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Trade Effects of Rules on Procurement for Commonwealth ACP Members

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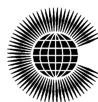

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Abbreviations and acronyms

ACP	African, Caribbean and Pacific
ADF	African Development Fund
AGP	Agreement on Government Procurement
APEC	Asia-Pacific Economic Cooperation
BIS	Baseline Indicator System
BMPIU	Budget Monitoring and Procurement Implementation Unit (Nigeria)
CARICOM	Caribbean Community
CET	Common External Tariff
COMESA	Common Market for Eastern and Southern Africa
CPAR	Country Procurement Assessment Report
CQS	Selection based on consultants' qualification
CSME	CARICOM Single Market and Economy
DAC	Development Assistance Committee
EAC	East African Community
EAR	European Agency for Reconstruction
EBA	Everything but Arms
EBRD	European Bank for Reconstruction and Development
EEC	European Economic Community
EFCC	Economic and Financial Crimes Commission (Nigeria)
EFTA	European Free Trade Area
EPA	Economic partnership agreement
EU	European Union
FBS	Selection under fixed budget
FIC	Forum island country
FTA	Free trade agreement
FYR	Former Republic of Yugoslavia
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GFR	General financial rules
GSP	Generalised system of preferences
HIPC	Heavily indebted poor country
HIF	Health Insurance Fund (Serbia)
ICPC	Independent Corrupt Practices and Other Related Offences Commission (Nigeria)
IDA	International Development Association
IMF	International Monetary Fund
ITO	International Trade Organization
LCS	Lowest-cost selection
LDCs	Least developed countries

MCA	Millennium Challenge Account
MCC	Millennium Challenge Corporation
MFN	Most favoured nation
MSG	Melanesian Spearhead Group
NAFTA	North American Free Trade Agreement
NEITI	Nigeria Extractive Industries Transparency Initiative
OECD	Organisation for Economic Co-operation and Development
OECS	Organisation of Eastern Caribbean States
ODA	Official development assistance
OPR	Operational Procurement Review
PACER	Pacific Agreement on Closer Economic Relations
PE	Procurement entity
PFMRP	Public Financial Management Reform Programme
PICTA	Pacific Island Countries Trade Agreement
PIF	Pacific Islands Forum
PMU	Procurement Management Unit (Tanzania)
PPA	Public Procurement Act (Tanzania)
PPAA	Public Procurement Appeals Authority (Tanzania)
PPRA	Public Procurement Regulatory Authority (Tanzania)
PPS	Pharmaceutical Procurement Service (OECS)
PSF	Pharmaciens Sans Frontières
QBS	Quality based selection
QCBS	Quality and cost-based selection
REPA	Regional economic partnership agreement
RFQ	Request for quotation
RTA	Regional trade agreement
SADC	Southern African Development Community
SBDs	Standard bidding documents
SDR	Special drawing right
SFB	Selection under fixed budget
SME	Small and medium-sized enterprise
SNA	System of National Accounts
SPARTECA	South Pacific Regional Trade and Economic Co-operation Agreement
TGP	Transparency in government procurement
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
WTO	World Trade Organization

Summary

The overall objective of this analysis is to assess the potential trade effects of rules on procurement policies on Commonwealth African, Caribbean and Pacific (ACP) group members. The main aim is to facilitate the understanding of Commonwealth ACP members about the effects on their economies of negotiating rules on government procurement policies in regional and international trade agreements and to determine strategies that will best advance their development interests in these forums.

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, the 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 because a transparent domestic procurement system is seen as a precondition of membership of a regional or international organisation, which then imposes market access conditions, and discussions relating to membership of such an organisation 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 the relevant literature that the benefits of a sound domestic procurement system (in other words, a 'transparent' procurement system) arise independently of any market access conditions imposed by or granted to bidders from third countries. There 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 make-up 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, the report also seeks 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 attempts 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 (or regional) trade will provide increased social benefits to the members of the different groupings. To achieve those benefits, national objectives need, to whatever extent is possible, to be limited, so that they do not create or maintain obstacles to the achievement of freer trade.

The report explains that under such systems 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 and national heritage. However, it is recognised that governments are content to subscribe to such systems not only because they seek to develop their own domestic markets through competitive forces, but also because they see advantages for their own suppliers in having access to the markets of third countries. They see access as a means of maximising their comparative advantage. The report points out that it is not only developing countries that benefit from exceptions to the World Trade Organization's (WTO) 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, the report also considers 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. The report considers the economic literature describing the use of such preferences and concludes that there is some doubt as to the efficacy of domestic preferences and that they have no effect on trade, i.e. they do not reduce imports or increase domestic prices, 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; if they are carried out properly, they could 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 world markets. This 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 the costs for the country applying them and for international trade remain certain.

Following this preliminary clarification, the report turns to the issue of transparency. 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. The mechanisms are: publication of the legal framework; publication of procurement opportunities; procedural transparency; transparency of contract awards; and transparent dispute settlement. We then consider the benefits of improved transparency in government procurement (TGP) and the costs of improving it. 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 it has been impossible to verify the findings on site or with the authorities of the countries in question, this is not a definitive assessment. The reports do, however, enable us to draw some general conclusions.

The report starts 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 is to highlight the existence of inefficient firms. If companies (bidders) do not produce efficiently and cannot match the prices of their competitors (i.e. they offer higher prices than the prevailing market prices), then they will 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 that it will force competing domestic industries to close. The choice facing the government is the same: to protect inefficient domestic industry and pay too much or to 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 about 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 can be used to rein in the corrupt, incompetent or careless procurement agent and ensure that they conduct the procurement function in the interests of the government.

We also consider the benefits and costs of transparency. The difficulty in obtaining hard empirical evidence of cost savings is due mainly to problems in obtaining accurate and reliable data. We rely on studies carried out in the European Union (EU) by the World Bank and the Organisation for Economic Co-operation and Development (OECD). These suggest that overall saving are in the order of 30 per cent, 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. 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 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 Agreement on Government Procurement (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 allows us to investigate the potential trade effects and possible policy decisions.

In particular, we consider the central debate over the definition of government (federal, central or sub-central), which related to the concern of negotiators to ensure that any agreement will bring trade advantages to all the signatories and that these advantages will 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 covered. The higher the threshold, the fewer contracts and entities would be involved, and this could well affect the net value of the 'contribution' of the different parties. Developing countries involved in 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 highlights the tensions between the various parties and also explains the specific characteristics of the current GPA. It demonstrates very clearly the limitations placed on the GPA that result from the contracting parties' desire not to create a model international procurement system, but to extract 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 most favoured nation (MFN) and national treatment, 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 leads 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 precondition 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 of introducing TGP or improving current procurement systems are invariably linked to the savings to be made based on the size of the procurement market involved, but there is 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, 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 expenditure financed through development assistance funds that are tied to sourcing goods and services from the donor country is also a contributing factor.

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 country circumstances, although research and the existing literature 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 domestic industry and that of foreign competition. In the first place, this requires an assessment of the strengths of the domestic industry, since reciprocal market access will, 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. In any event, such a system is a prerequisite for membership of such organisations.

The first option, or rather opportunity, given to negotiating parties is therefore to bring their domestic systems up to an acceptable level. 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 effects 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 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 for the reasons stated above the GPA has been used as the primary example. In respect of developing countries, the GPA currently contains some specific provisions which will assist them in negotiating preferential access to the agreement. For example, the GPA contains 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. Other concessions will be made for 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.

Introduction

One of the challenges facing those who are 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 the report is to assist the negotiating parties. They need to understand fully the benefits and costs of 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. There are two separate issues here: 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 precondition of 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.[1] Market access cannot be assured in the absence of a sound domestic procurement system in 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 prerequisite, 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 will 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 to the markets of the other members. This condition of market access comes after and in addition to 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 make-up 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 concerning 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 they themselves will also be able to compete in the procurement markets of those 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; 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 is 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. While 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 having sufficient knowledge of the economy in question.

This report is therefore divided into five parts, which 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 the report is intended as a tool for a variety of readers in the ACP countries, some of whom will be involved in the negotiating process, an attempt is made to be as comprehensive as possible, making appropriate reference to the relevant literature, while avoiding as far as 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 use terms differently. 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. The following terms are used in this report.

1.1 Transparency

The word 'transparency' is widely misused, but it is mostly used as a shortcut to refer to a transparent domestic legal framework for procurement. In this case 'transparent' implies that something is 'good' or 'acceptable'. It is frequently used in the expression 'transparent government procurement' (TGP). As a word, it simply means that something it 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,[2] 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,[3] but the execution of that policy (i.e. the purchases) is carried out by the bureaucracy (civil service), operating as agents of the government.[4] From that perspective, the actions of the agent may be invisible (opaque) since, unless there is any mechanism to hold the procurement agent accountable, their 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.[5]

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 else.[6] Transparency is used as a means of controlling the procurement agent so that the principal can monitor[7] 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 they need to conduct the search. In this respect, the agent can use (and the government can make sure they use) advertising as a means of collecting (and recording) price and product information allowing them to make the best purchasing decision, untainted by their 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 them, i.e. competition forces bidders to offer their best prices[8] 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 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 forums. The WTO has, since the Singapore Ministerial Declaration of 1996, been seeking to negotiate an agreement on 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 Asia-Pacific Economic Cooperation (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.[9]

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 international context. The core transparency tools envis-

aged 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 the legal framework; publication of procurement opportunities; procedural transparency; transparency of contract awards; and 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. These will be used to measure the degree of transparency achieved in the focus countries – Dominica, Nigeria, Samoa and Tanzania.

We 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 its 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 with the operation of the theory of comparative advantage (section 1.5).

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, 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.[10] It is extremely rare to see a national system which excludes foreign bidders or competition.[11]

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 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*[12] not need it. Where there is a domestic supply base, some countries may prefer domestic suppliers rather than 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.[13] In most cases, however, the mechanism used in the procurement context[14] 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 situations where there is both domestic and international supply. This becomes an issue of market access involving the removal of obstacles with a view to creating equal access opportunities for 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).

1.3 Market access

Woolcock[15] makes a distinction between framework rules, which we define here generally as transparency rules or TGP, and liberalisation. By liberalisation he means the bilateral and multilateral commitments made by the members of a trade agreement involving procurement and based on reciprocity. He also recognises, however, that improved transparency is 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 prefer the term 'market access', where Woolcock uses '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 GPA and which are reflected in the annexes to the GPA. While 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 prerequisite for membership of an economic organisation dealing with procurement. Where it is not satisfactory, it must be improved. This can 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, and 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[16] 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 obtain access to each other's procurement markets.

1.4 Domestic preference

We have already indicated that foreign competition will exist in all countries to a greater or lesser degree. Where 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;[17] 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.

While it is frequent to see such preference measures, experience shows that govern-

ments 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 or larger numbers of contracts awarded to local suppliers and fewer to foreign suppliers, but little thought is given to any consequential 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 USA 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 have them, whether explicitly or not. The Tanzanian preference, discussed below in the context of financial 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 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 (a legitimate objective), any domestic preference would need to attach to the product[18] 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 set out 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 re-enforced 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.[19] In this context, we will discuss only price preferences, 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 USA maintains the infamous set-aside for minority-owned companies. South Africa also uses set-asides to provide a preference for companies owned by people disadvantaged by the previous apartheid regime. As mentioned above, Tanzania also employs set-asides as a 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 used extensively in the context of public procurement; 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 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[20] 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.[21] 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.[22] To operate optimally, however, such price preferences would have to apply on an industry by industry (or product by product[23]) 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.[24]

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. While 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.[25] 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.

It has been suggested[26] that price preferences may, paradoxically, serve to achieve one of the goals of procurement regulation, i.e. to reduce the price to the government. While 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 firm's 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.[27] 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 the domestic price unaffected 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 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, it will pay a higher price than if it had been willing to buy products supplied as imports from foreign producers.[28] 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.[29] 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 practical 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 where they 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 and inefficiency replaces competitiveness, with potentially devastating effects for economic progress and development.

The precise effects of price preferences are difficult to assess. What can 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 unequivocally assist domestic industry.[30] 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.

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 and political initiatives. But this interdependence brings vulnerability as well as advantage. Whilst cross-border transactions become easier to 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.[31] In such circumstances, the task of governments is, where possible, to manage the 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 of this is the WTO. 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 EU is a good example, although there are many others: the European Free Trade Area (EFTA), the North American Free Trade Agreement (NAFTA), the Asia-Pacific Economic Cooperation Forum, all of which exhibit similar intentions, subject to the degree of integration envisaged.

The benefits to be expected from international trade and, therefore, those to be maximised and managed by all governments affected by it are based on the theory of comparative advantage first espoused by the economist David Ricardo.[32] 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 would lead to a single equilibrium price which would pertain when the quantity demanded equalled the quantity supplied. All attempts at creating free trade systems (at whatever degree of integration) are based on the theory of comparative advantage.

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 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 co-operative efforts exhibit a number of similar characteristics. The rules which they adopt reflect the belief that free international (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 so 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 extraterritorial effect on other states. Where states voluntarily adhere to some form of co-operative 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 retain national policies which are designed to protect matters which fall mainly within the ambit of the exercise of national sovereignty, such as national security, public health and national heritage; 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 maximising their comparative advantage. That membership of such a system implies reciprocal access merely indicates the belief that their own domestic markets are sufficiently strong to withstand such competition.

It is not only developing countries 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 transparent government procurement 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 1.1 above: publication of the legal framework; publication of procurement opportunities; procedural transparency; transparency of contract awards; and 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. Any 'preferred' solutions will be derived from the OECD/Development Assistance Committee (DAC) baseline indicators.[33] 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.[34] 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 the legal framework

(a) Benchmarks

This is a question of ensuring that the legal and regulatory framework is known. This includes any laws,[35] regulations (and implementing regulations or procedures), directives, administrative decisions or circulars, mandatory bidding and contract documents, and any other binding text which affect 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, 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 of regional or international economic co-operation, transparency of the national procurement system is generally the *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 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 2006 guidelines, were still displayed on the Ministry of Finance website along with their replacements, which were still marked as drafts. However, the Ministry of Finance 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 the Public Procurement Regulatory Authority (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. This is the result of significant efforts 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, and the applicable rules are 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 have been published. It seems that most of the players involved in the public procurement process, both from the public and private sector, are unaware 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 instead 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; once it is fully implemented, it 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 their requirements as widely as possible.

Traditionally, advertising has taken the form of advertisements placed in mass circulation newspapers or trade or other specialised journals, broadcast on the radio, posted on noticeboards 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 worldwide 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 proce-

dures 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, a 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 applicable rules. From an international perspective, trade negotiators would be inclined to see a high level of non-transparent procedures in a negative light either because it: (i) demonstrates lack of government commitment to TGP; or (ii) indicates that 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 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 this is advisable in the interest of maximising 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 will be invited even where that is 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 outline 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 in the official *Tanzania Procurement Journal*, which is available online. Further, when tenders are open to international competition, the invitation to tender must be advertised in an international newspaper. The legislation does not specify the name of the international journal/newspaper; the provision should probably clarify that the international newspaper should have a wide international circulation. At the wider level, competitive tendering is the preferred procurement method, but derogations from 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 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 radio announcements. 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[36] 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.[37] 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 confidence in the procedure by allowing bidders to identify any subsequent irregularities, e.g. the appearance of new bidders or award on the basis of prices that are different to those initially disclosed.

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 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. This 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 are relevant to 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, qualification criteria and award criteria all comply with international standards. Subject to the preference rules applied,[38] 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. Pre-qualification of bidders is used for works contracts and for the supply of technically complex equipment where the expected value is above US$500,000. Pre-qualification 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 number of pre-qualified 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 pre-qualification 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 or 45 days when international bidding is anticipated, and an extension of the bidding period is foreseen where that would result in greater competition.

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, they 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. 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. 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. 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 when 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; it also encourages the improvement of the supply base by indicating to failed bidders those areas where they need to improve, whether 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 awards appears to be made in Nigeria. In both these cases, therefore, it may be necessary to review the level of transparency.

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 to have 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 United Nations Commission on International Trade Law (UNCITRAL) model law and

complies with the recommendations of the *Country Procurement Assessment Report* (*CPAR*). Samoa would also seem to provide similar procedures, although these are based on administrative rather than quasi-judicial solutions. Recourse to the courts remains a final option, but the process is far from clear. 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, the bidder may submit a written request (with supporting reasons) for Tenders Board review. The Tenders Board is required to issue a decision within 30 days of receipt of a bidder's request. The Board's decision is final, but if the bidder believes that it is not consistent with the procurement guidelines or is otherwise contrary to law, it may appeal to the courts 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 complaints and appeals, much less an administrative body assigned to carry this process out that has been given proper authority and is properly staffed and funded. Currently, the system establishes ad hoc committees to review complaints.

