficient and effective procurement. Knowledge and familiarity with the legal framework enables all potential bidders to understand and assess the rules of the game. This provides the necessary confidence for bidders to act as honest brokers and thus provide their best offers. From an international perspective and where access by foreign bidders is permitted or unrestricted, these benefits are commensurately enhanced and will lead to greater participation by such bidders which will have the effect of increasing foreign investment in the country. In addition, such transparency provides a basis from which civil society may be engaged in the procurement process.

As a market search mechanism, the publication of procurement opportunities (or advertising) provides the procurement officer with the means of attracting the widest possible choice of products and prices from which to make an informed procurement decision. It does so by enhancing competition by reaching the widest possible number of potential bidders, thus

\[\text{As a body of politicians it may well have other priorities, not least of which will be the desire for re-election and this may well affect its regulatory policies.}\]
enhancing also value for money. From a regulator’s perspective, requiring advertising (at least above certain thresholds) ensures that procurement officers are not free to choose their preferred bidders in an arbitrary manner. From an international or trade liberalisation perspective, the idea is to ensure competition from foreign bidders as well.\textsuperscript{45}

Procedural transparency also has a number of aspects. From the bidder’s perspective, providing clear bidding documents, specifications, qualification and award criteria will enable the bidder not only to decide whether or not it is in his interest to bid but also to improve the quality of his bid; given the physical distance, this is even more important in the case on non-domestic tenderers. From the procurement’s officer’s point of view, this provides a clear set of instructions and guidelines to manage the process. For the purposes of the regulator, it provides the essential mechanism of controlling or checking the actions of the procurement officer to ensure that the officer is acting in the interests of the government and, ultimately, the taxpayer. As a verification tool, procedural transparency provides guarantees against inefficiency, bias and corruption. From the international perspective, it will enable international partners to monitor any instances of access restrictions or discrimination against either foreign products or bidders.

As a corollary of procedural transparency, transparency of contract awards provides a means of guaranteeing the appropriate implementation of the procurement system because it allows bidders to identify any potential breaches at a stage where they might be remedies. Additional benefits to bidders include information on deficiencies in their bids enabling them to improve in preparation for future contracts.

Transparent dispute resolution provides the mechanism to ensure enforcement of the rules in the event of a breach and represents the method of verification at the hands of the bidders. It imposes accountability on procurement officers and provides bidders with increased confidence in the system where the rules are seen to be successfully enforced.

\textbf{2.2.3 Quantitative Benefits of TGP}

Despite the widely accepted recognition that TGP provides tangible and significant cost benefits, such statements are usually based on general observations arising from experience and apocryphal examples. This does not mean that they are untrue. The difficulty is obtaining hard empirical evidence of the cost savings is due mainly to the difficulty in obtaining accurate and reliable data. In particular, the difficulty in obtaining data with which to provide a meaningful comparison. In the first place, many of the goods and services that are procured by government (e.g. roads) are procured only by government (at least in the same quantities) and it is difficult to make a comparison between purchases made by governments in an uncompetitive environment and those made by private undertakings in a competitive environment (assuming that this is indeed competitive). In the second place, procurement reform will often precede adequate record keeping by a long margin. The reforms are introduced before the data has been collected with which to make a ‘before and after’ comparison. In the third place, market prices can change rapidly (compounded by currency and exchange rate fluctuations) so that historical price data is not always reliable.

\textsuperscript{45} This is not always a question of market access because national governments will frequently seek bids from overseas either because they recognise that international competition is beneficial or because there is no domestic supply base.
One of the few relatively recent reports to have taken a solidly scientific approach is the 2004 European Commission’s Report on the functioning of public procurement markets in the EU. Though no less easy in terms of collecting and assimilating the relevant data, the EU has the benefit of applying procurement rules to a large number of member states so that prices paid across the Community (in those countries which apply the rules correctly and those which do not, for example) can be compared and the results analysed against the yardstick of the degree of compliance with the procurement rules. The consultants conducting the studies also applied econometric techniques to compensate for distorting factors. The evidence collected suggests that prices paid by public authorities are lower when procurement rules (in this case, the EC directives) are applied. The overall conclusion is that prices are, on average 30% lower.

Earlier Commission assessments of the success of its procurement directives were often disappointing, but this was probably due to the fact that they asked the wrong question. The assessment sought to ascertain the level of cross-border trade, but it may have been more advisable to consider the way in which modern business works. Generally, companies who are interested in bidding for contracts in various countries will, in most cases, set up local offices even if it is no more than a representation office. This is true both in the case of works and large ticket goods and often true in the case of certain transportable services (e.g. auditing, accounting, engineering services). In the case of off-the-shelf products, manufacturers and large retailers will use distributors and agents. As a result, the assessment should have been trying to find out how many bids in a given country were made by locally established ‘foreign’ companies or which contained products produced in other member states. The Commission did ask these questions in this later assessment with the result that it was able to demonstrate greater success. The executive summary states:

New data suggest that previous studies may have underestimated the actual dimension of cross-border procurement. In a sample of firms involved in procurement activities, 46% carried out some type of cross-border procurement. However, direct cross-border procurement remains low, accounting for just 3% of the total number of bids submitted by the sample firms. The rate of indirect cross-border public procurement is higher, with 30% of the bids in the sample being made by foreign firms using local subsidiaries...It is important to note that domestic firms and foreign subsidiaries have similar rates of success when bidding for contracts in the country where they are located (30% and 35% respectively). This confirms the importance in Europe of bidding for contracts through subsidiaries.

The results of the EU study are broadly similar to those obtained on a smaller scale by the World Bank during the preparation of its CPAR of the Former Republic of Yugoslavia (FYR) in 2001. Given the significant purchases of pharmaceuticals made through the national budget of the FYR and the existence in the same territory of other pharmaceutical purchasing organizations, it was possible to make a meaningful comparison based on the available figures. The CPAR mission undertook a limited analysis of historical prices paid for selected pharmaceuticals and medical consumables from a series of procurement transactions in Serbia during 2001. The objective of the exercise was to compare federally mandated prices, prices actually paid under local tenders financed by the Serbian HIF and prices for the same products resulting from competitive tenders financed by external sources (Pharmaciens Sans Frontières and the European Agency for

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46 A report on the functioning of public procurement markets in the EU; benefits from the application of EU directives and challenges for the future: 03/02/2004.
Reconstruction), so as to form an opinion as to whether prices paid for commonly-procured pharmaceuticals and materials offer reasonable value for money.

Taking the average of the 21 products purchased, the prices paid under the EAR-financed tender were 36.2% lower than federally approved prices. Finally, the total quantities of all 21 pharmaceutical products procured by the EAR cost a total of €4,085,353 (US$3,728,784 equivalent); had these products been procured in the same quantities at federally approved prices, the total cost would have been €5,493,574 (US$5,014,096). This translates into a notional saving of €1,408,221 (US$1,285,311) or 25.6%. In the case of the PSF purchases, and having calculated the cost of the estimated annual supply of these 46 drugs, the costs incurred by the Serbian HIF were calculated to be 23.7% higher in total than those based on the prices paid by PSF for a year’s supply of those drugs. The CPAR also cited an earlier survey which found that competitive contracting by the public sector in the United Kingdom yielded savings in the order of 20% without any reduction in quality47.

One of the sample countries, Dominica, is a member of the Organisation of Eastern Caribbean States (OECS) which has set up the Pharmaceutical Procurement Service (OECS/PPS) designed to improve the use existing resources by efficient procurement practices48. OECS/PPS is an agency of the OECS, a formal grouping of nine (9) Eastern Caribbean Countries; Anguilla, Antigua and Barbuda, British Virgin Islands, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines, with a combined population of approximately 550,000. The OECS/PPS was established under a project funded by USAID and by 1989 the scheme was financially self-sufficient. The core function of the OECS/PPS is the pooled procurement of pharmaceuticals and medical supplies for nine Ministries of Health (MOHs) of the OECS countries. The OECS/PPS presented suppliers with a public sector monopsony so that products tendered by OECS/PPS are purchased exclusively through annual contracts. It operates a centralized, restricted tendering system in which all approved suppliers are pre-qualified by a vendors’ registration questionnaire. Pre-qualification is necessary to assess the quality standards, technical competence, and financial viability of competing suppliers. Following a bid solicitation from over 75 international suppliers, OECS/PPS awards annual contracts, place orders directly with suppliers, and monitors delivery and supplier performance. Prior to the establishment of OECS/PPS, the OECS countries purchased drugs individually from suppliers by direct negotiation. During the 2001/02 tender cycle, the annual survey on a market basket of 20 popular drugs showed that the regional prices were 44% lower than individual country prices.

2.3 The Costs of Improving TGP

As well as considering the benefits of improved transparency in the domestic context, any country negotiating access to an international procurement agreement will also need to be aware of the costs of making the necessary improvements. They may benefit from financial assistance in making those improvements but the costs will not be negligible49.

48 See the OECS website at: http://www.oecs.org/about-the-oecs
49 Woolcock (n 16 above, at page 5) suggests that developing countries and even countries such as Australia and New Zealand did not sign up to the GPA because of the high compliance costs.
In reality, the costs of transparency must be considered in a twofold manner. The specific transparency tools itemised in the above sections will have associated costs which may be quantified. This also brings us back to the question of the underlying procurement system. To the extent that a sound procurement system exists, any transparency improvements are likely to be relatively modest. Where the underlying system is deficient, then the improvements needed will be more fundamental. The costs of reforming an unsound procurement system can be very significant. In developing countries, those costs are usually shared with the MDBs and other donors assisting those countries with the reform process (and there are examples of such reform initiatives costing several millions of dollars, although the costs of creating a reformed system would generally appear to start closer to half a million dollars). Even then, the benefits to be expected from the introduction of an efficient and effective procurement system are likely to outweigh the costs involved in establishing it. Whilst there is always a ‘cost’ to conducting a procurement process, the benefits are less obvious and can only be measured in the loss of savings. An inefficient procurement system is expensive and implies a higher than normal expenditure. A sound procurement system will lead to significant budget savings (see 2.2.3 above) which are likely to far exceed any costs involved in creating such a system.

The second issue concerns the broader costs, including the ‘cost’ of not applying TGP. Since the transparency tools are linked to the underlying system, the failure of the system is reflected in the lack of transparency and the costs of such a system will be the failure of the government to make any of the expected budgetary savings. In this section we will look at both the associated costs of improving transparency in the case of a basically sound procurement system and the more general costs, represented by lost benefits, of failing to apply TGP.

2.3.1 Associated Costs

On the assumption that the underlying procurement system is basically sound, the costs associated with improved transparency are relatively easy to determine. Taking once again the specific transparency tools identified in the previous sections, the anticipated costs are as follows.

Publication of the Legal Framework: This requires a vehicle for publication. Given the one-off nature of any initial publication, the costs associated with ensuring transparency of the overall legal framework will be modest. To this must be added, however, the costs of any subsequent interpretative guidelines or implementing regulations. Such publications would generally be made by way of the government’s official gazette and would ordinarily form part of the general transparency of government operations. To ensure accessibility and availability, however, it would probably not be sufficient to allow this information to be consigned to such documents where they are not widely distributed. Fulfilment of the requirement would imply a significant distribution of such documents and the possibility of either consulting or buying copies of the documents relatively cheaply.

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50 i.e. by measuring the difference between the higher prices paid in a non-competitive system and the prices paid using a competitive system.

51 As stated above, however, the costs of creating a sound legal framework could be significant.
In addition, it would be necessary to publish other decisions which affect the procurement environment such as reports of the decisions made following bid challenges. Where these are made by judicial bodies, it may be that they are published anyway. Even then, however, they would need to be disseminated in a more targeted and accessible way and could require a specific publication.

Traditional methods of providing transparency through physical means such as official gazettes, court reports or specialised bulletins are both time consuming and often subject to delay (at least in respect of the continuing transparency obligations). Most modern systems now rely extensively on electronic media and means of communication. Legal texts can very easily be provided on compact discs (CDs), for example, at a fraction of the cost of printed versions. For the purposes of the legal framework, the usual mechanism is to provide an information website which contains all the relevant information. The costs of setting up an establishing a website are relatively small. The real cost, however, is in maintaining the system (requiring the services of an IT expert) and in ensuring that there is a trained operator to input the updated information. These can be significant.

**Publication of Procurement Opportunities**: Traditionally, advertisements have been published in newspapers or official gazettes. In some cases, they are also published in specialised bulletins. In the case of advertisements placed in newspapers, it is generally the procuring entities that would cover the cost. Since such advertisements are generally required only in cases of higher value contracts, the cost of the advertisement usually becomes a relatively insignificant part of the overall transaction costs which would be far exceeded by the benefits to be gained through the obetention of more competitive prices. The cost of publishing gazettes and specialised bulletins is more often than not borne by the government or by a specialised regulatory authority. Costs of such bulletins which, to be useful and timely, would need to be published and distributed on a regular basis are not insignificant but may be reduced by charging for the bulletin. Such charges would need to be realistic, of course, and not designed to turn a profit.

Again, the advantages of electronic means of communication have been recognised in this context also and many countries and organisations now regularly publish opportunities on national or international websites. These websites are also used extensively at a national level. The benefit of such a system, notably where it is coupled with the ability for procuring entities themselves to upload the required opportunities, is that they are generally self-sustaining although they clearly need a more sophisticated team of operators and IT specialists than would be necessary for a pure information website.

**Procedural Transparency**: The costs of procedural transparency will not be significant and will mostly be borne by the procuring entities. The costs involve the preparation of documents and the inclusion of relevant information in the appropriate documents. Such documents will need to be prepared in any event if the procurement process is to run smoothly. The only difference is the care that the procuring officers are required to take in compiling the documentation.

In view of the verification function of procedural transparency, much will depend on the recording and reporting obligations of the procuring entities. Whilst it would in any event be in

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52 In most reform countries, standard form bidding documents would be prepared as part of the overall legal framework.
the interests of procurement officers to keep adequate records, an obligation to do so will involve some extra work in preparing the records. Nevertheless, as part of the job description, this would be covered by the officer’s salary and does not imply any additional direct costs.

**Transparency of Contract Awards:** Contract award notices would generally be published in the same vehicle as the bid opportunities and would not require any additional expenditure. Since they are comparatively short notices, their publication would only imply a few extra pages in any existing publications or some extra web space. Assuming these have already been set up, publishing award notices would add very little extra cost.

Debriefing of unsuccessful bidders will generally take time and will, therefore, be covered by the officers’ salary, but it does not imply any additional direct costs.

**Transparent Dispute Resolution:** Most of the transparency elements in this context would be covered by the costs associated with the legal framework. The rules applicable to review procedures, the procedural requirements, standard forms and so forth would all need to be made available as part of the publication of information in respect of the legal and regulatory framework. The same would probably be true of the resulting decisions, although specific provision may need to be made in the case of any specially created bodies.

The absence of an appropriate review mechanism would, on the other hand, imply the need for significant expenditure in creating such a mechanism. Its absence is not something that can be remedied by simply imposing transparency tools.

### 2.3.2 Broader Costs of TGP

If the benefits to be achieved by introducing and improving TGP are, as described above, increased competition and lower prices together with increased control over the bureaucracy in terms of creating greater efficiency and reducing instances of corruption, then the costs of failing to introduce TGP may be expected to be the opposite. Failure to implement TGP could, therefore, lead to a financial cost to the government equivalent to the figures cited above.

It is to be remembered that the benefits of TGP flow first and foremost to the government and lack of competition or fairness in the procurement process will lead to higher prices since (i) there will be less competition which reduces the available choice of producer and product and serves to provide a quasi-monopoly position to those privileged few who are admitted to the competition (who may thus charge monopoly rents) and (ii) the potential bidders will have no (or will have lost) confidence in the system such that they have no incentive to act as ‘honest brokers’ and offer their best or most favourable terms.

These ‘costs’ relate to the failure of introducing TGP. As already discussed above, however, there may be other costs of actually introducing TGP. These, however, are not economic or financial costs; they are political costs or costs which the government may wish to bear for social welfare reasons. The two main costs referred to above are:

- the possibility that inefficient firms will go out of business with a consequent loss of jobs;
This may pose a political problem for the government (especially if it is the result of international market access agreements) but, from an economic point of view, is not necessarily a negative consequence. There is little point in paying higher prices simply to protect inefficient firms. It would be better to seek ways of improving national firms through technical improvement programmes or legitimate subsidies where appropriate and exposing them to competition in order to provide incentives for improvement.

• the difficulty in pursuing purely social or environmental objectives where the procurement system seeks economic efficiency.

It is not always the case that such policies will result in higher prices\(^\text{53}\), meaning that they could be promoted through a procurement system based on lowest price, but this will generally be the case. Even in an international context, some of these objectives are also acceptable and so the question is not one of whether or not international partners will accept them but of whether or not the government is prepared to make the economic trade-off that the pursuit of such policies implies.

In both of these cases, the government has a choice between the economically efficient solution or the solution which will cost more financially but which may please the electorate or, in the case of protected companies, the industry lobby groups.

3. Market Access

That procurement is now firmly part of the international trade debate is in no doubt as is evidenced by the large number of bilateral and regional trade arrangements which contain provisions relating to procurement\(^\text{54}\). These include the numerous bilateral free trade agreements (FTAs) entered into by the US, the EU and EFTA with parties around the world as well as by the EU’s move towards Economic Partnership Agreements (EPAs) with the 77 ACP countries. Whilst the provisions of each of these agreements are somewhat (in some cases, very\(^\text{55}\)) different, the general trend that appears to be emerging is that most are now beginning to follow the model provided by the WTO’s GPA, i.e. they will include text establishing basic transparency provisions (the legal framework) and separately negotiate the coverage (market access) conditions. The transparency provisions will reflect those discussed above and will be based on an underlying procurement system which meets the requirements of the organisation in question. These may include the EU directives on procurement, the main text of the GPA 1994, the UNCITRAL Model Law on Procurement\(^\text{56}\) or the OECD/DAC baseline indicators and their associated scoring methodology which rewards features in a system that reflect good practice. In addition, the ‘coverage’ (market access conditions) of the provisions will be

\(^{53}\) From an environmental perspective, equipment which consumes less energy (i.e. which is energy efficient) may be less expensive when life cycle costs are taken into account, for example.

\(^{54}\) For a brief overview, see Woolcock (n 16 above, pp. 7-9).

\(^{55}\) The older agreements being less consistent.

negotiated separately. These will contain reference to the entities and contracts covered as well as any exemptions and reciprocity conditions.

It is not possible in the context of this report to consider all potential trade agreements. Given, however, that a trend is now beginning to emerge, we will as a result take the GPA as an example of the way in which international procurement agreements have been negotiated. The history of the GPA serves this purpose well since it highlights very clearly the difficulties and pitfalls of the negotiating process and offers some lessons for aspiring members. This will allow us to investigate the potential trade effects and possible policy decisions to be taken.

The current GPA was signed in 1994 as part of the Uruguay Round of international trade negotiations held under the auspices of the General Agreement on Tariffs and Trade (GATT) which led to the creation of the World Trade Organisation. The GPA (1994) replaced the earlier GPA (1979) which was itself amended in 1987. The GPA is a plurilateral, as opposed to multilateral, agreement signifying that it applies to a limited number of states only, i.e. only to those who have signed up to it and not to the whole membership of the WTO. While it remains part of the GATT/WTO family by virtue of its inclusion in the WTO annexes and is served by the WTO Secretariat and the Dispute Settlement Body, the GPA remains binding on and confers benefits only to those members who have signed up to it.

The stated objective of the GPA (1994) as set out in its preamble is to provide an effective and transparent multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade. Ostensibly, it does so by extending the GATT principles of non-discrimination (MFN and national treatment) to the tendering procedures adopted by government bodies at both central and regional levels as well as to those of other specified entities.

However, this extension of the GATT principles is not complete. First, it is a plurilateral agreement so that only those States which have signed up to the agreement are bound by it. Second, the non-discrimination obligations do not apply to all government procurement of the signatories. Rather, they apply in a qualified manner to specified entities, goods and services which have been the subject of extensive bilateral negotiations between the signatories. The results of these negotiations are contained in a series of Annexes to the GPA which are critical to an understanding of the scope of application of the GPA.

### 3.1 A Brief History of the GPA Negotiations

The progress of the negotiations leading to the original GPA and its subsequent amendments is indissolubly linked with the very contentious issues which formed the basis of those discussions, notably the issues of entity coverage and the scope of application of the GPA.  

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57 Although membership of the GPA has in some instances, e.g. China, been made a condition of membership of the WTO.

58 For a more extensive treatment, see Trepte 'Government Procurement' in Macrory, Appleton & Plummer (Eds.) The World Trade Organization: Legal, Economic and Political Analysis (Springer, 2004).
Despite being considered in the early International Trade Organisation discussions, the original GATT did not apply to government procurement and Article III, on national treatment, specifically excluded government procurement. The issue of government procurement nevertheless again emerged in the context of the OECD which had the more general objective of examining the general issue of government preferences in government procurement and of compiling information on the procurement procedures of its member governments. The results of this study were published in 1966\(^{59}\) and formed the basis for the further discussions which took place in a working group under the auspices of the OECD Trade Committee with a view to ensuring the "fairest possible government procurement procedures, seeking to limit discrimination against foreign suppliers".\(^{60}\)

This early work of the OECD was critical in the sense that it changed the way in which government procurement was approached by the negotiators. Unlike the initial ITO/GATT discussions which started from the premise that government procurement could be approached in the same way as general trade in goods and services and could thus be made subject to the general application of the GATT non-discrimination principles, the OECD showed that it would not be possible to impose such obligations without at the same time addressing the rules for the conduct of procurement which differed widely in form throughout the potential membership.

At the same time that the OECD discussions were taking place, the EEC had also started work on liberalising government procurement among its member states and there is little doubt that there was extensive cross-fertilisation between the two fora\(^ {60}\). The EC's co-ordinating directives took essentially the same approach as that discussed in the context of the OECD. They regulated coverage of the directives by reference to broad descriptions of the entities covered, together with (non-exhaustive) lists of the entities, and imposed a common set of procedures to be applied to procurement in the member states.

It had become apparent during the ITO discussions that there was no consensus on what the term 'government' meant in the context of government procurement. This was the result of the constitutional arrangements of the different States, notably in respect of the extent of the constitutional powers of central government between federal and unitary systems and the degree of control over regional, local or municipal governments. However, the central debate did not concern the level of control exercised by central government over local government and the ability of central government to impose and enforce procurement procedures at the various levels. Rather, these discussions took place in an attempt to reach international agreement on the opening up of and access to procurement markets. What was of concern to the negotiators, therefore, was to ensure that any agreement would bring trade advantages to all the signatories and that these advantages would be of equivalent value. The key was the achievement of reciprocal trade advantages\(^ {61}\). This issue was brought to a head particularly in the context of discussions over the extent to which public utilities could be covered by any agreement.


It was clear that in order to assess and ensure reciprocal advantages, some type of list of entities would need to be prepared based on the size and nature of the market in question. The idea was to devise a system under which, whatever the entity or market concerned, each member could offer the other members equivalent access to its government procurement in proportion to its size and the size of the economy as a whole. The solution was to turn to a system of offers and requests used widely in the multilateral negotiations of the GATT whereby coverage would be limited to an agreed list of (governmental) entities which each party would offer, subject to the approval of the other parties. They, in turn, could reject the offer and request those entities in the offering country which they would like to see included in the list. This is the system that was eventually adopted in the Tokyo Round and Uruguay Round GPAs.

The first Government Procurement Agreement was signed in 1979 and entered into force in 1981. It was clearly based on the work of the OECD and many of the solutions worked out in the OECD discussions were evident in the final text. The two broad elements of entity coverage by entity list and the introduction of detailed procedural requirements were maintained and formed the basis of the Agreement and, later, of the GPA 1994.

On the basis of the system of offers and requests, the lists of entities included in Annex I were those whose inclusion in the list had been negotiated between the parties. For the most part, these entities were agencies of the central or federal government and entities under the direct and substantial control of the government. Local, provincial and municipal entities were not covered nor were state owned enterprises or corporations of a commercial character which excluded many of the state utility companies, notably in the fields of energy and telecommunications. Defence entities were also largely excluded, with only non-military products purchased by them being covered.

Linked to the issue of entity coverage was the question of thresholds, i.e. the minimum value of a contract above which the Agreement would apply. This issue had been discussed in the OECD but became a serious point of disagreement under the Tokyo Round negotiations. This was partly due to the question of the value of procurement offered by the different parties. The lower the threshold, the more contracts and entities would be covered. The higher the threshold, the fewer there would be and this could well affect the net value of the ‘contribution’ of the different parties. At a more practical level, however, it was also recognised that a low threshold would cause a significant administrative burden on governments as a result of the large number of small value contracts undertaken by them on a daily basis. On the other hand, too high a threshold would limit, if not frustrate, the objectives of the Agreement since fewer contracts would be covered. Developing countries also favoured lower thresholds since this would enhance their prospects of gaining access to the procurement markets of developed countries by enabling them to compete for the lower value and less sophisticated contracts. In the end, a threshold value of SDR 150,000 or more was agreed.

The second main element of the Agreement was the imposition of common tendering procedures to govern the parties’ procurement under the Agreement. The core provision is contained in Article II which incorporated into the Agreement the GATT obligations of MFN and national treatment. This requires the parties immediately and unconditionally to provide to the

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products and suppliers of other parties treatment no less favourable than (a) that accorded to domestic products and suppliers and (b) that accorded to products and suppliers from any other Party. As is evident from the wording, this provision is limited to suppliers from Parties offering products originating from those countries.

The negotiating parties had concluded that the non-discrimination obligation was not sufficient alone to open up procurement markets and that the solution lay in the adoption of detailed and specific rules for the conduct of the procurement process. This was to be done by setting out specific tendering procedures inspired by the results of the OECD findings in relation to the parties’ existing procedures. The Agreement also contained publicity requirements for announcing tenders and for notifying the award of contracts; minimum time limits providing sufficient opportunity for all eligible bidders to respond and submit bids; transparent and objective bidder selection and contract award criteria to be made known to all bidders in advance; and requirements regarding the use and development of objective technical specifications. These provisions remain largely unaltered in the GPA (1994).

The amendments brought about in 1987 consisted essentially in amending the publicity requirements and the minimum time limits for submitting tenders; amending the qualification criteria; introducing provisions relating to urgency; imposing restrictions on the use of offsets and improving publication of post-award information. Negotiations on the Agreement continued after 1987 under the Committee on Government Procurement established by the Agreement.

The bargaining for entity coverage which had been the hallmark of previous negotiations reached a fever pitch during the Uruguay Round, most notably between the EU and the United States which disputed the real value of each other’s offers. The dispute was only resolved after both countries agreed to sign an interim agreement (MOU) in which they made certain reciprocal commitments to open their respective procurement markets as a ‘down payment’ towards an expanded Agreement in the areas of central government entities and electrical utilities. This solution prompted other parties to improve their offers in an attempt not to be left outside an exclusive transatlantic procurement agreement. These negotiations were largely bilateral with each party negotiating with the others resulting in a kaleidoscope of reciprocal arrangements between the parties. The resulting annexes to the GPA contain not only lists of entities and contracts covered; they also contain a variety of derogations and reciprocity clauses which apply differently between the various parties.

Notwithstanding the complications in implementation introduced by these various derogations, the parties succeeded in broadening entity coverage significantly. The GPA now includes an expanded list of central government entities, sub-central government entities (such as provinces and state authorities in federal systems and local and regional governments in centralised systems and ‘other’ entities whose procurement policies are substantially controlled by, dependent on, or influenced by central, regional or local government such as public utilities.

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65 de Graaf and King (n 63) at p. 445.
The second significant advance made during the Uruguay Round was the expansion of coverage of the GPA to services. The Tokyo Round Agreement was restricted to the procurement of products. The provisions of the GPA 1994 are framed in a way which does not distinguish between the procurement of goods and services, although there is a significant distinction in practice which is evidenced in the annexes. As with entity coverage, the approach taken was to provide a list of contracts covered. In the case of goods, this is a negative list, signifying that all goods are covered save for those specifically excluded. In the case of services, the lists are positive. This means that the only services covered by the GPA are those which have been explicitly included in the lists. There is a further distinction to be made. Construction services have been treated separately and are listed in Annex 5. All other services are listed in Annex 4.

Whilst there was general agreement on the definition of construction services and no reservations made by any of the parties in respect of their offers for construction services, no such agreement was reached for the Annex 4 services.