2.2 The benefits of improved transparency

The benefits of transparency or, 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, where a system relies on, for example, open bidding, it can be improved by moving from advertising in physical media to advertising in electronic media. This, however, presupposes that open bidding is the preferred method of procurement. If the procurement system in question does not provide for open bidding, then the transparency issue goes far deeper. In this case improved means of advertising will not bring additional benefits, and the procurement system itself 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, the situation can be improved by ensuring that it becomes 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 trans-

parency tool, but any improvements to the system will be made more effective by being more transparent.

2.2.1 The economic rationale of transparency

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,[39] 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'.[40] Determining that equilibrium market price depends, however, on perfect information and this is a difficulty faced by the government, and other buyers, who will rarely, if ever, possess such information.

Even in the case of perfectly homogeneous products, supply and demand are constantly changing so that a given equilibrium price will only reflect supply and demand at a precise moment in time. A competitive market is by its very nature dynamic. The nature of economic competition is not 'equilibrium', but a perpetual state of change.[41] 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 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; 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. 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 widely circulated. The most efficient modern method of undertaking a search of buyers, sellers and prices is by 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 potential buyers. Advertising enables the buyer to reach a broader audience, outside its immediate locality and, in the case of international procurement systems, advertis-

ing 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 the widest possible choice for the government, and therefore the highest potential gain in terms of lower prices and higher quality. Clearly, the wider the choice, the greater the potential savings; 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. if they offer higher prices than the prevailing market prices), then they will, 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 wishes to do this: fear of causing unemployment, or fear of losing votes in a particular area and failing to get re-elected. These are all non-economic reasons, some of which may be legitimate and some of which may not be. The point, however, is to emphasise that the decision involves 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 to accept the competition and risk seeing some domestic companies fail. The economics are clear: protection will result in continued overexpenditure (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 the 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 conse-

quently have more information on 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 their own personal welfare or that of their department, i.e. increased personal income or departmental budget, better working conditions or job prospects. 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 reduced.[42] 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 government goals.

The agency relationship may itself be responsible for waste and inefficiency, even where the agent does not set out deliberately to exploit the situation. 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 is a private firm, its objective is to maximise profits. The government has no such profit motive and the absence of any comparable measure of efficiency will affect the agent. A reduction in their work effort or failures in their 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 to the 'profit' (in terms of reduced expenditure) that 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 their part, the agent may simply become careless because they have no incentive to do otherwise. Equally serious is the agent

who, far from being careless, has the public good at heart. The agent sees it as their duty to get the best results; the problem is that the 'best' result in their mind is the best product, which is 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 concomitant over-expenditure and vulnerability to excessive long-term costs. The lack of profit motive is reflected in the desire to provide the best 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 they conduct 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 (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 (a critical problem in this context), they will choose to consume according to maximum utility. This rests on a straightforward cost-benefit analysis determined by the preferences 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 also has 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;[43] 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 USA, for example, preferences are given in the case of procurement to bidders owned by minority groups (based on gender or ethnicity) or people with certain disabilities. In the EU 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 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 that public procurement officers are aware of their obligations to conduct efficient and effective procurement. 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 make 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; this will have the effect of increasing foreign investment in the country. In addition, transparency provides a basis from which civil society can be engaged in the procurement process.

As a market search mechanism, the publication of procurement opportunities (advertising) enables the procurement officer to attract 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 enhancing also value for money. From a regulator's perspective, requiring advertising (at least above certain thresholds) ensures that procurement officers cannot 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.[44]

Procedural transparency also has a number of aspects. From the bidder's perspective, providing clear bidding documents, specifications, and qualification and award criteria will enable the bidder not only to decide whether it is in their interest to bid, but also to improve the quality of their bid; given the physical distance, this is even more important in the case of 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 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 there may still 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. Enforcement of the rules imposes accountability on procurement officers and provides bidders with increased confidence in the system.

2.2.3 Quantitative benefits of transparency

Despite the widely accepted recognition that TGP provides tangible and significant cost benefits, this is usually based on general observations arising from experience and apocryphal examples. This does not mean that such examples are untrue. The difficulty in obtaining hard empirical evidence of the cost savings is due mainly to the problems in obtaining accurate and reliable data, and in particular in obtaining data with which to provide a meaningful comparison. First, 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); it is hard to make a comparison between purchases made by governments in an uncompetitive environment and those made by private undertakings in a competitive environment. Second, procurement reform will often precede adequate record keeping by a long margin. The reforms are introduced before the data have been collected with which to make a 'before and after' comparison. Third, market prices can change rapidly (compounded by currency and exchange rate fluctuations), so that historical price data are not always reliable.

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.[45] Though it does not have any easier a task in terms of collecting and assimilating the relevant data, the EU has the advantage of applying procurement rules to a large number of member states, so that prices paid across the European Community (for example, in those countries which apply the rules correctly and those which do not) can be compared and the results analysed against the yardstick of the degree of compliance with the procurement rules. Consultants conducting these studies have 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 per cent lower.

Earlier EC 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 might have

been better to consider the way in which modern business works. Generally, companies that are interested in bidding for contracts in various countries will set up local offices, even if they are no more than representation offices. This is true both in the case of works and large ticket goods, and it is often true in the case of certain transportable services (e.g. auditing, accounting or 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 organisations, 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 Health Insurance Fund (HIF) and prices for the same products resulting from competitive tenders financed by external sources (Pharmaciens Sans Frontières (PSF) and the European Agency for 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 tender financed by the European Agency for Reconstruction (EAR) were 36.2 per cent 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); 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 per cent. 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 per cent 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 UK yielded savings in the order of 20 per cent without any reduction in quality.[46]

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 of existing resources by efficient procurement practices.[47] OECS/PPS is an agency of the OECS, a formal grouping of nine 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 the nine ministries of health of the OECS countries. The OECS/PPS presented suppliers with a public sector monopsony, so that products tendered by the OECS/PPS are purchased exclusively through annual contracts. It operates a centralised, restricted tendering system in which all approved suppliers are pre-qualified by a vendors' registration questionnaire. Pre-qualification is necessary to assess quality, technical competence and the financial viability of competing suppliers. Following a bid solicitation from over 75 international suppliers, the OECS/PPS awards annual contracts, places orders directly with suppliers and monitors delivery and supplier performance. Prior to the establishment of the OECS/PPS, the OECS countries purchased drugs individually from suppliers by direct negotiation. During the 2001/2002 tender cycle, the annual survey of a market basket of 20 popular drugs showed that regional prices were 44 per cent lower than individual country prices.

2.3 The costs of improving transparency

As well as considering the benefits of improved transparency in the domestic context, any country negotiating access to an international procurement agreement also needs 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 negligible.[48]

The costs of transparency involve two issues. 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, 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 multilateral development banks and other donors assisting those countries with the reform process. (There are examples of such reform initiatives costing several million dollars, although the costs of creating a reformed system would generally appear to start closer to US$500,000.) Even then, the benefits 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 by the loss of savings.[49] An inefficient procurement system is expensive and implies a higher than normal expenditure. A sound procurement system will lead to significant budget savings (see section 2.2.3), 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 identifies in the previous sections, the anticipated costs are as follows.

Publication of the legal framework:[50] 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 publication 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.

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 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, which requires 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 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, and is far exceeded by the benefits to be gained through obtaining more competitive prices. The cost of publishing gazettes and specialised bulletins is generally borne by the government or by a specialised regulatory authority. The cost of such bulletins which, to be useful and timely, need to be published and distributed on a regular basis, is not insignificant, but may be reduced by charging for the bulletin. Such charges of course need to be realistic and not designed to make a profit

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 benefits 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 is necessary for a purely informational 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[51] and the inclusion of relevant information in the appropriate documents. Such documents 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. While it is in any event be in the interests of procurement officers to keep adequate records, an obligation to do so involves 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 do not require any additional expenditure. Since they are comparatively short notices, their publication only implies a few extra pages in any existing publications or some extra web space. Assuming these have already been set up, publishing award notices add very little extra cost.

Debriefing of unsuccessful bidders generally takes time and will, therefore, be covered by the officer's 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 and standard forms 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 transparency

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 should 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 give the privileged few who are admitted to the competition (who may thus charge monopoly rents) a quasi-monopoly position; and (ii) the potential bidders will have no (or will have lost) confidence in the system, so 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 discussed above, however, there may be other costs of actually introducing TGP. These 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 expose 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,[52] 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; the question is not whether international partners will accept them, but whether the government is prepared to make the economic trade-off that the pursuit of such policies implies.

In both 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, 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 it.[53] These include the numerous bilateral free trade agreements (FTAs) entered into by the USA, the EU and EFTA with parties around the world, as well as the EU's move towards economic partnership agreements (EPAs) with the 77 ACP countries. Whilst the provisions of each of these agreements are somewhat, and in some cases very, different,[54] the general trend is that most are now beginning to follow the model provided by the WTO's GPA, i.e. they 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[55] 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 is be negotiated separately. These contain reference to the entities and contracts covered as well as any exemptions and reciprocity conditions.

It is not possible in this report to consider all potential trade agreements. Given, however, that a trend is now beginning to emerge, we will 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 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 WTO. The current GPA 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.[56] 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 is 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 liberalisation 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 by 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 its scope of application.

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.[57]

Despite being considered in the early International Trade Organization 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[58] 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'.

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 International Trade Organization (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 as the OECD discussions were taking place, the European

Economic Community (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 forums.[59] The EC's co-ordinating directives took essentially the same approach as those 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 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 in federal and unitary systems, and the degree of central control over regional, local or municipal governments. However, the central debate did not concern the level of control exercised by central government and its ability 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.[60] This issue was brought to a head in discussions over the extent to which public utilities could be covered by an agreement.

It was clear that in order to assess and ensure reciprocal advantages, a 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.[61] The solution was to turn to a system of offers and requests used widely in the multilateral negotiations under 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 country making the offer, 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 1994 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 central or federal government and entities under the direct and substantial control of governments. Local, provincial

and municipal entities were not covered, nor were state-owned enterprises or corporations of a commercial character, which excluded many state utility companies, notably in the fields of energy and telecommunications. Defence entities were also largely excluded; only non-military products purchased by them were 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 partly involved 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 SDR150,000 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 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 on its own sufficient 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 1994 GPA.

The amendments made in 1987 consisted essentially in amending the publicity requirements and the minimum time limits for submitting tenders; amending the qual-

ification 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 USA, which disputed the real value of each other's offers.[62] The dispute was only resolved after both countries agreed to sign an interim memorandum of understanding, 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.[63] This solution prompted other parties to improve their offers in an attempt not to be left outside an exclusive transatlantic procurement agreement.[64] 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, such as public utilities, whose procurement policies are substantially controlled by, dependent on or influenced by central, regional or local government.

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.[65] 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. While 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 such services, no such agreement was reached for the Annex 4 services.

The offers of the parties differ considerably with some, notably the USA, 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 1994 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 intergovernmental 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' jurisdictions, and opens up the possibility of quick and effective remedial action, including the award of compensation.

3.2 Features of the 1994 GPA

The history of the negotiations, which highlights 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 rather 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 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 construction services subject to the agreement, and lists of publications the governments use to publish tender notices, qualification lists and the procurement rules and procedures which 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 central government entities covered; Annex 2 contains a list of sub-central government entities covered; Annex 3 contains a list of all other entities covered 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; the two pillars of the GATT, national treatment and the 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 the products, services and suppliers of any other party (MFN). As discussed above, these non-discrimination principles are heavily contingent. They apply only 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 states 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[66] 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 in 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 USA and the EU for an 'interim agreement' on government procurement,[67] 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.[68] 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, 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 USA and the EU, 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'.[69] The hope was that by concentrating on the core principle of transparency, the parties would be able to draft a less 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, United Nations Development Programme (UNDP), European Bank for Reconstruction and Development (EBRD) and other comparable studies such as the APEC survey and conclusions. Work has, however, been slow. While there appeared little disagreement on the importance of transparency as a fundamental principle, there was less agreement on how transparency might be achieved.[70]

Despite the submission of draft agreements at the disrupted Seattle meeting by both the USA[71] and the EU,[72] 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[73] preference for goods and services that are produced domestically or 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 for regional or even national firms, 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.

Some of these practices are employed in the sample countries. 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 its inefficiency and, where foreign competition is restricted, increase 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. While the political impact is significant (with politicians claiming the credit for 'saving' or protecting' domestic industry),[74] 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 should 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. 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 pay-offs.[75] What statistical analyses there are would seem to suggest that welfare benefits arise from increased competition in domestic markets resulting from improved TGP[76] rather than from cross-border trade.[77] These include efficiency and specialisation gains,[78] but the benefits of international competition are not only linked to better choices on the goods and services to be purchased; international competition also leads to internationalisation of the business community, better value goods and job creation.[79]

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 precondition 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 market access negotiations that follow. The benefits of acceding to market access conditions, while theoretically justified, have not been the subject of any statistical analysis. As noted above, this also applies to 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 existing procurement systems are invariably linked to the savings to be made based on the size of the procurement market at issue.[80] 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,[81] although

the figures are based on 1998 statistics. While 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 per cent of their combined national outputs (the comparable figure for OECD member states was 7.9 per cent). The 106 developing countries' procurement markets amounted to only 13.9 per cent of total worldwide procurement spending in 1998.

These figures appear out of date, however. The European Commission, for example, puts the estimated total public procurement in the EU at about 16 per cent of the EU's GDP in 2002. Its importance varies significantly between member states, ranging from 11 to 20 per cent of GDP. Other authors also put the potential global figures higher[82] and estimate the value of, for example, the contestable procurement markets in ACP countries as equivalent to some 5–10 per cent of GDP. In Africa, the figure could be as high as 70 per cent.[83]

Nevertheless, the OECD report makes clear just how few developing countries have public procurement markets of any magnitude. Evenett and Hoekman[84] point out that only a few countries have procurement markets worth more than US$10 billion (South Africa, Brazil, China, Indonesia, Saudi Arabia and Russia) and that not many have procurement markets worth more than US$5 billion (Egypt, Morocco, Chile, Peru, Puerto Rico, Bangladesh, India, Israel, Kuwait, Malaysia, Singapore, Syria and 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 industrialised 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 make-up of a national procurement market with a view to identifying what conditions of such a market are likely 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) and 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 tied to sourcing 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 require an in-depth study of the country circumstances. The scope of this report is far more limited and while four countries have been selected for some preliminary assessment, the available information is far too limited (and often out of date) to allow any meaningful conclusions to be drawn. Research and the existing literature do, 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 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; 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 internationalisation 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 co-operation 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).[85]

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 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', with 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 meant it 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 of the strengths and weaknesses of its own industries and markets, and 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 requires 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, which 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 in the case of the GPA. Access to international markets and competition may, on the other hand, help local industries improve, enabling them ultimately to compete on international procurement markets.

The corollary to this, of course, is the increased opportunities given to foreign bidders to compete on the domestic market. This will again depend on the specific industry in

question (this is 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. Issues of geography, political situation, ease of doing business, language and currency convertibility 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.[86] 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.

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 precondition of membership; without it, none of the benefits referred to above are likely to be achieved – neither the expected trade benefits nor 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 system that looks good 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 and manuals), 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, whether or not there is corruption and the general capacity of the procuring entities to implement the legal framework. This also includes an assessment of systems of governance such as the internal checks and balances within the procuring entities and 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.

While 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 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 they are more likely to do so when 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 is only an indication of the factors that may need to be taken into account. The issues are clearly interdependent, but they are discussed separately here in order to retain clarity.

One of the first considerations will be the size of a country's public procurement market. As indicated above, this is often very difficult to assess, but in the EU, for example, it was estimated to be an average of 16 per cent of GDP in 2002. This represents a market with a value of some €1,500 billion. The GPA Secretariat[87] estimates that the adoption of the 1994 GPA led to a tenfold 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 are 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 OECD public procurement markets account for over 90 per cent of international procurement. That leaves something less than 10 per cent to be shared among the remaining countries. The OECD report estimates that the value of the procurement markets of the identified 106 developing countries (some of whom are OECD members) makes up only around 14 per cent of total international procurement.

The implication of this, as suggested by Evenett and Hoekman,[88] 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. The reality of international markets is, in any event, that many products 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.[89] Equally, if construction companies and other services providers are interested in a particular market, they will generally penetrate that market by establishing local offices or subsidiaries,[90] without the need for bidding from abroad.[91] This is mostly because they will need 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.[92] 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.[93] 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, including the location and geography of the market (how isolated it is and how expensive it will be to supply), the transport and insurance costs and other issues such as trading conditions (customs and tariffs, non-tariff barriers and ease of doing business). For small isolated markets, the difficulty may be not so much 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 the procurement market. Large, easily accessible markets may attract more competition and benefits, whereas smaller inaccessible markets will do less well. This also is a reason why countries tend to enter into agreements with regional partners: it reduces concerns arising from isolation, transport costs and other costs of doing business. This is true of the EU, of many free trade areas such as NAFTA and APEC, and in the context of this report the sample countries. Tanzania, for example, is a member of the East African Community (EAC) and 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.[94] 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.'[95]

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 attract foreign competition. This is not only a question of the overall size of the market, but also of its nature. As far as the domestic market is concerned, it is a question of determining what portion of the market would be available and/or of interest to foreign bidders. This includes a number of variables relating to the contracts that are open to international competition.

One issue is the extent of government purchases in a given market. In some countries, many services (for example, construction) will be provided in-house by government services and will not be outsourced. This limits the size of the procurement market, at least for routine contracts, although it probably suggests that major requirements will be outsourced where funds are available. Lack of funds also conditions the government's recourse to the market, so that the size of 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.[96] Even if the domestic procurement system is open, the financed procurement will not be open.[97] 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 is 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 countries,[98] 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 will 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 became a sticking point in the early GPA negotiations (see section 3.1). 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 control[99] 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 is covered, leaving state procurement untouched. In unitary states, it could be that only central government is included, 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 in 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, 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) and 'other' entities such as public utilities (Group C), whose procurement policies are substantially controlled by, dependent on or influenced by[100] central, regional or local government.[101]

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 very many small value contracts and a smaller number of large value contracts. Quite often in the case of developing countries, large value contracts will also be funded by donors and MDBs, raising again the question of tied aid. 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 this only becomes relevant where the contract is of a sufficiently high value at the outset to attract foreign competition. The size distribution of contracts was an issue raised in the context of the GPA negotiations, but this was in respect of the threshold values.

Most procurement systems at national level 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 exceed the expected price reductions. Some countries will also apply a financial threshold which distinguishes between open procedures that are open to national bidders (though international bidders may also participate) and those which must be opened to international competition. Although 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 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 are covered, and the higher the threshold, the fewer are covered. This was crucial in the GPA debate, since the level at which the threshold was set could affect the value of each party's '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. While it might have been expected that developing countries would favour larger 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 is the nature of the domestic market. For the purpose of identifying potential benefits to domestic industries, 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 IV) shows that the agricultural sector is the most important sector of production. 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 agricultural products have been excluded from most international agreements on procurement.[102] Food aid is also excluded from the OECD Recommendation on untying aid to least developed countries (LDCs) and heavily indebted poor countries (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.[103]

How then can the agricultural sector be stimulated by a procurement agreement? One possibility is to use negotiations on an international agreement on procurement to bargain for concessions with donors to untie food aid projects. Tanzania could allow the opening up of its procurement market on condition that developed country members of the international agreement 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 tied in the great majority of cases despite the adoption of the OECD/DAC recommendation on untying aid to LDCs.) In the context of the GPA, La Chimia and Arrowsmith[104] have suggested that inserting a commitment to untie aid in the GPA could be a way to stimulate developing countries' participation. 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 a commitment to untie food aid could be extremely beneficial, since 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 will focus first on the state of the national procurement system. While less an option than a requirement, any country negotiating a procurement related trade agreement needs to have a thorough understanding of its own national system and its weaknesses. Where it has not already done so, it is advisable for the country to undertake an objective assessment based on tools such as that offered by the OECD/DAC, which will measure the legal and institutional framework. Implementation is only partially captured by this tool in its present form. The intent was always to develop, test and introduce such measures, some of which are currently being piloted. In the short term, therefore, the country will need to undertake further monitoring to ascertain its level of implementation. This is also an area where international organisations can assist, especially where there is encouragement both for national procurement development and for wide participation in regional or international procurement communities.

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

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

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

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

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

5.2 Market access options

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

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

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

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

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

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

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

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

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

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

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

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

Annexes

Annex I
Dominica

There is very little up-to-date information on the procurement system in Dominica. The two main reviews are the World Bank's *Country Procurement Assessment Report* 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.[108] This latter document indicates that very little has changed since 2003, although new and improved legislation is apparently imminent, as it was in 2003. This assessment is based on these reports. As a member of the Caribbean Community (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 approximately 74,000 and an area of 750 sq. km. It achieved independence from the UK on 3 November 1978, but it retains the common law tradition. Dominica is a member of the Organisation of Eastern Caribbean States and CARICOM. Its GDP per capita was around US$4,450 in 2006. GDP per capita in terms of purchasing power, as estimated by the International Monetary Fund (IMF), was US$6,764.3. Net aid per capita in 2005 was estimated by the World Bank at US$409, the highest among OECS-WTO members. Services accounted for 66.2 per cent of GDP in 2005, followed by agriculture (18.5%), manufacturing (8.1%), construction (8.4%), water and electricity (6.4%) and mining and quarrying (0.9%). No employment or wages statistics are available.

Agriculture, specifically bananas, continues to play a dominant role in the Dominican economy. Although the contribution of agriculture to GDP declined from 30 per cent in the mid-1980s to 18.5 per cent 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 UK, 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. It also produces some chemicals, including dental creams, as well as soaps and lotions. Performance in the sector is dependent on the overall performance of one dominant player primarily producing

dental creams and soaps. The services sector includes financial services (reinsurance and banking); tourism and travel-related services (hotel development); recreational, cultural and sporting facilities; and communications.

Dominica's economy has been volatile in the last decade with a severe economic crisis early in the new millennium. Output fell by around 10 per cent in 2001–2002, but growth resumed in 2004 and 2005. The contribution of private consumption to GDP was 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 per cent since 2004. In general, growth since the recovery started has been driven mainly by expansion in 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 fall 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 characterises trade liberalisation. The main objective of Dominica's trade policies has been to maximise 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 EC and in the Doha Development Round of WTO negotiations. Dominica's key negotiating objective has been to obtain access for its 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 has not so much been market access, which the country has in any event in its main markets of the USA, EC and Canada, but ensuring that the development dimension is put at the centre of both the WTO and EPA negotiations. It notes 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 US 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 US 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 GSP schemes of Australia, Canada, the EU, Japan, New Zealand, Switzerland and the USA. 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 per cent of nominal GDP, while capital expenditure totalled EC$84.1 million (approximately €21 million), some 12.4 per cent 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 centralised 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 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. The Minister 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 out rules for stores management, disposal and accounting, and also include some basic procurement rules. These regulations are seriously 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 this is not made explicit and, in any event, it is wholly opaque. The Regulations do not seem to be 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:

- 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; the applicable rules are 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, in both 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 on the radio. The *Gazette* is published regularly and is available to the public. 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. Publicised 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 for 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 in which either method should be used or explicit reference to open bidding as the default method. Procurement for small amounts is decentralised. 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 other factors. 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 pre-qualification of contractors. Some bidding is done on the basis of publicised 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 awards

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 OECS, which has set up the Pharmaceutical Procurement Service, designed to improve the use of existing resources by efficient procurement practices.[109] The OECS/PPS is an agency of the OECS, a formal grouping of nine 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 of the OECS countries. The OECS/PPS presents suppliers with a public sector monopsony, so that products tendered by OECS/PPS are purchased exclusively through annual contracts. It operates a centralised, 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, the OECS/PPS awards annual contracts, places orders directly with suppliers, and monitors delivery and supplier performance. Prior to the establishment of the OECS/PPS, the OECS countries purchased drugs individually from suppliers by direct negotiation. During the 2001/2002 tender cycle, the annual survey on a market basket of 20 popular drugs showed that regional prices were 44 per cent lower than individual country prices.

Annex II
Nigeria

1 Introduction

1.1 Purpose

This annex attempts to identify and analyse the potential trade and welfare effects that improvements in the Nigerian public procurement system would bring. It will do this by setting out:

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

1.2 Government context

Nigeria is a federal republic comprising 36 states and the federal capital territory of Abuja. It is the largest country in west Africa, with around 155 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 around 70 per cent of the population were still living below the poverty line in 2007, compared to only 46 per cent in 1985. The government operates under a Constitution enacted in 1998 following the collapse of the military government that had ruled Nigeria for 16 years. The country 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 institutionalising democracy.

1.3 Conflicts and instability

Nigeria continues to experience long-standing 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 per cent 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 politically motivated and criminal groups that 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 between 1998 and 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 realised 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 federal, state and local levels were still visible, hobbling the government's ability to deliver services effectively.

1.4 Corruption

Progress was made in increasing transparency and tackling corruption between 2003 and 2007 by strengthening government institutions (e.g. setting up the Due Process Unit), prosecuting perpetrators of corruption (through the 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 based on public confidence that the government elected in 2007 would enforce the recently enacted governance reforms, rather than on any proof that the level of corruption had actually abated.

2 Nigerian public procurement system assessments

2.1 World Bank *CPAR*, June 2000

Only two thorough assessments of the Nigerian public sector procurement system have been carried out since 1998, when after 16 years of military rule the current Constitution was enacted. The first was the World Bank *Country Procurement Assessment Report* published on 30 June 2000, based on work that was 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 that 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. Organisation and resources

iv. Performance of bank-financed projects

v. Private sector performance

vi. Trade practices and customs

vii. Electronic commerce in public procurement

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

2.2 *Baseline Indicator System Report*, 2007

The second assessment is the Baseline Indicator System (BIS) assessment carried out in 2007 by a local Nigerian consulting company, 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. Version 4 is derived from the World Bank's *CPAR* procedure, but the World Bank donor-centric approach has been eliminated and the toolkit incorporates improvements developed by the OECD/World Bank Initiative, which involved more than 60 procurement experts from the multilateral and bilateral donor community and developing country procurement agencies.

The differences between the two methods will become clear in the presentation of the results of each assessment in section 3 below. The features listed above have been elaborated into a four-pillar framework, with 54 separate indicators that establish a baseline score for the system. In addition, several performance indicators have been suggested to enable future checks on system performance and compliance; a scoring methodology has also been provided.

3 Assessment results

3.1 World Bank *CPAR*, June 2000

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 in it by the Constitution, issued financial regulations which regulated the responsibilities for public procurement and financial management at federal level. The financial regulations were essentially an internal set of administrative rules for financial and economic control of the federal administration containing regulations concerning composition of tender boards 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 financial regulations based on the federal regulations, supplemented by circulars and guidelines from within each branch of administration in the state governments.

This arrangement had the following weaknesses:

- The financial regulations are not a law or an act of similar authority, but an administrative document which can be amended by the Minister of Finance without regard to the fundamental rights of the suppliers, contractors or consultants;
- They 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;
- There was no permanent body independent of the procuring entity set up to process complaints fairly.

Procedures and practices

Several features of the Nigerian procurement system were of great concern:

Eligibility: To bid for procurement funded by the federal or state governments and state-owned enterprises, bidders must be registered. The registration system is decentralised, 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 it should function. Bidders can be taken off the registration list for a number of reasons, which are not clearly specified. Once registration is cancelled there are no clear rules for how a bidder can get back on the list. This leaves procurement open to abuse and it is not transparent.

Procurement methods and procedures: The description in the financial regulations 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. 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 financial regulations. 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 financial regulations for the use of **standard bidding documents** and different types of standard contracts are currently in use.
- The financial regulations 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 financial regulations 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 organised and carried out. The secretary to the Tender Board, a sub-committee of 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 are not provided in these contracts.

Monitoring and contract management: The financial regulations are 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 staff in the civil service indicates that monitoring is weak and ridden with corruption.

3.2 BIS assessment, 2007

Methodology

As mentioned above, the BIS methodology closely follows that used in the *CPAR* and we will use the framework in the BIS when summarising the results showing the nature of the Nigerian public procurement system in 2007. The BIS bases its analysis on four different aspects (pillars) of a public procurement system. Pillars I, II and III are very similar to the approach in the World Bank's *CPAR* assessment. Pillar IV is new, combining elements relating to corruption and transparency that were previously examined in the precursors to pillars I, II and III. The pillars are now supported by a number of indicators, each of which is broken down into sub-indicators and scoring

criteria, allowing a more precise diagnosis of 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 and market performance

Pillar IV Integrity and transparency in public procurement

The intention of the OECD Initiative was that this framework, which consists of internationally recognised good practice solutions for all features of a public procurement system, should be used as the basis for an initial assessment to establish a quality benchmark or baseline. Subsequently, the 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 being piloted in Africa, Asia and Latin America; 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.

Results

The BIS assessment shows that some progress has been made in raising the level of procurement system quality since 2000. The improvements are listed below using the morphology in Version 4 of the OECD/World Bank BIS.

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 World Bank *CPAR* was completed and discussed with the government, they were only enacted into law shortly after the BIS assessment was released in June 2007. The Public Procurement Act is a significant improvement; when it is fully implemented it 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 must 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. The main reason for Nigeria's low score for Indicator 2 was that no standard bidding documents had been made available to procuring entities.

Pillar II: Pillar II addresses three 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 that carry out and regulate procurement operations (Indicator 5). After 2000 some steps were taken to improve performance relating to various aspects of Pillar II, but before the Public Procurement Act was enacted they lacked enforceability. Remaining concerns relating to each indicator include:

Indicator 3: Multi-year budgeting, which is necessary to sustain the 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 manage ongoing procurement operations and it is not adequately staffed or funded. Among other things, the BMPIU does not collect, analyse and report 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 have not created and sustained a professional cadre of procurement personnel capable of carrying out their anticipated procurement workload. Virtually no training programmes are available to close the skills gaps that exist in each ministry, and procurement personnel and recruiting never takes into account the specific skills needed for the annual procurement programme. The score for this aspect was 0, lower than for any other indicator.

Pillar III: Pillar III addresses three 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 (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 upon procurement. These include 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 done properly, a fact that made it very difficult to complete the BIS assessment adequately.

Indicator 7: Indicator 7 has received the highest score of all 12 indicators. The private sector market is large and apparently well organised. In general, it responds well to

government opportunities to bid. Compliance tests conducted by the local consultant carrying out the BIS show that on average between 20 and 100 bidders respond to bid opportunities, depending on the nature of the contract. The difficulties bidders face include registration with the ministry before they can participate, 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 and claims management. On dispute resolution procedures, it is now generally considered good practice 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. Unlike Pillar I, this pillar 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 government. The only focus of the existing national audit organisations is on financial matters.

Indicator 10: There is no well-defined structure for handling complaints and appeals, much less an administrative body assigned to carry out this process that has 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 are able to access 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 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 has in place programmes to encourage ethical behaviour across the civil service, but the sensitive nature of procurement operations is not addressed specifically. Similarly, the existing anti-corruption agencies, the EFCC and Independent Corrupt Practices and Other Related Offences Commission (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 2003–2005. The position taken at the end, which is still 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 on the internet, the scores are repeated in Table 1.

It should be clear that a score of 30 per cent out of a possible 100, however imprecise the methodology, indicates that in 2007 the Nigerian public procurement system was extremely weak. It lacked an organisation capable of providing procurement oversight and leadership; the entities carrying out actual procurement did not seem 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 routinely reported to the BMPIU, much less analysed by any other government organisation. The enactment of the 2007 Public Procurement Act 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 for this report included an assessment of the impact that entering into trade agreement negotiations, specifically in relation to competition policy and transparency, might have on the performance of the procurement system. 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 30 per cent savings or more can be achieved when a system is strengthened. However, as one can see by looking at the comprehensive reach of the BIS scoring mechanism, the Initiative concluded that savings of this magnitude could only be achieved by taking a system-wide perspective.

Those involved in the Initiative would say that improving competition policy or transparency alone will not have any sustainable impact on system performance, achievement of value for money, reduction of levels of corruption and the like unless careful attention is also paid to other aspects of procurement operations. Usually, improvements are also needed to enforce compliance even with good transparency requirements. Measures to manage conflicts of interest, capacity development measures

for procurement staff and similar measures to strengthen procurement audit capability are all needed to increase long-term market confidence, produce greater competition and generate increased government savings.

4.3 Recommendations

Based on this systemic approach to procurement systems, we recommend that Nigeria and other PCP members of the Commonwealth with systems at a similar of development should not be encouraged to engage 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 of course be beneficial, but without a strong procurement oversight body with at least some solid knowledge about and understanding of their own system, they will not be able to adequately defend Nigeria's best interests in any negotiations on the procurement issues 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 in pushing for greater involvement in regional and international trade pacts. Other countries, such as Nigeria, would derive greater benefit from targeted smaller programmes that 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 analysed, and so that negative trends can be corrected in a timely fashion.

Table 1. Nigeria's BIS assessment scores

Pillar no.	Indicator no.	Indicator score (%)	Pillar score (%)	Total score (%)
I	1	31		
	2	28	30	
II	3	33		
	4	41		
	5	0	25	
III	6	21		
	7	55		
	8	53	41	
IV	9	25		
	10	7		
	11	21		
	12	33	25	
Total				**30**

Annex III
Samoa

1 Country context

1.1 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.