The offers of the parties differ considerably with some (notably the United States) offering a comprehensive list of services and others, such as Japan, offering very few. Inevitably, some services are included in the lists of some parties and not in others', making it extremely difficult to identify with precision those services contracts open to bidders from other signatory countries. The issue is further complicated by the many restrictions included in the different parties' offers which apply reciprocity conditions, where access will not be given to service providers of parties which have not themselves included the same category of services contracts in their own offer.

Finally, perhaps the most important institutional change made by the GPA (1994) consists in the requirement for parties to provide independent bid challenge procedures. In addition to the possibility of resorting to the WTO's Dispute Settlement Body at an inter-governmental level, the parties must ensure the existence of non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the GPA arising in the context of procurements in which they have or have had an interest. This gives aggrieved bidders access to judicial or otherwise impartial bodies in each of the parties' jurisdiction and opens up the possibility of quick and effective remedial action, including the award of compensation.

### 3.2 Features of the GPA 1994

The history of the negotiations which highlighted the tensions between the various parties also explains the specific characteristics of the current GPA. They demonstrate very clearly the limitations placed on the GPA which result from the contracting parties' desire not to create a model international procurement system but to extract the maximum benefit for their nationals by guaranteeing access to the procurement markets of other contracting parties and granting access to their own markets only on a reciprocal basis. This should be instructive for aspiring members.

The GPA applies to any law, regulation, procedure or practice regarding any procurement by entities covered by the agreement. It does not seek to replace national procurement systems but sets out a requirement of consistency between the applicable national systems and the GPA. As a result, the national procurement systems of the parties have been modified to a greater or

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66 Except for the United States which adopted a negative list approach.
lesser extent in order to bring them into line with the GPA. This does, however, require there to be a sound national procurement system in place.

The GPA consists of the main text and four appendices. These appendices consist of lists of the agencies each government has committed to complying with the agreement, lists of services and constructions services subject to the agreement and lists of publications the governments use to publish tender notices, qualification lists and the procurement rules and procedures they apply. These appendices are critical to the understanding and implementation of the GPA. This is notably the case in respect of Appendix I which defines the coverage of the parties’ obligations under the GPA in terms of procuring entities and services, including construction services. Each party, based on the system of offers and requests discussed above, provides its own appendix which comprises five annexes: Annex 1 contains a list of the covered central government entities; Annex 2 contains a list of the covered sub-central government entities; Annex 3 contains a list of all other covered entities that procure in accordance with the agreement; Annex 4 specifies those services, whether listed positively or negatively, covered by the agreement; Annex 5 specifies covered construction services. In addition, there are General Notes to each party's Appendix 1 which qualify the commitments referred to in the annexes.

Implementation of the basic obligations of non-discrimination is ensured by setting out a number of detailed operational rules for tendering to be followed by procuring entities. This is done by prescribing three methods of tendering (open, selective and limited) and one additional mechanism which may be applied to each of those methods (competitive negotiation), supplemented by provisions relating to the preparation of tender documentation, the qualification of suppliers, selection procedures, receipt and opening of tenders and the award of contracts. In addition, the rules also provide specific transparency requirements relating both to tender notices and their publication, time limits for tendering and delivery and information on the award of contracts. The GPA also contains specific rules with regard to technical specifications.

The central premise of the GPA is non-discrimination in government procurement between the signatories and the two pillars of the GATT, national treatment and the most favoured nation (MFN) obligation, are incorporated in Article III. These principles are guaranteed by Article III:1 which requires each party, ‘immediately and unconditionally’, to provide to the products, services and suppliers (including service providers) of the other parties, treatment no less favourable than (a) that accorded to domestic products, services and suppliers (national treatment) and (b) that accorded to products, services and suppliers of any other party (MFN). As discussed above, these non-discrimination principles are heavily contingent. They apply only as between the signatories of the GPA and, even then, only subject to the conditions and exceptions set out in each signatory's appendices.

In addition, Article XVI provides emphatically that, in the qualification and selection of suppliers, products or services or in the evaluation of tenders and award of contracts, entities shall not impose, seek or consider offsets. Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements. Thus, there can be no discrimination in favour of domestic suppliers through the use of offsets. Nevertheless, an exception is made (in Article XVI:2) in the case of developing countries. At the time of accession, a developing country may negotiate objective, clearly
defined and non-discriminatory conditions for the use of offsets (such as requirements for the incorporation of domestic content) which will be set out in their Appendix 1. The offset conditions may only be used for purposes of qualification and not as criteria for the award of contracts, i.e. only tenderers meeting the offset requirement will be eligible to tender; offsets will not be used as a means of granting preferences between those tenderers meeting the offset requirement.

3.3 The Continuing Discussions

The GPA\(^{67}\) calls on the Parties to undertake further negotiations with a view to improving the Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions relating to developing countries and eliminating any remaining discriminatory measures and practices which distort open competition. Work began as early as February 1997. One of the stated aims of this review was the expansion of the membership of the Agreement by making it more accessible to non-Parties. Indeed, this is one of the major themes of the post-GPA discussions given the relative failure of the GPA to attract signatories other than from the developed world. This lack of a fully representative membership has clearly been of concern to the Parties and has driven further attempts to make the GPA more attractive to developing countries. Simultaneously with the review under Article XXIV and based on support from both the United States and the European Union for an 'interim agreement' on government procurement\(^{68}\), work also began on developing a 'Transparency Agreement' which would offer to developing countries a less rigorous discipline than the GPA.

The process of review which began in 1997 has covered a number of elements, in particular, the simplification and improvement of the GPA, including adaptation, where appropriate, to advances in the area of information technology; expansion of the coverage of the GPA, and elimination of discriminatory measures and practices which distort open procurement. The objective of simplification and improvement was thought to be a key element in attracting wider membership and thus improve the multilateral aspect of the Agreement\(^{69}\). In addition to the ongoing discussions about policy improvements, the Parties conducted an article by article review of the GPA. The results are now contained in provisionally agreed revised text which was reached in December 2006. However, with no progress on the market access discussions which were being conducted separately, this has not yet been finally agreed.

Following the suggestions of the United States and the European Union, the WTO Ministerial Conference in Singapore chose to 'establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement'\(^{70}\). The hope was that, by concentrating on the core principle of transparency, the Parties would be able to draft a less

\(^{67}\) Article XXIV:7(b) and (c).


\(^{69}\) See Dischendorfer, ibid. at 32.

\(^{70}\) WTO Document WT/MIN(96)/DEC/W of 13 December 1996.
rigid and burdensome agreement which would encourage broader membership from developing countries. By avoiding the increased bureaucracy and financial burden which naturally flows from adherence to the provisions of the GPA, it was hoped that an agreement which requires only a limited number of basic procedural guarantees would encourage membership and, thus, an acceptance of the basic disciplines of an open and competitive public procurement system.

As is clear from the mandate given in Singapore, the working group's activities are to be considered in two phases: first, a study on transparency with a view, second, to developing an agreement on transparency. To date, efforts have concentrated mainly on the study of national and international systems as they relate to transparency and the working group has been collecting information from a number of sources, including national systems, international organisations such as the World Bank and UNCITRAL, OECD, UNDP, EBRD and from other comparable studies such as the APEC survey and conclusions. Work has, however, been slow. Whilst there appeared little disagreement on the importance of transparency as a fundamental principle, there was less agreement on how transparency might be achieved.

Despite the submission of draft agreements at the disrupted Seattle meeting by both the United States and the European Union, no agreed text of any Transparency Agreement has emerged. Indeed, the initiative would appear to have been abandoned following the General Council's decision on the Doha Agenda work programme of 1 August 2004. Despite the hiatus in the negotiations, it is important to bear in mind a number of things. Transparency has now been dissociated from market access. The existence of a sound and transparent procurement system is a precursor to membership negotiations so that without such a system no market access discussions will take place.

4. Potential Trade Effects

Trade effects or, more precisely, procurement related actions which affect trade are quite often identified and considered from a narrow perspective, notably in the context of procurement actions which might have a discriminatory trade effect. This includes such things as domestic preferences which provide a price or purchase preference for goods and services which are produced domestically or which contain a defined level of domestic content or use of domestic labour. Similar effects are also attributed to other mechanisms such as 'set asides' which set aside all or a given percentage of contracts to regional or even national firms, thus effectively excluding foreign competition for those contracts. The same discriminatory effect may be sought through what is, in effect, a procurement ban where international competition is requested (or permitted) only where there is insufficient domestic supply.

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72 WTO Document WT/GT/GP/W/27.


74 Meaning that a domestic bidder is given the option of matching the price offered by another (foreign) bidder and of then being preferred over the latter.
In the sample countries, various of these practices are employed. In Tanzania, for example, there are price preferences and conditions on the use of national contractors as well as set-asides for Tanzanian companies. The Samoan Tenders Board also approves on a case-by-case basis a margin of preference for domestic manufactured goods and domestic works contractors. It is likely that many ACP member countries will maintain similar policies which seek to favour the domestic supply base, ostensibly with a view to protecting domestic industry. Such policies are therefore likely to feature prominently in any trade negotiations, if only because of their apparently explicit discriminatory effect.

Such practices are often justified on the basis that they assist domestic industry, although economic analyses suggest that the only effect is to increase the inefficiency of domestic industry and, where foreign competition is restricted, increase the costs for the public purchaser. This was discussed in section 1.4 above where it was also shown that that the economic consensus appears to be that the existence of, for example, price preferences (as the primary example of discriminatory procurement policies) actually has no effect on trade, i.e. does not reduce imports or increase domestic price, output or employment. Whilst the political impact is significant (with politicians claiming the credit for 'saving' or protecting' domestic industry\textsuperscript{75}), the trade effect appears negligible. That is not to say, however, that there is no effect. The negative effect of discriminatory policies is felt by the public purse which may be forced to pay more than necessary for its purchases and which may, in the long run, be faced with the higher costs of an uncompetitive national industry.

There would appear to be wider consensus, on the other hand, that a sound domestic procurement system will lead to welfare benefits, mainly based on increased competition. To the extent that transparency provisions also encourage the elimination of supposed discriminatory procurement practices, they will also have a positive effect by increasing or facilitating competition (domestic and international). Removal of such discriminatory provisions is thus more about improving the national procurement system and the competitive process than it is about increasing trade. As a political statement, such discriminatory policies would undoubtedly fall foul of any market access negotiations since they appear explicitly antithetical to free trade. They will thus figure highly in any trade negotiations and any negotiating position must take the existence of such policies into account. The economic reality, however, is that their elimination will improve the domestic procurement system even if it will, at the same time, facilitate the more political market access discussions.

Potential trade effects need to be considered at a more fundamental level and take into account the benefits of both improved transparency of the domestic procurement system and the trade effects of market access conditions.

4.1 Statistical Evidence of Trade Effects

In the same way that there is little hard statistical evidence in respect of the concrete savings to be made from having or introducing a sound and transparent domestic procurement system, there is also a lack of hard data relating to the actual trade effects created by membership of any international agreements which apply market access conditions in respect of procurement.

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\textsuperscript{75} Or at least those sections of it which it is in the politicians' interest to protect.
There is a lack of analysis and information on the ‘return on investment’ to alternative types of procurement reforms, the role that international disciplines can and should play, and how such disciplines need to be complemented by national actions to ensure positive payoffs.\(^{76}\) What statistical analyses there are would seem to suggest that welfare benefits arise from increased competition in domestic markets resulting from improved TGP\(^{77}\) rather than from cross-border trade\(^{78}\). These include efficiency and specialisation gains\(^{79}\), but the benefits of international competition are not only linked to better choices for the goods and services to be purchased; international competition also leads to internationalization of business community, better value goods and job creation\(^{80}\).

From the perspective of a party’s negotiating position, therefore, it may well be that the primary benefits from entering into a procurement related trade agreement will result from the inevitable pre-condition of attaining acceptable transparency of the national procurement system. The effort required to bring the country’s procurement system ‘up to speed’ is more likely to bear fruit than the following market access negotiations. The benefits of acceding to market access conditions, whilst theoretically well justified, have not been the subject of any statistical analysis. As noted above, this also applies to the more obvious discriminatory procurement policies such as price preferences.

The existing studies which seek to identify the benefits to be gained from introducing TGP or improving the existing procurement systems are invariably linked to the savings to be made based on the size of the procurement market at issue\(^{81}\). Those savings are considerable where procurement spend is significant. The latest comprehensive study on the value of procurement markets was conducted in 2002 by the OECD\(^{82}\), although the figures were based on 1998 statistics. Whilst it is often difficult to isolate procurement spend from national budgets (where non-capital expenditure is usually subsumed within other categories of spend, including ‘wages’ and ‘utilities’), the report employed the System of National Accounts (SNA) to compute the magnitude of procurement of goods and services by state bodies not only in developed countries but also in 106 developing countries. Taking 106 developing countries together, the OECD study found that government purchases of goods and services in these economies accounted for approximately 5.1% of their combined national outputs (the comparable figure for the OECD member states was 7.9%). The 106 developing countries’ procurement markets amounted to only 13.9% of the total worldwide procurement spending in 1998.


\(^{78}\) S. Evenett and B. Hoekman (2005) (n 76 above). As the European Commission discovered (n 46 above), even within the single procurement market of the EU, direct cross border trade was less common than the practice of bidding through locally established subsidiaries.

\(^{79}\) See, notably, Trionfetti (n 28 above).


\(^{81}\) See section 2.2.3 above.

These figures appear out of date, however. The European Commission, for example, puts the estimated total public procurement in the EU at about 16% of the Union’s GDP in 2002. Its importance varies significantly between Member States ranging between 11% and 20% of GDP. Other authors also potentially put the global figures higher and estimate the value of, for example, the contestable procurement markets in ACP countries as equivalent to some 5-10% of GDP. In Africa, the figure could be as high as 70%.83

Nevertheless, the OECD report does however make clear just how few of the developing countries have public procurement markets that are of any magnitude. Evenett and Hoekman point out that only a few countries have procurement markets worth more than US$10 billion (South Africa, Brazil, China, Indonesia, Saudi Arabia, Russia) and that not many have procurement markets worth more than US$5 billion (Egypt, Morocco, Chile, Peru, Puerto Rica, Bangladesh, India, Israel, Kuwait, Malaysia, Singapore, Syria, United Arab Emirates). They go on to say that there appears little to suggest that the state procurement markets of much of the developing world are large enough to attract much attention from the trade officials in leading industrialized countries.

The studies seeking to identify the benefits to be gained from introducing TGP presuppose, however, not only that the procurement markets are large but that they are large enough to be affected by international trade. It is, therefore, not just the size of the market that matters but also its susceptibility to foreign competition. This, in turn, leads to a need to investigate in more detail the makeup of a national procurement market with a view to identifying what conditions of a national procurement market are apt to be affected by foreign competition (and thus increased market access) and what effect such market access could potentially have on the domestic market.

Some of these issues were already raised in the context of the GPA negotiations discussed above, notably the issues surrounding the entity coverage in terms of the identity of the purchasing entities subject to the transparency provisions (whether central or regional/local and the position of sub-federal States) and the question of threshold values. The share of total procurement available to international competition is a function of many variables. In addition to the size distribution of contracts (smaller contracts tend not to be attractive to foreign firms), the size of central government as compared to local or municipal governments, these include the share of government services that are ‘contracted out’ to the private sector and the share of expenditures financed through development assistance funds that are tied to sourcing of goods and services from the donor country, as well as other variables.

As already stated, the potential trade effects will depend very largely on the individual situation of the negotiating party. Clearer predictions would require an in-depth study of the country circumstances. The scope of this report is far more limited and, whilst four countries have been selected for some preliminary assessment, the available information is far too limited (and often


84 Woolcock (n 16 above) referring to World Bank CPARs for Uganda and Tanzania.

85 Note 76 above.
out of date) to allow any meaningful conclusions to be drawn. Research and existing literature does, however, provide some basis from which to make this analysis. The following sections thus set out a framework within which the potential trade effects can be considered.

4.2 The Potential Effects

As explained in section 1.2, there is already likely to be interaction between domestic and international markets in most countries which will be participating in trade negotiations. The question then is what will membership of a procurement related trade agreement add to this. The very basis of this report is to distinguish between the transparency requirements of any trade agreement and the possible market access conditions and the potential trade effects will thus also be dependent on each of these two components. In practice, the effects will be a question of degree. Existing international competition produces trade effects in the domestic market. The trade effects of international competition will be augmented through increased transparency. They may be further consolidated through market access conditions. Where there are such conditions, the ability of the government to protect national industry will be more limited.

In terms of transparency, there would appear to be consensus (and some economic evidence) that a sound domestic procurement system will lead to welfare benefits, mainly based on increased competition. To the extent that the transparency provisions also encourage international competition (irrespective of any mandatory market access conditions), they will also have trade effects in the sense that they will facilitate the cross border provision of goods and services. This will present the national purchasing entity with a wider choice of products and prices and, where those are better than those offered on the domestic market, will commensurately improve the quality and reduce the prices of the purchases of the Government to the benefit of the public purse. This position is often challenged on the basis that there is no net economic benefit to national welfare because of the effect on the domestic industry which loses out (an argument which is often used to justify the application of domestic preference rules and the like). That challenge, however, finds little or no support in the economic literature (section 1.4 above). Wider effects will include a catalyst to the improvement of domestic industry which will now need to compete with foreign competition more effectively as well as to less obvious improvements such as the internationalization of business community the creation of jobs to service to incoming foreign bidders. These will often need, for example, local dealerships or subsidiaries and, in the case of works contracts, will also often use local labour. As the European Commission found, increased regional cooperation in the field of procurement did not so much create more direct cross-border contract awards as encourage greater cross border flows of capital and labour in the form of a local presence by foreign firms (bidders)\textsuperscript{86}.

In the case of market access, we saw in the context of the GPA negotiations in section 3 above that the key for the parties was to ensure that any agreement would bring trade advantages to all the parties and that these advantages would be of equivalent value. The idea was that each member would offer the other members equivalent access to its government procurement in proportion to its size and the size of the economy as a whole so that the ‘offers’ did not need to be identical. The point was that, during negotiations, the parties would assess the relative value

\textsuperscript{86} See section 2.2.3 above.
of the ‘contribution’ of the different parties and decide whether it was acceptable and what value they would offer in return. Clearly, therefore, the trade advantages to be gained were seen as part of a ‘two way street’, each party expecting to get an equivalent or similar advantage. In concrete terms, this implied that country A assumed that its own bidders would benefit from access to the procurement markets of country B and that this would be worth giving bidding bidders from country B access to its own procurement markets. This process did not take place in a vacuum but was based on the assessment made by each party on the strengths and weaknesses of its own industries and markets and on its assessment of the reciprocal advantages on offer.

The potential trade effects must, therefore, be assessed from two perspectives: that of the domestic industry and that of the foreign competition. In the first place, it would require an assessment of the strengths of the domestic industry since reciprocal market access would, in theory, present domestic industry with increased opportunities for export business. This in turn depends on what is produced by the domestic market and whether the country (or its industry) has a comparative advantage. Depending on the threshold values of the contracts which would be open for competition (again an issue raised in the GPA negotiations; see section 3.1 above), it is also necessary to enquire about the ability of national companies to compete for high value contracts. It may be that the capacity of the local firms in some industries is such that they will not be able to compete (no comparative advantage, insufficient technical or financial capacity). In those cases, the opening up of foreign procurement markets will be of little benefit to the national firms who will not be in a position to compete for contracts abroad. This may be true in respect of some or all of the other members of the trade agreement and so it may be possible to take a differentiated view of the markets as is the case of the GPA. Access to international markets and competition may, on the other hand, encourage the improvement of local industries enabling them ultimately to compete on the international procurement markets.

The corollary to this, of course, are the increased opportunities given to foreign bidders to compete on the domestic market. This will again depend on the specific industry in question (and again an issue for detailed negotiation) and on the value of contracts and size of markets. International bidders will not automatically be interested in other markets, particularly where they are small. The issues of geography, political situation, ease of doing business, language, currency convertibility etc. will all play a part as well as the perceived quality of the local public procurement system (i.e. its reputation for fairness). If foreign bidders are not interested, then granting them market access will not bring any trade benefits to the national (procurement) economy since competition will not be increased. Indeed, where local companies are unable to compete internationally and where foreign bidders are not interested in competing in that domestic market, it may be that market access conditions produce no trade effects at all.

Despite the potential trade effects, it should be recalled that the available statistical evidence (referred to above) suggests that the main effect of improved transparency rules (which come about as the result of trade negotiations which focus on procurement) are found in improving domestic competition. This does have a positive welfare effect; it is just not the expected effect when observers are expecting significant changes in trade flows.

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87 As in the EU, though, it could be that foreign bidders would set up shop in local markets in order to conduct business there. This would clearly have positive welfare effects on the national economy through job creation, domestic production and technology transfer, for example).
4.3 How the Effects may be Conditioned

The above commentary makes clear that the primary effect of international agreements in the field of procurement which cover both transparency and market access is to be found in the domestic procurement system. All international economic organisations will, in the first instance, focus on the transparency (quality) level of the national system to determine whether, ultimately, market access conditions will be workable. If the system is deficient, the market access conditions will be unable to operate and, thus, bring the expected benefits to the parties. In those circumstances, membership negotiations are unlikely to proceed much further. A sound procurement system is the necessary pre-condition to membership and, without it, none of the benefits referred to above are likely to be achieved, either the expected trade benefits or the benefits to national competition.

The transparency of the national system is only one part of the equation. Though not directly a focus of the formal discussions, there will also be a concern about the implementation of the national system, especially where that is newly developed. A good system on paper does not necessarily translate into a good system in practice. As well as considering written implementing measures (e.g. bidding documents, formal procedures, guidance notes, manuals etc.), it is also necessary to consider the level and quality of implementation at the level of the procuring entities. This will involve assessing the willingness of those entities to comply, the existence or not of corruption and the general capacity of the procuring entities to implement the legal framework. This also includes an assessment of the systems of governance in place such as the internal checks and balances existing within the procuring entities as well as the process of internal and external audits. In terms of the sample countries considered in this report, Tanzania would appear to be well on the way to providing a sound national procurement system. Samoa also appears to have a good system on paper, although little is known currently about implementation. The available assessments for Nigeria indicate that there is a new improved Act in place but that implementation is still lagging behind. Dominica seems to have a patchy legal framework and a poor record of implementation.

Whilst not a benefit of the effects of membership, the negotiating process may itself bring about significant benefits to the aspiring members. To the extent that their national systems are not acceptable, they will benefit from detailed assessments of those systems which will enable them more easily to identify those areas which are in need of improvement. In many cases, the potential trading parties will also provide technical and financial assistance to acceding parties to improve their systems. Moreover, the MDBs and other donors are generally keen to assist developing or reform countries in improving their national systems and this inclination is often bolstered where the country in question is contemplating joining a regional or international trade arrangement which concerns procurement. Negotiating parties may thus be able to exploit their position of procurement weakness by seeking additional assistance from their putative trading partners and donors in the development of their domestic procurement systems.

The establishment of a sound national procurement system is critical if any of the potential benefits are to be achieved. Where the system is not sound, where implementation is poor, where bribery is prevalent or where there is insufficient capacity within the procuring entities, membership of a procurement related trade arrangement will not be an option because the
potential benefits could not, in any event, be achieved. Where a country does possess a well functioning transparent domestic procurement system, it would be possible to consider other potential trade effects. A proper assessment of these requires, however, detailed information and data on the country’s procurement spend, procurement market and trade flows. What follows then is only an indication of the factors that may need to be taken into account. The issues are clearly inter-dependent but we treat them here in partial isolation in order to retain clarity.

One of the first considerations will be the size of the public procurement market in the country. This is often very difficult to assess as indicated above but, in the EU, for example, the size was estimated to be an average of 16% of the EU GDP in 2002. This represents a market with a value of some €1,500 billion. The GPA Secretariat\(^88\) estimates that the adoption of the GPA 1994 led to an estimated ten-fold increase in the value of procurement subject to international competition under its rules, as compared to the approximate annual value, between 1990 and 1994, of US$30 billion of covered procurement under the Tokyo Round Agreement. It thus believes that the GPA members’ procurement markets are currently worth in excess of US$300 billion. These are enormous markets and very attractive to most bidders. Of course, a significant part of the EU market is also subsumed within the GPA market figures, i.e. that portion which exceeds the financial threshold values of the GPA and thus falls within the scope of the GPA. Indeed, most (but not all) developed countries with significant public procurement markets of their own are party to the GPA and most are also OECD member countries. It is estimated that the OECD public procurement markets account for over 90% of the international procurement. That leaves something less than 10% to be shared among the remaining countries. The OECD report places the value of the identified 106 developing countries’ (some of whom are OECD members) procurement markets at around only 14% of international procurement.

The implication of this, as suggested by Evenett and Hoekman\(^89\), is that smaller procurement markets will be of less interest to trade officials in industrialised countries and, by extension, to their firms and bidders. The cost of doing business abroad is not negligible and businesses will become active in foreign markets only when the profit to be achieved outweighs the costs of doing so. The reality of international markets is, in any event, that many products at least are traded internationally without any direct intervention of foreign manufacturers. These operate through resellers, distributors and agents throughout the world. Their share of the domestic market, if they are present in this way, will not change whatever the state of the procurement system\(^90\). Equally if construction companies and other services providers are interested in a particular market, they will generally penetrate that market through establishing local offices or subsidiaries\(^91\), without the need for bidding from abroad\(^92\). This is mostly because they will need

\(^{88}\) [http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm](http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm)

\(^{89}\) See n 76 above.

\(^{90}\) Though it may change depending on other trade-related barriers such as customs duties and tariffs, as well as the existence of domestic preferences.

\(^{91}\) Hence the importance of Article III(2)(a) of the GPA 1994 which provides that the parties must ensure that their procuring entities do “not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership”.

\(^{92}\) This is less the case for MDB funded contracts which present different opportunities in the case of very large contracts. Bidding for MDB contracts is an industry in itself.
local knowledge, local infrastructure and local labour to complete their projects and, as indicated above, this is something which is of direct benefit to the national economy\textsuperscript{93}. As a result, in practice, only specialised or bespoke products, big ticket items and sophisticated services will be the subject of direct bidding from abroad\textsuperscript{94}. The likelihood that foreign bidders will be interested in bidding where they do not have a local presence will depend on a number of factors which will include the location and geography of the market (how isolated it is and how expensive it will be to supply), the transport and insurance costs as well as a number of other issues such as the trading conditions (customs and tariffs, non-tariff barriers, ease of doing business). For small isolated markets, the difficulty may not so much be in protecting the domestic market as encouraging foreign bidders to supply at all.

The benefits to be gained from accession to international trade agreements will, therefore, in part depend on the size of the national economy and of the procurement market. Large easily accessible markets may attract more competition and benefits whereas smaller inaccessible markets will do less well. This also a reason why countries tend to enter into agreements with regional partners: this reduces the concerns of isolation, transport costs and other costs of doing business. This is the case of the EU, of many FTAs such as NAFTA, the APEC States, and, in the context of this report, the sample countries. Tanzania is, for example, a member of the East African Community (EAC), the South African Development Community (SADC) and is negotiating to rejoin the Common Market for Eastern and Southern Africa (COMESA). It is currently negotiating an EPA through SADC\textsuperscript{95}. Similarly, Samoa is a member of the Pacific Islands Forum (PIF), the Pacific Island Countries Trade Agreement (PICTA) and the Pacific Agreement on Closer Economic Relations (PACER). An EPA is being negotiated through PACER. It is not clear, however, whether regional arrangements are always beneficial. It has clearly been of benefit to the EU where the creation of the single market has benefited its original members and encouraged newer members to develop in a way that allows them also to benefit. In less developed contexts, views seem to differ. In respect of Samoa, a paper prepared by the Asian Development Bank in 2007 commented on PICTA as follows: “A trade agreement among small developing states, such as PICTA or the MSG, is unlikely to be welfare-enhancing. In fact, it is more likely to set back the promotion of free trade within the FICs because of the propensity for trade diversion and tariff and investment diversion to the more advanced states, resulting in income divergence and increased antagonism against free trade.”\textsuperscript{96}

The first consideration in seeking to assess the likely trade effects of entering into negotiations will be to determine the size of the national market with a view to determining whether or not membership will operate to attract foreign competition. This is not only a question of the overall size of the market but also of its nature. In considering the domestic market, it is a question of determining what portion of the domestic market would be available and/or of interest to

\textsuperscript{93} Such benefits may be lost, however, where domestic preferences are based, as appears to be the case in Tanzania, not on domestic goods or labour but on domestically owned companies.

\textsuperscript{94} What those are will, of course, depend on the state of the local economy.