The following are some salient facts:

Area: 2,944 sq. km.
Population: 192,000 (2008 estimate)
Capital: Apia (on Upolu)
Official languages: Samoan and English
GDP: US$537 million (2008 estimate at current prices)
Currency: Tala or Samoan dollar (ST) (T1 = approximately US$0.40)

Samoa has a developing economy based mainly on agriculture, with some light manufacturing, fishing, lumbering and tourism.

In 2008 the principal destinations of its exports were Australia (81.7%), New Zealand (10.2%) and American Samoa (3.6%). Its main sources of imports were Australia (25.6%), New Zealand (22.8%) and the USA (12.5%).

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

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

1.2 Regional affiliations

Samoa is a member of the following regional groupings:

The Pacific Islands Forum: The Forum is a political and economic policy organisation of 16 independent and self-governing states that meets regularly to discuss regional issues.

Forum members are: Australia, Cook Islands, Federated States of Micronesia (FSM), Fiji Islands, 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 a special observer (2002).

The Forum has taken an interest in government procurement and particularly in the scope for collaborative activity among its 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 petroleum products collectively (or via sub-groupings) following a competitive tender process. This would be the first collaborative project of its kind. The PIF 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 40th PIF meeting in Cairns in August 2009, the leaders of member countries endorsed the project and urged members to give 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 World Health Organization, in collaboration with national counterparts.

Pacific Island Countries Trade Agreement: PICTA is a free trade agreement between 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 it only became operational from 2007, when a number of island states indicated their readiness to commence preferential trade. As a result of the delay, the schedule for elimination of tariffs on intraregional trade now extends to 2021.

In Article 15 of 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 Agree-

ment coming into force. The issue has not, however, been given the priority envisaged by the Agreement.

A paper prepared by the Asian Development Bank in 2007 commented on PICTA as follows:[110]

> 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.

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 co-operation. It was signed in Nauru on 18 August 2001 and entered into force on 3 October 2002.

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

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 EU. 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 40th Pacific Islands Forum Meeting in Cairns in August 2009, leaders approved a recommendation to commence PACER Plus negotiations, 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 is being established, with substantial financial support from Australia and New Zealand, to provide independent support and advice to FICs during the course of the negotiations.

South Pacific Regional Trade and Economic Co-operation Agreement (SPARTECA): SPARTECA is a non-reciprocal trade agreement under which the two developed nation members of PIF, 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 11th meeting in Kiribati on 14 July 1980. It came into effect for most FICs on 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,[111] 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 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 has not been possible 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 make recommendations 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 issued in 2003 with two new procurement and contracting guidelines These apply to all government ministries and to corporations in which the government has a greater than 50 per cent share or voting rights. They deal with:

- Procurement of goods and works (including the category of 'non-consulting services'); and
- Procurement of consulting services.[112]

These new guidelines, copies of which were supplied to the consultant, align the Samoan regime more closely with World Bank guidelines and procedures.

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 combat-

ing 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;
- Contract administration.

At the time this report was written, 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 focuses on procedure and is 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 the 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 will 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 licences (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'.[113] 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 per cent of the lowest evaluated EXW price offered by a foreign supplier;
- For contractors, 7.5 per cent 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 must 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

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's May 2006 *Operational Procurement Review* (*OPR*) recommended the development of 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 of the completion of this report.

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 range $ST50,000–500,000 except as approved by the Board. An open procedure is also to be used for works procurement in the range $ST100,000–500,000.

Above this value range, the standard procedure for both goods and works involves pre-qualification.

Tenders Board approval is not required for small purchase transactions. This includes transactions above a value of $ST5,000 and not more than $ST50,000, for which at least three written quotations against a formal request for quotation (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 $ST100,000) 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 pre-qualify or bid, and other procurement notices be advertised in 'a widely circulated newspaper', and internationally where required by a donor or financier or where this is advisable in the interest of maximising 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 must be in English, but Samoan may be used as well.

Pre-qualification and post-qualification

Pre-qualification of bidders is used for works contracts and for the supply of technically complex equipment where the expected value is above $ST500,000. Pre-qualification 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[114] and financial position. There is no limitation on the numbers of pre-qualified 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 pre-qualification 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 is the '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 the relative weights stipulated in a RFP.
- 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 expression of interest process and is invited to submit a combined technical and financial proposal and to 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 and proposals, together with 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 with a debriefing may submit a written challenge within seven days. This 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 30 days of receipt of a bidder's request. The Board's decision 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 imple-

mented 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 pre-qualification.

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 be any socio-economic policies applied through procurement.

3 Effects of an 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 improvements 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 focuses, however, 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 and that development is continuing.

Finally, an 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.

Annex IV
Tanzania

1 Methodology

This annex is based on a report commissioned by the Commonwealth Secretariat; its terms of reference are attached at the end of the main report. The possibility of conducting field work and empirical research was not foreseen by the terms of reference and therefore the study builds on available data, using and elaborating the outcomes of the literature on the economic and legal aspects of government procurement. Relevant data and studies were accessed via OECD and World Bank electronic resources and the Government of Tanzania's official public procurement websites. Important data were also available in the *Tanzania Procurement Journal* (see also the Bibliography).

In compliance with the official methodology presented to the Secretariat, the 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 recognised and accepted public procurement instruments such as the UNCITRAL model law on procurement of goods, construction and services. Reference will also be made to the GPA and the EU procurement directives.

In order to achieve the aims indicated by the terms of reference, the 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. It includes information on:

1. The institutional, economic and development context;
2. Development reforms in Tanzania and public procurement;
3. International agreements signed by Tanzania;
4. The legal framework for public sector procurement regulation, focusing on the transparency of the procurement system, and on competition and non-discrimination;
5. Development issues, including aid assistance granted to Tanzania and procurement negotiations as a means to stimulate specific sectors of production.

2 Structure of the report

The report is divided into three parts. The next section provides general economic, social and legal information about Tanzania in order to place the issue in an appropriate socio-legal and economic context. It gives an overview of the country's institutional and economic structure and provides information on major development initiatives to eradicate poverty and achieve sustainable development as enshrined in the *Tanzania Development Vision 2025*. The report focuses in particular on the role that procurement plays in development and illustrates how public procurement reforms fit within Tanzania's 'development vision'.

In line with the scope and aim of the terms of reference, section 3 also provides information on the major international and regional agreements of which Tanzania is a member or is negotiating membership. This is done with a view to investigating whether these agreements could become an obstacle to an agreement on procurement aimed at opening up Tanzania's procurement market to international or regional competition.

Section 4 provides an account of the state of the procurement system in Tanzania, investigating the legal framework applying to public procurement. It focuses on two fundamental aspects of the procurement process, namely transparency and non-discrimination. When the procurement provisions are analysed reference will be made to the UNCITRAL 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, because of the impossibility of conducting empirical research, this part is necessarily limited. Indeed, the author had to rely on studies conducted by the Tanzanian Public Procurement Regulating Authority itself. No up-to-date studies by the World Bank or any other international institution were available (the latest World Bank *CPAR* for Tanzania was published in 2003, before the reforms of Tanzanian procurement system, which took place in 2004).

Section 5 analyses the major development issues Tanzania would face if it were to conclude a procurement agreement, and provides an account of donor development initiatives in the country. It includes detailed information and data on the level of bilateral and multilateral development aid donated to Tanzania. This is done in order to understand the role played by the donor community in Tanzania and the relationship between development aid and procurement reforms. The section concludes with 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.

3 General information

In 1964 Tanganyika and Zanzibar formed the nation of Tanzania. Tanzania has two governments, the Union Government in the Tanzanian mainland and the Zanzibar Revolutionary Government in Zanzibar, where the Union Government has jurisdiction over some areas, including security and foreign affairs.

Tanzania is categorised as a least developed country.[115] In 2007 its population reached 40,432,000 inhabitants and its gross national income (GNI) was US$16,129 million. GNI per capita was US$400.

Tanzania exports mainly agricultural products, especially coffee, cotton, tea, tobacco, cashew nuts and sisal. Since 2005, there has been a rise in industrial production and a substantial increase in the output of minerals, led by gold. Its main trading partners are India, the Netherlands, Japan and the UK.

The country has an external debt of US$4.379 billion (31 December 2007 estimate), which absorbs approximately 40 per cent of total government expenditure. Tanzania has qualified for debt relief under the enhanced HIPC initiative.

Tanzania has a very ambitious development vision enshrined in the *Tanzania Development Vision 2025*. Its main goal is for Tanzania to become a middle-income country by 2025. This aim is not out of reach if the positive results achieved in recent years can be maintained.

Since 2005 Tanzania has registered significant improvements in its economic performance. GDP in real terms grew by 6.7 per cent in 2005, 6.2 per cent in 2006 and by nearly 7 per cent in 2007. This growth has been achieved thanks to 'continued donor assistance and solid macroeconomic policies'.[116]

As with many other LDCs, Tanzania's economy and public expenditure are still overwhelmingly donor dependent. It receives bilateral and multilateral aid from donor countries and multilateral institutions. In 2007, it received total net official development assistance (ODA) of US$2,810.8 million, of which US$1,830.7 million was bilateral aid from OECD/DAC member countries and US$972.6 million was from multilateral institutions, including the EC.[117] In 2007, aid from the EC alone amounted to US$187.1 million, and aid from the EC and its member states totalled US$930.5 million.[118] In 2008, Tanzania was one of 19 countries that qualified for Compacts contracts granted by the Millennium Challenge Corporation (MCC), a new US independent development agency. Compacts contracts are large, five-year grants (see section 5). Thanks to the Compact grant, Tanzania will receive more than US$698 million in the next five years.

Major development partners include the International Development Association (IDA), the African Development Fund (ADF), the UK, the EC and the US Millennium Challenge Corporation.[119] 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.

3.1 Development reforms in Tanzania and public procurement

In recent years Tanzania has undertaken significant institutional and structural reforms, especially in the public procurement sector. Indeed, public procurement is an important part of Tanzania's development path.

The country 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. Government bodies and top officials are committed to a 'reliable procurement process' and to guaranteeing that procurement money is spent in such a way that it achieves these objectives.[120]

This is extremely important, considering that sound procurement practices are necessary to ensure sustainable development and social and economic objectives.[121] Procurement is well placed at the centre 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, Dr Ramadhan Mlinga, Chief Executive Officer of Tanzania's Public Procurement Regulatory Authority, 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'.[122]

The volume of procurement for 2007/2008 of 153 out of 362 procuring entities was Tshs 1,801 billion (US$1,360.79), of which 61 per cent (Tshs 1,104 billion or US$78,580) was spent on procurement of various works contracts. The Tanzania National Roads Agency (TANROADS) alone spent Tshs 625 billion (US$472,234) and 62 out of 132 local government authorities spent Tshs 56 billion (US$42,312) on works contracts. A significant proportion of the budget for 2008/2009 has been allocated to infrastructure development, and the construction of hospitals, dispensaries and schools.[123]

In future years, Tanzanian public procurement expenditures will focus on the infrastructure sector 'in order to enhance development strategies and eradicate poverty'.[124]

The Tanzanian public procurement system has undergone an extraordinary reform process in the past decade. The first stage was concluded in 2001 with the enactment of Public Procurement Act (PPA) No. 3 of 2001. A second wave of reforms was completed in 2004 with the enactment of Public Procurement Act No. 21, which repealed the 2001 Act. The 2004 law was complemented by the enactment in 2005 of procurement regulations, followed in 2007 by regulations for local government authorities.

Zanzibar is governed by its own rules and regulations under Act No. 9 for Public Procurement and Disposal of Public Assets of 2005.

Major institutional changes have been introduced by the new procurement legislation. The most significant are the establishment of the Public Procurement Regulatory Authority, which replaced the Central Tender Board,[125] and the Public

Procurement Appeals Authority (PPAA). Both reforms formed part of the main recommendations of the 2003 *CPAR* for Tanzania.

The PPRA has the duty of monitoring and securing compliance with the legal rules; it reports on the performance of the public procurement system and gives advice on desirable changes. It also provides advice and guidance to entities on what the rules mean and acts as an 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 Articles 5–27 of the 2004 PPA. The PPRA has a very active website available at 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 acting as their chairpersons (except in local government authorities, where the executive directors remain as the chairpersons), in order to increase accountability; and changes in the membership of the PPAA to include private sector and professional bodies. However, the Act retains the basic procurement principles contained in the 2001 Act.[126]

It seems that in recent years the level of compliance with the procurement legislation has improved considerably and now appears to be at a high level (see section 4). This appear to be due to various strategies which are being implemented by the Public Procurement Authority through various funding streams, including the ADB, Public Financial Management Reform Programme (PFMRP) and USAID.[127]

3.2 International and regional agreements and related issues

The most prominent international economic organisation acceded to by Tanzania is the WTO. Tanzania became a WTO member in 1995.

As an LDC member, 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 therefrom. Major preferential EU schemes for Tanzania include the EU's GSP scheme, the EU Everything but Arms (EBA) initiative (which grants zero tariffs on all LDC products excluding arms imported into the European market) and the Cotonou Agreement. Tanzania also benefits from the US and Japanese GSP schemes. Although Tanzania's exports to OECD countries enjoy low tariff levels, exports to non-OECD countries, such as China and India (two of the Tanzania's top ten 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 favour of LDCs.

Tanzania, like most LDCs and developing countries, 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 [128] and the Southern African Development Community. Negotiations are also taking place to rejoin COMESA, from which it withdrew in 2000. African members of COMESA

have agreed to harmonise their procurement rules in order to encourage international competition. However, the rules are not legally binding.[129]

Tanzania is negotiating an economic partnership agreement with the EU through SADC. EPAs will replace the Cotonou Agreement. They will be reciprocal agreements rather than preferential trade agreements. The EU requires all countries negotiating EPAs to negotiate as a regional block. In East Africa there are two EPA regions, ESA and SADC. EPAs foresee the creation of free trade areas between regions in the ACP and the EU and will lead to the creation of a type of custom union between the regional groupings.

Members of the EAC are not negotiating an EPA together, as they are in two different regional EPA groups. While Tanzania is negotiating an EPA within SADC, the other ECA members, Kenya and Uganda, are negotiating an EPA within ESA. According to Na Zitto Z Kabwe, this is 'the biggest challenge EAC members face at the moment as far as trade relations with the EU'.[130]

As highlighted in a study on Tanzania by the World 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'.[131] On this point Kabwe states: 'Since EAC has already signed the Customs Union, then negotiating EPAs in two different geographic configurations by its member countries will undermine it'. For example, if Tanzania negotiated an EPA and signed it under SADC, while Kenya and Uganda signed it under ESA, 'there will be a problem of which Common External Tariff (CET) is to be applied on goods imported from EU to EAC. SADC ones, ESA ones or EAC Customs Union ones?'[132]

Another major drawback of EPAs is considered to be the loss in revenue that participating countries will suffer. As regards the negative impacts of being in an EPA, Kabwe argues 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).[133]

Similar considerations 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',[134] it is possible that the loss in revenue caused by abolishing tariffs will be compensated for by the savings made through efficient procurement and reduced costs for goods purchased, as a result of international competition. Further studies are necessary to verify this latter possibility.

An interesting study by McKay *et al*., which investigates the trade and welfare gains of a regional trade agreement between the EAC countries (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 regional economic partnership agreement (REPA) will:

> … increase imports from the EU in these sectors over current levels by about 16 per cent in the case of Tanzania and 23 per cent 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.[135]

McKay *et al*. estimate that in sectors with *consumption effects only* there will be a welfare effect of +TShs 4,086 million (US$3,087). In sectors with trade diversion and consumption effects there will be a welfare effect of –TShs13,439 million (US$10,154); in sectors with trade creation and consumption effects, the welfare effect will be +TShs116 million (US$87.7). As regards the welfare effect, the authors 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, they 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 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.[136]

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 losing the current trade preferences granted by the EU (i.e. zero tariff rates on all products except arms). Hence the consequences of not participating in a regional agreement with the EU would be greater and Tanzania would find itself in the position of needing an EU agreement. Tanzania is currently in a good negotiating position because it already benefits from trade preferences and hence it can bargain for better concessions. This position might be lost in the future if Tanzania was no longer an LDC. It can use its current position to negotiate favourable terms of trade. Further, negotiations on procurement could be used as a bargaining tool to achieve concessions in other sectors, such as agriculture (see section 5).

4 Public procurement in Tanzania

This section uses data from the 2003 *Country Procurement Assessment Reports* for Tanzania and from the 2009 and 2007 *Procurement Audit Reports* by the Tanzanian Public Procurement Authority. Up-to-date information is also available on the Public Procurement Authority's website and the *Tanzania Procurement Journal.* Available literature has also been consulted.

4.1 Legislative framework

As described above, the procurement system on the mainland is governed by the 2004 Public Procurement Act, CAP 410 and its regulations and the 2005 regulations, as well as regulations for local government authorities that were promulgated in 2007. Zanzibar is governed by its own rules and regulations under PPDPA No. 9 of 2005. The 2004 procurement law and the 2005 regulations represent the culmination of a period of reforms started in 2003 after criticism from the World Bank *CPRA*.

The 'underlying principle [of this legislation] is to obtain competitive prices through open competition process which is transparent and non-discriminatory amongst bidders'.[137]

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

This report 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 the next section will focus on market access and competition with a view of ascertaining whether the Tanzanian procurement system is 'ready' for a system of international competition.

4.2 Transparency

As the literature has 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 effort to participate in tendering 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 excess costs in the range of 25–50 per cent (Rose-Ackerman cited in Evenett and Hoekman, 2005). Considering that public procurement can account for 10–20 per cent of GDP, it is evident that a transparent procurement system can bring significant budgetary savings. Non-transparent systems increase information costs, which in turn raises the costs of firms and so the prices of goods and services purchased (Evenett and Hoekman, 2005).

Further, the lack of transparency can be the result of corruption of procurement officials (or it can favour corruption). International, regional and national procurement regulations see in the principle of transparency the cornerstone of any sound procurement system.

Trepte (2004) argues:

> 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.

Many measures are usually implemented to achieve transparency, such as publicising procurement laws and regulations; advertising tenders; setting strict rules for using negotiated or single source procurement methods; disclosing the criteria for evaluating tenders; and having in place an efficient system of suppliers' review, which ensures that suppliers can complain about unfair procurement decisions.

However, implementing transparency rules is 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 make the procurement process too burdensome and lengthy.

In order to properly highlight the elements of transparency in the Tanzanian procurement system this report will follow Trepte's guidelines and investigate five elements of transparency in the procurement process: *publication of the legal framework*; *publication of procurement opportunities*; *transparency of contract awards*; *procedural transparency*; and *transparent dispute settlement*.

However, before analysing the Tanzanian system it is necessary to briefly reflect on some other aspects of procurement policies that can have an impact on transparency, namely pursuing industrial, social and environmental policies through public procurement, 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 negative effects caused by horizontal policies and to ensure transparency. This general analysis will then guide us when analysing the procurement system.

4.3 Horizontal policies

Governments may have a tendency to derogate from 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 should 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. In addition, the fact that policies aimed at protecting local producers or minority groups are generally pursued by 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 are unlikely to accept horizontal policies that have a discriminatory effect, except in exceptional circumstances (see, for example, Article XVI of the GPA).

Besides, once these policies 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 their 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 may have quicker and more visible results, its costs are difficult to measure, and it can lead to less competition without any incentive to efficiency for the targeted group.[138]

As far as the protection of national firms is concerned, 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 is used as an effective tool to help local firms. Other mechanisms may be more helpful in achieving these objectives, while implying lower costs. For example, as regards the protection of small and medium-sized enterprises (SMEs), governments can support them by adopting a more general and neutral approach that involves the elimination of all those barriers intrinsic to the procurement process[139] and that deter SMEs 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 may, of course, not be sufficient, but only after these steps are taken should more detailed programmes in terms of price preferences and/or set-aside be considered by governments as a means to support local industries or SMEs via public procurement.

Public procurement can also be harnessed to the achievement of social and environmental policies, such as labour standards and 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 the possibility of availing 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. Article 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 economising on labour costs in order to tender the lowest price.[140] The success of contract compliance is strictly linked to the clear definition of the duties imposed on the contractor and to the mechanisms provided for enforceability once a condition has been breached.[141]

Remedies such as termination of contract or the possibility of debarment from future contracts, together with the grant of damages, should be provided. External agencies should be appointed to monitor contractor compliance with the policy and they should also be accorded a proactive role in activating 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, the implementation of horizontal policies may result in a lower level of transparency which can significantly increase the chance of corruption. There may also be an increase in administrative costs and undue delays which compromise the efficiency of the system.[142] 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 considerations related to horizontal policies are admitted as criteria for the evaluation and selection of bidders, it may be helpful to set those horizontal policies considerations by law or regulation and require the authority to act within the limits established therein. This will avoid the risk that the procurement entity adopts ad hoc solutions to favour one specific bidder. The same selection criteria should be applied to all bidders so as to ensure 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.[143] Careful attention should also be paid at the specification stage (this is further analysed below).

However, this is not to say that governments should not pursue horizontal policies, just that a cautious approach should be adopted when evaluating any rule that digresses from the principle of competition, and that an attempt should be made to ensure that guarantees aimed at avoiding ad hoc solutions are firmly 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 guarantees can be implemented to limit the risks to transparency when horizontal policies are implemented.

Publication of the legal framework

This first part will focus on whether the procurement rules are published and readily available, and whether they are known to and implemented by the procurement agents. On the latter point, we will use the PPRA's 2009 *Procurement Audit Report*. Finally, we 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, which also provides interpretative guidelines and administrative instructions.[144] Tender evaluation guidelines are also provided to procurement entities.

Public procurement laws and regulations are published in the official *Gazette*. Indeed, Article 88 of the Public Procurement Act states: '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 PPRA 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 *Tanzania Procurement Journal*: these are set out in an editorial section by the PPRA's Chief Executive Officer. Procurement notices and, less often, information on the award of contracts are also published in the *Journal*. All these documents are easily accessible and can be downloaded from the internet.

The situation in respect of judicial and quasi-judicial decisions is more difficult to assess. Information on complaints proceedings is not easily available. Further studies should be commissioned to assess and monitor the state of the review system. For example, it would be interesting to have clear data and analysis on whether aggrieved bidders make use of the review system, and if so how they use it and how often they succeed. 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 were registered in 2007/2008. The review for 2009, which refers to data for the financial year 2007/2008, shows that the average level of compliance rose to 71 per cent. Specifically, the PPRA's report on 'Follow-Up Implementation of Procurement Audit Recommendations in Forty Five Procuring Entities' states:

> [T]he outcome of the review indicated a remarkable compliance improvement from an average level of compliance of 39 and 43 per cent in the financial years 2006/07 and 2007/08, respectively, to an average level of compliance of 71 per cent. The average level of compliance in LGAs [local government authorities] has increased from 40 to 66 per cent while in the MDAs [ministries, departments and agencies] it has increased from 43 to 74 per cent. The Medical Stores Department attained a maximum compliance level of 96 per cent while the National Housing Corporation attained a minimum compliance level of 37 per cent.

The report continues by stating that:

> [T]he 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 make aid disbursement conditional on the implementation of sound procurement policies (see below for the case of the US MCC).

Finally, it should 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 80 per cent by the end of the financial year 2010/2011. To this end, some capacity building programmes have been put in place.

Capacity building

Training programmes for procurement officials were introduced in 2009 to implement the 'Large Scale Capacity Building Program on Public Procurement'. The programmes started in June 2009 and training is carried out by the PPRA.

The PPRA has embarked on a large-scale modular-based training programme, with the aim of reaching as many procuring entities as possible. The official PPRA report states: 'The primary focus of the programme is staff of the Procurement Management Units (PMUs) and members of the Tender Boards'. The reasons advanced for focusing on these groups are that 'PMUs are where the procurement processes are managed, while Tender Boards are responsible for approving various actions in the processes'. There may be a case for these training sessions to be extended to officials involved in higher reviews and appeals bodies (such as the PPAA). The argument against their inclusion is that members of higher appeal boards are already expected to be highly qualified professionals and public procurement experts. Nonetheless, it should be kept in mind that sometimes new developments in procurement practices require training even for highly qualified professionals.

Each course lasts for 14 days, with classes of 50 participants, and a total of 900 officials will be trained. The proposed training will cover seven modules: (a) an overview of the 2004 PPA and its regulations, including the system for checking and monitoring, the procurement management information system and the procurement of commonly used items; (b) the procurement of goods; (c) the procurement of works; (d) the procurement of non-consultancy services; (e) the procurement of consultancy services; (f) the disposal of public assets by tender; and (g) the procurement procedures of the African Development Bank.

Nothing is said on what each module will include. It is hoped that the modules will cover both practical issues, and theoretical questions and general principles, so that participants will be able to address any procurement issue, and not just those stemming

from a single set of regulations. The course should be taught by professionals with both practical and theoretical/academic experience. It should aim at giving officials an understanding of broad and general procurement principles, as well as the technicalities of the particular legislation. This should be done with a view to ensuring that procurement officials are 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 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-day full-time course is sufficient to train procurement officials. Understandably, however, such a broad course cannot involve a longer period of time. One question that could be raised is whether it would be better to have smaller-scale programmes with fewer participants and a more intensive curriculum.

Summary of the transparency of the legislative framework

Analysis of the transparency of the 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 the 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. Special training for people in charge of government procurement was set up in May 2009. 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 made in recent years to reform the procurement system, aided by the strong presence of multilateral and bilateral donors such as Public Financial Management Reform Programme funds.

Publication of procurement opportunities

This element is said to have two components: 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 must prepare and advertise a tender notice before carrying out any of the open tendering procedures available. For example, Article 9 of the regulations provides 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.

Article 65 of the regulations provides that in international competitive tendering, the tender notice 'shall be advertised nationally and internationally'.

According to Article 33 of the 2004 PPA, the accounting officer or chief executive of a procuring entity is responsible for ensuring that procurement opportunities are advertised. According to Article 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 in the official *Tanzania Procurement Journal*, which is available online. This has been a major innovation introduced by the 2004 PPA, aimed at addressing one of the major criticisms of the *CPAR* 2003.

One of the major criticisms of the *CPAR* 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 must be advertised in an international newspaper. According to Article 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 or newspaper in which the tender should be advertised. This could cause some uncertainties; the provision should probably clarify that the international newspaper must have a wide international circulation. If Tanzania were to conclude a procurement agreement with the EU, procurement opportunities should be advertised in the EU's official journal.

Some further elements relating to the tender documents also need to be pointed out. For example, Article 9 of the regulations provides for strict and clear guidelines on the information that must be included in the tender documents. According to Article 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 provisions of the Act and the regulations shows that

Tanzania complies with internationally recognised standards for procurement regulation. Does the practice reflect the law? As said above, the PPRA's 2009 report shows that as far as advertisement of bid opportunities is concerned, the performance of the 45 procurement entities observed was reported as above average (50 per cent and above).

It has been verified 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 an 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 UNCITRAL model law; however, other methods are also allowed under specified circumstances and provided that specific guarantee are in place. (This is also the case under other international and regional procurement agreements such as the GPA and the EU directives.)

Article 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 thresholds apply (and are specified in the regulations), which guide the procurement entity as to whether they should use national or international competitive bidding, or any other method of procurement.

Article 65 also provides that:

> (1) In international competitive tendering, 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, some thresholds must be met for this procedure to apply, as laid down in the third schedule of the regulations. Further conditions for the use of these procedures are also laid down in Article 65, such as the need to use foreign currency. In other cases the procurement authority can use national competitive bidding (or tendering). When using the national competitive bidding procedure, the procurement entity is also required not to discriminate on grounds of nationality (Article 66). However, the tender notice has only to be advertised in Tanzania.

Article 7 further provides that written approval by the Tender Board must 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. Article 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'.

Article 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 … 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 Regulations 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 must keep a record containing a statement of 'the grounds and circumstances on which it relied to justify the use of that method' (Article 63(3)).

Important conditions need to be made in relation to the possibility of derogating 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 should be noted that the second part of Article 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'. It could be questioned whether this provision provides an easy loophole for the avoidance of 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 situations. These include cases where '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 must be under a certain threshold (set out in schedule 2). The possibility of using restricted tendering is restricted to situations where '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' (Article 67).

Article 67(3) specifies that except where suppliers, contractors or service providers 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 have not registered.

The use of requests 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 where the goods are readily available off-the-shelf or as standard specification commodities' (Article 68). Quotations must 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 must be submitted to the appropriate Tender Board for approval and thereafter the procuring entity must address a request for quotations to all approved suppliers simultaneously. Article 68 also contains further detailed provisions on the information to be provided to suppliers and the time limits for requesting proposals from international suppliers.

Finally, Article 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 … (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 Article 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 which are left for research, without any specification as to a time limit.

Direct contracting is also possible (Article 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 appear to allow too much discretion to the procurement entity.

In conclusion, competitive tendering is the preferred procurement method, but derogations from this principle apply and public authorities can use alternative methods provided that they respect certain thresholds and the conditions laid down in the regulations are respected. In addition, general monitoring mechanisms continue to be in place (for example approval by the Tender Board must be sought); records must be kept; and rules are also provided for avoiding splitting up contracts in order 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 a final consideration of 'implementation and practice', some further reflections on the possibility of derogating from the competitive procurement method in the eventuality of 'urgent need' for the goods to be purchased are needed.

It appears that the major safeguard in the regulations for not allowing the procurement authority to abuse its discretion and invoke urgency inappropriately is the provision that urgency should not be the result of 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 includes bad planning.)

The fact that Tanzania allows derogation from ordinary rules in case of emergency situations is not a stand-alone case. Many systems use derogations in similar situations. However, experience has shown that derogating from ordinary procedures can give rise to considerable abuse (for example in the case of Hurricane Katrina) and new systems are being explored for emergency situations.

Current debates seem to indicate that even the toughest and tightest procurement systems can be at risk in emergency situations. Experts have suggested that a different and innovative approach is needed.

Governments facing emergency situations often allow procurement entities to derogate from 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 minimise delays.

A contrary view argues that full and open competition is always the most appropriate course of action, despite any logistical hurdles that might arise, because the government has a duty to act as custodian of 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'.[145]

Kelman (1990) has suggested that the way to balance the need for speed against 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 clean-up 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 of facing urgent needs of procurement entities in emergency situation, while still respecting the basic principles of competition and transparency. It is suggested here that Tanzania should explore the possibility of using such framework agreements.

Finally, as regards implementation, the 2009 PPRA Report shows that as far as the use of appropriate methods of procurement is concerned, the performance of the 45 procurement entities observed was above average (50 per cent and above). If this is really the case, it would be a massive improvement over the most recent *CPAR*, where one of the major criticisms was the fact that procurement entities simply derogate from the ordinary method of procurement (competitive bidding also in 2003) without respecting the thresholds and guarantees put in place by the 2001 Public Procurement Act.

Procedural transparency

Transparency touches on 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 timeframe could disadvantage some bidders (this is especially the case for foreign suppliers, as they are be less likely to be familiar with the tendering system). In this respect Article 80 of the regulations states that tender notices should be published in sufficient time 'to allow equality of access to suppliers'. Further guidance on the timeframe 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 the evaluation criteria will they be able to participate in the tendering process and submit a conforming bid.

Important aspects of transparency relate 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 in ensuring fair treatment and equality of opportunity for bidders. Procurement entities could set specification requirements that create unnecessary obstacles for bidders. If complying with national standards is too costly, bidders may decide not to participate in the tender. At this stage, procurement entities could use criteria that can be met only by very few and specific suppliers. For example, if specifications are too technical and too specific without any real need for this, any chance of competition will be excluded at the very first stage of the procurement process. This is why international regulations often require that specifications must be described in terms related to the function of the product, rather than to trademark, name or patent, or with reference to international standards rather than national ones.[146]

The UNCITRAL model law suggests that 'any specifications … that create obstacles to participation, including obstacles based on nationality' should be avoided (Article 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 so are all requirements affecting the process and production methods used. 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:* 50).

Article 73 (4) of the Tanzanian Public Procurement Act, under the rubric 'Conduct 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 Article 8 of the 2005 regulations. The regulations contain many more articles directly devoted to ensuring that technical

specifications are not used in an abusive manner by procurement entities. So Article 9 of the regulations states:

> … 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: …. 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.

Article 22 of the regulations (again fully complying with the UNCITRAL model law) states:

> (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 pre-qualification 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) Standardised 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 must also approve tender documents and specifications (Article 40 of the regulations).

Hence the Tanzanian measures on technical specifications 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 discretionary powers 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.[147] The UNCITRAL model law allows the possibility of excluding bidders that are not able to perform the contract (Article 6(b)(i)). It also provides for the exclusion of firms that are guilty of criminal offences or of infringement of tax and social security laws. 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 pre-qualification and solicitation documents, and equality of application of these criteria to all suppliers or contractors.[148] Article 6 (3) then states that 'no other criteria than that provided for in this article shall be used'.

> Subject to the exceptions in Article 8 (1), 34 (4) (d) ... the procuring entity shall establish no criterion ... that discriminates among suppliers on the basis of nationality or that is not objectively justifiable.

Arguably, because of the prominent role played by 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 Articles 8 and 34.

One of the exceptions in Article 6 is that provided in Article 8(1). The article promotes the international participation of suppliers and contractors, but 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' (Article 8 (2)) on which it relies. Once the process has been declared to be open to international participation it cannot be retracted at the last minute (Article 8 (3)).

As regards Tanzania, in respect of discrimination on the ground of nationality it suffices to say at this point that Article 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 UNCITRAL model law), but some exceptions to this principle are laid down in the regulation itself. This also complies with the model law, i.e. the requirement 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 4.3.