\textsuperscript{95} The conflict raised by membership of so many regional organisations is, however, itself an impediment to trade negotiations: see the country report in Annex 4, pp. 6-9.

foreign bidders. This includes a number of variables relating to the contracts which are open to international competition.

One issue is the extent of Government purchases in a given market. In some countries, for example, many services (construction and other) will be provided in-house by the government services and not outsourced. This limits the size of the procurement market, at least for routine contracts, although probably suggests that major requirements would be outsourced where funds are available. Lack of funds also conditions the government’s recourse to the market so that the size of the public procurement may be a reflection of the wealth of the nation. Countries in this position will often benefit from grants and loans from donors and the MDBs which could suggest that their procurement markets would grow. However, there are significant procurement consequences related to such funded contracts. Where procurement is financed by a donor it is also very often tied to the procurement of goods and services from the donor country or countries97. Even if the domestic procurement system is open, the financed procurement will not be open98. This is not a major problem in the case of the World Bank, for example, whose aid has in any event now been untied, because the membership of the World Bank was so large. This is less true of the African Development Bank, however, which maintains tied aid in favour of a smaller number of countries. The EU also imposes tied aid in the case of its development budget at least in relation to ACP countries99 so that all goods and services funded by the EU must originate either in the beneficiary country or in the EU. Where such funding exists, therefore, it may well be that a large proportion of the national procurement market would be excluded from any market access conditions. Of course, where a donor country is part of the relevant free trade arrangement, then this becomes less of an issue.

Even where there is, in theory, a sufficiently large procurement market, access to that market will also be determined by the public entities that are obliged to follow not only the national procurement system to the full but also to grant access to foreign bidders. This was an issue which became a sticking point in the early GPA negotiations (section 3.1 above). There the issue began as one relating to the difference between federal and unitary systems and was expanded to cover the question of the degree of control100 over regional, local or municipal governments. In both cases, the issue is to determine which of the entities are subject to the procurement rules. In some countries, only procurement at federal level may be covered, leaving state procurement untouched. In unitary states, it could be that only central government is included

97 See Falvey et al (n 83 above).

98 Most procurement systems will contain an exception allowing funded contracts to be governed by the rules of the funding organisation. If not, the funding organisations, notably the MDBs will not entertain the grant or loan. The national procurement system may also be overridden by way of the legal agreement granting the loan or grant.

99 It recently removed the same obligation in respect of aid coming from the general budget: see, further, Trepte, ‘Regulating Procurement: Understanding the Ends and Means of Procurement Regulation’ (OUP, 2006), chapter 10.

100 The question of the control exercised by a federal state over the states also became an issue in the context of the GPA, for example, in relation to the ability of the U.S. federal government to impose the procurement rules required by the GPA on the individual States. Indeed, a WTO dispute panel was established in 1997 to consider a law enacted by the State of Massachusetts which essentially sought to prohibit State public authorities, covered by the GPA, from procuring goods or services from any companies, whether from the United States or elsewhere, who engaged in business with Burma (Myanmar) and who were listed in the law (United States – Massachusetts State Law prohibiting contracts with firms doing business with or in Myanmar, WT/DS88/1-5, WT/DS95/1-5 and WT/DS8/M/49). The Law also imposed a ten percent price penalty on bids submitted by listed companies. The work of the Panel was suspended following a U.S. court ruling preventing the implementation of the law.
but not regional or local government. This could seriously affect the ‘value’ of the procurement market on offer which is why it became so crucial to the GPA negotiations. Indeed, the whole structure of the negotiations and ultimate agreement became dependent on the value of the market represented by the identity of the procuring entities covered. That is why, as described in section 3 above, it became imperative to negotiate the various annexes which detailed the market access conditions by reference to the procuring entities themselves, *i.e.* central government entities (Group A), sub-central government entities (Group B) “other” entities (Group C) whose procurement policies are substantially controlled by, dependent on, or influenced by101 central, regional or local government such as public utilities102.

Connected issues concern the size of contracts and the application of financial thresholds. In respect of size, what will be of interest to foreign bidders will be contracts of a sufficiently large value to justify the costs of bidding. In most countries, there will be many, many small value contracts and a smaller number of large value contracts. Quite often in the case of developing countries, those large value contracts will also be funded by donors and MDBs raising again the question of tied, above. Part of the transparency requirements of a procurement system will be to prevent the artificial splitting of contracts with a view to avoiding the use of competitive procedures but that only becomes relevant in this context where the contract is of a sufficiently high value at the outset to attract foreign competition. The size distribution of contracts was, as again discussed in section 3.1 above, an issue raised in the context of the GPA negotiations but in respect of the threshold values.

Most procurement systems at national level will introduce the idea of financial thresholds to distinguish between contracts which merit award by way of open competition and those which are better awarded by other less competitive, and thus less expensive methods. This is based on a cost/benefit analysis which recognises that competitive procedures bring price reductions but that there is a cut-off point at which the cost of conducting the procedure does not outweigh the price reductions to be expected. Some countries will also apply a financial threshold which distinguishes between open procedures which are open to national bidders (though where international bidders may also participate) and those which *must* be opened to international competition. Though not apparently based on mathematical formula, such thresholds are designed to impose international competition at a level where international bidders are likely to be interested in bidding, *i.e.* where the costs of participating in the bidding procedure is outweighed by the prospect of turning a profit. These thresholds are often linked to the thresholds adopted, for the same purposes, by international organisations. These thresholds target large value contracts which are those most susceptible to international competition.

At international level, of course, there has been much debate as to the appropriate level of such thresholds. As explained above, the lower the threshold, the more contracts and entities would be covered. The higher the threshold, the fewer there would be. This was crucial in the GPA debate since the level at which the threshold was set could affect the value of each party’s

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101 The means of control or influence could include, *inter alia*, governmental ownership or part ownership, government financial assistance such as subsidies, statutory relationship between the entity and the government, special privileges such as legal monopolies, budget review by government, appointment of management personnel by government, political pressure etc. See Blank and Marceau, op. cit., at p. 113

102 Negotiations were abandoned on a fourth category of entities (Group D) which consisted of entities not substantially controlled by, dependent on, or influenced by central, regional or local government such as the private utilities operating on the basis of special or exclusive rights.
'contribution'. The GPA negotiators also recognised that a low threshold would cause a significant administrative burden on governments as a result of the large number of small value contracts undertaken by them on a daily basis. Whilst it might have been expected that developing countries would favour higher contracts, thus avoiding competition from foreign bidders for lower value contracts, they actually favoured lower thresholds since this would enhance their prospects of gaining access to the procurement markets of developed countries by enabling them to compete for the lower value and less sophisticated contracts. Their position was thus a recognition of the specificities of their own domestic markets, i.e. the capacity of their own firms and the market segments they were in.

A final consideration must also be the nature of the domestic market. For the purpose of identifying potential benefits to domestic industry, it is necessary to identify their strengths and capacities as well as the external markets in which they might seek to operate. The negotiating party would need to identify its comparative advantages and then to investigate the value of current trade flows. It is really only where the negotiating party has companies capable of exporting efficiently (i.e. producing good quality at acceptable prices) that its industry is likely to benefit directly from reciprocal market access conditions. This investigation would also indicate those areas which need to be negotiated most strongly, i.e. threshold levels, sector coverage, possible exemptions and reciprocity arrangements.

Tanzania provides a good example of the difficulties of making such an assessment. The country report (annex 4) shows that the agricultural sector is the most important sector of production in Tanzania. Any agreement on procurement should thus be used to stimulate this sector and encourage local production. However, trade barriers in agriculture are still high worldwide and it is to be noted that agricultural products have been excluded from most international agreements on procurement.103 Food aid is also excluded from the OECD Recommendation on untying aid to LDCs and HIPCs. Trade agreements relating to procurement would thus seem not to be in the interests of Tanzania because the very sector in which it is strong is currently excluded from most such agreements.104

How then can the agricultural sector be stimulated by a procurement agreement? One possibility could be to use negotiations on an international agreement on procurement to bargain concessions with donors to untie food aid projects. Tanzania could allow the opening up of its procurement market on condition that developed countries members to the international agreement agree to untie their food aid projects. If donors untied their food aid projects Tanzanian producers could participate in the tenders to supply the food aid goods financed by donors (food aid continues to be overwhelmingly tied despite the adoption of the OECD/DAC Recommendation to untying aid to LDCs). In the context of the GPA, La Chimia and Arrowsmith105 have suggested that inserting untying aid commitment in the GPA could be a way

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103 For example, the GPA parties have excluded from the scope of the GPA goods related to food consumption (see for example EU annex 1).

104 Arguably because developed countries did not believe that their own producers could compete sufficiently strongly in other markets where there might be comparative advantages. As suggested in section 3 above, the GPA negotiations are the result of significant ‘horse-trading’ between the parties and not on some ideal construct of what an international procurement agreement should cover. This will be the case for almost any international agreement on procurement.

to stimulate developing countries’ participation in the GPA. A similar approach could be taken for any international agreement on procurement concluded between a developed and a developing country. In the specific case of Tanzania an agreement on procurement that includes untied aid commitment on food aid could be extremely beneficial since, as shown in the above table, the agricultural sector is strong in Tanzania. It is reasonable to assume that Tanzanian producers would be able to take advantage of procurement opportunities in the Agricultural sector and provide the aid goods.

This example illustrates both the difficulty of identifying and using the strengths of domestic industry in the context of trade negotiations and the need to conduct such an investigation on an industry by industry level. The likely benefits can only be ascertained when the country situation is fully appreciated.

5. Policy Options

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

5.1 Transparency Options

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

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

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

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

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

5.2 Market Access Options

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

Using the issues discussed in section 4.3 as a baseline, a negotiating party would need to assess the size of its procurement market and the scope of public procurement contracts available for competition basing itself on the level of public contracting, the identity of the contracting entities covered by the legislation, the number and value of the contracts awarded and the extent of donor assistance which is subject to tied aid. Apart from giving the negotiating party an understanding of its negotiating position, the collection of such information will be necessary
in respect of setting out any market access conditions. In the case of the GPA, for example, these issues would all need to be covered in the relevant annexes. Similar approaches are used in FTAs and in the context of EPA negotiations even if precisely the same annexes are not used.

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

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

As stated at the outset, it has not been possible to consider all types of trade agreements. The GPA has been used as the primary example since it has set the trend for most current trade agreements. The details of all will be different, of course, but the approach will be similar. In respect of developing countries, the GPA currently contains some specific provisions which will assist developing countries in negotiating preferential access to the agreement. For example, the GPA maintains provisions which seek to establish special and differential treatment for developing countries. The objective of these provisions, contained in Article V, is to encourage the existing parties, in the implementation and administration of the agreement, to take into account the development, financial and trade needs of developing countries, in particular least-developed countries. These needs relate, in particular, to the need of these countries to safeguard their balance-of-payments position and ensure a level of reserves adequate for the implementation of programmes of economic development; promote the establishment or

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106 Maybe a recognition that they do not have the economic effect ascribed to them in political circles?
development of domestic industries including the development of small-scale and cottage industries in rural or backward areas and economic development of other sectors of the economy; support industrial units so long as they are wholly or substantially dependent on government procurement; and encourage their economic development through regional or global arrangements among developing countries.

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

After entry into force of the Agreement, a developing country Party may also modify its coverage lists in accordance with the GPA’s provisions for modification of such lists\(^\text{107}\), having regard to its development, financial and trade needs, or may request the to grant exclusions from the rules on national treatment for certain entities, products or services that are included in its coverage lists. A developing country Party may also request the Committee to grant exclusions for certain entities, products or services that are included in its coverage lists in the light of its participation in regional or global arrangements among developing countries. Each request to the Committee by a developing country Party relating to modification of a list must be accompanied by documentation relevant to the request or by such information as may be necessary for consideration of the matter. These provisions apply mutatis mutandis to developing countries acceding to this Agreement after its entry into force.

Article V:12 also contains provisions which grants special treatment for the least-developed countries based on paragraph 6 of the Decision of the CONTRACTING PARTIES to GATT 1947 of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries\(^\text{108}\). Under this provision, special treatment shall be granted

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\(^{107}\) Contained in Article XXIV:6.

\(^{108}\) BISD 26S/203-205
to least-developed country Parties and to the suppliers in those Parties with respect to products or services originating in those Parties, in the context of any general or specific measures in favour of developing country Parties. A Party may also grant the benefits of the Agreement to suppliers in least-developed countries which are not Parties, with respect to products or services originating in those countries. Each developed country Party shall also, upon request, provide assistance which it may deem appropriate to potential tenderers in least-developed countries in submitting their tenders and selecting the products or services which are likely to be of interest to its entities as well as to suppliers in least-developed countries, and likewise assist them to comply with technical regulations and standards relating to products or services which are the subject of the intended procurement.

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

The Public Procurement System of Dominica

There is very little up to date information on the procurement system in Dominica. The two main reviews are the World Bank’s CPAR of 2003 and the OECS CPAR, also of 2003 which is effectively a reproduction of the World Bank CPAR. The latest review of the procurement system appears to be contained in the WTO’s Trade Policy Review of October 2007. This latter document indicates that very little has changed since the 2003 CPARs although new and improved legislation was apparently imminent, as it was in 2003. This assessment is based on these reports. As a member of CARICOM, Dominica is participating in the development of a common policy framework on public procurement in advancing the CARICOM Single Market Economy.

1. Country Context

The Commonwealth of Dominica is a small Caribbean island state with a population of some 74,000 and an area of 750 sq. km. It achieved independence from Great Britain on 3 November 1978 but it retains the common law tradition. Dominica is a member of the Organisation of Eastern Caribbean States (OECS) and the Caribbean Community (CARICOM). Dominica's GDP per capita was some US$4,450 in 2006. GDP per capita in terms of purchasing power, as estimated by the IMF was US$6,764.3 in the same year. Net aid per capita in 2005 was estimated by the World Bank at US$409, the highest among OECS-WTO Members. In terms of its economy, services accounted for 66.2% of GDP in Dominica in 2005, followed by agriculture (18.5%), manufacturing (8.1%), construction (8.4%), water and electricity for (6.4%), and mining and quarrying (0.9%). No employment or wage change statistics are available.

Agriculture, and specifically bananas, continues to play a dominant role in the Dominican economy. Although the contribution of agriculture to GDP declined from 30% in the mid 1980s to 18.5% in 2005, its share of GDP continues to be higher than in other OECS countries. Moreover, agriculture still employs around one third of the labour force and is an important earner of foreign exchange. The banana industry has been declining since the 1990s for a number of reasons, among which are the erosion of preferential access to its main export market, the United Kingdom, the changing demography of the farming community, high production costs, and low productivity.

Dominica produces relatively low value manufactured goods, with production revolving around, inter alia, agri-processing, some assembly of plastic and metal goods, and textile production. Agri-industry includes beverage production using a variety of raw materials, including coconuts, citrus, and other fruits. Dominica also produces some chemicals, including dentals creams, as well as soaps and lotions. Performance in the sector is dependant on the overall performance of

one dominant player primarily producing dentals creams and soaps. The services sector includes financial (reinsurance and banking); tourism and travel related (hotel development); recreational, cultural and sporting (entertainment and sporting services); and communications.

Dominica’s economy has been volatile in the last decade with a severe economic crisis early in the decade. Output fell by some 10% in 2001-02 but growth resumed in 2004 and 2005. Private consumption held its contribution to GDP relatively stable during the period. The shares of both imports and exports fell as a consequence of the crisis, but, while the share of imports recovered with resumed economic growth, the share of exports continued to decline. Economic growth has been around or above 3% since 2004. In general, growth since the recovery started has been driven mainly by expansion in the services, with strong growth in wholesale and retail trade, telecommunications, and construction, which received a boost from public sector projects. Output in manufacturing increased but in agriculture it was affected by a decrease in banana production, partly a result of unfavourable weather.

2. Trade policy

Since the mid 1990s, Dominica's trade policies have been aimed at gradually establishing an open trading environment while ensuring that domestic producers become more competitive in order to face the increased competition that characterizes trade liberalization. The main objective of Dominica's trade policies has been to maximize exports and export earnings to improve the country's balance of trade position. Dominica has pursued this objective through programmes and measures seeking to expand market share for exports, such as competitiveness-improving and marketing-assistance and promotion programmes. This policy has remained broadly unchanged since 2001.

Dominica has also been committed to securing the best ‘development-oriented’ agreement it can in international trade negotiations, including the Economic Partnership Agreement with the European Communities and in the Doha Development Round of WTO negotiations. Dominica’s key negotiating objective has been to obtain access for exports while attempting to reduce the potential negative impact of some obligations, by advocating the need for special and differential treatment, given what it regards as the vulnerabilities of its economy.

Dominica’s point of emphasis would appear not so much to have been market access, which the country has in any event in the main markets of the U.S., EC, and Canada, but ensuring that the development dimension is put at the centre of both the WTO and EPA negotiations. They also noted that in addition to differentiated treatment of member states, the development dimension embodies the critical aspect of securing development assistance to address concerns of domestic production capacity in order to turn opportunities for market access into actual access, and to build or strengthen capacity. The authorities consider that gaining market access will not help the development process if Dominica cannot overcome its supply side constraints.

Dominica participates in a number of regional and preferential trade arrangements: the Caribbean Community (CARICOM and CARICOM Single Market and Economy (CSME); the OECS; the ACP-EC Revised Cotonou Agreement; the U.S. Caribbean Basin Initiative (CBI); the Canadian CARIBCAN; and the Association of Caribbean States (ACS); and is a beneficiary of the General System of Preferences of several industrial countries. Among these, the ACP-EC Agreement, CARICOM, and the OECS have had the greatest impact on the economy of Dominica. The
majority of Dominica’s exports continue to go to the United Kingdom and to other CARICOM countries.

Dominica enjoys preferential access under the U.S. Caribbean Basin Initiative (CBI). Dominica also enjoys preferential access to the Canadian market through CARIBCAN, mainly for processed and fresh vegetables. Products from Dominica are eligible for the Generalized System of Preferences (GSP) schemes of Australia, Canada, the European Union, Japan, New Zealand, Switzerland and the United States. The range of products varies according to each country’s scheme.

3. **Procurement**

Dominica’s procurement market is modest. Public finance figures indicate that public sector current expenditure on goods and services totalled EC$45.9 million (approximately €12 million) in 2006, some 6.8% of nominal GDP, while capital expenditure totalled EC$84.1 million (approximately €21 million), some 12.4% of nominal GDP. Due to the size of the country, the government carries out limited procurement with the majority of capital investments being financed by external sources. Even so, the domestic public sector procurement system is inefficient and lacks transparency.

3.1 **Legal and Regulatory Framework**

The current rules governing government procurement in Dominica are contained in Finance Administration Act No.4 of 1994. Procurement for government agencies is centralized for large projects: tenders must be submitted to government tenders boards, established on an ad hoc basis, which tend to base decisions on lowest price considerations. The Minister of Finance issues rules and regulations (Financial Regulations) under the Act which in effect govern procurement. However, the Financial Regulations only broadly define functions and responsibilities but do contain much detail concerning procurement. There is no specific procurement office or board with policy and oversight functions. Most purchases are made on a ministerial basis, although tenders boards may be established on an ad hoc basis for large purchases (e.g., construction projects). The Minister of Finance is the primary regulatory authority and approves virtually all contracts. He will also generally refer all contracts with a value above EC$50,000 (approximately €12,000) to the Cabinet. The Minister of Works in practice approves all works contracts above EC$10,000 (approximately €2,500). These thresholds are clearly out of date but there is no mechanism for revision. Whilst these authorities are not set out in the Stores Regulations, the Ministers are filling the vacuum created by the non-existent Central Tenders Board.

Stores Regulations set forth rules for stores management, disposal and accounting but also include some basic procurement rules. These regulations are severely outdated, however, and refer to procedures that are no longer followed and entities that no longer exist or have never existed (Central Tenders Board). The Stores Regulations were clearly drafted with the procurement of goods in mind, but there are no separate regulations or rules applicable to works or services procurement. It seems that the Stores Regulations are regarded as applicable to such procurement but that is not explicit and, in any event, wholly opaque. The Regulations are not, it would seem publicly available.
The Stores Regulations, as the only explicit set of rules applicable to procurement do not contain any provisions relating to the following critical issues. There is/are:

- no clear definition of procurement methods other than competition and the conditions under which they might apply;
- no mention of open tendering used with pre-qualification or in two stages, or by way of lots;
- no provisions relating to the qualification of suppliers and contractors;
- no reference to public bid opening;
- no requirement to return late bids unopened;
- no standard award criteria quantifiable in monetary terms and no requirement to award the contract to the lowest evaluated bidder;
- no standard bidding documents;
- no standard form contracts or any indication of what the contract conditions should be;
- no administrative review of procurement decisions.

In summary, there appears to be no legal or regulatory requirement to publicise procurement related legal texts. There is also no comprehensive piece of legislation with the applicable rules being scattered among various texts of differing authority. The Ministry of Finance is responsible for making financial and procurement regulations and issuing directions for the procurement of goods, works and services by tender or direct purchase but these do not appear to be published. It seems that most of the players involved in the public procurement process, both from the public and private sector, are not aware of the procedures.

### 3.2 Advertising

There is a legal requirement in the Stores Regulations to advertise contract opportunities. This is generally done through the Gazette, local press and by way of radio announcement. The Gazette is published regularly and is available to the public. For the procurement of works, in practice works projects are advertised and contractors can be invited to pre-qualify depending on the complexity of the project. Projects are advertised in local newspapers, with larger projects being advertised in international newspapers, as well as in the Gazette and in the broadcast media. Publicized tenders are published domestically, except when regional and international publication is required by a project’s funder (e.g., an international financial institution). Even when a project is domestically published, foreign suppliers of goods and services may still bid.

It seems, however, that selective tendering, with a request of a minimum of three quotes, is usually preferred to open tendering so that advertisements are relatively rare.
3.3 Procedural Transparency

The Stores Regulations provide for bidding following public advertisement as well as a form of restricted tendering but include no clear definition of the circumstances for use of either method or explicit reference to open bidding as the default method. Procurement for small amounts is decentralized. In practice, there is no specified threshold between large and small projects. For the procurement of supplies, local purchase orders are used in many cases and procurement is at ministry level; quotations from three different local suppliers are obtained, and the supplier is chosen on a price-competitive basis. In some cases, decisions also take into account the quality and skill level of the bidder.

In addition, there are no legislative guidelines on qualification criteria but contractors appear to be listed in an unofficial register, which is not updated on a regular basis. There is no statutory requirement to include evaluation criteria in bidding documents. The bid evaluation and contract award criteria are not fully provided to the bidders and, where they are, tend to be vague. Procuring entities do not consider themselves bound to give reasons for not accepting the lowest tender or any tender. A bid evaluation (as opposed to qualification) can take into account past dealings with the contractor, the past performance of the bidder and the completion date and price, among others. It appears that the bidding documents do not contain many formal instructions on the conduct of the procedure. At present, most procurement is on the basis of a short-list and the prequalification of contractors. Some bidding is done on the basis of publicized tenders. Selective tendering tends to be used for local community projects, where the communities themselves are invited to participate.

Preferences are not granted either to Dominican nationals or to other OECS or CARICOM countries. This is generally not possible, however, for large projects as there may be no local firms capable of providing the necessary services. Small and micro enterprises are favoured in community projects (e.g., a small road repair project).

3.4 Publication of Award

Contract information should be published in the Gazette but this is not done in practice.

3.5 Review Mechanism

There is no independent body to which a supplier or a contractor can address their complaints or report irregularities during a tendering procedure and no formal complaints procedure. Judicial review is possible but the procedure appears to take 5-7 years.

3.6 The OECS/PPS

Dominica is a member of the Organisation of Eastern Caribbean States (OECS) which has set up the Pharmaceutical Procurement Service (OECS/PPS) designed to improve the use existing resources by efficient procurement practices. OECS/PPS is an agency of the OECS, a formal grouping of nine (9) Eastern Caribbean Countries; Anguilla, Antigua and Barbuda, British Virgin Islands, Dominica, Grenada, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, and Barbados. For more information, visit the OECS website at: [http://www.oecs.org/about-the-oecs](http://www.oecs.org/about-the-oecs)
Islands, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines, with a combined population of approximately 550,000. The OECS/PPS was established under a project funded by USAID and by 1989 the scheme was financially self-sufficient. The core function of the OECS/PPS is the pooled procurement of pharmaceuticals and medical supplies for nine Ministries of Health (MOHs) of the OECS countries. The OECS/PPS presented suppliers with a public sector monopsony so that products tendered by OECS/PPS are purchased exclusively through annual contracts. It operates a centralized, restricted tendering system in which all approved suppliers are pre-qualified by a vendors’ registration questionnaire. Pre-qualification is necessary to assess the quality standards, technical competence, and financial viability of competing suppliers. Following a bid solicitation from over 75 international suppliers, OECS/PPS awards annual contracts, place orders directly with suppliers, and monitors delivery and supplier performance. Prior to the establishment of OECS/PPS, the OECS countries purchased drugs individually from suppliers by direct negotiation. During the 2001/02 tender cycle, the annual survey on a market basket of 20 popular drugs showed that the regional prices were 44% lower than individual country prices.
2. Nigeria

THE NIGERIAN PUBLIC PROCUREMENT SYSTEM
AN ASSESSMENT

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1. INTRODUCTION

1.1 Purpose This Annex attempts to identify and analyze the potential trade and welfare effects that improvements in the Nigerian public procurement system would bring. It will do this by describing:

i. The current political and economic conditions that prevail in Nigeria;
ii. The structure of the current public procurement system;
iii. The results of two assessments of this system that were carried out in 2001 and 2006;
iv. What impact improvements would result from increased competition, reduced corruption and transparency in public procurement; and
v. Recommendations about what stance Nigeria should take in regional and international trade negotiations concerning procurement.

1.2 Government Context Nigeria, a Federal Republic comprising 36 States and the Federal Capital Territory of Abuja, is the largest country in the West Africa: with around 149 million people and a GDP of US$ 335.4 billion. GDP per capita in 2005 had more than doubled from approximately US $338 billion in 2000 to US $752 billion, but approximately 70% of the population in 2007 was still living below the poverty line at that time, compared to only 46 percent in 1985. The government is operating under a Constitution enacted in 1998 following the collapse of a military government that had ruled Nigeria for 16 years. It is attempting to build a stable basis for governance, but it continues to face the daunting task of reforming a petroleum-based economy, whose revenues have been squandered through corruption and mismanagement, and institutionalizing democracy.

1.3 Conflicts and Instability Nigeria continues to experience longstanding ethnic and religious tensions. Despite the wealth of oil extracted from the Niger Delta region, poverty remains high (see above) and development indicators are very poor (average life expectancy is 43, and 12% of infants do not live to see their first birthday. The States receive large allocations from the Federal Government, but little is used to provide necessary services and benefits for the general population. Poor development efforts, increasing public concern over environmental damage, and high levels of youth unemployment, have led to the growth of both political and criminal groups, who kidnap oil workers and damage oil pipelines for publicity, profit or both. The conflict, though contained in the Delta Region, has a significant economic impact. The reduction in oil production as a result of conflict is estimated to have cost US $58.3 billion from 1998 to 2007. The World Bank determined in 2008 that at the State level the needed institutional and legal framework for improved fiscal management had yet to be realized across the board. It noted some tangible improvements in Cross River, Kaduna, Kano and Lagos States, but institutional and capacity weaknesses in the civil service at the federal; state; and local levels were still visible, hobbling the government’s ability to deliver all services effectively.

1.4 Corruption Progress was made in increasing transparency and tackling corruption between 2003 and 2007 by strengthening government institutions (e.g. the Due Process Unit); prosecuting perpetrators of corruption (Economic and Financial Crimes Commission - EFCC); and enacting governance reforms (e.g. bills relating to Procurement and Fiscal Responsibility and the Nigeria Extractive Industries Transparency Initiative (NEITI)). But corruption remains a major
problem. Nigeria was ranked 121 on the Transparency International Corruption Perception Index in 2008. This was up from 147 in 2007, which was mainly due to public confidence that the Government elected in 2007 would proceed to enforce the recently enacted governance reforms, not based on proof that the level of corruption had actually abated.

2. NIGERIAN PUBLIC PROCUREMENT SYSTEM ASSESSMENTS

2.1 World Bank CPAR June 2000 Only two (2) thorough assessments of the Nigerian public sector procurement system in Nigeria have been carried out since 1998 when after 16 years of military rule the current Constitution was enacted: the first, the World Bank Country Procurement Assessment Report (CPAR) published on June 30, 2000 and based on work mostly carried out in 1999 shortly after the fall of the military government. The World Bank used the new methodology for rating country public procurement systems it started developing in the late 1990s, which entailed a close examination of the following features comparing each to recommended good practice and identifying strengths and weaknesses:

i. The Legal and Regulatory Framework
ii. Procedures and Practices
iii. Organization and Resources
iv. Performance on Bank-financed projects
v. Private Sector Performance
vi. Trade Practices and Customs
vii. Electronic Commerce in Public Procurement

A holistic approach was taken it being assumed that all features need to be present for a system to function properly and better competition and transparency to result. A summary of the results is provided in Section 3 below.