Other provisions which might affect trade and foreign suppliers' participation in relation to the qualification stage could be, for example, measures requiring 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, Article 46 of the 2004 PPA provides that 'local firms wishing to participate in any procurement proceedings must satisfy all relevant requirements for registration with appropriate professional or any other statutory bodies 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 avoids discouraging foreign suppliers from participating in tender opportunities.

Careful analysis of Tanzanian procurement legislation reveals that the qualification criteria laid down in the 2004 PPA and 2005 regulations fully meet international standards. Clearly, the drafters of the legislation were familiar with the international principles laid down in the UNCITRAL model law. For example, Article 9 of the regulations states that procurement entities need to ensure that 'all the selection criteria are specified in the tender documents' and that selection criteria are monitored by the PPRA. Exclusions are provided for insolvency, bankruptcy, criminal offences and debarment for corruption by international institutions (see Article 14 of the regulations). In addition:

> 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 (Article 14(3)).

Article 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 the regulation. Article 14(5) provides that 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 of qualifications must be kept.

It is extremely positive to note that Tanzanian procurement rules on qualifications accord with internationally accepted principles of transparency, because in the qualification stage discriminatory behaviour 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 in 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, Article 34 of the UNCITRAL model law allows the adoption of the lowest evaluated tender award criteria, but it states that the criteria must be objective and quantifiable and must be given a relative weight or be expressed in monetary terms. This provision is clearly aimed at enabling tenders to be evaluated objectively and compared on a common basis. It is also necessary, in order to prevent abuse of discretionary powers, that all the evaluation criteria are set out in the solicitation documents and that no criteria other 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. Number (ii) states that 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. Number (iii) covers industrial policies and (iv) deals with national defence and security. The criteria set forth in Article 4(c)(iii) relate to economic development objectives. The guide to the UNCITRAL model law makes recommendations on the list of non-price criteria taking into account the risks that these criteria may pose to the objective of good procurement practice. This is because criteria other than price (and criteria 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 criteria with a non-economic character.[149] Article 34(d) allows 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, but only if this is authorised in the procurement regulations and approved by an external body. 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*).

Article 65 on evaluation criteria seems to fulfil the transparency principles. 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, Article 9 of the regulations 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, Article 90(17)(c) states 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, contracts must be approved and awarded by the Tender Board (Article 96).

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

Transparency of contract awards

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

Article 21 of the regulations provides 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'. 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 (Article 89(1). Article 89(8) further states that all tenders submitted before the deadline 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 Article 89(12) and (13), which states 'Discounts offered by tenderers must be read out and announced in public during the process of tender opening. 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.'

Article 90(1) states that a procuring entity shall establish a tender evaluation committee comprising not less than three and not more than five members. The tender evaluation must be consistent with the terms and conditions set forth in the tender documents and such evaluation will be carried out using the criteria explicitly stated in the tender documents (Article 90(4)). 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 asset by tender (Article 90(5)). 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 (Article 90(6)). 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 (Article 90(7)). If a tender is not responsive to the tender document, it shall be rejected (Article 90(16)).

All these provisions comply with international standards. However, practices seem not to comply with the legislation in respect of one important aspect of transparency in award proceedings, namely notification of awards. Indeed, the PPRA's Chief Executive Officer reported that during the financial year 2007/2008, 204 procurement entities (PEs) failed to report. He noted that '153 procurement entities reported to have awarded contracts amounting to Tshs 1,800,974 million (US$1361). Tanzania has 357 procurement entities. Unfortunately, however 204 PEs have so far failed to report.'[150] The Tanzania National Roads Agency reported the highest volume of contracts.

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 (2004) 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 very important that whatever means is chosen, the system is effective and does not discriminate between foreign and national suppliers.

The 2004 PPA established 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' (Article 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 imposed on a procuring entity or an approving authority may seek a review.' The Act provides for a broad deadline for bringing complaints, within 28 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 contained in Article 79(2), which states that the possibility of making 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 nation-

ality in accordance with section 49'. If Tanzania were to agree to 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 complaints is via the procedure for settlement of complaints or disputes by procuring entities and approving authorities (Article 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 are reviewed and decided upon through a written decision by the accounting officer or 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, the complaint needs to be put before the appeal authority (Article 82)).

The aggrieved bidder has the right to receive a decision on his claim within 30 days; if the bidder does not receive an answer or if the matter is not solved in a satisfactory manner, they can apply to the Authority for an administrative review.

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 tenderer may make a complaint to the authority within 14 working days from the date of communication of the decision by the accounting officer. The authority shall within 30 days after the submission of the complaint or dispute deliver a written decision. It is interesting to note that the days passed could potentially be 102 (28+30+14+30). The decision of the authority is unless an action is commenced under section 82 of the Act.

Article 82 states:

> (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 effected 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 (28+30+14+30+14+30))

The procurement proceedings can be suspended for a period of seven days (Article 84). Contracts already entered into force can also be suspended for seven days. These suspensions can be extended to 30 days. However, considering that 146 days may pass before a final decision is reached, the length of this suspension seems inadequate. Contracts already entered into force cannot be annulled.

Finally, the supplier can apply for judicial review (Article 85).

4.4 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 is sufficient, relevant and timely, and whether there is equality of readily accessible information.

Many of the provisions in the regulations help in answering this question: for example, Article 15 on the information to be provided for the pre-qualification of suppliers. This article is very detailed and a considerable amount of information is required to be released by the procurement entity. Article 19, on the record of procurement, is also a very detailed and comprehensive provision. Article 81 deals with the provision of detailed information on the content of the invitation to tender. Article 83 contains strict requirements on the content of the solicitation documents.

The regulations covering the timeliness of information are very satisfactory. They include Article 79, which provides for 'timely and adequate notification', Article 80, which states that tender notices must be published in sufficient time 'to allow equality of access to suppliers' and Article 82, which requires solicitation documents to be sent 'soon after response to the tender notice'.

Article 84 deals with the tender period. Further detailed information on this point is also available in the third schedule of the regulations.

In conclusion, it seems that the 2004 PPA and the regulations leave little scope for the procurement entity to act in a non-transparent manner. Only a field study could assess whether all these strict criteria are implemented in practice.

The 2009 PPRA Report is extremely positive on implementation, even though the information it provides seems to deal more with the quantity of transparency than its quality. As stated above, any review assessment should be conducted independently. Moreover, in order to give an adequate assessment of the quality of the system, a review should involve the business community.

4.5 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. The benefits of international competition are not only linked to better choices for the goods and services to be purchased, but also to the fact that international competition leads to internationalisation of the business community, better value goods and job creation.[151]

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 per cent. Open, non-discriminatory and transparent procedures can also help boost the competitiveness of firms operating in public procurement markets (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 specialisation 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 procure-

ment 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 may influence the possibility of opening up procurement to international and regional competition (see section 5 on aid to Tanzania). Recipient countries may also hold back from participating in an agreement on the grounds that if the aid is tied, they will be unable 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 section 5.

The following section looks at 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 the 2004 PPA and the 2005 regulations.

Eligibility criteria of the PPA: the non-discrimination principle

As a general principle, Tanzanian public procurement law prohibits discrimination against bidders on the basis of their nationality. See, for example, Articles 6 and 10 of the 2005 regulations. However the 2004 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'.[152] 'Bidders are permitted to participate in the procurement proceedings without regard to their nationality, except in cases where the 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 clearly complies 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 created by law, and so there can be no ad hoc discrimination.

Exceptions to the non-discrimination principle are laid down in Article 4(2) of the 2004 PPA and Article 16, Articles 25–27 and schedule 4 of the 2005 regulations.

Exceptions to non-discrimination principle

Article 4(2) of the 2004 PPA: Special rules (Article 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*.

Article 4(2) of the PPA 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'.

Article 4(2) grants exclusive rights to participate in 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 these international contracts are 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 the donor country and/or provided by donors' national suppliers. Hence, Article 4(2), by requiring that Tanzanian money (in the context of an international agreement) is spent only in Tanzania, seems aimed at offsetting the implementation of tied aid by donors.[153]

However, limiting participation in procurement contracts to national suppliers only carries risks and disadvantages (see above). The Tanzanian authorities try to limit these possible drawbacks in Articles 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 possible criticism of this provision is that the wording is very unclear, especially in Article 4(3). It seems that the provisions convert set-aside to price preferences. If, however, national suppliers have already been considered unqualified, would it not be better to open the process to international competition?

No other provisions granting preferential treatment to national suppliers are provided in the 2004 Act itself. However, more detailed provisions on national preferences are contained in the 2005 regulations, namely Articles 16, 25–27 and schedule 4.

According to Article 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 significant provision because it requires preferences to national suppliers to be set by law. This is an important safeguard aimed at avoiding abuses and it complies with the UNCITRAL model law.

Another important provision is the fact that discrimination is allowed only in specific cases (those laid down in the regulations and/or specified by law. This is impor-

tant as it avoids ad hoc decisions by the public authorities which could allow discrimination motivated by concealed corruption.

It is also commendable that in order to avoid abuses by the procurement entity, Article 16, paragraph 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 must be disclosed in advance. Suppliers must be informed whether national preferences will be granted according to the regulations and once foreign suppliers have been told that the procedure is open to international competition, the rules can no longer be modified (again, this provision is aimed at improving transparency, avoiding corruption and prohibiting ad hoc solutions). Article 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'.

Article 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 sub-regulation (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 Article 25, when foreign suppliers participate in tenders (for goods, services or works contracts), the maximum margins 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

Input of national firm in the association (%)	Preference (%)
20–40	4
40–60	6
60–80	8
80–100	10

(b) Margin of preference for goods mined or manufactured in Tanzania up to 15%

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 the costs of price preferences can be quantified. Would these preferences be an obstacle to an international agreement? Many agreements now recognise that developing countries use procurement to boost national industries and that they are unwilling to give up this option. (See, for example, the case of South Africa.) Article 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 developing countries' development needs, with a view to encouraging more developing countries to accede to the GPA.[154] 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'.[155]

Article 26 of the 2005 regulations provides for set-aside of contract 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 Article 26(2), the exclusive preference will also be granted to joint ventures or associations between foreign and local contractors or service providers. (The exclusive preference is applicable to national firms and associations of national and foreign firms in which the contribution of the national firm to the association is more than 75 per cent.)

According to the fourth schedule, project values below which exclusive preference will be applied are as follows:

Procurement type	Value (Tshs)
Works	1,000,000,000 (US$755,574.83)
Goods	200,000,000 (US$151,114.97)
Non-consultant services	250,000,000 (US$188,893.71)
Disposal by tender	Not applicable

Given the fact that the option 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 Article 49(1) of the 2005 regulations provides that 'a procuring entity shall not divide its procurement into separate contracts for the purpose of avoiding international or national competitive tendering'. In order to disincentivise procurement officials from splitting up contracts, 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: paragraph (3) 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 agreement were to be signed by Tanzania, such a provision would have to be tightened and the requirement not to split up 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 agreement. Related to the prohibition against splitting contracts is Article 45(d) of the PPA, which states that procurement entities should avoid splitting procurement to defeat the use of appropriate procurement methods unless the purpose of such splitting is to enable wider participation of local consultants, suppliers or contractors. In this case, the authority shall determine such an undertaking. This latter measure seems derogate, to a great extent, from the principle of non-splitting up of contracts.

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

In order to avoid the risk that limiting participation to national suppliers would affect the quality of the goods purchased, Article 26(3) states: 'In applying exclusive preference to local contractors or service providers, 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 procurement entities do not buy low quality goods? It only states 'quality' of goods but what quality? The risk that the goods purchased will be of a worse quality than those that would be purchased if the procurement was open to international competition probably still exists and is 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 should be remembered that set-aside is allowed only when the provisions of Article 26(1) is met, namely for contracts with 'a value not exceeding the values provided in the Fourth Schedule of these Regulations'.

Finally, Article 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'.

An assessment should be conducted aimed at ascertaining whether these price preferences and set-aside for national suppliers are effective.

Other trade-related measures

Other relevant provisions which might affect foreign suppliers' participation are those 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 dealing with 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 to the market and inherent in participating in procurement opportunities in a different country. For example, language can be a barrier to trade. However, some conditions are often expected and accepted to be different from country to country.

Language

Tanzania is very favourable to foreign suppliers in this respect, as Article 52 of the 2004 PPA 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 tenderers may be requested to tender in either language.

5 Development issues

5.1 Supporting production through negotiations for an agreement on procurement

Table 1 (extracted from the 2007 PPRA *Assessment of the Country's Procurement System Final Report*) shows sectoral contributions to Tanzania's GDP. The table shows that agriculture makes a substantial contribution to the economic growth of the country. Hence any shock to the agricultural sector will have significant repercussions on overall GDP.

Table 1. Sectoral contributions to GDP

S/No.	Sector	Percentage
1	Agriculture	44.7
2	Manufactured products (Industry)	9.2
3	Trade (wholesale, retail, hotels and tourism)	17.5
4	Construction	5.8
5	Electricity and water	1.4
6	Transport and communication	5.4
7	Finance and business	9.5
8	Public administration and other services	6.9
9	Mining	3.8

Source: PPRA, *Assessment of the Country's Procurement System Final Report*, 2007

Table 1 enables us to advance 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. It should be borne in mind that this is not an economic analysis and does not aim to give an economic account of how an international agreement on procurement will affect production sectors. This analysis will instead highlight the issues linked to the factor of production that any current or future agreement entered by Tanzania could take into account to stimulate trade, given the distribution of production. Policy options to enhance development and stimulate production in light of the sectoral distribution of GDP and the current state of international law will be proposed.

Policy options

Table 1 shows that the agricultural sector is the most important production sector 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 agricultural products have been excluded from most international agreements on procurement. (For example, goods related to food consumption are excluded from the scope of the GPA. Food aid is also excluded from the OECD Recommendation on untying aid to LDCs and HIPCs.) How then can the agricultural sector be stimulated by a procurement agreement? One possibility is to use negotiations on an international agreement on procurement to bargain for concessions with donors to untie food aid projects. Tanzania could open up its procurement market on condition that developed country members of the international agreement agree to untie their food aid projects. Tanzanian producers could then participate in tenders to supply the food aid goods financed by donors. As explained below, food aid continues to be overwhelmingly tied.[156] This is despite the adoption of the OECD/DAC recommendation on untying aid to LDCs, which excludes food aid. La Chimia and Arrowsmith (2000) have suggested that inserting a commitment to untie aid into the GPA could be a way to stimulate developing countries' participation. A similar approach could be taken in any international agreement on procurement concluded between a developed and a developing country. In the specific case of Tanzania, an agreement on procurement that included a commitment to untie food aid could be extremely beneficial, because of the importance of the agricultural sector. Hence, it is reasonable to assume that Tanzanian producers would be able to take advantage of procurement opportunities in the sector and provide the aid goods.

Table 1 also shows that the manufacturing sector is still relatively small in Tanzania. Could an international agreement on procurement be used to stimulate this sector? One possibility that could be explored would be to take advantage of knowledge transfer and joint ventures with foreign suppliers as a way to encourage and stimulate improvement in production. One option would be to use an agreement to grant price preferences to joint ventures of local and foreign suppliers in this sector. However, such a use of price preferences is often questioned, so the drawbacks of such an

approach should be carefully considered. (A further analysis of price preferences has been provided above.)

5.2 Bilateral aid to Tanzania

An analysis of data on the amount of aid granted to Tanzania helps in understanding the importance that sound procurement practices have for the success of development policies and for fostering aid effectiveness. Thus, from a development perspective, such an analysis is very important. In addition, such an analysis also contributes to an understanding of the actual impact that aid policies could have on regional and international agreements aimed at liberalising Tanzania's procurement market to regional and international competition.

An overwhelming proportion of aid is delivered through the public contracting process.[157] Hence the relationship between procurement and aid is vital in understanding development processes and the institutional and economic context of an aid recipient such as Tanzania. Low-income developing countries 'tend to have a sizeable proportion (10–20 per cent is not uncommon) of their non-defence government budgets funded by aid, loans, or grants'.[158] Data on the level of aid disbursed help in 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.[159] Thus the relationship between procurement and aid is reciprocal: aid influences procurement because it finances public expenditure and procurement influences the success of aid policies because sound procurement practices help enhance aid effectiveness. Procurement is recognised as a 'strategic aid management function and central to aid effectiveness'.[160]

In 2007 Tanzania received total net ODA of US$2,810.8 million; this includes bilateral and multilateral aid. It received US$1,830.7 million in bilateral aid from OECD/DAC member countries and US$972.6 million from multilateral institutions, including the EC. A breakdown of the latest published data on bilateral net ODA reveals that Japan[161] was the most generous bilateral donor in 2007, followed by the UK and the USA.

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

Table 2 provides data on ODA donated to Tanzania by DAC countries.