2.2 Baseline Indicator System (BIS) Report, 2007 The second assessment is the Baseline Indicator System (BIS) Assessment carried out in 2007 by a local Nigerian consulting commissioned by the Government and published in June 2007. The local consultant used Version 4 of the Baseline Indicators Tool for Assessment of a National Public Procurement System developed by the joint OECD-World Bank Initiative, which was released for piloting in 2005. The Version 4 is derived from the World Bank’s CPAR procedure but the WB donor-centric approach (i.e. iv) has been eliminated and it incorporates improvements developed by the OECD/WB Initiative, which included over sixty (60) procurement experts from the multilateral and bilateral donor community and developing country procurement agencies.

The differences between the two will become clear in the presentation of the results of each assessment presented in Section 3 below. The features listed above have been elaborated into a 4 Pillar framework with 54 separate Indicators that are to be used to establish a Baseline Score for the system. In addition several Performance Indicators have been suggested to enable future checks on system performance and compliance, and a scoring methodology has also been provided.
3. ASSESSMENT RESULTS

3.1 WB CPAR JUNE 2000

3.1.1 Legal and Regulatory Framework

The legal framework in place in 2000 had serious flaws. There was no specific law or other act of parliament regarding public expenditure or procurement in Nigeria. The Ministry of Finance, with the authority vested to it by the Constitution, issued Financial Regulations (FR), which regulated the responsibilities for public procurement and financial management at federal level. The FR were essentially an internal set of administrative rules for financial/economic control of the Federal administration containing regulations concerning composition of Tender Boards (TB) and the limits of their jurisdiction, and regulations concerning the actual procurement process. In addition, they were superficial in their statutory regulation of the actual procurement process. Insufficient clear detail was provided. The procurement regulations in the states consisted mainly of local FRs based on the Federal FR, supplemented with circulars and guidelines from within each branch of administration in the state governments.

This arrangement had the following weaknesses:

- The FR is not a law or an act of similar authority, but an administrative document, which could be amended by the Minister of Finance without regard to fundamental rights of the suppliers, contractors or consultants.
- It contained no permanent measures for surveillance and control.
- There was no permanent body outside the purchasing entities themselves monitoring and controlling the procurement process.
- There was no central policy making entity for public procurement. This was the responsibility of the Ministry of Finance, which issued ad hoc circulars on current topics of interest. Staff therefore had difficulty finding what rules applied when issues arose.
- No procedure for filing complaints about public procurement was provided.
- Nor was there a permanent body independent of the procuring entity set up to process complaints fairly.

3.1.2 Procedures and Practices

There were several features in the Nigerian procurement system that were of great concern:

A. Eligibility

To bid for procurement funded by the federal or state governments and state-owned enterprises bidders must be registered. The registration system is decentralized, every state has its own registration list and form and there are no binding countrywide guidelines describing how the registration system should be set-up, much less how is should function. Bidders could be taken off the registration list for a number of reasons, which were not clearly specified. Once registration is cancelled there are no clear rules for how a bidder can get back on the list again. This leaves procurement open to abuse and it is not transparent.
B. **Procurement Methods and Procedures** The description in the FR about what procurement methods should be used is very limited and there are no detailed rules on when or how they should be applied. The choice of method is left to the discretion of individuals to choose. This is unacceptably opaque. The following outlines the major weaknesses in the system:

- How and when advertisements should be posted is not clearly spelled out in the FR. In some States and federal Ministries bidding opportunities are seldom posted. The Official Government Gazette is not published on a regular basis.
- There is no requirement in the FR for use of standard bidding documents and different types of standard contracts are currently in use.
- The FR do not require nor do they give guidance on bid openings in terms of timing, location and participation. In practice bid opening is often performed in closed sessions.
- There is no requirement in the FR to include evaluation criteria in the bidding documents. Non-transparent criteria such as "reference price" and "profit margins" are often part of the evaluation.
- There are no specific instructions on how bid evaluations should be organized and carried out. The Secretary to the Tender Board, a Sub-Committee to the Tender Board, technical experts or the implementing ministry or department Evaluations can conduct evaluations. No provisions are in place to guard against conflicts of interest by evaluation committee members.
- Award criteria are excessively rigid.
- **Negotiation of contract conditions** is the standard. Consistent conditions for payment, advance payment and guarantee for advance payment, bid security, and penalty for late payments were not provided in these contracts.

C. **Monitoring and Contract Management** The FR is silent on what monitoring practices should be followed. Locally developed routines are followed which vary by type of contract and are not in line with best practice. Feedback from the private sector and from persons in the civil service indicates that monitoring is weak and in fact is ridden with corruption.

### 3.2 BIS ASSESSMENT 2007

#### 3.2.1 Methodology
As mentioned above, the BIS methodology closely follows that used in the CPAR and we will use the framework in the BIS when summarizing the results showing the nature of the Nigerian public procurement system in 2007. The BIS bases its analysis on four (4) different aspects (Pillars) of a public procurement system. Pillars I, II and II are very similar to the approach in the WB's CPAR assessment. Pillar IV is new, combining elements relating to corruption and transparency that previously were examined in the precursors to Pillars I, II and III. The Pillars are now supported by a number of Indicators, each of which is then broken down into a number of Sub-Indicators and
scoring criteria allowing a more precise diagnosis where serious areas of weakness exist so that targeted and realistic remedies can be developed.

- Pillar I (Legal and regulatory framework)
- Pillar II (Institutional framework and management capacity)
- Pillar III (Procurement operations, market performance)
- Pillar IV (Integrity and transparency in public procurement)

The intent on the part of the OECD Initiative was that the above framework, which consists of internationally recognized good practice solutions for all features in a public procurement system, be used as the basis for an initial assessment to establish a benchmark or baseline of quality. Subsequently actual performance of procurement operations in that system would be measured periodically (i) to see if corrective measures had been taken following the initial assessment to remedy areas of weakness, (ii) to measure the extent of compliance with the legal and regulatory framework and (iii) to assess how well the system is producing value for money. The BIS assessment conducted in Nigeria used the Version 4 draft, which is still undergoing piloting in Africa, Asia and Latin American, and the companion set of indicators to measure compliance and performance is still under development. As a result the final BIS report only covers actual compliance and performance superficially.

3.2.2 Results

The BIS assessment shows that some progress has been made in raising the level of procurement system quality since 2000. These are listed below using the morphology in Version 4 of the OECD/WB Baseline Indicator System.

- **Pillar I** The issues covered by Pillar I are divided into the legal and regulatory framework (Indicator 1) and the Implementing Regulations that are needed to support this framework during day-to-day procurement operations (Indicator 2). Both Indicators 1 and 2 continued to be rated low in 2007. Although a comprehensive new Public Procurement Act and the supporting documentation had been drafted and submitted to Parliament not long after the WB CPAR was completed and discussed with the Government, they were only enacted into law shortly after the BIS assessment was released (June 2007). The Public Procurement Act is a significant improvement, which once it is fully implemented should provide a much more solid basis for Nigeria’s public procurement. Areas of particular concern relating to Indicator 1 were (i) the mandatory requirement that all bidders be registered and the lack of guidelines about how this registration process should be carried out, and (ii) the threshold for prior review, which was considered excessively high. Nigeria’s score for Indicator 2 was low in great part because no standard bidding documents had been made available to procuring entities.

- **Pillar II** Pillar II addresses three (3) issues: how well procurement operations are integrated into the Government’s public budgeting and financial management system (Indicator 3), whether a procurement oversight body has been set up and given the appropriate authority, independence and funding (Indicator 4), and the quality of the Government’s strategy for developing the capacity of institutions carrying out and regulating procurement operations (Indicator 5). After 2000 some steps were taken to improve performance relating to various aspects of Pillar II, but before the Procurement Act was enacted, they lacked enforceability. Remaining concerns relating to each Indicator include:
Indicator 3 Multi-year budgeting, which is necessary to sustain performance of larger contracts, was not possible; payment of invoices was often delayed unnecessarily.

Indicator 4 The Budget Monitoring and Procurement Implementation Unit (BMPIU) was established to act as Nigeria’s procurement oversight body, but it lacks the necessary independence to be able to manage ongoing procurement operations and it is not adequately staffed or funded. Among other things, the BMPIU is not collecting, analyzing and reporting meaningful national procurement statistics.

Indicator 5 In addition the BMPIU has done nothing to develop a viable strategy to create better institutional capacity in public procurement. The procuring ministries are doing nothing to create and sustain a professional cadre of procurement personnel capable of carrying out their anticipated procurement workload. Virtually no training programs are available to close the skills gaps that exist in each ministry procurement personnel and recruiting never takes into account the specific skills needed for the annual procurement program. The score for this aspect was 0: lower than for any other score granted.

Pillar III Pillar III addresses three (3) other important aspects of performance: how well the public sector procuring entities carry out their day-to-day procurement work (Indicator 6), performance by the private sector in response to government calls to bid (Indicator 7) and the quality of contract management and dispute resolution mechanisms that are being used (Indicator 8). The remaining weaknesses related to these Indicators are described below:

Indicator 6 The BIS report is very critical of the institutional systems in place in the procuring entities, which negatively impact procurement. Among other things, the lack of a recruiting strategy that focuses on skills requirements and is designed to fill skills gaps, inadequate salary levels for procurement staff, and poor internal governance and control systems. Governance issues are addressed in the civil service regulations, but they do not specifically address real procurement issues. Filing is not being done properly, a fact that made it very difficult to complete the BIS assessment properly.

Indicator 7 Indicator 7 has received the highest score of all twelve (12) indicators. The private sector market is large and apparently well organized. In general it responds well to Government opportunities to bid. Compliance tests carried out by the local consultant carrying out the BIS show that on average, between twenty (20) to one hundred (100) bidders usually respond to bid opportunities depending on the nature of the contract. The difficulties bidders face include registration with the ministry before they can participate and payment of associated registration fees, payment for bid documents and access to bank credit, but they have learned how to cope with these obstacles.

Indicator 8 The consultant has given the second highest score to this aspect of the Nigerian system, citing only the existence of (i) inspection clauses in contracts as evidence that proper contract management is being carried out and (ii) arbitration clauses in contracts to prove that disputes are being handled properly. We would question whether these examples are sufficient. Clauses in contracts are often ignored, particularly in systems where staff skills are known to be weak. Some check should be made of actual contract management practices covering not only inspections but also reporting, change processing, claims management, and the like. And regarding dispute resolution procedures, it is generally considered good practice today to include
a preliminary amicable dispute resolution step in contracts. These have been proven to save governments substantial amounts of money and time.

- **Pillar IV** The score for this Pillar is very low. The weaknesses associated with each Indicator include those listed below, which unlike Pillar I, will not be substantially improved by the enactment of the Public Procurement Act.

  - **Indicator 9** Procurement audit capacity is dangerously missing in the procuring ministries and elsewhere in the Government. The only focus of the existing national audit organizations is on financial matters.
  - **Indicator 10** There is no well-defined structure for handling of complaints and appeal, much less an administrative body assigned to carry this process out that has been given proper authority and is properly staffed and funded.
  - **Indicator 11** The system currently establishes ad hoc committees to review complaints. The score for this Indicator, which judges the level of transparency in the system, i.e. how well the public and the market have access to relevant procurement information, is also low. The fact that the Government lacked adequate IT capacity in 2007 is cited as the major reason for this.
  - **Indicator 12** This Indicator is meant to score the overall system in place to ensure that government staff handling procurement follow a high code of ethics and that proper measures are in place to manage conflicts of interest and combat fraud and corruption. The Government does have in place programs to encourage ethical behavior across the civil service, but the sensitive nature of procurement operations is not addressed specifically. Similarly, the existing anti-corruption agencies EFCC and ICPC were created without any specific attention being given to corruption during the procurement cycle. The consultant recommends that the Acts setting up these two agencies be amended to provide for better procurement oversight. The degree to which people comply with the existing anti-corruption legislation and how well it is enforced should play a major part in determining the score for this Indicator. The BIS report indicates that the EFCC has yet to prosecute anyone for fraud or corruption.

4. **CONCLUSIONS AND RECOMMENDATIONS**

4.1 **Scoring BIS Assessments** How to score the result of a BIS assessment was a matter of great debate while the Initiative was active during 2003 to 2005. The position taken at the end, which is still being maintained, is that, even though there is a scoring mechanism in the Version 4 draft, each government that agrees to carry out an assessment is free to decide how to aggregate the results and whether to reveal them. Because the Nigerian Government has allowed the BIS Report results to be posted freely on the Internet, the scores are repeated in Table 1 at the end of this Annex.

It should be clear that a score of 30% out of a possible 100, however imprecise the methodology might be, indicates that in 2007 the Nigerian public procurement system was extremely weak. It lacked an organization capable of providing procurement oversight and leadership; the entities carrying out actual procurement did not appear to have staff with the skills needed to carry out the full range of
procurement transactions competently; good filing practices were non-existent; and ongoing procurement activities were not being routinely reported to the BMPIU much less analyzed by any other organization in the Government. The enactment of the Public Procurement Act in 2007 will help, but it will take years to overcome the pervasive institutional weaknesses in the system.

4.2 System Assessments and the Trade Agenda. The Terms of Reference asked us to assess the impact that entering into trade agreement negotiations, specifically regarding competition policy and transparency, might have on performance of the procurement system in Nigeria. Reliable data about Nigerian public procurement are scarce, but those who participated in the Initiative generally agreed with the common rule of thumb that as much as thirty (30) percent savings or more can be achieved when a system is strengthened. But as one can see by looking at the comprehensive reach of the BIS scoring mechanism, the Initiative ended up believing that savings of this magnitude could only be achieved by taking a system-wide perspective.

They would say improving competition policy or transparency alone will not have any sustainable impact on system performance, achievement of value for money, a reduction of levels of corruption and the like unless careful attention is also paid to other aspects of procurement operations. Improvements usually are also needed to enforce compliance with even good transparency requirements, measures to manage conflicts of interest, capacity development measures in place for procurement staff, similar measures to strengthen procurement audit capability etc., etc. that all are needed to be in place to increase long-term market confidence, increased competition and increased government savings.

4.3 Recommendations. Based on this systemic approach to procurement systems, we must recommend that Nigeria and other PCP member of the Commonwealth with systems at a similar of development not be encouraged to engage yet in serious trade negotiations involving procurement matters until their systems have reached a higher level of stability and performance. Opening up their trade to more competition would be beneficial of course, but without a strong procurement oversight body with at least some solid knowledge about and understanding of their own system they would not be able to defend adequately Nigeria’s best interests in any negotiations over the procurement issues being debated in a proposed trade agreement.

It would be better therefore for the Commonwealth to differentiate its efforts first to support the ACP states with procurement systems that have reached a moderately advanced stage of development to push for greater involvement in regional and international trade pacts. Other countries like Nigeria would benefit more from targeted smaller programs to support capacity and governance system improvements in the procurement oversight body and procuring entities, strengthening procurement audit capacity and developing better filing and reporting systems so that more real-time information about current performance is available and analyzed and negative trends corrected in a timely fashion.
### Table 1

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3. Samoa

1. Samoa: Country Context

Samoa in Summary

Samoa is an island country in the central South Pacific Ocean, among the westernmost of the island nations of Polynesia. It is part of the Samoan archipelago and consists of two major islands, Upolu and Savaii, and seven small islands, two of which are inhabited. Prior to 1997 the country was named Western Samoa.

These are some salient facts:

Area: 2,944 sq km
Population: (2008 est.): 192,000.
Capital: Apia (on Upolu).
Official Languages: Samoan and English
GDP: (2008 estimate at current prices): $US537m
Currency: The Tala ($ or WST), currently worth about $US 0.40

Samoa has a developing economy based mainly on agriculture, with some light manufacturing, fishing, lumbering, and tourism. Its major merchandise trade flows in 2008 were:

Principal export destinations:
1 Australia 81.7%
2 New Zealand 10.2%
3 American Samoa 3.6%

Principal import sources:
1 Australia 25.6%
2 New Zealand 22.8%
3 United States 12.5%

Like many Pacific countries Samoa also has a significant export trade in services, primarily tourism.

As the preceding information illustrates, Samoa’s major trading relationships are with Australia and with New Zealand, which administered the country as a UN Trust Territory prior to independence in 1962.

Regional Affiliations

Samoa is a member of the following regional groupings:
The Pacific Islands Forum

The Forum is a political and economic policy organization of 16 independent and self-governing states that meets regularly to discuss regional issues. The Forum members are: Australia; the Cook Islands; Federated States of Micronesia (FSM); Fiji; Kiribati; Nauru; New Zealand; Niue; Republic of the Marshall Islands (RMI); Palau, Papua New Guinea (PNG); Solomon Islands; Samoa; Tonga; Tuvalu and Vanuatu. New Caledonia and French Polynesia, previously Forum Observers, were granted Associate Membership in 2006. Current Forum Observers include: Tokelau (2005); Wallis and Futuna (2006); the Commonwealth Secretariat (2006); and the Asian Development Bank (2006); with Timor Leste as Special Observer (2002).

The Forum has taken an interest in government procurement and particularly in the scope for collaborative activity among the Island members.

A current important Forum initiative is the Pacific Petroleum Project. Its objective is to develop a commercial contract for services that will allow Signatories to the Memorandum of Understanding on the Pacific Petroleum Project to procure desired petroleum products collectively (or via sub-groupings) following a competitive tender process. This would be the first collaborative project of its kind. The Forum Secretariat has invited tenders for a consultancy to manage the first phase of this project including:

(a) An assessment of national standards and requirements.
(b) A procurement strategy
(c) A risk assessment
(d) A draft commercial contract for goods and services
(e) A final commercial contract incorporating agreed changes; and
(f) All associated tendering documentation and services necessary for a successful tender process.

At the Fortieth Pacific Islands Forum Meeting in Cairns in August 2009 Leaders endorsed the Project and urged Forum Members to lend their support to ensure its success.

Also under consideration is a proposal for a collective arrangement to procure pharmaceuticals, which has been discussed over many years. This was the subject in 2007 of a feasibility study by the WHO, in collaboration with national counterparts.

The Pacific Island Countries Trade Agreement (PICTA)

PICTA is a free trade agreement amongst Forum Island Countries (FICs) that came into force in 2003 and currently applies to goods only. The objective of PICTA is to promote regional integration and trade development in the island states through creation of a single regional market, as a precursor to their progressive involvement in the wider regional and world economy.

Implementation of the Agreement was delayed and only became operational from 2007, when a number of island states indicated their readiness to commence preferential trade. As a result of
the delays, the schedule for elimination of tariffs on intra-regional trade now extends out to 2021.

In Article 15 of the PICTA the Parties commit to the objective of liberalising government procurement within the Area as soon as possible and to conclude arrangements for detailed rules on government procurement within two years of the Agreement coming into force. The issue has not, however, had the priority envisaged by the Agreement.

A paper prepared by the Asian Development Bank in 2007 commented on PICTA as follows:

A trade agreement among small developing states, such as PICTA or the MSG, is unlikely to be welfare-enhancing. In fact, it is more likely to set back the promotion of free trade within the FICs because of the propensity for trade diversion and tariff and investment diversion to the more advanced states, resulting in income divergence and increased antagonism against free trade. 111

PACER

The Pacific Agreement on Closer Economic Relations (PACER) is an agreement among members of the Pacific Islands Forum that provides a framework for the future development of trade cooperation.

It was first signed at Nauru on 18 August 2001 and entered into force on the 3rd October 2002.

It does not contain substantive trade liberalisation provisions, but envisages a step-by-step process of trade liberalisation. This started with PICTA. PACER provides for programs of assistance to the island country members with trade facilitation and capacity building.

PACER also foreshadows negotiations on Forum-wide reciprocal free trade (including Australia and New Zealand). It appears that these are to be brought forward as a consequence of the Pacific Island countries’ negotiation of an Economic Partnership Agreement with the European Union. This is because PACER contains a provision triggering negotiations with Australia and New Zealand if a Forum state begins negotiation of a free trade agreement with a developed country. The prospective successor agreement to PACER is referred to as “PACER Plus”.

At the Fortieth Pacific Islands Forum Meeting in Cairns in August 2009 Leaders approved a recommendation to commence PACER Plus negotiations forthwith, and agreed that Forum Trade Ministers should meet on the matter as soon as possible and not later than November 2009. An Office of the Chief Trade Adviser (OCTA) is being established, with substantial financial support from Australia and New Zealand, to provide independent support and advice to Forum Island Countries during the course of the negotiations.

SPARTECA

The South Pacific Regional Trade and Economic Co-operation Agreement (SPARTECA) is a nonreciprocal trade agreement under which the two developed nations of the South Pacific Forum, Australia and New Zealand, offer duty free and unrestricted or concessional access for virtually all products originating from the developing island member countries of the Forum.

Most Forum members signed SPARTECA at the Forum's Eleventh Meeting in Kiribati on 14th July 1980. It came into effect for most Forum Island countries (FICs) from 1 January 1981.

2. The Samoan Procurement System

Statute Law

Like Australia and New Zealand Samoa does not have a procurement statute. Statutory Provision for the regulation of public procurement is contained in the Public Finance Management Act 2001.

Part XII of the Act provides that all persons “entering into a contract for the acquisition, disposal or management of good, services and construction works” on behalf of the Government of Samoa must comply with the processes and procedures that the Act prescribes.

Part XIII of the Act, which deals with public bodies\(^{112}\), provides that the Financial Secretary may issue procurement guidelines in the form of a Treasury Instruction that binds public bodies.

Part XII of the Act also establishes a Government Tenders Board chaired by the Minister of Finance and including the Minister of Works, the Attorney General and officials including the Financial Secretary and the Director of Works. The Act provides that the membership will include a private sector representative appointed by the Minister. It was not possible in this study to determine whether a representative has been appointed yet.

The Board’s functions are to call for tenders, award procurement contracts or recommend them to Cabinet where the value is above the approved financial limits. It has similar functions in relation to disposal of surplus property. Finally it is required to review and recommend to Cabinet on its own composition, functions and powers. Its powers for these purposes are as prescribed “by regulation, Treasury Instructions or Operating Manuals”.

Guidelines for Procurement and Contracting

The Ministry of Finance advises that, in line with a recommendation from the World Bank’s Operational Procurement Review of May 2006 the Tenders Board has replaced a single set of Guidelines that it had issued in 2003 with two new Procurement and Contracting Guidelines. These apply to all Government Ministries and to “corporations in which the Government has more than a 50 percent share or voting rights.\(^{113}\) They deal respectively with:

- Procurement of Goods and Works (including also the category of “non-consulting services”); and,

- Procurement of Consulting Services\(^ {114}\)

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112 “public body” means an organisation (whether called a state-owned enterprise or otherwise under any other Act) that is listed in schedule 4 or is deemed to be a public body under section 91 (Application of this Part) and shall include a subsidiary of a Public Body.

114 “professional or technical services of an intellectual or advisory nature covered by Tenders Board Guidelines (Goods and Works)
These new Guidelines, copies of which were supplied to the consultant, align the Samoan regime more closely with World Bank Guidelines and procedure.

The two sets of Guidelines each cover:

- Procurement Principles (five common principles of Transparency, Open and Fair Competition, Value for money, Accountability and “Promoting Integrity and combating corruption in procurement”. A sixth principle of “Ensuring high quality” appears in the case of Consulting services only)
- Planning and Preparation
- Supplier Eligibility Requirements (including domestic preferences)
- Allowable methods of procurement or selection of suppliers, with an emphasis on competitive process.
- Inquiries and Challenges
- Exclusion of Suppliers
- Integrity in procurement; and,
- Contract Administration

At the time this was drafted, the 2003 Tenders Board Guidelines were still displayed on the Ministry of Finance website along with their replacements, which were still marked as drafts. The Ministry of Finance, however, assured the consultant that the new Guidelines have been trialled and finalised and the 2003 version superseded.

**Procurement Manual**

In addition to the Guidelines the Tenders Board has approved a Procurement Manual as “an operational reference tool for those involved in procurement” and as a training aid. Essentially this document, a copy of which was provided to the consultant, is a self-explanatory guide to the management of procurement transactions from planning through tender evaluation and contract award. It is focused on procedure and quite prescriptive in its provisions, e.g. in relation to rating scales for use in tender evaluation.

Although the manual does not deal in detail with management of procurement functions it does make extensive provision for procurement planning at the organisational level. This includes the development of detailed organisational procurement plans for approval by management. The plans are intended to identify needs, consolidate related procurements, verify the availability of budgets and set timeframes. The preparation of these plans is to start at least three months before the launch of the first planned tender process. The approved plans are to be disclosed on organisational websites of procuring entities and published “in the Samoan press having national circulation”.

While the Manual, like the Guidelines, stresses the importance of competition it does not, for example deal with how to prepare specifications or the value of functional and performance specifications in promoting competition. It appears to be presumed that, at least for complex and high value procurements, the necessary skills may need to be provided by technical experts, such as engineers and project managers.

The Manual’s provisions are not biased against foreign suppliers or products.

**General Eligibility Requirements**

Prospective bidders must meet several general requirements including the possession of valid business licenses (where applicable), solvency, and legal capacity. They must also be up to date with tax payments and free from indictment or conviction within the preceding year of a “criminal offense involving corruption or other misconduct reflecting a lack of suitability to participate in government procurement” 115 Goods and works contractors also need “valid registration in the appropriate category”

The Guidelines provide that government procurements are “normally open to all qualified and eligible bidders regardless of nationality and without restriction as to the origin of their inputs”.

**Preferences for Domestic goods and services**

There is provision for the Tenders Board to approve on a case-by-case basis a margin of preference for domestic manufactured goods and domestic works contractors. Any preference margin and the procedures for its application must be stated in the relevant bidding documents. The guidelines set upper limits for preference margins as follows:

- for goods, 15 percent of the lowest evaluated EXW price offered by a foreign supplier; and,
- for contractors 7.5 percent of the lowest evaluated price submitted by a foreign contractor

In the case of consultancy services the Guidelines provide that Tenders Board may approve, on a case-by-case basis, the use of a margin of preference for domestic consultants, domestic key employees, or inclusion of domestic joint venture partners. If approved, the amount and procedures for application of the domestic preference margin are to be described in the bidding documents.

Criteria for determining domestic status must also be stipulated. In no event will a preference margin exceed 10/100 available quality points.

As with goods, works and other services, any preference must be disclosed in the bidding documents

**Bidding Documents**

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115 Goods and Works Guidelines
The Guidelines make extensive provision for the content of bidding documents, including the use of standard bidding documents (SBDs) required by donors or financiers as appropriate and the use of Government SBDs for self-financed procurement, subject to any exemptions approved by the Tenders Board.

None of the provisions relating to bidding documents discriminates against foreign suppliers. The World Bank in its May 2006 OPR recommended the development of Standard Bidding Documents (SBDs) and the Ministry of Finance advised the consultant that this had occurred. The Ministry undertook to provide the copies of the SBDs but none had been received by the time the completion of this report was required.

**Bidding Periods and Bid Opening**

The standard bidding period is 30 days or 45 days when international bidding is anticipated. Extension of the bidding period is allowable where that would result in greater competition. Tenders must be submitted by hand to the Tenders Board Tender Box or by mail where that is specifically provided for.

For public tender processes the Tenders Board opens bids/tenders publicly in the presence of tenderers or their representatives and salient details relating to the identity of tenderers and tender pricing are read out and recorded before the bids are delivered to ministries or Corporations for evaluation.

In the case of consulting services, financial proposals are opened publicly.

**Procurement Methods**

The Procurement Manual provides for a variety of methods in the procurement of goods and works and outlines the circumstances in which they may be applicable. The methods are:

- International Competitive Bidding
- Limited International Bidding
- National Competitive Bidding
- Direct Contracting
- Shopping - for low value off the shelf good, standard commodities and small simple works

The Tenders Board must approve the procurement method to be used in each case. Generally, an open tender process is to be used in the procurement of goods in the value range $50,000 to $500,000 except as approved by the Board. An open procedure is also to be used for works procurement in the range from $100,000 to $500,000.

Above this value range, the standard procedure for both goods and works involves prequalification.
Tenders Board approval is not required for small purchase transactions. This includes transactions above $5,000 and not more than $50,000, for which at least three written quotations against a formal RFQ are required.

The Guidelines set out circumstances in which the Tenders Board will consider approving “Local and International Shopping”, Direct Purchase, “Limited Tendering or Repeat Order” and divergence from open competitive bidding for minor works (up to $100,000) and emergency procurement.

These provisions take account of the recommendations in the World Bank’s 2006 OPR.

**Advertising**

Procurement Guidelines require that all open invitations to prequalify or to bid and other procurement notices be advertised in “a widely circulated newspaper”, and internationally where required by a donor or financier, or where that is advisable in the interest of maximizing competition. In addition, electronic posting on Government websites is encouraged. Invitations to bid and procurement notices are to be advertised in sufficient time to enable prospective bidders to prepare and submit bids. Bidding documents are to be in English but Samoan language may be used as well.

**Prequalification and Post-qualification**

Prequalification of bidders is used for works contracts and for supply of technically complex equipment where the expected value is above $500,000. Prequalification must be based entirely on the ability to perform the relevant work or supply the goods required, taking account of experience and past performance, capabilities and financial position. There is no limitation on the numbers of prequalified bidders and all of them must be invited to bid. Post-qualification is applied in a similar manner to verify the capability of the lowest bidder where prequalification does not apply.

Works contractors are required to be registered for the category of works involved, both for pre-qualification and for post-qualification.

**Award criteria**

The Guidelines lay out a variety of methods for evaluating and choosing bids

For consulting services these are:

- Quality and Cost-Based Selection (QCBS). This “Principal Method of Procurement” for other than for small consultancies and involves a competition among shortlisted firms taking account of both cost and quality in accordance with relative weights stipulated in an RFP.

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116 Experience and past performance are in principle relevant only as indicators of current capability but treating them as a category in their own right is quite common internationally.
• Quality Based Selection (QBS) where through a one or two stage proposal process a contract is awarded to the consultant who has submitted the best technical proposal.

• Selection under Fixed Budget (FBS)- where a contract is awarded to the consultant that has the highest ranked technical proposal within the budget that has been disclosed in the RFP process

• Lowest-Cost Selection (LCS) where, in small and simple assignments the lowest price solution that has met a technical hurdle score is chosen

• Selection Based on Consultants’ qualification (CQS) for small assignments where the firm with the best qualifications and references is selected through an EOI process and invited to submit a combined technical and financial proposal and negotiate a contract.

For works and goods and non-consulting services the rule for the selection of the first ranked tender is essentially that it should be the lowest responsive technically compliant offer within the maximum available budget. Technical compliance is assessed on a pass/fail basis and not scored.”

Tender Evaluation

The Procurement Manual includes provision for the establishment of Evaluation Committees to assess tenders/proposals and includes detailed provisions to ensure that they are free of conflicts of interest, act with impartiality, observe confidentiality and follow standard procedures.

Procedural Transparency

There is an emphasis on transparency throughout the Guidelines and associated documentation. This includes requirements for:

• the disclosure of relevant information to prospective bidders;

• public opening of tenders and financial proposals;

• supplier debriefing; and,

• public release of organisational procurement plans, as previously described.

Review Mechanism

Unsuccessful bidders with concerns about a procurement process are expected to request a debriefing in the first instance from the procuring Ministry or Corporation. An unsuccessful bidder not satisfied a debriefing may submit a written challenge within seven days. A challenge must be in writing and specify the basis of the challenge and the material facts relating to it. It must be addressed to the procuring Ministry or Corporation, with a copy to the Secretary of the Tenders Board. If the challenge is unsuccessful a bidder may submit a written request (with supporting reasons) for Tenders Board review.
The Tenders Board is required issue a decision within thirty days of receipt of a bidder’s request. The decision of the Board will be final but if the bidder believes that such decision is not consistent with the Procurement Guidelines or is otherwise contrary to law, it may appeal to court within six months of its receipt of the Tenders Board's decision.

“Whenever it is determined to be appropriate”, an award or contract may be temporarily suspended pending decision on the award challenge. This may be implemented by the Ministry or Corporation or directed by the Tenders Board. The Cabinet may also direct such action with regard to an award subject to its approval.

The 2006 OPR recommended that provision be made in the interests of transparency for complaints to be referred to a fully independent authority such as the Ombudsman or an Independent Review Panel. This recommendation appears not to have been accepted. There also does not appear to be any appeal against the rejection of an application for prequalification.

Contract Administration

Neither the Guidelines nor the Procurement Manual deal in detail with contract administration.

Socio-Economic Policies

Apart from the provisions for preference, including limited preference for national providers of consulting services, there do not appear to any socio-economic policies applied through procurement.

Effect of improved procurement system

There does not appear to be any public information or planned review to assess whether at this stage the changes that have been made since 2006 have led to improvement in procurement performance or measurably improved the treatment of procurement risk.

In this context it is worth noting what the OPR found by way of risk assessment in 2006:

“The general assessment of the OPR Team is that procurement risks in Samoa are average. The Team’s main concern is the limited number of Government officials who have experience in handling procurement in general, and international procurement in particular. This risk can be mitigated through the training of Government officials and appointment of consultants to supplement them. With more capacity development, the need for such consultants would be reduced. Corruption is not generally perceived to be an issue.”

The Procurement Manual was intended as a major contribution to capacity development. The manual is a comprehensive document that undoubtedly provides considerable value for the government and users. It is, however, focussed on the implementation of rules and procedures and does not attempt to address the broader body of professional procurement knowledge and skills. For that purpose it would be desirable for practitioners to have access to other sources of training and education and to mentoring and/or work experience that will provide other
learning opportunities. Ideally, key personnel should be expected and assisted to achieve full professional status in procurement.

It is not clear whether the Samoan government maintains statistics on its procurement. None are readily discoverable on the web and the consultant did not receive any response to a request for any statistics that might be collected, e.g. for Tenders Board purposes. Thus no detailed information was readily available on:

- the scale and composition of government purchases;
- the relative market shares of domestic and foreign products and suppliers;
- the number and outcome of procurement complaints; and
- procurement performance overall

It does, however, seem clear that the Samoan procurement regime is open, competitive and broadly aligned with international norms. Further, although not all of the OPR recommendations appear to have been implemented as yet it does appear that there have been substantial reforms since that time and that development is continuing.

Finally, a particular issue worth highlighting is the possibility that Samoa may become involved in collaborative procurement with other Forum countries, e.g. through the Pacific Petroleum Project. If the business case for such initiatives is persuasive and Samoa decides to participate in them it may wish to adjust its procurement rules to make clear provision for them.
4. Tanzania

Tanzania

Methodology

This report was commissioned by the Commonwealth Secretariat; the terms of reference (ToR) for the study are attached at the end of the main report. The possibility to conduct field work and empirical research was not foreseen by the ToR therefore, this study builds on available data, using and elaborating the outcomes of existing economic and legal literature. Relevant data and studies were accessed via consultation of the OECD and WB electronic resources and consultation of the Government of Tanzania’s official public procurement websites. Important data were also available in the Tanzanian public procurement journal (a complete bibliography is included at the end of this report, Appendix 2).

In compliance with the official methodology presented to the Commonwealth Secretariat, this report follows, as far as possible, the OECD/DAC Baseline Indicators and uses as terms of comparison for assessing the state of Tanzania’s public procurement system, internationally recognized and accepted public procurement instruments such as the UNCITRAL Model Law on procurement of goods, construction and services (hereinafter the Model law). Reference will also be made to the GPA and the EU procurement directives.

In order to achieve the aims indicated by the ToR this report investigates the current state of procurement systems in Tanzania focusing in particular on the analysis of those provisions aimed at enhancing transparency and competition between suppliers. The report also provides information on development issues that might be relevant were Tanzania to initiate negotiations for an agreement aimed at opening up the Tanzanian procurement market to international and regional competition. The report will include among others information on:

1. Institutional, economic and development context
2. Development reforms in Tanzania and public procurement
3. Information on international agreements signed by Tanzania
4. Analysis of Legal framework for public sector procurement regulation focusing on
   - Transparency of the procurement system
   - Competition and non discrimination
5. Development issues including
   - aid assistance granted to Tanzania
   - procurement negotiation as a means to stimulate specific sector of production

Structure of the report

This report is divided into three parts. The first part provides general economic, social, and legal information about Tanzania. This is done with the view of placing the report in the appropriate socio-legal and economic context. This first part starts with an overview of the institutional and
economic structure of the country and it offers information on the major development initiatives implemented in the country for eradicating poverty and achieving sustainable development as enshrined in the “Tanzania development vision 2025.” The report focuses in particular on the role that procurement plays for development and illustrates how public procurement reforms fit within Tanzania’s “development vision.”

In line with the scope and aim of the ToR, this first part of the report also provides information on the major international and regional agreements Tanzania is members of and/or is negotiating membership to. This is done with the view of investigating whether these international and regional agreements could become an obstacle to an agreement on procurement aimed at opening up Tanzania’s procurement market to international and/or regional competition.

The second part of this report provides an account of the state of the procurement system in Tanzania investigating the legal framework applying to public procurement. This part focuses on two fundamental aspects of the procurement process, namely Transparency and non-discrimination. When the procurement provisions are analyzed reference will be made to the Model Law and, whenever appropriate to the GPA and the EU procurement directives. This part of the report will also focus, as far as possible, on the state of implementation and application by Tanzanian public procurement entities of the Tanzanian legislative framework for procurement. Unfortunately, however, because of the impossibility to conduct empirical research this part is necessarily limited. Indeed, the author could only rely on available studies conducted by the Tanzanian Public Procurement Regulating Authority itself. No up to date studies by the WB or any other international institutions are available in this respect (the latest WB’s CPRA for Tanzania dates 2003, before the reforms of Tanzanian procurement system which took place in 2004.)

Part three of this report is dedicated to an analysis of major development issues Tanzania would face if it were to conclude a procurement agreement. This part of the report starts by providing an account of donors’ development initiatives implemented in the country. The report will include detailed information and data on the level of bilateral and multilateral development aid donated to Tanzania. This is done with the view of understanding the role played by the donor community in Tanzania and the relationship between development aid and procurement reforms. This part will be concluded by some policy considerations on the possible implications that any agreement on procurement could have for Tanzania in terms of the relationships between Tanzania and its donors.

**Part I**

**General information about the United Republic of Tanzania**

**Tanzania**

**1.1 Introduction:**

In 1964 Tanganyika and Zanzibar formed the nation of Tanzania.

Tanzania has two governments, the Union Government in Tanzania Mainland and the Zanzibar Revolutionary Government in Zanzibar where the Union Government also takes care of some government affairs including security and foreign affairs.
Tanzania is a Least Developed Country\textsuperscript{117} (LDC). In 2007 its population reached 40432 (thousands) inhabitants and its GNI was 16129 (current $ Million). GNI per Capita was $400.

Tanzania exports mainly agricultural products, especially coffee, cotton, tea, tobacco, cashew nuts, and sisal. Since 2005, the country has featured a rise in industrial production and a substantial increase in output of minerals led by gold. Its main trading partners are India, the Netherlands, Japan and the UK. Tanzania has an external debt of US $4.379 billion (31 December 2007 est.) which absorbs about 40% of total government expenditures. Tanzania has qualified for debt relief under the enhanced Heavily Indebted Poor Countries (HIPC) initiative.

Tanzania has a very ambitious development vision enshrined in the “Tanzania Development Vision 2025.” The main goal of Tanzania’s Development Vision 2025 is for Tanzania to become a Middle income country by 2025. This goal is not out of reach if the positive results achieved in recent years will be maintained.

From 2005 Tanzania has been registering significant improvements in its economic performances. The Gross Domestic Product in real terms grew by 6.7 percent in 2005, 6.2 percent in 2006 by nearly 7% in 2007. The growth in GDP has been achieved thanks to “continued donor assistance and solid macroeconomic policies.”\textsuperscript{118}

As many other LDCs, Tanzania’s economy and public expenditures are still overwhelmingly donor-dependent. Aid to Tanzania is granted both bilaterally and multilaterally by donor countries and multilateral institutions. In 2007 Tanzania received\textsuperscript{119} total NET ODA for $2810.8 (Million USD, this includes bilateral and multilateral aid) of which $1830.7 (Million USD) was received as bilateral aid by OECD/DAC member countries and $972.6 (million USD) was granted by multilateral institutions (including the EC). In 2007 the EC alone granted to Tanzania $187.1 (million USD), the EC and its MS taken together granted $930.5 (million USD).\textsuperscript{120} In 2008 Tanzania was one of the 19 countries qualified for Compacts contracts granted by the Millennium Challenge Corporation (a new US independent development agency). Compacts contracts are large, five-year grants (see further info below in part III of this report). Thanks to the Compact grant Tanzania will receive more than $698 million in the next five years. Major development partners include IDA, the African Development Fund, the United Kingdom, the European Community and the US’s Millennium Challenge Corporation.\textsuperscript{121} It is unclear whether new donors such as India and China are also disbursing aid to Tanzania, this uncertainty is due to the fact that new donors are not members of the OECD/DAC and have no international commitments to disclose information on the level of aid they disburse.

\textsuperscript{117} see UN list at \url{http://www.un.org/special-rep/ohrlls/ldc/list.htm}
\textsuperscript{118} Source: UN-OHRLLS
\textsuperscript{119} All data on aid distributions have been extracted from OECD, Geographical Distribution of Financial Flows to Developing Countries Disbursements, Commitments, Country Indicators 2003-2007
\textsuperscript{120} All data on aid distribution have been extracted from OECD, Geographical Distribution of Financial Flows to Developing Countries Disbursements, Commitments, Country Indicators 2003-2007
\textsuperscript{121} Source: UN-OHRLLS
1.2 Development reforms in Tanzania and public procurement:

In recent years Tanzania undertook significant institutional and structural reforms, especially in the public procurement sector. Indeed, public procurement is firmly placed in Tanzania’s development path.

Tanzania has undertaken reforms of its national procurement system aimed at ensuring that public funds are used in the most efficient and economic way and at guaranteeing that the system delivers value for money. Governmental bodies and their high officials are committed to “reliable procurement process” and to guarantee that procurement money is spent so to achieve the above adjectives. 122

This is extremely important considering that sound procurement practices are necessary to ensure sustainable development and social and economic objectives. 123 Procurement is well placed at the center of Tanzania’s philosophy for development and government institutions and officials see the establishment of a sound public procurement system as a key development strategy. In March 2009 Mr. Milinga, the CEO for Tanzania, stated “Through reliable procurement processes, in line with PPA 2004, Tanzania can achieve high quality livelihood for her people, attain good governance through the rule of law and develop a strong and competitive economy by 2025.” 124

The volume of procurement “for the Financial Year 2007/08 of 153 out of 362 Procuring Entities was Tshs. 1,801 billion ($1,360.790.28), out of which (61%) Tshs. 1,104 billion (equivalent to $78579.78) was spent for procurement of various works contracts. Tanzania National Roads Agency (TANROADS) alone spent Tshs. 625 billion (equivalent to $472234.27) and 62 out of 132 Local Government Authorities spent Tshs. 56 billion (equivalent to $42312.19) on works contracts. Similarly for the Financial Year 2008/09 a sizable amount of budget has been allocated for infrastructure development, construction of hospitals, dispensary and schools.” 125

It appears that in forthcoming “in order to enhance development strategies and eradicate poverty” Tanzania public procurement expenditures will focus years on the infrastructure sector126.

The Tanzania public procurement system underwent an extraordinary reform process in the past decade. The first stage of this reform process was concluded in 2001 with the enactment of PPA No. 3 of 2001. A second wave of reforms was completed in 2004 with the enactment of the Public Procurement Act (PPA) No. 21 of 2004 which repealed PPA No. 3 of 2001. The 2004 procurement law was complemented by the enactment, in 2005, of procurement Regulations, complemented by the 2007 Regulations for Local Government Authorities.

The Procurement system in the Mainland is currently governed by the Public Procurement Act 2004 No. 21, CAP 410 and its Regulations, the 2005 Regulations as well as the 2007 Regulations.
for Local Government Authorities, while Zanzibar is governed by its own rules and Regulations under the Act No. 9 of 2005 for Public Procurement and Disposal of Public Assets (PPDPA No. 9 of 2005).

Major Institutional changes have been introduced by the new procurement legislation.

The most significant institutional reforms are the establishment of the Public Procurement Regulatory Authority (PPRA) which replaced the Central Tender Board127 and the establishment of the Public Procurement Appeals Authority. Both reforms have been auspicated and formed part of the main recommendations of the CPAR 2003 for Tanzania.

The Public Procurement Regulatory Authority (PPRA) has the duty to monitor and securing compliance with the legal rules; it reports on the performance of the public procurement system and it gives advice on desirable changes. It also provides advice and guidance to entities on what the rules mean and it also acts as informal dispute resolution authority. It has the power to impose sanctions where the rules are not being observed. Detailed rules on the functioning, structure, objectives and role of the PPRA are laid down in Art 5 to 27 of the PPA 2004.

The PPRA has a very active website available at [http://www.ppra.go.tz/](http://www.ppra.go.tz/)

Other institutional changes introduced by the 2004 PPA include changes in the composition of tender boards with Accounting officers no longer Chairpersons of tender boards (except in local government authorities where the Executive Directors will still remain the chairpersons) in order to increase accountability; and changes in the membership of PPAA to include private sector and professional bodies. However, the act retains the basic procurement principles in the repealed Act.128

It seems that in recent years the level of compliance with the procurement legislations has considerably improved and now there appear to be a high level of compliance between law and practice (see infra section 2 of this report). This seems to be due to “various strategies which are being implemented by the Authority through various funding including ADB, Public Financial Management Reform Programme129 (PFMRP), and USAID.”

1.3 International and regional agreements signed by Tanzania and related policy issues

The most prominent international economic agreement signed by Tanzania is the WTO. Tanzania became a WTO member in 1995.

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127 R.S Mlinga Chief Executive Officer Public Procurement Regulatory Authority WHAT ENGINEERS NEED TO KNOW ABOUT THE PUBLIC PROCUREMENT ACT NO. 21 OF 2004
128 Ibid Milinga
129 The Public Financial Management Reform Program (PFMRP) is Tanzania’s main program for improving public financial management (PFM). The Program has been in place since 1998 and a phase III of the program was launched November 2008. The funding for the program during 2008/09 is around USD 30 Million. At the present active donors in the PFM program are the World Bank (currently in lead of the PFM donor group), European Commission and eight bilateral developing partners. The principles and terms for the partnership between the Government of Tanzania (GoT) and the partners are set out in the Memorandum of Understanding (MoU) signed in April 2009.
As an LDC member of the WTO it benefits from the special and differential treatment provisions contained in all WTO agreements. In particular it benefits from part IV of GATT and from the advantages of the enabling clause and the GSP schemes derived thereto. Major preferential EU schemes for Tanzania include the EU’s GSP scheme, the EU Everything but Arms initiative (granting zero percent tariffs level on all LDCs’ products –excluding arms- imported in the European market) and the Cotonou agreement. Tanzania also benefits from the US and Japan GSP schemes. Although Tanzania’s exports to OECD countries enjoy low tariffs levels, exports to non-OECD countries, such as China and India (two of the Tanzania’s top 10 export countries) still face high tariffs. Stronger efforts should be made within the WTO negotiations to encourage a reduction of tariffs from these countries in favor of LDCs.

Tanzania, like most LDCs and developing country, is not a member of the GPA, (which is the major international agreement on government procurement). The GPA is a plurilateral agreement signed only by some WTO Member countries.

At the regional level Tanzania is a member of the East African Community (EAC) and the Southern African Development Community (SADC). Negotiations are also taking place to rejoining COMESA from which it withdrew in 2000. African countries members of COMESA have agreed to harmonize their procurement rules in order to encourage international competition. However, the rules are not legally binding.

Tanzania is negotiating an EPA agreement with the EU through the Southern African Development Community (SADC). EPA agreements will replace the Cotonou agreement. EPAs will be reciprocal agreements rather than preferential trade agreement. The European Union required all countries negotiating EPA to negotiate it as a regional block. In East Africa there are two EPA regions, ESA and SADC. EPAs foresee the creation of Free Trade Areas (FTAs) between regions in the ACP and the EU and will lead to the creation of a sort of custom union between the regional groupings.

EAC members (i.e. the regional African group Tanzania is member to) are not negotiating EPA together but they are in two different regional EPA groups. While Tanzania is negotiating EPA within SADC, Kenya and Uganda [the other ECA members] are negotiating EPA within ESA. According to one author this is “the biggest challenge EAC members face at the moment as far as trade relation with the EU.”

As highlighted in a study on Tanzania by the Wold Bank, “the fact that the EU expects the EPA regional groupings to form customs unions poses an obvious conflict for Tanzania and the East African Community, as Tanzania cannot simultaneously adopt both ECA and SADC common external tariffs, let alone implement the customs and fiscal integration that are basic components of customs unions.” On this point Na Zitto Z. Kabwe also stated “Since EAC has already signed the Customs Union, then negotiating EPA in two different geographic configurations by its member countries will undermine it.” For example if Tanzania negotiated EPA and signed it under SADC, while Kenya and Uganda signed it under ESA, according to Na

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130 Members of EAC are Kenya, Tanzania and Uganda, who recently signed a new treaty for East Africa Co-operation (EAC) in November 1999
Zitto Z. Kabwe “there will be a problem of which Common External Tariff (CET) to be applied on goods imported from EU to EAC. SADC ones, ESA ones or EAC customs Union ones? [134]

Another major drawback for EPA is considered to be the loss in revenue that countries participating to EPAs would suffer. As regards the negative impacts for being in an EPA, Na Zitto Z. Kabwe also highlighted that “The elimination of customs duties on products from EU will lead to a significant decline in government revenues and to an increase in unemployment provoking heightened economic insecurity and political instability in East Africa. Significant decline in government revenues will result in less budget funding for social and human development and would result into higher tax burden for citizens (as a way of adjustment). [135]

Similar considerations would apply to an agreement involving public procurement. However, considering that “open international competition for contracts is essential in order to maximise the development benefits of strengthened procurement systems [136] it is possible that the loss in revenue caused by abolishing tariffs will be compensated by the saving made through efficient procurement and reduced costs for the goods purchased as a result of international competition. Further studies are necessary to verify this latter possibility.

An interesting study by Morrissey &Co, which investigates the trade and welfare gains of a regional trade agreement between the East African Co-operation (EAC) countries (namely Kenya, Tanzania and Uganda) and the EU, shows that in the sectors where the EU is already the dominant supplier (the study assumes that “trade creation is allowed only via consumption expansion”) the REPA will “increase imports from the EU in these sectors over current levels by about 16% in the case of Tanzania and 23% in the case of Uganda. This would benefit local consumers considerably, however the direct loss of tariff revenue on current imports from the EU reduces the net welfare benefit of this.[137] Morrissey & Co estimates that in Tanzania in Sectors with Consumption effects only there will be a Welfare Effect of + 4,086 (in millions of Tanzanian Shillings (TShs) equivalent to $ 3087.28). In Sectors with Trade Diversion and Consumption effects there will be a Welfare Effect of - 13,439 (in millions of Tanzanian Shillings (TShs) equivalent to $ 10154.17); in Sectors with Trade Creation and Consumption effects the Welfare Effect will be + 116 (in millions of Tanzanian Shillings (TShs) equivalent to $ 87.65). As regards the welfare effect Morrissey & Co conclude that “results suggest that, on present patterns, the net effect on Tanzania and Uganda is likely to be adverse. And these are the countries with least to gain from the REPA; as least developed countries they would be able to retain favourable access to the EU in any case. At the very least this argues strongly that EAC countries should be allowed to liberalise vis-à-vis the EU only gradually over the ten-year permitted period.” However, the authors also recognise that “in reality, other factors also need to be considered. Many of the benefits of a REPA may in fact come into play in a dynamic framework; formation of a REPA with the European Union may have beneficial impacts by making trade liberalisation measures undertaken by EAC countries irreversible and therefore credible. This in turn may bring significant benefits in terms of increased domestic and foreign investment in EAC countries. Secondly, the rest of the world is unlikely to stay still; other

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[136] Ibid DAC Guidelines and Reference Series Harmonising

[137] Andrew McKay, Chris Milner and Oliver Morrissey, “The Trade and Welfare Effects of a Regional Economic Partnership Agreement” credit research paper 00/08.
significant exporters to the EAC, notably North America, are likely to want to set up similar partnership arrangements, and this could significantly change the welfare implications of a partnership agreement with the EU. We have aimed to provide a tractable method, if adequate trade data are available, to estimate the welfare effects on ACP countries of forming a REPA with the EU. More complicated arrangements could be accommodated (data permitting). The core conclusion is that one cannot assume that the welfare effects on ACP countries will be positive; it is more likely that the static effects will be negative. This should be taken into account in negotiating a REPA.\textsuperscript{138a}

This author believes that a further question to consider is whether, and if so how, this situation would differ if Tanzania were to achieve its “development vision” and become a middle income country by 2025, qualifying from the status of LDC, and loosing the current trade preferences granted by the EU (i.e. zero tariff rates on all products but arms) and hence the consequences of not participating to a regional agreement with the EU would be greater and Tanzania would find itself in the position of needing an agreement with the EU. Tanzania is currently in a good negotiations position because it already benefits from trade preferences and hence it could bargain better concessions, this position might be lost in the future if Tanzania was no longer a LDCs. Tanzania, could use its current negotiating position to negotiated favourable terms of trade. Further, negotiations on procurement could be used as a bargaining tool to achieve concessions in other sectors such as the agricultural sector (see further infra third part of this report).

Part II: public procurement in Tanzania

The sources of data relied upon in this section emanate from the 2003 country procurement assessment reports (CPARs) for Tanzania, and from the 2009 and 2007 PROCUREMENT AUDIT REPORT by the Tanzanian PPA. Up-to-date information was also available on the Tanzanian public procurement authority website and the Tanzanian procurement journal. Available literature has also been consulted.

2.1 Legislative framework

The Procurement system in the Mainland is currently governed by the Public Procurement Act No. 21 of 2004, CAP 410 and its Regulations, the 2005 Regulations, as well as Regulations of 2007 for Local Government Authorities, while Zanzibar is governed by its own rules and Regulations under the Act No. 9 of 2005 for Public Procurement and Disposal of Public Assets (PPDPA No. 9 of 2005).

As said above the Tanzania public procurement system underwent an extraordinary reform process in the past decade. The first stage of this reform process was concluded in 2001 with the enactment of PPA No. 3 of 2001. A second wave of reforms was completed in 2004 with the enactment of the Public Procurement Act (PPA) No. 21 of 2004 which repealed PPA No. 3 of 2001. The 2004 procurement law was complemented by the enactment in 2005 of procurement Regulations, complemented by the 2007 Regulations for Local Government Authorities. The 2004 procurement law and the 2005 Regulations represent the culmination of a period of

\textsuperscript{138a} See Morrissey & Co Ibid
reforms started in 2003 after criticism by the World Bank CPRA. As it will be shown in the forthcoming pages most of the criticism therein has been addressed by the 2004 public procurement law.

The 2004 Procurement act provides the legal framework for carrying out public procurement procedures and spending public funds in Tanzania. The “underlying principle [of this legislation] is to obtain competitive prices through open competition process which is transparent and non-discriminatory amongst bidders.\(^{139}\)

Value for money and efficiency are the core objectives of the Tanzania procurement system. These objectives are intended to be fulfilled through Transparency, non-discrimination and competition.

Following the ToR the following pages will assess whether the Tanzanian procurement system is transparent. The analysis will also explain how these transparency provisions can be used to achieve the benefits of effective procurement. Whenever appropriate, comparisons will be made with international standards. The second part of this section will focus on market access and competition. This is done with the view of ascertaining if the Tanzanian procurement system is “ready” for a system of international competition.

2.2 Transparency:

As the literature has amply pointed out ensuring and promoting transparency in the procurement process is essential to encourage foreign participation in tender opportunities. Indeed, foreign suppliers need to have confidence in the national system in order to be willing to invest the time and efforts to participate to tender opportunities abroad. “As bidders must trust in the fairness of process to participate in a tender, the perception of transparency is crucial in attracting the largest possible number of tenders and increasing competition” (ADB/OECD 2006).

The lack of transparency can also cause involuntary barriers to trade, even when governments do not intentionally pursue protectionist policies. A non transparent system can “impede the ability of foreign firms to bid for contracts even if there is no intended discrimination” (Arrowsmith, 2003).