Most bilateral aid was disbursed for the social infrastructure and services sector; in 2007 this amounted to US$673.1 million.

The EU is also a generous donor. In 2007 Tanzania received US$187.1 million from the EC and a total of US$930.5 from the EC and its member states. An analysis

Table 2. ODA received by Tanzania from DAC countries (US$ million)

Country	Amount
Australia	2.6
Austria	1.5
Belgium	13.8
Canada	56.7
Denmark	90.1
Finland	36.7
France	3.0
Germany	65.0
Greece	0.7
Ireland	52.1
Italy	4.3
Japan	721.7
Luxembourg	0.7
Netherlands, The	128.2
New Zealand	1.1
Norway	114.3
Portugal	–
Spain	8.0
Sweden	107.8
Switzerland	24.0
United Kingdom	231.8
United States	166.9

Source: OECD, *Geographical Distribution of Financial Flows to Developing Countries: Disbursements, Commitments, Country Indicators 2003–2007*, available at www.oecd.org

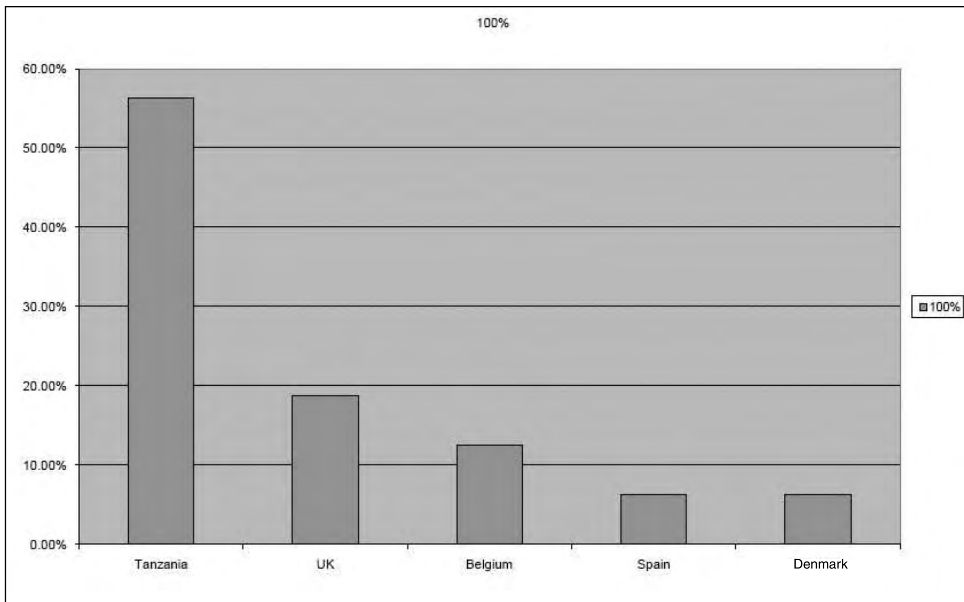
conducted by this author on the allocation of EU aid to Tanzania (i.e. a study on the nationality of suppliers who have been awarded EU aid contracts) reveals that EU aid classified as 'contracts' has seen a significant successful rate of Tanzanian suppliers (or at least suppliers based in Tanzania). Indeed, the highest percentage of EU aid contracts (56.25%)[162] are awarded to suppliers located in Tanzania (see Figure 1 and Table 2). The situation is different for EU aid classified as 'grants'.

Table 2. Allocation by nationality of EU aid contracts awarded to Tanzania

Country	Percentage of total	No. of projects
Tanzania	56.25	9
UK	18.75	3
Belgium	12.50	2
Spain	6.25	1
Denmark	6.25	1

Note: EU data do not distinguish between contracts financed by EDF funding and contracts financed from the EC budget. However, since Tanzania is an ACP country, it is reasonable to assume that the EU published data on the award of EC aid contracts refer to EDF-funded projects.

Figure 1. Classification of awarded aid contracts by nationality



Data extracted from http://ec.europa.eu/europeaid/work/funding/beneficiaries_en.htm
The data refer to procurement contracts awarded in 2007 by European Commission Development and Cooperation EuropeAid

A total of 16 aid 'contracts' to be performed in Tanzania were allocated in 2007 by the EU.

This analysis, although limited in scope because it only includes contracts awarded in 2007 and aid granted by the EU, is nonetheless important because it reveals that in 2007 Tanzanian industries were competitive in the international market (at least in those sectors where EU aid was awarded). Participation in aid contracts was open to international competition, as the EU has adopted the OECD Recommendation on untying aid to LDCs.

The Millennium Challenge Account

The Millennium Challenge Account (MCA) has been described 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 is administered by the Millennium Challenge Corporation.

The MCC is a new and independent US foreign development agency. It makes grants to recipient countries that have adopted programmes to reduce poverty and promote sustainable economic growth. Beneficiary countries need to demonstrate that they have in place sound development policies and programmes before they can qualify for a grant. A fundamental role is played by the state of the procurement system. Only

countries that have undergone sound procurement reforms and implement proper procurement practices are eligible for MCC programmes.

Aid projects financed by the MCC are divided into **compacts** and **threshold programmes**. The former are the biggest and most prestigious form of aid granted by the 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. (A further 19 countries have received grants under threshold programmes; these are smaller grants awarded to countries that come close to meeting the MCC's criteria and are firmly committed to improving their policy performance.)

The MCC states on its website that the 'MCC is a prime example of smart US Government assistance in action, benefiting both developing countries and US taxpayers'. Beneficiary countries are selected and funds allocated following rigorous procedures. For a country to be selected as eligible for an MCC assistance programme, 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'.[163]

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

- **Competitive selection:** Before a country can become eligible to receive assistance, the 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:** The 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 programme.
- **Country-led implementation:** The MCC administers the Millennium Challenge Account. 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.

Tanzania is a beneficiary of one of these grants, confirming the positive relationship in Tanzania between procurement and development and the perception that it is well on the way to achieving a sound procurement system. This project is also a testament to the importance of donor 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 US$698 million. The main aim 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, 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 is contained in the *Quarterly Implementation Status Report*. Recent published data show that US$2,955,434 has been disbursed to date, of a total US$26,810,330 of contract commitments. The report is available at http://www.mcc.gov/mcc/bm.doc/qsr-imp-tanzania.pdf

According to the MCA programme, contracts for goods, works, non-consultancy services and services financed under the programme will be implemented according to the principles, rules and procedures set out in the MCC *Program Procurement Guidelines*. Procurements are generally open to all bidders from eligible source countries as defined in the MCC programme. It should be remembered that Tanzania is a LDC and the USA has committed to implement the OECD Recommendation on untying aid; hence projects that fall within the Recommendation category are supposed to be untied and open for participation to all suppliers. However, most MCA projects 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

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*).

It is not possible to make a detailed analysis of these guidelines here and this does not fall within the terms of reference of this report. However, it is interesting to focus briefly on the eligibility criteria for participating in contract award opportunities. These criteria can be found in Article 1 of the *Guidelines*. Article 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: Article 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. Article 19 states:

> (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.

This raises the issue of what happens if there are clashes with the procurement rules laid down in the Tanzanian PPA.

As already stated in the compact, Article 4 of the PPA applies. According to Article 4, if there is any contradiction between the Tanzanian procurement rules and an international agreement, the international rules prevail. Specifically, Article 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 fulfil 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'.[164] There are two levels 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

Thus, in addition to the specific rules and procedures that apply to the procure-

ment process for projects sponsored by MCC, specific sets 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 MCC aid-funded projects. This is especially so considering that Tanzania is undergoing important reforms of its own procurement system. Why were Tanzanian rules not considered adequate to govern MCC projects? Why could Tanzania not use its own rules and procedures when implementing these projects? These questions seem pertinent considering that Tanzania's procurement reforms led to the approval of the compact contract for Tanzania. Indeed, when deciding to grant the compact contracts, the MCC deemed that Tanzania's rules met the MCC criteria for 'sound reforms'. If these reforms were good enough for the compact contract to be approved, why were they not good enough for contracts funded by the MCC? How many set of procedures, rules and challenge systems does a country need? What costs are incurred by a recipient country because of the multiplicity of rules that it needs to apply in order to fulfil donors' requirements? These questions should be investigated and donors should try to comply with principles of ownership and partnership by letting the beneficiary county use its own procurement rules, especially when it has made important reforms of its procurement system.

5.3 Development issues and liberalising 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 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 co-operation, 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 or limits as regards the origin of the goods to be purchased and the nationality of the suppliers participating in the procurement process. When aid is tied, goods and services for the aid-financed project must be purchased from the donor country.

Would an agreement on procurement between Tanzania and a limited group of countries providing for national treatment 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 exception of food aid) can be spent anywhere; hence there would be no breach of MFN obligations (as there would be if Tanzania were to grant preference to the donor's goods and the donor was not a party to the international agreement).

Given that current aid to Tanzania is already untied and that all OECD/DAC countries have already accepted that their aid money can be spent on purchasing goods

and services from any country, no agreement on procurement should affect Tanzania's ability to accept aid by donors who are not members of the agreement. The only obstacle would be presented by new donors such as China, which might grant tied aid.

Such problems could be avoided by inserting a clause into any procurement agreement excluding development aid contracts.

Do Tanzanian industries have a good chance of winning procurement contracts when procurement is open to international competition?

This author has been trying to obtain 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 *Tanzania Procurement Journal*. One recommendation for the future would be to urge Tanzania to provide full data on contract awards, including information on the nationality of the contractors that have won tenders. Information on contract awards should be as comprehensive as possible.

However, as shown above, data have been collected on the award of EC aid contracts granted to Tanzania in 2007 (see Table 1) and because those contracts referred to untied aid and hence were open to international competition, they can be used to make some comparisons.

The data show that Tanzanian suppliers (or suppliers based in Tanzania) were 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, contracts aid. The data cannot be used to reach any general conclusions on the strength of Tanzanian suppliers. Nonetheless, they are interesting as they show that Tanzanian suppliers have been successful and won 56 per cent of EC aid contracts in 2007. They are encouraging, especially when one considers that 'one of developing countries' major concerns for reaching an agreement on procurement is related to market access, 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'.[165]

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.

Notes

1. 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.
2. Companies are also not individuals, but different conditions apply. These are outside the scope of this paper, which considers *government*, as opposed to *private*, procurement.
3. These may, for the purposes of this paper, 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'.
4. 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 and Tirole, *A Theory of Incentives in Procurement and Regulation*, MIT, 1993.
5. In economic terms, the principal/agency relationship creates 'informational asymmetries'.
6. 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 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.
7. 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; the bidders act, in effect, as the monitors of procuring entities and agents on behalf of the government.
8. Of course, the award may be based not only on price, but on a mix of price and product quality.
9. See, for example, case *C-275/98 Unitron Scandinavia et al. v Ministeret for Fødvarer, Landbrug og Foskeri ('Unitron')* [1999] ECR I-8291; *Case C-324/98 Telaustria and Telefonadress v Telekom Austria ('Telaustria')* [2000] ECR I-10745.
10. Many of the multilateral development banks, such as the World Bank, the Inter-American Development Bank and the African Development Bank, have introduced some confusion by making an artificial distinction between what they call national competitive bidding and international competitive bidding, 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. The multilateral development banks, of course, 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 international competitive bidding, even though there is a current move to reliance on country systems. But at national level there is usually only one set of procurement rules that applies to both national and international bidding.
11. No market economy does so and even hardline communist states such as North Korea cannot do without some foreign imports, however hard they try.
12. The word 'may' is used advisedly. As discussed further below, restricting foreign competition will probably have a negative economic impact, even if it gains 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.
13. For example, section 150 of the federal general financial rules; this is replicated in all the Indian states and applied vigorously.
14. 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.
15. S Woolcock, *Public Procurement and the Economic Partnership Agreements (EPAs): Assessing the Potential Impact on ACP Procurement Policies*, Commonwealth Secretariat, May 2008.

16 See Chapter 3 below.
17 The preferences for small businesses or those which are owned and operated by minority groups or disadvantaged groups are not explicitly (though they may be) directed towards national companies, but the effect is often the same.
18 This will usually be defined by reference either to local content requirements or to rules of origin, and may include some foreign component.
19 G Deltas and S Evenett, 'Quantitative Estimates of the Effects of Preference Policies' in B Hoekman and P Mavroidis, *Law and Policy in Public Purchasing*, University of Michigan Press, 1997.
20 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.
21 See McAffee and McMillan (1989), 'Government Procurement and International Trade', *Journal of International Economics*, 26: 291; Branco (1994), 'Favoring Domestic Firms in Procurement Contracts', *Journal of International Economics*, 37: 65.
22 In cases where the domestic firm has a cost advantage, however, this would simply serve to increase the cost to the government unnecessarily, because even without the price preference, the local supplier would have won the bid.
23 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.
24 For example, the USA applies a basic 6 per cent price preference under the Buy American Act, Canada 10 per cent and Australia 20 per cent.
25 A Mattoo (1996), 'The Government Procurement Agreement: Implications of Economic Theory', *World Economy*, 19: 695.
26 McAffee and McMillan (1989), 'Government Procurement and International Trade', *Journal of International Economics*, 26: 291.
27 Baldwin and Richardson, 'Government Purchasing Policies, Other NTBs and the International Monetary Crisis', in English and Hay (eds), *Obstacles to Trade in the Pacific Area*, Carleton University, 1972; Miyagiwa (1991), 'Oligopoly and Discriminatory Government Procurement Policy', *American Economic Review*, 81: 1321; Hindley (1978), 'The Economics of an Accord on Public Procurement Policies', *The World Economy* 279; S Evenett and B Hoekman, 'Government Procurement: Market Access, Transparency and Multilateral Trade Rules' ,World Bank Policy Research Working Paper No. 3195, 2004; F Trionfetti (2000), 'Discriminatory Public Procurement and International Trade', *The World Economy*, 32: 57.
28 Hindley (1978), 'The Economics of an Accord on Public Procurement Policies', *The World Economy*, 279: 282.
29 S Evenett and B Hoekman, op. cit.
30 It is, of course, a 'political' claim that is made constantly.
31 Even where that is at a cost to the country.
32 See, in particular, Ohlin, *Inter-regional and International Trade,* Harvard University Press, 1933; Dornbusch, Rudiger, Fisher, Stanley and Samuelson (1977), 'Comparative Advantage, Trade and Payments in a Ricardian Model with a Continuum of Goods', *American Economic Review*, 67: 823–839.
33 Developed by OECD/DAC's Joint Venture for Procurement.
34 This is particularly true of Nigeria, where legislation was in the process of being passed at the time of the last available reports.
35 Whether it is a law, regulation or other administrative instruction that regulates procurement is generally a matter for the national system, although hierarchically superior legislative acts are generally preferred on grounds of legal certainty.
36 Including any applicable local preferences.
37 Most of this will be set out in the bidding documents.
38 See section 1.4 above.
39 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 homogeneous products, such as commodities or standard off-the-shelf products.

40 F Hayek, 'The Use of Knowledge in Society' (1945), *American Economic Review*, 35: 519–30, cited in McAffee and McMillan (1987), 'Auctions and Bidding', *Journal of Economic Literature*, 25: 699.
41 Schumpeter, *The Theory of Economic Development*, Harvard University Press, 1934.
42 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.
43 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.
44 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.
45 *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.
46 Domberger and Jensen (1997), 'Contracting Out by the Public Sector: Theory, Evidence, Prospects', *Oxford Review of Economic Policy*, 13(4).
47 See the OECS website at: http://www.oecs.org/about-the-oecs
48 Woolcock (op. cit., p. 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.
49 That is, by measuring the difference between the higher prices paid in a non-competitive system and the prices paid using a competitive system.
50 As stated above, however, the costs of creating a sound legal framework could be significant.
51 In most reform countries, standard form bidding documents would be prepared as part of the overall legal framework.
52 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.
53 For a brief overview, see Woolcock, op. cit., pp. 7–9.
54 The older agreements are less consistent.
55 A model prepared by the United Nations Commission on International Trade Law (1994, UNCITRAL Model Law on the Procurement of Goods, Construction and Services), adapted by many countries for their own domestic systems.
56 Although membership of the GPA has in some instances, e.g. China, been made a condition of membership of the WTO.
57 For a more extensive treatment, see Trepte, 'Government Procurement', in Macrory, Appleton and Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis*, Springer, 2004.
58 *Government Purchasing in Europe, North America and Japan: Regulations and Procedures*, OECD, 1966.
59 A Blank and G Marceau (1996), 'The History of the Government Procurement Negotiations since 1945', *Public Procurement Law Review*, 5: 77.
60 M Pomeranz (1980), 'Towards a New International Order in Government Procurement', *Law and Policy in International Business*, 11: 1263.
61 A Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing*, Kluwer Law International, 1998, p. 107.
62 For an account of the negotiations, see de Graaf and King (1995), 'Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round', *International Lawyer*, 29: 435.
63 See also Halford, 'An Overview of EC-US Relations in the Area of Public Procurement' (1995), *Public Procurement Law Review*, 4: 35; Trepte (1993), 'The EC-US Trade Dispute: Negotiation of a Partial Solution', *Public Procurement Law Review*, 2, CS82.
64 De Graaf and King, op. cit., p. 445.
65 Except for the USA, which adopted a negative list approach.
66 Article XXIV: 7(b) and (c).
67 See Arrowsmith (1996), 'Developing Multilateral Rules on Government Procurement', *Public Procurement Law Review*, 6, CS154; Dischendorfer (2000), 'The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO', *Public Procurement Law Review, 9:* 1 at 29 et seq.

68 See Dischendorfer, ibid., p. 32.
69 WTO Document WT/MIN(96)/DEC/W of 13 December 1996.
70 WTO Documents WT/WGTGP/W/10 and 11. See also Priess and Pitschas (2002), 'The Proposed WTO Agreement on Transparency in Government Procurement – Doha and Beyond', *Public Procurement Law Review*, 11, NA13, p. 14.
71 WTO Document WT/WGTGP/W/27.
72 WTO Document WT/WGTGP/W/26.
73 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.
74 Or at least those sections of it which it is in the politicians' interest to protect.
75 S Evenett and B Hoekman, 'International Cooperation and the Reform of Public Procurement Policies', World Bank Policy Research Working Paper No. 3720, 2005.
76 S Evenett and B Hoekman, 2004, op. cit.
77 S Evenett and B Hoekman, 2005, op. cit. As the European Commission discovered (note 45 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.
78 See, notably, Trionfetti, op. cit.
79 S Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?', in S Arrowsmith and A Davies, *Public Procurement: Global Revolution*, Kluwer Law International, 1998.
80 See section 2.2.
81 *The Size of Government Procurement Markets*, OECD, 2002.
82 R Falvey, A La Chimia, O Morrissey and E Zgovu, 'Competition Policy and Public Procurement in Developing Countries', CREDIT Research Paper 08/07, 2007.
83 Woolcock, op. cit., referring to World Bank *CPAR*s for Uganda and Tanzania.
84 See note 76 above.
85 See section 2.2.
86 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, for example, through job creation, domestic production and technology transfer.
87 http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm
88 See note 76 above.
89 Though it may change depending on other trade-related barriers such as customs duties and tariffs, as well as the existence of domestic preferences.
90 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'.
91 This is less the case for contracts funded by multilateral development banks, which present different opportunities in the case of very large contracts. Bidding for MDB contracts is an industry in itself.
92 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.
93 What those are will, of course, depend on the state of the local economy.
94 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.
95 'Small Pacific States', background paper prepared by the Pacific Asian Development Bank for 'Mobilizing Aid for Trade: Focus Asia and the Pacific', 19–20 September 2007, Manila, Philippines.
96 See Falvey *et al.*, op. cit.
97 Most procurement systems contain an exception allowing funded contracts to be governed by the rules of the funding organisation. If not, the funding organisations, notably the multilateral development banks, 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.
98 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.

99 The question of the control exercised by a federal state over states also became an issue in the context of the GPA, for example, in relation to the ability of the US Federal Government to impose the procurement rules required by the GPA on individual US states. 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 USA 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/DSB/M/49). The law also imposed a 10 per cent price penalty on bids submitted by listed companies. The work of the panel was suspended following a US court ruling preventing the implementation of the law.

100 The means of control or influence could include, *inter alia*, government 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., p. 113.

101 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 private utilities operating on the basis of special or exclusive rights.

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

103 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 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.

104 A La Chimia and S Arrowsmith (2000), 'Addressing Tied Aid: Towards a More Development-Oriented WTO?', *Journal of International Economic Law*, 12: 707.

105 Perhaps this implies a recognition that domestic preferences do not have the economic effect ascribed to them in political circles.

106 Contained in Article XXIV: 6.

107 BISD 26S/203-205.

108 http://ctrc.sice.oas.org/TRC/CommonDocs/WTO_Trade_Review_2007/s190dma_e.doc

109 See the OECS website at: http://www.oecs.org/about-the-oecs

110 'Small Pacific States', background paper prepared by the Pacific Asian Development Bank for 'Mobilizing Aid for Trade: Focus Asia and the Pacific', 19–20 September 2007, Manila, Philippines.

111 '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.

112 Professional or technical services of an intellectual or advisory nature covered by Tenders Board Guidelines (Goods and Works).

113 Tenders Board Guidelines (Goods and Works).

114 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.

115 See UN list at http://www.un.org/special-rep/ohrlls/ldc/list.htm

116 United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLLS), available at http://www.unohrlls.org/en/orphan/150/

117 All data on aid distribution have been extracted from OECD, *Geographical Distribution of Financial Flows to Developing Countries: Disbursements, Commitments, Country Indicators 2003–2007*.

118 See note 117.

119 See UN-OHRLLS.

120 Dr Ramadhan Mlinga, Chief Executive Officer of the PPRA, *Tanzania Procurement Journal*, March 2009.

121 DAC, *Harmonising Donor Practices for Effective Aid Delivery*, Guidelines and Reference Series.

122 Dr Ramadhan Mlinga Chief Executive Officer of the PPRA, *Tanzania Procurement Journal*, March 2009.

123 Ibid.
124 Ibid.
125 Dr Ramadhan Mlinga, Chief Executive Officer of the PPRA, '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
126 Ibid.
127 The PFMRP is Tanzania's main programme for improving public financial management. The programme has been in place since 1998 and Phase III was launched in November 2008. The funding for the programme for 2008/2009 was approximately US$30 million. Current active donors to the programme are the World Bank (currently in the lead in the public financial management donor group), theEuropean Commission and eight bilateral development partners. The principles and terms for the partnership between the Government of Tanzania and the partners are set out in a Memorandum of Understanding signed in April 2009.
128 The original three partner states of the EAC – Kenya, Tanzania and Uganda – signed a new Treaty for East African Co-operation in November 1999. Rwanda and Burundi joined the Community in 2007.
129 See Nwogwugwu (2005), 'Towards the Harmonisation of International Procurement Policies and Practices', *Public Procurement Law Review*, 14: 131.
130 Na Zitto Z Kabwe, 'The Economic Partnership Agreement (EPA): Challenges for Tanzania', available at www.chadema.net/makala/kabwe/zitto_4.html
131 Extract from World Bank, 'Tanzania: Regional and Global Integration', available at http://siteresources.worldbank.org/INTTANZANIA/Resources/WB_Regional_Global_Integration_Factsheet.pdf
132 Kabwe, op. cit.
133 Kabwe, op. cit.
134 DAC, op. cit.
135 A McKay, C Milner and O Morrissey, 'The Trade and Welfare Effects of a Regional Economic Partnership Agreement', CREDIT research paper 00/08, University of Nottingham, UK.
136 Ibid.
137 Dr Ramadhan Mlinga, Chief Executive Officer of the PPRA, '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
138 S Arrowsmith, G Meyer and M Trybus, 'Non-commercial Factors in Public Procurement', unpublished report for the UK Office of Government Commerce, 2000, pp. 4–5 .
139 UNCTAD/WTO International Trade Centre, 'Improving Access of Small and Medium Enterprises to Public Procurement: Experience of Selected Countries', draft, pp. 9–53.
140 HK Nielsen (1995), 'Public Procurement and International Labour Standards', *Public Procurement Law Review*, 4: 94.
141 S Arrowsmith, 2003, pp. 242.
142 Arrowsmith, Meyer and Tribus, op. cit., pp. 3–13.
143 S Arrowsmith, J Linarelli and D Wallace, *Regulating Public Procurement: National and International Perspectives*, Kluwer Law International, 2000, pp. 298–301.
144 Article 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'.
145 Schwartz (2006), 'Katrina's Lessons for Ongoing US Procurement Reform Efforts', *Public Procurement Law Review,* 6: 362–373; Yukins, 'Feature Comment: Hurricane Katrina's Tangled Impact on US Procurement', The George Washington University Law School Public Law And Legal Theory Paper No. 161, also published in *The Government Contractor,* 479(34), 2005, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=333989; Linarelli, 'Public Procurement in Times of War and Catastrophe: Iraq and Other Cases', Paper presented at the Conference on Public Procurement: Global Revolution III, University of Nottingham, UK, 19 June 2006; US General Accountability Office; 'Hurricane Katrina: Improving Federal Contracting Practices in Disaster Recovery Operations', *Journal of Public Procurement*, 7: 105–116, 2007.
146 Arrowsmith, Linarelli and Wallace, op. cit., pp. 253–256.
147 Ibid., pp. 296–301.

148 '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' (*Guide to the Law*).
149 Arrowsmith, Linarelli and Wallace, op. cit., pp. 286–298.
150 Data reported in the *Tanzania Procurement Journal* (March 2009) 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%20Contract%20Awarded.pdf
151 Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?', in Arrowsmith and Davies, *Public Procurement: Global Revolution*, Kluwer Law International, 1998, chapter 1.
152 Dr Ramadhan Mlinga, Chief Executive Officer of the PPRA, '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
153 Aid to Tanzania granted by DAC members is covered by the OECD Recommendation on Untying Aid; it is untied because Tanzania is an LDC. However, the OECD Recommendation does not cover non-DAC member, for example China.
154 See generally V Guimaraes de Lima e Silva (2008), 'The Revision of the WTO Agreement on Government Procurement: To What Extent Might it Contribute to the Expansion of Current Membership?', *Public Procurement Law Review*, 17: 61.
155 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.
156 E Clay, *The Effects of Untying Food Aid*, OECD Publications.
157 DAC, *Harmonising Donor Practices for Effective Aid Delivery*, Guidelines and Reference Series.
158 Evenett, 'Can Developing Countries Benefit from Negotiations on Transparency in Government Procurement in the Doha Round?' Task Force 9 (Open, Rule-Based Trading System) of the United Nations Millennium Project, 2003, available at www.alexandria.unisg.ch/Publikationen/22164
159 DAC Guidelines and Reference Series: Harmonising Donor Practices for Effective Aid Delivery.
160 Ibid., *Vol. 3: Strengthening Procurement Capacities in Developing Countries*.
161 Japan's high level of ODA could be due to debt forgiveness, which also counts as ODA. In 2007 Japan recorded a total US$1,601 million granted as debt relief to HIPCs.
162 EU data on aid contracts exclude aid classified as 'grants' in the very peculiar EU aid terminology.
163 From http://www.mcc.gov/mcc/selection/index.shtml
164 MCA-Tanzania Bid Challenge System 2008, p. 4.
165 Falvey *et al.*, 2007.

Bibliography

ADB/OECD (2006). Anti-Corruption Initiative for Asia and the Pacific, *Curbing Corruption in Public Procurement in Asia and the Pacific: Progress and Challenges in 25 Countries*, available at http://www.oecd.org/dataoecd/4/40/37575976.pdf

Arrowsmith, S (1998). 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?', in Arrowsmith, S and Davies, A, *Public Procurement: Global Revolution,* Kluwer Law International, The Hague, chapter 1.

Arrowsmith, S (2003). 'Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization', *Journal of World Trade*, 37(2): 283–303.

Arrowsmith, S (2005). *The Law of Public and Utilities Procurement*, 2nd edition, Sweet & Maxwell, Andover, UK.

Arrowsmith, S, Linarelli, J and Wallace, D (2000). *Regulating Public Procurement: National and International Perspectives*, Kluwer Law International, The Hague.

Arrowsmith, S, Meyer, G and Trybus, M (2000). 'Non-commercial Factors in Public Procurement', Unpublished report for the UK Office of Government Commerce.

Arrowsmith, S and Trybus, M (eds) (2003), *Public Procurement: The Continuing Revolution*, Kluwer Law International, The Hague.

Cecchini, P (1988). *The European Challenge: Benefits of a Single Market*, Brussels.

Clay, E (2006). *The Effects of Untying Food Aid*, OECD, Paris.

DAC (2005). *Harmonising Donor Practices for Effective Aid Delivery, Volume 3: Strengthening Procurement Capacities in Developing Countries*, Guidelines and Reference Series, available at www.oecd.org/dataoecd/12/14/34336126.pdf

European Commission (2004). 'Report on the Functioning of Public Procurement Markets in the EU: Benefits from the Application of EU Directives and Challenges for the Future', EC document (03/02/2004), Brussels.

Evenett S 'Can Developing Countries Benefit from Negotiations on Transparency in Government Procurement in the Doha Round?', available at www.ycsg.yale.edu/documents/papers/Evenett.doc

Evenett, S and Hoekman, B (2003). 'Transparency in Government Procurement: What Can We Expect from International Trade Agreements?' in Arrowsmith and Trybus (eds), *Public Procurement: The Continuing Revolution*, Kluwer Law International, The Hague.

Evenett, S and Hoekman, B (2005), 'Government Procurement: Market Access, Transparency, and Multilateral Trade Rules', *European Journal of Political Economy*, 21(1): 163–183.

Falvey, R, La Chimia, A, Morrissey, O and Zgovu, E (2007). 'Competition Policy and Public Procurement in Developing Countries', CREDIT Research Paper 08/07, University of Nottingham, UK.

Government of Tanzania. *Tanzania Development Vision 2025*, available at www.tanzania.go.tz

Hunja, H (2003). 'Obstacles to Public Procurement Reforms in Developing Countries', in

Arrowsmith, S and Trybus, M (eds), *Public Procurement: The Continuing Revolution*, Kluwer Law International, The Hague.

La Chimia, A and Arrowsmith, S (2000). 'Addressing Tied Aid: Towards a More Development-Oriented WTO?', *Journal of International Economic Law*, 12: 707.

Linarelli, J (2006). 'Public Procurement in Times of War and Catastrophe: Iraq and Other Cases', Paper presented at the Conference on Public Procurement: Global Revolution III, University of Nottingham, UK, 19 June 2006.

Kabwe Na Zitto Z. 'The Economic Partnership Agreement (EPA): Challenges for Tanzania', available at www.chadema.net/makala/kabwe/zitto_4.html

Kelman, S (1990). *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*, AEI Press, Washington, DC.

Khor M. 'Government Procurement in FTAs: An Outline of the Issues', available at http://www.twnside.org.sg/title2/FTAs/Singapore%20Issues/GovernmentProcurement/GovernmentProcurementInFTAsAnOutlineOfTheIssuesMartinKhor.doc

McKay, A, Milner, C and Morrissey, O (2000). 'The Trade and Welfare Effects of a Regional Economic Partnership Agreement', CREDIT research paper 00/08, University of Nottingham, UK.

Mlinga R (2004). '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

Nielsen, HK (1995). 'Public Procurement and International Labour Standards', *Public Procurement Law Review*, 4: 94.

OECD, *Geographical Distribution of Financial Flows to Developing Countries Disbursements, Commitments, Country Indicators 2003–2007*, OECD, Paris.

Rege, V (2001). 'Transparency in Government Procurement – Issues of Concern and Interest to Developing Countries', *Journal of World Trade*, 35: 4: 489–516.

Schwartz, JI (2006). 'Katrina's Lessons for Ongoing US Procurement Reform Efforts', *Public Procurement Law Review*, 6: 362–373;

Task Force 9 (2003). 'Open, Rule-Based Trading System of the United Nations Millennium Project', available at www.alexandria.unisg.ch/Publikationen/22164; UN list of developing countries at http://www.un.org/special-rep/ohrlls/ldc/list.htm

Trepte, P (2004). 'Ensuring Accountability in Public Procurement: Bridging Information Asymmetry, Fighting Corruption and Promoting Integrity in Public Procurement', in OECD, *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD, Paris, pp. 115–118.

Trepte, P (2005). 'Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations', GOV/PGC/ETH, OECD, Paris.

UNCTAD/WTO International Trade Centre. 'Improving Access of Small and Medium Enterprises to Public Procurement: Experience of Selected Countries', draft.

UN-OHRLLS, 'Landlocked Developing Countries and the Small Island Developing States', available at http://www.unohrlls.org/en/orphan/150/

US General Accountability Office (2007). 'Hurricane Katrina: Improving Federal

Contracting Practices in Disaster Recovery Operations', *Journal of Public Procurement*, 7: 105–116.

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

World Bank. 'Tanzania: Regional and Global Integration', available at http://siteresources.worldbank.org/INTTANZANIA/Resources/WB_Regional_Global_Integration_Fact sheet.pdf

Yukins (2005). 'Feature Comment: Hurricane Katrina's Tangled Impact on US Procurement', The George Washington University Law School Public Law and Legal Theory Paper No. 161; Also published in *The Government Contractor*, 47(34), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=333989

This Economic Paper assesses the potential trade effects of rules on procurement policies in Commonwealth ACP countries. It provides a practical guide for policy-makers and negotiators to determine the impact of government procurement rules and policies taken at the national level or negotiated in trade agreements.

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