The lack of transparency can cause significant losses for governments. It seems that a non-transparent system incurs in excess costs in the range of between 25-50% (Rose- Ackerman cited in Evenett and Hoekman, 2005). Considering that public procurement can account for 10-20% of GDP, it is evident that a transparent procurement system can bring significant budgetary savings. Non-transparent systems increase the information costs, which, in turn, raises the costs of firms and so the prices of the goods/services purchased (Evenett and Hoekman, 2005). Further, the lack of transparency can be the result of corruption of procurement officials (or can favour corruption). International, regional and national procurement regulations see in the principle of Transparency the cornerstone of any sound procurement system.

\(^{139}\) R.S Mlinga Chief Executive Officer Public Procurement Regulatory Authority What Engineers Need To Know About The Public Procurement ACT NO. 21 OF 2004 available at http://www.ppra.go.tz/papers/What%20Engineers%20Need%20To%20Know%20About%20Public%20Procurement%20Act%202004.pdf
Trepte has argued that “the importance of transparency is that it makes visible what would otherwise be concealed and allows the actions of the participants and especially of the agent to be verified objectively... The transparency tool is applied in a number of ways: the choice of procedure; the publicity requirements for tender and award notices; the use of technical specifications; the application of qualification and award criteria. By setting out the broad parameters of the choices to be made by the agent and by requiring the agent to make public the specific choices made and the decisions based on them, the regulator enables the interested parties to monitor and verify compliance with the public policy objectives of procurement” (Trepte)

Many measures are usually implemented for achieving transparency, such as publicity of procurement laws and regulations; advertisement of tenders; setting strict rules for using negotiated or single-source procurement methods; disclose the criteria for evaluating tenders; having in place an efficient system of suppliers review, which ensures that suppliers are given the possibility to complaint against unfair procurement decision.

However, implementing transparency rules is also costly for governments. For instance, running a procurement competition through an open procedure is more costly than running it through a negotiated procedure (Arrowsmith, 2003; Rege, 2001). Besides, fettering the discretion of procurement officials can result in inefficiencies in terms of value for money, or it can render too burdensome and lengthy the procurement process.

Below we will analyze whether the Tanzanian procurement system has in place effective transparency rules. Reference will be made to the standards set in the UNCITRAL Model law.

In order to properly highlight the elements of transparency in the Tanzanian procurement system this report will follow Trepte’s guidelines and will investigate five elements of transparency in the procurement process, namely Publication of Legal Framework; Publication of Procurement Opportunities; Transparency of Contract Awards; Procedural Transparency and Transparent Dispute Settlement.

However, before starting the analysis of the Tanzanian system it is necessary to briefly reflect on some other aspect of procurement policies that can have an impact on Transparency, namely pursuing industrial, social and environmental policies through public procurement, i.e. the so called horizontal policies. This is important because horizontal policies are sometimes implemented at the expense of transparency, hence it is necessary to highlight from the outset what measure could be taken to offset any inconvenience caused by horizontal policies and to ensure Transparency. This general analysis will then guide us when analysing the Tanzanian procurement system.

Horizontal policies:

Governments might be prone to derogate to the principle of competition to pursue horizontal policies (i.e. industrial and socio-economic policies). Examples of such policies are using public funds to protect national industries or minority groups. Governments can decide to do so by setting aside contracts for national suppliers or by granting price preferences in the award of public contracts. When investigating the opportunity of pursuing horizontal policies through
public procurement it needs to be kept in mind that there are also substantial costs linked to the implementation of these policies, costs which will ultimately be borne by taxpayers. Besides the fact that policies aimed at protecting local producers or local minority groups are generally pursued through affording protection or preferences to national against foreign industries, can give rise to problems of compatibility with international agreements aimed at opening up the procurement market. International agreements tend to be reluctant to accept horizontal policies that have a discriminatory effect them in exceptional circumstances (see for example art XVI of GPA).

Besides, once these polices are inserted in the procurement process, other objectives such as value for money and transparency, efficiency and probity risk being compromised. Experience has shown that the pursuing of horizontal policies is not always effective and they do not often meet the prefixed goals. In order to really ensure the success of horizontal polices in the procurement process, efficient mechanisms for their implementation, monitoring and enforcement have to be inserted in the procurement system.

How do governments implement these policies in the public procurement process? Governments generally provide for a set aside of contracts (or a percentage of them) or for allowing a price preference at the award stage to those bidders that meet the policy requirements. Price preferences are generally to be preferred to set aside, in fact whereas the latter could have quicker and more visible results, its costs are difficult to measure, and moreover it could lead to less competition with no incentive to efficiency for the targeted group.

As concerns the protection of national firms, this author believes that before implementing horizontal policies through set aside or price preferences, other more general instruments should be considered to ensure that procurement could be used as an effective tool to help local firms. One has to keep in mind that other mechanisms might be more helpful to achieve these objectives while implying lower costs. For example as regards the protection of SMEs governments could start supporting SME by adopting a more general and neutral approach, that involves the elimination of all those barriers intrinsic to the procurement process and that deter SME from participating in public procurement. Such as for example improving speediness of payments (surely the already restricted access to finance is not helped by the slowness in payments under public contract, or by onerous guarantees required by Governments) and/or requiring the use of standardised documents in order to reduce information problems and costs. General reforms can of course not be sufficient, but only after these prior steps are taken more detailed programmes in terms of price preferences and/or set aside should be considered by governments as a means to support local/sme industries via public procurement.

Public procurement can also be harnessed to the achievement of social and environmental policies, such as labour standards, human rights. The methods used for the implementation of these policies is generally through their insertion in key passages of the procurement process, such as the specification and award stage, or through contract compliance. The insertion of these goals as contract conditions is particularly important. Procuring entities are in fact offered

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141 International Trade Centre UNCTAD/WTO (ITC), Improving Access of Small and Medium Enterprises to Public Procurement: Experience of Selected Countries .draft, pp.9-53.
the possibility to avail themselves of remedies such as termination of contracts or request for damages if those conditions are breached. This latter method is used by ILO Convention No (94). Art. 2(1) of the Convention requires public entities to insert in the contract labour clauses requiring treatment to workers employed by a private contractor no less favourable than those established for work of the “same character in the trade or industry concerned in the district where the work is carried out”. The aim is to avoid bidders economise in labour costs in order to tender the lowest price142. The success of contract compliance is strictly connected with the clear definition of the duties imposed on the contractor and with the mechanisms provided for enforceability once a condition has been breached143.

Remedies such as termination of contract, the possibility of debarment from future contract together with the grant of damages, should be accorded. External agencies should be appointed to monitor the contractor compliance with the policy and they should also be accorded a proactive role in activate the judicial system.

When secondary policies are introduced in the procurement process, higher costs or lower quality products can be accepted to the prejudice of the primary objective of achieving value for money. In addition, as said above, the implementation of horizontal policies could result in a lower level of transparency which could increase dangerously the chance of corruption. Additional problems could be linked with an increase in administrative costs and undue delays compromising the efficiency of the system144. However, some rules can help to minimise those risks. For example, if it is feared that the discretion of the procuring entity will be too broad when horizontal policies criteria are admitted as criteria for the evaluation and selection of bidders, it could be helpful to set those horizontal policies criteria by law or regulation and require the authority to act within the limits established therein. This would avoid the risk that the procurement entity adopts ad hoc solution to favour one specific bidder. The same criteria of selection need to be applied to all bidders so to ensure the fairness and equal treatment of bidders. Another guarantee could be to require the pre-disclosure in the tender documents of these selection criteria, forbidding the procuring entity to change them once the process has started.145 Careful attention should also be paid at the specification stage (further analysed below).

However, this is not to say that government should not pursue horizontal policies but just that a cautious approach needs to be adopted when evaluating any rule diverting from the principle of competition and attention should be paid to make sure that all the adequate guarantee aimed at avoiding ad hoc solution are well in place.

The way in which horizontal policies are implemented can affect transparency hence a few general principles need to be highlighted here in order to see how and what guarantee can be implemented to limit risks for transparency when horizontal policies are implemented.

143 Arrowsmith S. pp.242
144 Arrowsmith, Mayer, Tribus, Supra 2, pp 3-13.
145 Arrossmith, Linarelli and Wallace, Supra 6, pp 298-301.
2.2.1 Publication of Legal Framework

This first part will focus on whether the procurement rules are published, readily available and whether they are known to and implemented by the procurement agents. As concerns this latter aspect, this author will use the PPRA’s Procurement audit report for 2009. Finally, this author will assess whether capacity building programmes are in place and, if so, whether they seem appropriate.

Availability of information on the procurement system

The Tanzanian government is to be praised for the quantity and quality of information available on its procurement legal framework as a result of its reform efforts. Laws and regulations pertinent to the procurement process are accessible via the internet; standard form bidding and contract documents are prepared by the PPRA who also provides interpretative guidelines and administrative instructions. Tender evaluation guidelines are also provided to procurement entities.

Public procurement laws and regulations are published in the official gazette. Indeed, Art 88 of the PPA states that “All Regulations, rules and directions made in connection with this Act shall be published in the Gazette.” All documents are also easily accessible through the PPRA website.

The Tanzanian regulatory procurement authority publishes every year the procurement audit Report which contains information on the state of implementation of the procurement law and regulations, and information on the functioning of the procurement market.

Information on the state of procurement law and plans for its reforms are published in the Tanzanian Procurement Journal –these are expressed through an editorial section by the CEO of Tanzania, procurement notices and, less often, information on the award of contracts are also published on the procurement Journal (see infra).

All these documents are easily accessible and can be downloaded from the internet.

The situation in respect of judicial and quasi- judicial decisions is instead more difficult to assess. Information on complaints proceedings are not easily available. It is believed that further studies should be financed to assess and monitor the state of the review system in Tanzania. For example, it would be interesting to have clear data and analysis on whether aggrieved bidders make extensive/not-sufficient use of the review system and if so how they use it, what is the rate of success of bidders’ complaints etc. at present such data are not available.

Implementation:

As regards implementation of the procurement law and regulations the PPRA’s audit reports show that in the past few years there has been a good level of compliance with the PPA and the Regulations. Major improvements have been registered last year, the Review for 2009 (which

\footnote{89 of the PPA states “The Authority shall issue guidelines from time to time for the better carrying out of the objectives or any functions under this Act.”}
refers to data for the financial year 2007/08, report published on June 2009) shows that the average level of compliance has raised to 71%. Specifically the PPRA’s report on “Follow-Up Implementation of Procurement Audit Recommendations in Forty Five Procuring Entities” states that “the outcome of the review indicated a remarkable compliance improvement from an average level of compliance of 39% and 43% in the financial years 2006/07 and 2007/08, respectively, to an average level of compliance of 71%. The average level of compliance in LGAs has increased from 40% to 66% while in the MDAs it has increased from 43% to 74%. The Medical Stores Department attained a maximum compliance level of ninety six percent (96%) while the National Housing Corporation attained a minimum compliance level of thirty seven percent (37%).”

The report continues by stating that “the performance was above average (50% and above) in twelve out of the thirteen compliance indicators including: Establishment and composition of Tender Board; Establishment and composition of PMU; Preparation of Annual Procurement Plan; Functioning of AO, TB and PMU; Complying to compulsory approvals; Advertisement of bid opportunities; Publication of contract awards; Time for preparation of bids; The use of appropriate methods of procurement; Complying with the use of Standard Tender Document as stipulated in the regulations; Quality assurance; and Contract implementation. On the other side, the average performance on one indicator, records keeping, was below average.”

However, the limits of the PPRA reports need to be kept in mind. Indeed, the audit reports monitor only a limited number of procurement entities (this is inevitable considering that this monitoring process needs to be carried out often); besides these reports are carried out by the PPRA itself which could have a vested interest in showing that its procurement system is efficient, especially if considering that many donors subject aid disbursement to the implementation of sound procurement policies (see infra the case of the US’ MCC).

Finally it needs to be said that one of the goals of the PPRA is to ensure that the average compliance level of procuring entities reaches the target of eighty percent (80%) by the end of the financial year 2010/11, to this end some capacity building programmes have been put in place.

Capacity building:

Training programmes for procurement officials have been introduced in 2009. These programmes have been introduced under the implementation of the “Large Scale Capacity Building Program On Public Procurement.” Training programmes have started in June 2009. The training is carried out by the Public procurement Regulatory Authority (PPRA).

From June 2009 the PPRA has embarked on large-scale modular based training program, with the aim of “reaching as many Procuring entities as possible.” as stated in the official PPRA report “The primary focus of the program is staff of the Procurement Management Units (PMUs) and members of the Tender Boards.” The reasons advanced for focusing on these groups are that “PMU are where the procurement processes are managed, while Tender Boards are responsible for approving various actions in the processes.” One might wonder whether these training sessions should involve also officials involved in higher reviews and appeals bodies (such as PPAA). Although such exclusion is justified by the fact that members of higher appeal boards are already expected to be highly qualified professionals and public procurement expert.
Nonetheless it needs to be kept in mind that sometimes new developments in procurement practices might require new training even for highly qualified professionals.

Each course will last for 14 days, each class will have 50 participants and a total of 900 officials will be trained. The proposed training will cover 7 modules, namely a) Overview of PPA 2004 and its regulations, (also covering 1) System for Checking and monitoring; 2) Procurement Management Information System; and, 3) Procurement of Commonly Used Items) b) Procurement of Goods, c) Procurement of Works, d) Procurement of Non Consultancy Services, e) Procurement of Consultancy Services, f) Disposal of Public assets by Tender, and g) Procurement Procedures of the African Development Bank.

Nothing is said on what each module will cover. It is hoped that the modules will cover both practical and theoretical questions/general principles so that participants will be able to address any procurement issue not just those stemming from a single set of regulations. The course should be taught by professionals with both practical and theoretical/academic experience. The course should aim at training officials also an broad and general procurement principles as well as the technicalities of the particular legislation, this should be done with the view of ensuring that procurement officials are trained to be able to face any future situations. The CPAR 2003 pointed out that Training for the reform of public procurement should not only cover the rules and regulations, but it should also “involve changes in ethical and cultural ways of doing procurement.” It is not clear if this point will be addressed by the new capacity building courses.

A further point to note is whether a 14 days full time course is sufficient to train procurement officials. Understandably, however, such a broad scale course cannot involve longer period of time. One question that could be raised is whether it could have been better to have smaller scale programmes (with fewer participants) with a more intense curriculum.

Summary of transparency of legislative framework

The analysis on transparency of legislative framework has revealed that Tanzania has a very comprehensive legislative framework. The legal texts are all publicised and easily accessible via the internet. Standard documents are prepared by PPRA. All the relevant procurement information is gathered in a manageable format, there are guidelines and a great effort appears to have been made to disseminate this information. Recently in May 2009 a special training for people in charge of government procurement has been set up. In conclusion, it seems that the Republic of Tanzania benefits from a positive level of transparency in respect of the legal and regulatory framework which governs government procurement.

This is the result of the significant efforts underwent in recent years to reform the procurement system aided by the strong presence of multilateral and bilateral donors such as the Public Financial Management Reform Programme (PFMRP) funds.

2.2.2. Publication of Procurement Opportunities
This element is said to have two meanings: advertising and use of open procedures as opposed to single source procurement (which should be limited to exceptional cases)

Advertising
As far as advertising is concerned Tanzanian rules ensure a high level of transparency. Procuring entities need to prepare and advertise a tender notice before carrying out any of the open tendering procedures available. For example, Art 9 of the Regulations provide that “To ensure the widest possible participation by suppliers, contractors, service providers or buyers on equal terms in invitations to tender for goods, works, services or disposal of assets, as appropriate, procuring entities and approving authorities shall take the necessary measures to: (a) ensure publication of invitations to tender in the Authority’s journal and website, local newspapers of wide circulation and any other appropriate information media;”

Art 65 of the regulations provides that in international competitive tendering, the tender notice “shall be advertised nationally and internationally”

According to Art 33 of the PPA 2004 the Accounting Officer or Chief Executive of a procuring entity is responsible to ensure that procurement opportunities are advertised. According to Art 61 “The approved tender notice shall be advertised by the procuring entity as set out in the Regulations made under this Act and shall ensure widest reach of potential suppliers or contractors.”

Tender opportunities are advertised on the Tanzania official procurement journal which is available on line. This has been a major innovation introduced in the PPA 2004, aimed at addressing one of the major criticisms of the CPAR 2003.

One of the major criticisms of the CPRA 2003 for Tanzania was the lack of a procurement journal where information on procurement (tenders opportunity, awards etc.) could be published. The Tanzania government has addressed this criticism and an official procurement journal is now available. The journal is published every three months.

Further, when tenders are open to international competition the invitation to tender has to be advertised in an international newspaper. Indeed, according to Art 65 of the regulations “Under the international competitive tendering the procuring entity shall advertise the invitation to tender in the form of the specific procurement notice or specific disposal notice for any particular procurement or disposal contract, in the Authority's website and journal, and at least one newspaper of wide and general circulation in Tanzania and in any international newspaper as may be directed by an appropriate tender board. (4) For large or specialised contracts, the appropriate tender board may additionally require that the invitation to tender advertised in well-known technical magazines or trade publications, or in newspapers of wide international circulation.”

The legislation does not specify the name of the international journal/newspaper where to advertise the tender. This could cause some uncertainties; the provision should probably clarify that the international newspaper should be of wide internationally circulation. If Tanzania were to conclude a procurement agreement with the EU procurement opportunities should be advertised on the EU Official Journal.

Some further elements related to the tender documents also need to be here pointed out. For example Art. 9 of the regulations provide for strict and clear guidelines on the information that need to be included in the tender documents. According to art 54 of the Regulations “Approval
of the tender documents by the tender board is required before the tender is advertised,” this could be considered a further element aimed at avoiding abuses by the procurement entity.

Careful analysis of the provision in the act and the regulation show that Tanzania does comply with international recognised standard for procurement regulation. Does the practice reflect the law? As said above the 2009 PPRA’s report shows that as far as Advertisement of bid opportunities is concerned the performance of the 45 procurement entities observed was reported satisfactory as above average (50% and above). This author has been able to verify that tender opportunities are easily accessible on the PPRA website.

Open procedures

This is the procurement method that allows the broadest participation of suppliers and the highest form of transparency. However, applying the open procedure involves higher costs for the procurement entity, and in some circumstances procurement entities are allowed to derogate from this procurement method. Open tender is the preferred mode of purchasing under the Model Law, however, other methods are also allowed under precise circumstances and provided that specific guarantee are in place (the same can be said for other international and regional procurement agreements such as the GPA and the EU directives).

As far as Tanzania is concerned, Art 7 of the regulations provides that “Procurement of goods, works and related services through international and national competitive tendering as defined in Part VI of these Regulations shall be considered first before other methods of tendering described in Regulations 67 to 71 are used” Hence, the use of competitive procedures is the preferred procurement method. Specific threshold apply (set in the regulation) which guide the procurement entity as to whether to use National or International competitive bidding, or any other method of procurement.

Art 65. Also provides that (1) In international competitive tendering or otherwise known as international competitive bidding, a procuring entity shall invite suppliers, contractors, service providers or asset buyers regardless of their nationality, by means of a tender notice that shall be advertised nationally and internationally to submit priced tenders for goods, works or services or purchase of public assets.” However there are some thresholds to be met for this procedure to apply (laid down in third schedule of the regulation), further conditions for the use of this procedures are also laid down in art 65 such as the need to use of foreign currency. In other cases the procurement authority can use the national competitive bidding (or tendering). When using the NCB procedure the PA is also required not to discriminate on the ground of nationality (art 66). However, the tender notice needs to be advertised in the United Republic of Tanzania only.

Art 7 further provides that written approval by the tender board needs to be sought before a procurement entity can derogate from the competitive procedure. This is clearly a positive provision aimed at monitoring procurement entities decisions and avoiding (or limiting) ad hoc derogation from competitive tendering. Art 7 also requires that “other forms of procurement may be used whenever it can be established that this is done with due regard for transparency, economy and efficiency in the implementation of the project.”
Art 63 of the regulations states “(1) Except as otherwise provided for by these Regulations, a procuring entity engaging in procurement of goods, works, non-consultant services or public private partnership ...(omissis) shall do so by means of competitive tendering proceedings......(4) A procuring entity may select an appropriate alternative method of procurement as provided for in Regulation 72, 73 or 76 in the case where tendering would not be the most economic and efficient method of procurement and the nature and estimated value of the goods, works, or services permit.”

The procurement entity is required to keep a record containing a statement “of the grounds and circumstances on which it relied to justify the use of that method.” Art 63(3)

Important considerations need to be made as regards the possibility to derogate from competitive tendering. First of all, exceptions to the general rule of competitive tender can only be provided for by law. The first part of the above provision requires that exceptions to competitive tendering can only occur according to the provisions laid down in the act or the regulations. This is an important guarantee as it aims at avoiding abuses by the procurement entity.

However, on a less positive note in terms of transparency, it needs to be noted that the second part of Art 63(4) uses more flexible terms, namely “A procuring entity may select an appropriate alternative method ... where tendering would not be the most economic and efficient method.” One might wonder whether this provision provides for an easy loophole not to procure via competitive tendering or whether instead it is aimed at enhancing the efficiency of the procurement process. However, in order to answer this question other provisions of the regulations need to be analysed.

The 2005 regulations allow the use of Restricted tendering in some specific cases, these include “the goods, works, or services required are of a specialised nature or can be obtained from a limited number of specialised contractors”; the contract value needs also to within certain thresholds (provided for in schedule 2); the possibility to use Restricted tendering is when “there is an urgent need for the goods, works or services such that there would be insufficient time for a procuring entity to engage in open national or international tendering, provided that the circumstances giving rise to the urgency could not have been foreseen by a procuring entity and have not been caused by dilatory conduct on its part.” (art 67)

Art 67 (3) Except where suppliers, contractors or service provider have already pre-qualified, a procuring entity issuing a restricted tender shall seek tenders from a list of potential suppliers, contractors, or service providers broad enough to assure competitive prices” the use of qualifications lists is common however it can give rise to the exclusion of potential good suppliers who did not register.

The use for request for quotations at international or national level is also allowed when the goods to be procured are so diversified that it would be of no commercial interest for any single supplier to tender for them; or (b) the goods are readily available off-the-shelf or standard specification commodities” (art 68). Quotations shall be obtained from at least three suppliers which may include qualified agents of foreign suppliers in Tanzania. The list of the suppliers to be contacted shall be submitted to the appropriate tender board for approval and thereafter the procuring entity shall address a request for quotations to all approved suppliers
simultaneously. Art 68 contains also further detailed provisions on the information to be provided to suppliers, the time limits to be respected to request proposals from international suppliers etc.

Finally, Art 69 provides that “Subject to approval by the tender board, a procuring entity may engage in a single-source procurement in accordance with sub-regulation (3) under the following circumstances: (a) the goods or services are available only from a particular supplier (omissis) (b) there is an urgent need for the goods or services, and engaging in tendering proceedings or any other method of procurement would therefore, be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part”

The following paragraphs of art 69 lay down additional and more uncertain criteria for the use of single-source procurement. Some of these requirements are linked to defence and security, spare parts, but, more worryingly there are some uncertain terms for research (without any specification of what time of research).

Direct contracting is also possible (art 70) in case of urgency and when there is a single contractor that could provide the goods, when “there are advantages to a procuring entity in using a particular contractor who has undertaken or is undertaking similar works or who may have already been mobilised with plant, equipment and staff in the vicinity or any other resources as may be appropriate;” again some of these criteria seem too broad and seem to allow too broad discretion to the procurement entity.

In conclusion, as shown above competitive tendering is the preferred procurement method but derogations to this principle apply and public authorities can use alternative methods provided that they respect certain thresholds and the conditions laid down in the regulation are respected. Further, the general monitor mechanisms continue to be in place (for example approval by the tender board needs to be sought); records need to be kept and rules are also provided for avoiding splitting up of contracts so to lower the value of the procurement. Balancing efficiency and transparency is often a difficult exercise, however if the exceptions to the competitive method are implemented applying the guarantees provided for in the legislation abuses of discretion should be limited. Before saying a few final words on “implementation and practice”, some further reflections on the possibility to derogate to the competitive procurement method in the eventuality of “urgent need” of the goods to be purchased seem here necessary.

It appears that the major safeguard provided for by the regulation for not allowing the procurement authority to abuse its discretion and invoke urgency inappropriately seem to be the fact that urgency should not be due to circumstances that could have been foreseen by a procuring entity and/or that have been caused by dilatory conduct on its part (it seems reasonable to assume that this covers bad planning).

The fact that Tanzania allows derogation from ordinary rules in case of emergency situations is surely not a stand alone case. Many are the systems that use such derogations in similar situations. However, experience has shown that derogating from ordinary procedures can give rise to a great deal of abuse (for example the Hurricane Katrina case) and new systems are being explored to face emergency situations.
Current doctrinal debates seem to indicate that even the toughest and tightest systems of procurement can be at risk in emergency situations. Experts have suggested that a different and innovative approach is necessary to face emergency situations.

Governments having to face emergency situations often allow procurement entities to derogate the ordinary procurement rules and to put in place non-competitive and non-transparent procurement mechanisms. The use of waivers and rapid acquisition procedures, including the liberal use of sole-source awards, is often justified in order to minimize delays.

A contrary view instead sustains that full and open competition is always the most appropriate course of action, despite any logistical hurdles that might arise, because the Government has the duty to act as custodian of the taxpayers’ money. As one author has put it “In emergency contracting the challenge is to balance the need for competition and transparency with the urgent nature of the requirements”.

Kelman has suggested that the way to balance the need for speed vs. the benefits of competition is for agencies to negotiate contracts in advance if “agencies know that they will need disaster-related services, such as debris cleanup and construction, they should award contracts that activate when disaster strikes. They should set prices and establish delivery terms with the best vendors. Then agencies need only place orders when the time comes.” Many authors have suggested that the use of framework contracts could be a good means to help facing urgent needs of the procurement entity in emergency situation while still respecting the basic principles of competition and Transparency. Following this current of thoughts it is here suggested that Tanzania should explore the possibility of using Framework agreements in the future.

Finally, as regards implementation it needs to be said that the recent 2009 PPRA’s report shows that as far as the use of appropriate methods of procurement the performance of the 45 procurement entities observed was satisfactory as above average (50% and above). If this is really the case it would be a massive improvement since the latest CPAR where one of the major complaints was the fact that procurement entities simply derogate from the ordinary method of procurement (competitive bidding also in 2003) without really respecting the thresholds and the guarantees put in place at the time by the 2001 PPA.

2.2.3 Procedural Transparency

This transparency elements touches upon many aspects of the procurement process. For example, it relates to the bidding documents and the information provided in terms of where, when and how to submit bids. One very important factor is ensuring that the procurement entity allows sufficient time from the publication of the tender notice to the deadline for submitting the bid. A short time frame could disadvantage some bidders (this is especially the case for foreign suppliers, considering that they would be less likely to be familiar with the

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tendering system). In this respect Art 80 of the regulations states that tender notice should be published in sufficient time “so to allow equality of access to suppliers.” Further guidance on this time frame is provided in the schedule to the regulations.

The procedural transparency element is essential to ensure that bidders are treated fairly and to promote competition. Only if bidders have all the necessary information as to the products and/or services required and on the evaluation criteria applied they will be able to participate to the tender and submit a conforming bid. Important aspects of this element are related to the technical specifications; the eligibility and qualification criteria and the award criteria.

**Technical specifications:**

The specification stage is very important for sound procurement practices. The way in which specifications are laid down can be crucial for ensuring fair treatment and equality of opportunities for bidders. Procurement entities might set specification requirement that can create unnecessary obstacles for the participation of bidders. When complying with national standards is too costly, bidders could decide not to participate to the tender at all. At this stage procurement entities could set forth criteria that can be met just by very few and specific suppliers. For example, if specifications are too technical and too specific without a real necessity, any chance of competition would be cut at the very first stage of the procurement process. This is why international regulations often require that specifications need to be described in terms related to the function of the product rather than to trade-mark, name, patent or with reference to international standards rather than national ones. 148

The model law has suggested that “any specifications....that create obstacles to participation, including obstacles based on nationality” should be avoided (Art. 16). The interpretation given to this article is quite restrictive. The possibility of including preferences related to the domestic origin of the product is excluded, but also should all requirements affecting the process and production methods used (PPMs). The reasons for this restrictive approach are “to make clear the importance of the principle of clarity...to encourage participation by suppliers and contractors” (Guide to the Law p.50).

The Tanzanian PPA at art 73 (4) under the rubric “Conducts influencing Public Officers” states “A procuring entity shall not include in any tender document any condition or specification such as to favour any one supplier, contractor or consultant.” This principle is reiterated in Art 8 of the 2005 regulations. The regulation contain many more articles directly devoted at ensuring that technical specifications are not used in an abusive manner by procurement entities. So art 9 of the regulation state “to ensure the widest possible participation by suppliers, contractors, service providers or buyers on equal terms in invitations to tender for goods, works, services or disposal of assets, as appropriate, procuring entities and approving authorities shall take the necessary measures to: (omissis....) eliminate discriminatory practices or technical specifications which might stand in the way of widespread participation on equal terms;” these are important provisions that seem to fully comply with international standards.

Art 22 of the regulations (again fully complying with the MODEL LAW) states

148 Arrosmith, Linarelli and Wallace , pp.253-256.
“(1) Any specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods, or works to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, or description of services that create obstacles to participation, including obstacles based on nationality, by suppliers, contractors or service providers in the procurement proceedings shall not be included or used in the prequalification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations. (2) To the extent possible, any specifications, plans, drawings, designs and requirements or descriptions of goods or construction shall be based on the relevant objective, technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific or intelligible way of describing the characteristics of the goods, works or services to be procured and provided that words such as "or equivalent" are included. (3) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods, works or services to be procured shall be used, where available, in formulating any statement of requirements, specifications, plans, drawings and designs to be included in the pre-qualification documents, solicitation documents or other documents for solicitation of proposals, offers or quotations. ...” (emphasis added).

Additional guarantees are provided by the fact that any procurement by a procuring entity must be authorised by an Accounting Officer and endorsed by a Tender Board that will also need to approve tender documents and specifications (art 40 of the regulations).

Hence the Tanzania measures on technical specifications do comply with international standards.

Eligibility and qualification

The qualification stage involves the selection of suppliers in order to consider who is eligible for the contract. Abuses at this stage could result in the procurement entity opportunistically excluding some suppliers from the competition. This is why many systems provide for strict rules to limit abuses of discretion at this stage. Manipulation by the procurement entity can be easy at this stage and so it is necessary that the criteria for the exclusion of bidders are clearly set forth in advance in the tender documents. The Model Law allows the possibility to exclude bidders that are not able to perform the contract (art.6 (b) (i)) It also provides for the exclusion of firms that are guilty of criminal offences or of infringement of taxes and social security law. However the Model Law also foresees some guarantees in the application of these criteria to ensure the transparency of the process, such as the pre disclosure of these criteria in the prequalification and solicitation documents, and equality of application of these criteria to all suppliers or contractors. Art. 6 (3) then states that “no other criteria than that provided for in this article shall be used”. “Subject to the exceptions in Art. 8 (1), 34 (4) (d)...the procuring entity shall establish no criterion... that discriminate among suppliers on the basis of nationality or that is not objectively justifiable”. Arguably, because of the prominent role played by

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149 Ibid pp.296-301.
150 “Those provisions aim at equal treatment and prevention of arbitrariness, the procurement entity is afforded sufficient flexibility to determine the exact extent to which it is appropriate to examine qualifications in a given procurement proceeding” (from the Guide).
transparency only a provision set by law or regulation could establish what is “objectively justifiable.” This interpretation is favoured by the fact that the article is subject to art. 8 and 34.

One of the exceptions in art. 6 is that provided in art. 8 (1). The article promotes the international participation of suppliers and contractors but it allows the procuring entity to limit participation on the basis of nationality. This exception needs the fulfilment of two prerequisites for its application: the existence of a provision of law on which the procuring entity relies and the express statement that the process is so limited. The procuring entity is also bound to explain and to keep records of the “grounds and circumstances” (art. 8 (2)) on which it relies. Once the process has been declared to be open to international participation it cannot be retracted at the very last minute Art. 8 (3).

As regards Tanzania, in respect of discrimination on the ground of nationality it suffices here to say for the moment (further analysis of the principle of non-discrimination is provided in the following section 2.3) that Art 6 of the 2005 Regulations provides that “(1) Any supplier, contractor, service provider or asset buyer who qualifies for consideration further to Regulations 10 and 14 of these Regulations shall be eligible to take part in procurement or disposal proceedings, regardless of their nationality except where this is limited further to Regulations 25 and or by other provisions of other written Laws.”

Hence the general principle in Tanzania is that there are no restrictions in relation to nationality (in full compliance with the Model law) but some exceptions to this principle are laid down in the regulation itself (and also this complies with the model law, i.e. the requirement seen above that exceptions should be set by law and not left to ad hoc decisions of the procurement entity). These exceptions will be analysed in section 2.3.1

Other provisions which might affect trade and foreign suppliers’ participation in relation to the qualification stage could be for example measures requiring the inscription in professional registries. It is very important that these provisions are not constructed in such a way as to conceal barriers to trade. As regards registration with appropriate professional bodies the Tanzania PPA provides in Art 46 that “local firms wishing to participate in any procurement proceedings must satisfy all relevant requirements for registration with appropriate professional or any other statutory body in Tanzania. Foreign bidders are exempted from this requirement, but if they win a tender they must register as appropriate.” The fact that Tanzania does not require foreign suppliers to sign up to professional bodies before they are awarded the contract is avoids that foreign suppliers are discouraged to participate to tender opportunities.

Careful analysis of the Tanzanian procurement law reveals that the qualification criteria laid down in the PPA 2004 and regulation 2005 fully meet international standards. Clearly the drafters of the Tanzanian procurement legislation were familiar with the international principles laid down in the MODEL Law. For example, Art 9 of the Regulation states that procurement entities need to ensure that “all the selection criteria are specified in the tender documents;’’ selection criteria are monitored by the PPRA; exclusions are provided for insolvency, bankruptcy, criminal offences and debarment for corruption by international institutions see art 14 of the regulations. besides “Any requirement established pursuant to this Regulation shall be set forth in the pre-qualification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, and shall apply equally to all suppliers, contractors, service providers or buyers..” Art 14(3).
Art. 14(4) also states that a procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers, contractors, service providers or buyers other than those provided for in this Regulation. (5) The procuring entity shall evaluate the qualifications of suppliers, contractors, service providers or buyers in accordance with the qualification criteria and procedures set forth in the pre-qualification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations. Records on qualifications need to be kept.

It is extremely positive to note that Tanzanian procurement rules on qualifications abide to international accepted principles of transparency because in the qualification stage discriminatory behaviours could be concealed.

**Evaluation and award criteria**

The award criteria could be the lowest price or the “lowest evaluated tender.” In the latter case the procuring entity is authorised to use for the awarding of contracts criteria other than simply the lowest price on the basis of the criteria specified in the qualification document. However, the way in which these other criteria are laid down and applied needs careful scrutiny. For example art 34 of the Model Law allows the adoption of the lowest evaluated tender award criteria but it states that the criteria have to be *objective and quantifiable* and shall be given a relative weight or be expressed in monetary terms. This provision is clearly aimed at enabling tender to be evaluated objectively and compared on common basis. It is also necessary, in order to prevent abuse of discretion, that all the evaluation criteria are set out in the solicitation documents and that no other criteria than those there specified can be used. Article 34 then states in subparagraph (c), what the procurement entity can consider while examining which is the lowest evaluated tender. Paragraph (4) (c) lists such criteria. In number (ii) the Public authority can take into account “The cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services (iii) space is given to industrial policies and in (iv) is given a specific space to national defence and security. The criteria set forth in art 4 (c) (iii) are related to economic-development objectives. The guide to the Model Law recommend to use with when and if expanding the list of non-price criteria in view of the risk that such other criteria may pose to the objective of good procurement practice. This is because criteria other than price (and or linked to horizontal policies) are regarded as less objective and more discretionary, and their use can reduce confidence in the procurement process. The Model law does not leave space for the adoption of horizontal that have a non-economic character. Art. 34(d) allows the procuring entity (but only if authorised by the procurement regulation and approved by an external body to the procuring entity) to grant a margin of preference in favour of local suppliers and contractors, and/or locally produced goods and locally provided services. This is seen as “a mechanism for balancing the objectives of international participation and fostering national industrial capacity, without resorting to purely domestic procurement” (Guide to the Law).

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151 Arrowsmith, Linarelli, wallace, Supra 6 pp.286-298
In Tanzania Art 65 on evaluation criteria seems to fulfil the transparency principles as per above, it states “The basis for tender evaluation and selection of the lowest evaluated tender shall be clearly specified in the instructions to tenderers or in the specifications to the required goods or works.” Similarly Art 9 of the regulation also requires the procurement entities to ensure that “all the selection criteria are specified in the tender documents; and the tender selected conforms to the requirements of the tender documents and meets the selection criteria stated therein.”

As regards the criteria for the evaluation of tenders Art 90 (17)(c) stets that “in determining the lowest evaluated tender, the procuring entity may consider the following: (i) the tender price, subject to any margin of preference applied; (ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services; (d) in determining the highest evaluated tender for disposal of asset the preferred evaluation method shall be the evaluation based on price only unless other factors, such as end-user or export restrictions, or a need to attach conditions to a sale are taken into consideration, and stated clearly in the solicitation documents. (e) in evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for works by Tanzanian contractors, for the benefit of tenders for domestically produced goods, for benefit of Tanzanian service providers, or for benefit of Tanzanian asset buyers provided that the margin of preference shall be calculated in accordance with Regulations 91 to 96 and reflected in the record of the procurement proceedings.”

Finally, Tender board need to approve and award contract (art 96).

In conclusion, Tanzania’s award criteria set in the procurement law and the regulations do comply with international standards.

2.2.4. Transparency of Contract Awards

The transparency of contract awards is also very important. In this respect, Tanzanian procurement law set strict standards; however, as we will see below, in one case practice does not adhere to the legislation.

Art 21 of the regulations provide that “Where an award of contract is made, the secretary to the tender board shall notify the Authority stating who has been awarded the contract, the contract amount and the date when the award was made.” 89.-{1] The tender board that approved the issue of the tender documents shall receive tenders, which shall wherever possible be placed in a locked tender box or in a secure office space. Art 89(8) further states that all tenders submitted before the deadline time and date for submission shall be opened in public, in the presence of the tenderers or their representatives and other parties with a legitimate interest in the tender proceedings. Another important provision is laid down in 89 (12) and (13) which states “Discounts offered by tenderers must be read out and announced in public during the process of tender opening. (13) Any discount which is not read out at the formal tender opening ceremony shall not be taken into account in the evaluation and comparison of tenders.”
A procuring entity shall establish a tender evaluation committee comprising not less than three and not more than five members. The tender evaluation shall be consistent with the terms and conditions set forth in the tender documents and such evaluation shall be carried out using the criteria explicitly stated in the tender documents. Tenders shall be comparable among themselves in order to determine the lowest evaluated cost for procurement of goods, works or services or the highest evaluated price for disposal of assets by tender. Prior to the detailed evaluation of tenders, the tender evaluation committee shall carry out a preliminary examination of the tenders to determine whether or not each tender is substantially responsive to the requirements of the tender documents, whether the required guarantees have been provided, whether the documents have been properly signed and whether the tenders are otherwise generally in order. A substantially responsive tender is one which conforms to all the terms, conditions and specifications of the tender document(s) without material deviation or reservations. If a tender is not responsive to the tender document, it shall be rejected.

All these provisions do comply with international standards. However, practices seem not to respond to the legislation in respect to one important aspect of transparency in award proceedings, namely notification of awards. Indeed, the CEO for Tanzania reports that during the F/Y 2007/2008, 204 procurement entities failed to report. He noted that “153 procurement entities reported to have awarded contracts amounting to Tshs. 1,800,974 million (equivalent to $1360.77). In Tanzania there are 357 PEs, unfortunately, however 204 PE have so far failed to report.” The Tanzania National Roads Agency (TANROADS) is the procurement entity which reported the highest volume of contracts.

### 2.2.5 Transparent Dispute Settlement

Any sound system of procurement regulation needs to have in place provisions for enforcing the public procurement law. This is important in order to discourage violation of the rules and to protect the rights of aggrieved bidders. As Trepte has pointed out an adequate review system and complaints procedures are important elements of a “transparent” procurement system.

Public procurement systems can provide for different review mechanisms, these can be either administrative and/or judicial (or both). International agreements and regulations on procurement tend to leave to government substantial discretion on how to organise their national review mechanisms. However, it is really important that whatever means is chosen, the system is effective and does not discriminate between foreign and national suppliers.

The following pages focus on the Tanzania’s review mechanisms.

First and foremost it needs to be said that the 2004 PPA establishes the Public Procurement Appeals Authority, as an organ of the Ministry of Finance. This institutional innovation complies with one of the major recommendations of the CPAR 2003. Its role is to “entertain appeals against tender boards, clarify the issues in dispute between the parties and shall endeavour to bring about agreement between the parties” (art 78) any supplier, contractor or consultant who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty.

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153 Data reported in the Tanzanian Procurement Journal (March Issue) and in Volume of Contracts Awarded by the Procuring Entities (PEs) in F/Y 2007/08 Available at [http://www.ppra.go.tz/reports/Volume%20of%20Contracts%20Awarded.pdf](http://www.ppra.go.tz/reports/Volume%20of%20Contracts%20Awarded.pdf)
imposed on a procuring entity or an approving authority may seek a review. The act provides for a broad deadline for bringing complaints, namely twenty-eight days of the supplier, contractor or consultant becoming aware of the circumstances giving rise to the complaint or when the supplier, contractor or consultant should have become aware of those circumstances. An important provision is art 79 (2) which states that the possibility to bring about a review complaint does not apply to “the selection of a method of procurement or in the case of services the choice of a selecting procedure; the limitation of procurement proceedings on the basis of nationality in accordance with section 49. If Tanzania were to agree on an international agreement on procurement these provision would need to be revised. Indeed, one of the core objective of an international/regional agreement would be forbidding discrimination, is such an act cannot be reviewed and challenged by suppliers the scope of the agreement would be undermined.

The first stage for the complaints is via Settlement of Complaints or disputes by procuring entities and approving authorities. Art 80-(1) Complaints or disputes between procuring entities and suppliers, contractors or consultants which arise in respect of procurement proceedings and awards of contracts and which cannot be resolved by mutual agreement shall be reviewed and decided upon a written decision by the Accounting Officer, Chief Executive of a Procuring Entity, unless the procurement has been reviewed and approved by an approving authority, in which case that approving authority shall review and decide on the dispute and give reasons for its decision in writing.

It is also interesting to note that after the procurement contract has entered into force “The head of a procuring entity or of the approving authority shall not entertain a complaint or dispute or continue to entertain a complaint or dispute.” (In this case, as we will see the complaint needs to be raised in front of the appeal authority Art 82).

The aggrieved bidder has the right to receive a motivated decision to his claim within 30 days, if he doesn’t receive an answer or if the matter is not solved in a satisfactory manner the aggrieved bidder can apply for administrative review to the Authority.

The second stage of a complaint proceeding is the Administrative Review. A supplier, contractor or consultant who is aggrieved by the decision of a procuring entity or an approving authority may refer the matter to the Authority for review and administrative decision. The tender may make a complaint to the Authority within fourteen working days from the date of communication of the decision by the Accounting Officer. The Authority shall within thirty days after the submission of the complaint or dispute deliver a written decision. It is interesting to note that the days passed so far could potentially be 102 (28+30+14+30). The decision of the Authority shall be final unless an action is commenced under section 82 of this Act.

Art 82 states that “(1) Complaints or disputes not amicably settled by the Authority shall be referred to the Public Procurement Appeals Authority. A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority - (a) if the complaint or dispute cannot be submitted or entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or dispute is submitted within fourteen days from the date when the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when that supplier, contractor or consultant should have become aware of those circumstances; ..... if the supplier, contractor or consultant claims
to be adversely affected by a decision of the head of the procuring entity or of the approving authority under section 81 provided that the complaint or dispute is submitted within fourteen days after the delivery of the decision. (4) The Public Procurement Appeals Authority may, unless it dismisses the complaint or dispute, recommend one or more of the following remedies: (a) declare the legal rules or principles that govern the subject matter; (b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure; (c) require the procuring entity that has acted or proceeded in an unlawful manner, or reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision; (d) annul in whole or in part an unlawful act or decision of the procuring entity or approving authority other than any act or decision bringing the procurement contract into force; (e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force; (f) require the payment of compensation for any reasonable costs incurred by the supplier, contractor or consultant submitting the complaint or dispute as a result of an unlawful act, decision or procedure followed by the procuring entity or approving authority; or (g) order that the procurement proceedings be terminated. (5) The Public Procurement Appeals Authority shall, within thirty days, issue a written decision concerning the complaint or dispute stating the reasons for the decision and the remedies granted, if any. (6) The decision of the Public Procurement Appeals Authority shall be final unless an action is commenced under section 85 of this Act. Potential days passed so far 146 (Days so far 28+30+14+30+14+30)

The procurement proceedings can be suspended for a period of seven days (art 84). Contracts already entered into force can also be suspended for 7 days. The suspensions above can be extended to 30 days. However, considering that 146 days might pass before a final decision, the length of this suspension seems not enough.

Contracts already entered into force cannot be annulled.

Finally the supplier can apply for Judicial Review (art 85)

2.3 Quality of the Transparency Mechanisms

This element is necessary for identifying whether the quality of the transparency is appropriate, i.e. whether the information available are sufficient and relevant, timely, whether there is equality of information which are ready accessible.

Many of the provisions of the regulation could help answer this question. For example, Art 15 on the information to be provided for the pre-qualifications of suppliers. This article is very detailed and numerous information are required to be released by the procurement entity. Art 19, on the record of procurement, this is also a very detailed provision and, it seems, also comprehensive. Art 81 dealing with many, detailed information on the content of the invitation to tender. Art 83 contains strict requirements on the content of the solicitation documents.

As regards the timeliness of information we can also say that the regulations are very satisfactory in on this point. For example, Art. 79, which talks about "timely and adequate notification," or as seen above Art 80 which states that tender notice should be published in sufficient time "so to allow equality of access to suppliers. Art 82 requiring that solicitations documents are sent "soon after response to the tender notice"
Art 84, on tender period, which requires “as required by the complexity of the procedure”, further detailed information on this point are also available in the third Schedule of the regulations.

In conclusions, it seems that the procurement Act and the Regulations leave little space to the procurement entity to act in a non-transparent manner. As regards implementation, and whether all these strict criteria are implemented in practice, only a field study would allow answering this question in a conclusive manner. As said above the 2009 PPRA’s report seem to be extremely positive on implementation even though the information there provided seem to be related more on quantity of Transparency than on quality of transparency. As said above, any review assessment should be conducted independently. Moreover, in order to give an appropriate assessment of the quality of the system it should involve the business community.

2.4 Benefits of opening up the procurement market to international and regional competition

Enhancing both the efficiency of the procurement process through targeted reforms and opening up procurement to foreign competition can bring significant advantages to governments. Benefits with international competition are not just linked to better choices for the goods and services to be purchased but also to the fact that international competition leads to internationalization of business community, better value goods and job creation. Studies on the effects of opening up procurement to international competition show that competitive procurement practices promote efficiency in public spending and help public authorities acquire cheaper, better quality goods and services at lower costs. A study by the European Commission (2004) suggests that the implementation of the EC procurement directives, where the principles of transparency and non-discrimination act as cornerstones, reduce prices by around 30%. Open, non-discriminatory and transparent procedures can also help boost the competitiveness of firms operating in public procurement markets (The Cecchini Report 1988). Trionfetti (2003) shows that two types of inefficiencies may arise as the consequence of discriminatory procurement: “inefficient production of government output and inefficient specialization of the country.” Evenett and Hoekman (2005) argue that fostering either domestic competition or transparency in state contracting tends to improve national welfare. They find no clear-cut effect on market access of ending discrimination or improving transparency.” The benefits will obviously depend also on the size of the procurement market. However, “when considering the size of contestable procurement in developing countries one has to take into account that a considerable part of procurement in ACP states is financed through aid which is often tied to the procurement of goods and services from the donor country (i.e., irrespective of the Government’s own policy, procurement is not open).” Whether aid is tied might influence the possibility to open up procurement to international and regional competition (see Part III on aid to Tanzania). Besides recipient countries might feel restrained from participating to an agreement considering that, if the aid is tied, they won’t be able to freely decide whether government expenditures can be open to international competition. This has consequences in terms of the scope of any agreement on procurement. This latter aspect is analysed in Part III, the following pages will analyse how the principle of non-discrimination is applied by Tanzania.

The following pages will investigate what is the current status of Tanzania procurement law as far as non-discrimination on the ground of nationality is concerned. The analysis will start with the eligibility criteria of PPA 2004 and the 2005 Regulations.

2.4.1 Eligibility criteria of the Tanzanian public procurement Act: the non-discrimination principle

As a general principle, the Tanzanian PPRA Act prohibits discrimination of bidders on the basis of their nationality. See for example Art 6 and 10 of the 2005 Regulations. However the act and the regulations also contain “provisions to set aside contracts not exceeding a certain value to local firms and granting a margin of preference to local firms when they compete with foreign firms in tendering.”

“Bidders are permitted to participate in the procurement proceedings without regard to their nationality, except in cases where procuring entity limits participation on account of exclusive preference for local firms as provided for in the Act or according to the provisions of any other written law.”

Hence, the general principle is one of non-discrimination between national and foreign suppliers. This principle would clearly comply with a system of modern procurement based on international competition. It also implies that there would not be many obstacles based on price preferences and non-discrimination were Tanzania to enter an international agreement on procurement. It is also positive to note that exceptions to this principle can only be set up by law, and so ad hoc discriminations are avoided.

The exceptions to the non-discrimination principle are laid down in Art 4(2) of the PPA N.21 of 2004 and Art 16, Arts 25-27 and schedule 4 of the 2005 Regulations.

Exceptions to non-discrimination principle:

Art 4(2) of the PPA N.21

Special rules (Art 4) apply in the eventuality of contracts awarded in the context of an international agreement and/or in the context of aid contracts which favours external beneficiary.

Art 4(2) of the PPA N.21 states “Where the procurement, in the context of Section 4(1) [i.e. procurement in the context of an international agreement and/or in the context of aid contracts] favours an external beneficiary, then (a) procurement made through contributions made by the United Republic shall be undertaken in the United Republic through national suppliers, contractors or consultants (b) all relevant insurances shall be placed with companies registered in the United Republic, (c) supplies shall be transported in carriers registered in the United Republic.”

154 Engineer R.S Milinga, What Engineers Need To Know About The Public procurement act N 21 of 2004 available at http://209.85.229.137/search?q=cache%3AcYXqdJGa8n8%3Awww.ppra.go.tz%2Fpapers%2FWhat%2520Engineers%2520Need%2520to%2520Know%2520About%2520Public%2520Procurement%2520Act%25202004.pdf+%Section+4+of+the+Public+Procurement+Ac+t+No.+21+of+2004&hl=en&gl=uk
Art 4(2) grants exclusive rights to participate to Tanzania’s funded projects to national contractors (i.e. set aside of contracts). However, such a provision only applies in the case of procurement in the context of an international agreement and/or in the context of aid contracts which *favours external beneficiary*. The act and the regulations do not specify what are these international contracts that “*favours external beneficiary*.” These provisions seem to refer to the case of tied aid, i.e. when donors grant aid on condition that goods and services will be purchased exclusively from their the donor country and/or provided by donors’ national suppliers. Hence, art 4(2) by requiring that Tanzanian money (in the context of an international agreement) are spent only in Tanzania seems aimed at offsetting the implementation of tied aid by donors.\(^{155}\)

However, limiting participation to procurement contracts to national suppliers only bears some risks and disadvantages (see above). The Tanzania authorities try to limit these possible drawbacks in Art 4(3) and 4(4) which provide.

(3) Where, for reasons of limitations of capacity, national suppliers, contractors or consultants are unable to satisfy wholly or in part, the specific procurement requirements, they shall be offered an preferential opportunity to participate in the procurement or disposal by tender process of the beneficiary entity (in conjunction with firms in that country) and where applicable to offer such requirements from third sources. (4) A derogation from the application of the subsection (1) and (2) may be applied for to the Authority by the competent agency responsible for the procurement or disposal in question, with supporting documentation and justification.

A criticism that can be raised to this provision is that the wording is very unclear especially for 4(3). It seems that the provisions converts set aside to price preferences, however if national suppliers have already been considered unqualified, wouldn’t it be better to open the process to international competition?

No other provisions granting preferential treatment to national suppliers are provided for in the 2004 Act itself. However, more detailed provisions on national preferences are provided for in the 2005 regulations, namely Art 16, Arts 25-27 and schedule 4 of the 2005 Regulations.

According to Art 16-(1) A supplier, a contractor, a service provider or an asset buyer is permitted to participate in procurement or disposal proceedings without regard to nationality, except in cases in which a procuring entity decides, on *grounds specified in these Regulations or according to provisions of law*, to limit participation in procurement or disposal proceedings on the basis of nationality.”(emphasis added)

This is an important provision because it requires preferences to national suppliers to be set by law. This is an important safeguards aimed at avoiding abuses to take place and complies with the Model law.

Another important provision is the fact that discrimination is allowed only in specific cases (those laid down in the Regulations and/or they need to be specified by law. this is important as

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\(^{155}\) We will see below that aid to Tanzania granted by DAC member is covered by the OECD Recommendation on untying aid and it is untied because Tanzania is an LDC however, the OECD Recommendation does not cover non-DAC member, for example China.
it avoids ad hoc decisions by the public authorities which could give leeway to discrimination motivated by concealed corruption.

It is also commendable to note that in order to avoid abuses by the procurement entity, art 16 at para. 2 requires that “A procuring entity that limits participation on the basis of nationality pursuant to sub-regulation (1) shall include in the record of the procurement or disposal proceedings a statement of the grounds and circumstances on which it relied.”

The rules on eligibility shall be disclosed in advance, suppliers need to be informed on whether national preferences will be granted according to the Regulations and once foreign suppliers have been communicated that the procedure is open to international competition the rules can no longer be modified (again provision aimed at improving transparency, avoiding corruption and prohibit ad hoc solutions). Indeed art 16(3) states “A procuring entity, when first soliciting the participation of suppliers, contractors, service providers or buyers in the procurement or disposal proceedings, shall declare to them that they may participate in the procurement or disposal proceedings as appropriate regardless of nationality, a declaration which may not later be altered but, if it decides to limit participation pursuant to sub-regulation (1), it shall so declare to them”

Art 25 of the Regulations provides for price preferences for national suppliers. It requires that “a procuring entity shall, when procuring goods, works, or services by means of international and national competitive tendering, grant a margin of preference for the benefit of tenderers for certain goods manufactured, mined, extracted or grown in the United Republic of Tanzania, or works by Tanzanian contractors provided that this is clearly stated in the tender documents.” (emphasis added).

The article continues by stating that “Suppliers contractors, service providers or buyers of assets who are citizens of Tanzania shall be eligible to be granted a margin of preference as provided for in subregulation (1) only if they meet the criteria given in section 49 of the Act, and are registered by the Authority pursuant to Regulation 27 or any other statutory body acceptable to the Authority.”

According to paragraphs 3, 4, 5 and 6 of Art 25, when foreign suppliers participate to tenders (for goods, services or works contracts) the maximum margin of price preference that can be granted are laid down the Fourth Schedule of these Regulations. This schedule provides for the following price preferences:

a) Margin of Preference for National and International competitive for domestic contractors and service providers

<table>
<thead>
<tr>
<th>Input of National firm in the association</th>
<th>Preference (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>20-40%</td>
<td>4</td>
</tr>
<tr>
<td>40-60%</td>
<td>6</td>
</tr>
<tr>
<td>60-80%</td>
<td>8</td>
</tr>
<tr>
<td>80-100%</td>
<td>10</td>
</tr>
</tbody>
</table>

(b) Margin of Preference for Goods mined or manufactured in Tanzania up to 15%
As said above many governments like to use procurement to boost national industries and local production. The fact that price preferences are granted rather than set aside is positive because, as said above, the costs of price preferences can be quantified. Would these preferences be an obstacle to an international agreement? Well, many agreements now do recognise that developing countries use procurement to boost national industries and that they are unwilling to give up this possibility. (see the case of South Africa for example). For example, Art 16 of the GPA allows developing countries to use offset to boost national industries and the revised version of the GPA agreed in 2006 takes account of the developing countries’ development needs and with a view to encouraging more developing countries to accede to the GPA. It clarifies the rules on special and differential treatment for these countries and seeks to encourage accession by “providing expressly for various transitional measures, such as price preferences — although these remain entirely subject to negotiations.”

Art 26 of the 2005 Regulations provides for set aside of contracts opportunities for national suppliers when the value of the procurement does not exceed a certain thresholds. It states:

“(1) Procurement of works or goods with a value not exceeding the values provided in the Fourth Schedule of these Regulations shall be reserved exclusively for local persons or firms who meet the requirements of Section 49 of the Act.” According to paragraph 2 of art 26 the exclusive preference will also be granted to joint ventures or associations between foreign and local contractors or service provider (The exclusive preference is applicable for National Firms and Association of National and Foreign firms in which the contribution of the national firm to the association is more than 75%).

According to the Fourth Schedule Project value below which Exclusive Preference will be applied is as follow:

<table>
<thead>
<tr>
<th>Procurement type</th>
<th>Value (Tshs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Works</td>
<td>1,000,000,000 (equivalent to $755574.83)</td>
</tr>
<tr>
<td>Goods</td>
<td>200,000,000 (equivalent to $151114.97)</td>
</tr>
<tr>
<td>Non-Consultant Services</td>
<td>250,000,000 (equivalent to $188893.71)</td>
</tr>
<tr>
<td>Disposal by tender</td>
<td>Not applicable</td>
</tr>
</tbody>
</table>

Given the fact that the possibility to set aside contracts for national suppliers is linked to thresholds it is important to ensure that rules on splitting up of contracts are in place. In this respect Art.49 of the 2005 Regulations provide that “49. (1) A procuring entity shall not divide its procurement into separate contracts for the purpose of avoiding international or national competitive tendering.” In order to disincentive procurement officials from splitting up contract the article also provides that the head of that procuring entity and such other officer shall be held personally responsible for the splitting up of contracts. However, there is an important exception to this principle, namely paragraph (3) which states “Notwithstanding provisions of sub-regulations (1) and (2), a procuring entity shall be allowed, with prior approval of the Authority, to split contracts to enable participation of local firms or persons.” If an international

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157 La Chimia and Arrowsmith, JIEL 2009 Committee on Government Procurement, Minutes of the Meeting Held on 6 February 2003, GPA/M/20, 8 May 2003, para 82
agreement were to be signed by Tanzania such a provision would have to be tighten and the requirement of non-splitting up of contracts should either become absolute or the reasons for granting such an exception should be clarified and agreed up by all the parties to the international procurement agreement. Related to the prohibition of splitting of contract is Art 45 of the PP Act on Procurement Planning which at paragraph (d) states that procurement entities should avoid splitting of procurement to defeat the use of appropriate procurement methods unless such splitting is to enable wider participation of local consultants, suppliers or contractors in which case the Authority shall determine such an undertaking; this latter measure seem to retreat, to many extent, from the principle of non-splitting up of contracts.

Would these provisions on set aside of contracts be compatible with international agreements? Well, many international agreements do not apply below certain thresholds, which would probably not be reached in this case (this would be the case surely for the GPA). However, tighter rules on splitting up of contracts would probably be necessary (especially in light of Art 45)

In order to avoid the risk that limiting participation to national suppliers affects the quality of the goods purchased Paragraph (3) of art 26 states “In applying exclusive preference to local contractors or service provider, the procuring entity shall have the responsibility of ensuring that selected persons or firms are capable of providing quality of works or services. (emphasis added)”

However, is this provision really sufficient to ensure that the procurement entities does not buy low quality goods? It only states “quality” goods but of what quality? The risk that the goods purchased are of a lower quality than those that would be purchased were the procurement to be open to international competition probably still exists and are inherent in any procurement that is exclusively limited to national suppliers. Furthermore, the risks are greater because preferences for national suppliers are granted through set aside of contracts. However it needs to be remembered that set aside are allowed only when the first paragraph of art 26 is met, namely for contracts with “a value not exceeding the values provided in the Fourth Schedule of these Regulations.”

Finally, Art 27 states that: when granting set aside and price preferences public authorities “shall make use of the Authority’s register of local contractors and service providers to determine whether a local contractors or service providers is qualified for margin of preference or exclusive preference.”

This author believes that an assessment should be conducted aimed at ascertaining whether these price preferences and set aside for national suppliers are effective.

2.4.2 Other trade-related measures

Other relevant provisions which might affect foreign suppliers’ participation are provisions related to qualification of suppliers, inscription in professional registries and/or meeting national standards. It is very important that these provisions are not constructed in such a way as to conceal barriers to trade. We have analysed these provisions above in the section dedicated to the analysis of qualifications and specifications.
However, some requirements specific to the country where the procurement takes place can instead be classified as “natural/inevitable” barriers to trade. These are related to differences intrinsic within the market and inherent in the nature itself of participating to procurement opportunities in a different country. For example the language might be a barrier to trade in a different country. However, some conditions are often expected and accepted to be different from country to country.

Language:

Tanzania is very favorable to foreign suppliers in this sense as Art 52 of the Procurement Act states “(1) Except as provided for in sub-section (2) of this section, pre-qualification documents and tender documents shall be written in English and tenders shall be invited in that language. (2) In case a procuring entity has limited participation in the procurement to Tanzania nationals in addition to sub-section (1) of section 22, tender documents may be written in either Kiswahili or English and tenders may be requested to tender in either language.”

Part III: DEVELOPMENT ISSUES

3.1 Sectoral Contribution to Tanzania’s GDP: issues to consider for supporting production through negotiations for an agreement on procurement

Table 1 below (extracted from the PPRA “Assessment of the Country’s procurement System Final Report” 2007) shows the sectoral Contribution in Tanzania’s GDP. As can be seen from the table, the Agriculture sector contributes substantially to the economic growth of the country. Hence any shock experienced therein will have significant repercussion on the overall GDP.

<table>
<thead>
<tr>
<th>S/No</th>
<th>Sector</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Agriculture</td>
<td>44.7</td>
</tr>
<tr>
<td>2</td>
<td>Manufactured products (Industry)</td>
<td>9.2</td>
</tr>
<tr>
<td>3</td>
<td>Trade Sector (wholesale, Retail Trade, Hotels and Tourism)</td>
<td>17.5</td>
</tr>
<tr>
<td>4</td>
<td>Construction Sector</td>
<td>5.8</td>
</tr>
<tr>
<td>5</td>
<td>Electricity and Water</td>
<td>1.4</td>
</tr>
<tr>
<td>6</td>
<td>Transport and Communication</td>
<td>5.4</td>
</tr>
<tr>
<td>7</td>
<td>Finance and Business</td>
<td>9.5</td>
</tr>
<tr>
<td>8</td>
<td>Public Administration and other Services</td>
<td>6.9</td>
</tr>
<tr>
<td>9</td>
<td>Mining</td>
<td>3.8</td>
</tr>
</tbody>
</table>


The above table allows advancing some preliminary considerations (albeit of limited scope given that this is not an economic analysis) as to what sectors of production in Tanzania could most benefit from an international agreement on procurement. The reader needs to bear in mind
that this is not an economic analysis and does not aim at giving an economic account of how an international agreement on procurement will affect the above production sectors. This analysis will instead highlight the issues linked to the factor of production that any current or future agreement entered by Tanzania might want to take into account to stimulate trade as per the above distribution of production in the different sectors in Tanzania. Policy options to enhance development and stimulate production according to the above table and the current state of international law will be proposed.

**Policy options:**

The above table shows that the agricultural sector is the most important sector of production in Tanzania; hence any agreement on procurement should be used to stimulate this sector and encourage local production.

Trade barriers in agriculture are still high worldwide and that agricultural products have been excluded from most international agreement on procurement. (For example GPA parties have excluded from the scope of the GPA goods related to food consumption (see for example EU annex 1). Food aid is also excluded from the OECD Recommendation on untying aid to LDCs and HIPC.) How then can the agricultural sector be stimulated by a procurement agreement? One possibility to consider could be to use negotiations on an international agreement on procurement to bargain concessions with donors to untie food aid projects. Tanzania could allow to open up its procurement market on condition that developed countries members to the international agreement agree to untie their food aid projects. If donors untied their food aid projects Tanzanian producers could participate to the tenders to supply the food aid goods financed by donors. As explained below food aid continues to be overwhelmingly tied.\(^{158}\) This despite the adoption of the OECD/DAC Recommendation to untying aid to LDCs, this is because food aid is not included in the Recommendation’s coverage. In the context of the GPA, La Chimia and Arrowsmith have suggested that inserting untying aid commitment in the GPA could be a way to stimulate developing countries’ participation in the GPA. A similar approach could be taken for any international agreement on procurement concluded between a developed and a developing country. In the specific case of Tanzania an agreement on procurement that includes untied aid commitment on food aid could be extremely beneficial since, as shown in the above table, the agricultural sector is strong in Tanzania. Hence, it is reasonable to assume that Tanzanian producers would be able to take advantage of procurement opportunities in the Agricultural sector and provide the aid goods.

Table 1 above also shows that the manufacturer product sector is still relatively small in Tanzania, could an international agreement on procurement be used to stimulate this sector? One possibility to explore could be to take advantage of knowledge transfer and joint ventures with foreign suppliers as a way to encourage and stimulate improvement in production. The possibility could be explored to use an international agreement on procurement to grant price preferences to joint venture of local and foreign suppliers in this specific sector. However, such a use of price preferences is often questioned, so the drawbacks of such an approach should be carefully considered (further analysis of price preferences has been provided above).

\(^{158}\) E. Clay, the effects of untying food aid, OECD publications
3.2 Bilateral aid to Tanzania

The analysis of data on the level of aid grated to Tanzania helps understanding the importance that sound procurement practices have for the success of development policies and for fostering aid effectiveness. Thus, form a development perspective such an analysis is very important. Further, such an analysis also helps understanding the actual impact that aid policies could have on regional and international agreement aimed at liberalizing Tanzania’s procurement market to regional and international competition.

An overwhelming proportion of aid is delivered through the public contracting process, hence the relationship between procurement and aid is vital to understand the development progresses and the institutional/economic context of a country recipient of aid such as Tanzania. Low-income developing countries “tend to have a sizeable proportion (10-20% is not uncommon) of their non-defence government budgets funded by aid, loans, or grants.” Data on the level of aid disbursed help understanding the influence aid has on public procurement. At the same time sound procurement practices have an enormous impact on the delivery of aid projects and in the spending of aid money. Indeed sound procurement practices are necessary to ensure sustainable development and social and economic objectives. Thus the relationship between procurement and aid is reciprocal, namely aid influences procurement because aid finances public expenditures and procurement influences the success of aid policies because sound procurement practices help enhance aid effectiveness. Procurement is indeed recognised as a “strategic aid management function and central to aid effectiveness.”

In 2007 Tanzania received total NET ODA for 2810.8 (Million USD, this includes bilateral and multilateral aid). It received 1830.7 (Million USD) as bilateral aid by OECD/DAC member countries and 972.6 (million USD) by multilateral institutions (including the EC). A breakdown of the latest published data for bilateral NET ODA reveals that Japan has been the most generous bilateral donor in 2007 followed by the UK and the USA. (Data extracted from OECD Geographical distribution of aid.)

Donors exercise a very active presence in Tanzania. Procurement notices advertised in the Tanzania procurement journal specify who is financing the procurement contracts and often it is mentioned that the contract is sponsored by development partners, when aid is granted bilaterally the specific donor is mentioned.

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159 Ibid DAC Guidelines and Reference Series Harmonising Donor Practices for Effective Aid Delivery
161 Ibid DAC Guidelines and Reference Series Harmonising Donor Practices for Effective Aid Delivery
162 DAC Guidelines and Reference Series Harmonising Donor Practices for Effective Aid Delivery Volume 3: STRENGTHENING PROCUREMENT CAPACITIES IN DEVELOPING COUNTRIES
163 Japan high level of ODA could be due to debt forgiveness which also counts as ODA. in 2007 Japan recorded a total level of 1 601 (USD Million) granted as debt relief to HIPC
Table 2 provides data on ODA donated to Tanzania by DAC COUNTRIES (expressed in USD Million)

<table>
<thead>
<tr>
<th>Country</th>
<th>ODA (USD Million)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>2.6</td>
</tr>
<tr>
<td>Austria</td>
<td>1.5</td>
</tr>
<tr>
<td>Belgium</td>
<td>13.8</td>
</tr>
<tr>
<td>Canada</td>
<td>56.7</td>
</tr>
<tr>
<td>Denmark</td>
<td>90.1</td>
</tr>
<tr>
<td>Finland</td>
<td>36.7</td>
</tr>
<tr>
<td>France</td>
<td>3.0</td>
</tr>
<tr>
<td>Germany</td>
<td>65.0</td>
</tr>
<tr>
<td>Greece</td>
<td>0.7</td>
</tr>
<tr>
<td>Ireland</td>
<td>52.1</td>
</tr>
<tr>
<td>Italy</td>
<td>4.3</td>
</tr>
<tr>
<td>Japan</td>
<td>721.7</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>0.7</td>
</tr>
<tr>
<td>Netherlands</td>
<td>128.2</td>
</tr>
<tr>
<td>New Zealand</td>
<td>1.1</td>
</tr>
<tr>
<td>Norway</td>
<td>114.3</td>
</tr>
<tr>
<td>Portugal</td>
<td>-</td>
</tr>
<tr>
<td>Spain</td>
<td>8.0</td>
</tr>
<tr>
<td>Sweden</td>
<td>107.8</td>
</tr>
<tr>
<td>Switzerland</td>
<td>24.0</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>231.8</td>
</tr>
<tr>
<td>United States</td>
<td>166.9</td>
</tr>
</tbody>
</table>

Data extracted from OECD Geographical distribution of aid

Most bilateral aid was disbursed for the Social Infrastructure & Services sector, in 2007 this amounted to 673.1 (Million USD)

The EU is also a generous donor. In 2007 the EC alone granted to Tanzania 187.1 (million USD), the EC and its Member States taken together granted 930.5 (million USD). (All data on aid distributions have been extracted from OECD, Geographical Distribution of Financial Flows to Developing Countries Disbursements, Commitments, Country Indicators 2003-2007).

An analysis conducted by this author on the allocation of EU aid to Tanzania (i.e. a study on the nationality of suppliers who have been awarded EU aid contracts) reveals the following: EU aid classified as “contracts” see a significant successful rate of Tanzanian suppliers (or at least suppliers based in Tanzania) indeed the highest percentage of EU aid contracts 164 (56.25%) are awarded to suppliers located in Tanzania (see Graphic 1 and table 2). The situation is instead different as regard EU aid classified as “grants” (see Graphic 2 and table 3).

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164 EU Data on aid contracts excludes aid classified as “grants” in the very peculiar EU aid terminology.
Table 2: allocation by nationality of awarded EU aid contracts to Tanzania. Please note the EU data do not distinguish between contracts financed out of EDF fund and contracts financed out of Community budget. However, since Tanzania is an ACP it is reasonable to assume that the EU published data on the award of EC aid contracts refer to EDF funded projects.

<table>
<thead>
<tr>
<th>Country</th>
<th>Percentage</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tanzania</td>
<td>56.25%</td>
<td>9</td>
</tr>
<tr>
<td>UK</td>
<td>18.75%</td>
<td>3</td>
</tr>
<tr>
<td>Belgium</td>
<td>12.50%</td>
<td>2</td>
</tr>
<tr>
<td>Spain</td>
<td>6.25%</td>
<td>1</td>
</tr>
<tr>
<td>Denmark</td>
<td>6.25%</td>
<td>1</td>
</tr>
</tbody>
</table>

A total of 16 aid “contracts” to be performed in Tanzania were allocated in 2007 by the UE.

This analysis, although limited in scope because it only includes contracts awarded in 2007 and aid granted by one donor only (namely the EU), is nonetheless important because it reveals that in 2007 Tanzania industries were competitive in the international market (at least in those sectors where EU aid was awarded.) Indeed participation to aid contracts was open to international competition as the EU has adopted the OECD Recommendation on untying aid to LDC.
3.2.2 The Millennium Challenge Account

The Millennium Challenge Account has been defined as one of the most significant aid projects currently implemented by USAID in developing countries. The MCA is a component of the US approach to development and it is administered by the Millennium Challenge Corporation (MCC).

The Millennium Challenge Corporation (MCC) is a new and independent US foreign development agency. The Millennium Challenge Corporation (MCC) donates grants to recipient countries who have adopted programs to reduce poverty and promote sustainable economic growth. Beneficiary countries need to demonstrate to have out in place sound development policies and programs before being able to qualify for the grant. A fundamental role is played by the state of the procurement system. Only countries that have undergone sound procurement reforms and implement sound procurement practices can be eligible for MCC programs.

Aid projects financed by MCC are divided into Compacts and Threshold programs. The former are the biggest and most prestigious form of aid granted by MCC.

Compacts are large, five-year grants for countries that pass the Compacts allocation requirements. So far only 19 countries have been awarded Compacts contracts. Tanzania is one of these countries. (Some other 19 countries have instead been awarded the other form of grants, namely the Threshold programs which are smaller grants awarded to countries that come close to passing the MCC’s criteria and are firmly committed to improving their policy performance.)

MCC proudly states on its website that the “MCC is a prime example of smart U.S. Government assistance in action, benefitting both developing countries and U.S. taxpayers.” Beneficiary countries are selected and funds are allocated following rigorous procedures. For a country to be selected as eligible for an MCC assistance program, it must demonstrate a “commitment to policies that promote political and economic freedom, investments in education and health, the sustainable use of natural resources, control of corruption, and respect for civil liberties and the rule of law, as measured by 17 different policy indicators.”

Three major components are essential for the success of MCC, namely:

- **“Competitive selection:** Before a country can become eligible to receive assistance, MCC’s Board examines its performance on 17 independent and transparent policy indicators and selects compact-eligible countries based on policy performance.
- **Country-led solutions:** MCC requires selected countries to identify their priorities for achieving sustainable economic growth and poverty reduction. Countries develop their MCC proposals in broad consultation within their society. MCC teams then work in close partnership to help countries refine a program.
- **Country-led implementation:** MCC administers the Millennium Challenge Account (MCA). When a country is awarded a compact, it sets up its own local MCA accountable entity to manage and oversee all aspects of implementation. Monitoring of funds is rigorous and transparent, often through independent fiscal agents.”

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Tanzanian is beneficiary of one of these grants, confirming the positive relationship in Tanzania between procurement and development and the perception that Tanzania is well underway in the process of a sound procurement system. This project is also a testament to the importance of donors’ influence in the country in the public procurement sector. The major aim of the project is to eradicate corruption in public procurement.

The Tanzanian MCA project started in February 2008 and will last for five years. The total amount of the five-year grant that Tanzania will receive is over $698 million. The main scope of the grant is to enhance economic growth by increasing “household incomes through targeted investments in transportation, energy, and water.”

Projects financed under the compact are dealt with by MCA-Tanzania which is an autonomous government entity established under the law of Tanzania.

All projects financed so far in Tanzania are well underway, the most up-to-date information on implementation progress, are found in the Quarterly Implementation Status Report. Recent published data show that $2,955,434 have been disbursed to date, over a total of $26,810,330 contract commitments, the report is available at http://www.mcc.gov/mcc/bm.doc/qsr-imp-tanzania.pdf

According to the MCA program contracts for Goods, Works, Non-Consulting Services and Services financed under the program will be implemented according to the principles, rules and procedures set out in the MCC Program Procurement Guidelines (Current edition). Procurements are generally open to all bidders from eligible source countries as defined in the MCC Program. It needs to be remembered that Tanzania is a LDC and the US has committed to implement the OECD Recommendation on untying aid, hence project that fall within the Recommendation category are supposed to be untied and open for participation to all suppliers. However, most of the projects of the MCA fall within the agricultural sector which is excluded from the OECD Recommendation. Procurement Guidelines, can be downloaded at http://www.mcc.gov/procurement/partnercountries/guidancepapers.php

3.2.2.1 Main Procurement principles under MCC (according to the guidelines)

As regards the procurement rules and principles applicable to contracts to be awarded under the MCA, the compact for Tanzania states:

“Under the exception set forth in Section 4 of the Public Procurement Act No. 21 of 2004, the Government shall ensure that the procurement of all goods, works and services by the Government or any Provider in furtherance of this Compact will be consistent with and conducted in accordance with the procurement guidelines notified by the MCC to the Government in writing or by posting on the MCC Website, or otherwise made publicly available (“MCC Program Procurement Guidelines.”

A detailed analysis of these guidelines is not here possible and would not be pertinent with the ToR, however, it is interesting to focus briefly on the eligibility criteria for participating to contracts award opportunities. These criteria can be found in Art 1 of the Guidelines. Art 1 establishes that “The MCA Entity is responsible for implementing the Projects, and therefore for
selecting the contractors and suppliers, and awarding and subsequently administering the contracts”. As regards nationality of suppliers the eligibility criteria are as follows:

Eligibility: Art. 1.(7) states that in order to foster competition “MCC permits firms and individuals from almost all countries to offer goods, works, and non-consultant services for MCC-funded Projects.” There are however some exceptions to this principle. Amongst the exceptions to this rule Art. 1.9 states the foregoing:

“(a) Firms of a country or goods manufactured in a country may be excluded if, (i) as a matter of law or official regulation, the country of the MCA Entity prohibits commercial relations with that country, provided that MCC is satisfied that such exclusion does not preclude effective competition for the supply of goods, works or non-consultant services required, or (ii) by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, the country of the MCA Entity prohibits any import of goods from, or payments to, a particular country, person, or entity. A firm declared ineligible by The World Bank for any reasons including in accordance with The World Bank Group anti-corruption policies, shall be ineligible to be awarded an MCC-funded contract during the period of time that the firm is sanctioned by The World Bank. In addition, any person or entity that has been blacklisted by The World Bank or debarred or suspended from participation in procurements funded by the United States Federal Government or otherwise prohibited by applicable United States law or executive order or United States policies including under any then-existing anti-terrorist policies shall be excluded from procurements awarded under the Compact.”

One question that can be raised is what happens if there are clashes with the procurement rules laid down in the Tanzanian PPA?

As already stated in the Compact, Art 4 of the PPA applies. According to Art 4 of the Tanzanian PPA 2004, if there is any contradiction between the Tanzanian procurement rules and any international agreement, the international rules prevail. Specifically, Art. 4 states: “1) To the extent that this Act conflicts with an obligation of the United Republic under or arising out of - (a) any treaty or other form of agreement to which the United Republic is a party with one or more other states or political sub-divisions of such states; or (b) any grant agreement entered into by the United Republic with an inter-governmental or international financing institution in which the United Republic is the beneficiary, The requirement of such treaty or agreement shall prevail, but in all other respects, the procurement shall be governed by this Act.”

Bidding challenge system under MCC financed project:

Another interesting aspect of the MCC Compact project is that in order to fulfill the Compact contract requirements the MCA-Tanzania has established a Bid Challenge System with specific rules in order to address bidders’ complaints and to review “alleged inappropriate acts and decision taken by MCA-Tanzania.” There are two level of review. A first level dealt with by the Review Panel and a second level dealt with by the Independent Appeal Board, this body conducts the second and final review of claims. The specific rules for bringing claims and composition of these bodies are available at http://mca-t.go.tz

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166 MCA-Tanzania Bid Challenge System 2008, p. 4
Thus, in addition to the specific rules and procedures that apply to the procurement process for projects sponsored by MCC, specific set of rules and procedure also apply to the challenge and review system.

One must wonder what the costs for the Tanzanian government are of having a different set of procurement rules and challenges procedures for aid-funded projects by MCC. This is especially so if considering that Tanzania is undergoing important reforms of its own procurement system. Why Tanzania rules were not considered adequate to govern MCC projects. Why Tanzania could not use its own rules and procedures when implemented MCC projects? These questions seem pertinent considering that Tanzania’s procurement reforms lead to the approval of the compact contract for Tanzania. Indeed, when deciding to grant the compact contracts the MCC regarded Tanzania’s rules to meet the MCC criteria of “sound reforms”. So if these reforms were good enough to approve the Compact contract why then they were not good enough to be implemented for contracts funded by the MCC? How many set of procedures, rules, challenge system does a country need to have? What are the costs incurred by a recipient country because of the multiplicity of rules that it need to apply in order to fulfill donors’ requirements? These questions should be investigated and donors should try to be coherent to the principles of ownership and partnership by letting the beneficiary county use its own procurement rules, especially when it just underwent important procurement reforms.

3.3 Reflection and analysis on aid granted to Tanzania: the impact on development issues and the possibility to liberalize the procurement market

The reason for introducing a detailed account of bilateral aid donated to Tanzania is related to the question of whether the distribution of bilateral aid could affect the signing up of a procurement agreement.

ODA received by Tanzania is covered, for the most part, by the OECD Recommendation on untying aid to LDCs. Although, the Recommendation does not cover food aid and technical cooperation, aid to Tanzania can be considered overwhelmingly untied. When aid is untied, goods and services for the aid financed projects can be purchased freely from the suppliers that offer the best value goods and there are no ties and limits as regards the origin of the goods to be purchased and the nationality of the suppliers participating to the procurement process. When the aid is tied instead goods and services for the aid financed project have to be purchased from the donor country only.

Would an agreement on procurement between Tanzania and a limited group of countries providing for NT and MFN obligations affect the disbursement of donors’ aid to Tanzania and/or the capacity of Tanzania to accept non-member donors’ aid? Currently aid to Tanzania is untied and donors money (with the exclusion of food aid) can be spent anywhere, hence there would be no breach of MFN obligations (as instead there would be if Tanzania were to grant preference to donor’s goods and the donor was not a party to the international agreement.)

given that current aid to Tanzania is already untied and all OECD/DAC countries have already accepted that their aid money can be spent to purchasing goods and services from any country, no agreement on procurement should affect the Tanzania’s capacity to accept aid by donors
non-member to the agreement. The only obstacle would be presented by new donors such as China who might grant tied aid.

Such problem could be avoided by inserting a clause in any procurement agreement excluding development aid contracts from the agreement coverage.

Have Tanzanian industries good chances of winning procurement contracts when procurement is open to international competition?

This author has been trying to get data on the award of Tanzania procurement contracts, and specifically on the nationality of suppliers winning public contracts. Unfortunately however, it has been impossible to collect such data because they are not available on the PPRA website and/or in the procurement journal. One recommendation for the future would be to exhort Tanzania to provide full data on contract awards, including information on nationality of contractors being awarded the tender. As already said above information on contract awards should be as comprehensive as possible.

However, as shown above, this author did manage to collect data on the award of EC aid contracts granted to Tanzania in 2007 –see above table 1- and because those contracts referred to untied aid and hence were open to international competition they could be here used to make some comparisons.

As seen above data collected by this author in relation to EC aid to Tanzania show that Tanzanian suppliers (or suppliers based in Tanzania) have been very successful in winning aid contracts in 2007. However, the data need to be accepted with extreme caution because they are limited to one donor only, namely the EC, to contracts awarded in 2007 only and to the study of one particular form of aid only, namely contracts aid. The data are not aimed at suggesting any conclusive assumption on the strength of Tanzanian suppliers. Nonetheless they are interesting as they show that Tanzania suppliers have been successful and have won 56% of EC aid contracts in 2007 and they are encouraging, especially if considering that “one of developing countries’ major concerns for reaching an agreement on procurement is related to market access (Khor), in particular the perception that they are unlikely to derive any benefit from EU procurement while exposing their own firms to competition from the EU.”

Further qualitative and quantitative studies should be conducted assessing contract awards made both by procurement entities in Tanzania when tenders are open to international competition and by donors when they grant untied aid to Tanzania.

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Appendix 1 to Annex 4

Bibliography


E. Clay, the effects of untying food aid, OECD publications

DAC Guidelines and Reference Series Harmonising Donor Practices for Effective Aid Delivery Volume 3: Strengthening Procurement Capacities In Developing Countries

Evenett S. J., Can Developing Countries Benefit from Negotiations on Transparency in Government Procurement in the Doha Round?


Rod Falvey, Annamaria La Chimia, Oliver Morrissey and Evious Zgovu, Competition Policy and Public Procurement in Developing Countries, credit 08/07

Government of Tanzania, Tanzania development vision 2025


Linarelli, “public procurement in times of war and catastrophes: Iraq and other cases”, paper presented at the conference *Global Revolution III*;


Andrew McKay, Chris Milner and Oliver Morrissey, “The Trade and Welfare Effects of a Regional Economic Partnership Agreement” credit research paper 00/08

Mlinga R.S, Chief Executive Officer *Public Procurement Regulatory Authority* WHAT ENGINEERS NEED TO KNOW ABOUT THE PUBLIC PROCUREMENT ACT NO. 21 OF 2004


OECD, Geographical Distribution of Financial Flows to Developing Countries Disbursements, Commitments, Country Indicators 2003-2007


UN-OHRLLS, information on Tanzania


132
Volume of Contracts Awarded by the Procuring Entities (PEs) in F/Y 2007/08 Available at http://www.ppra.go.tz/reports/Volume%20of%20Contract%20Awarded.pdf
