

THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT: A NECESSARY EVIL IN THE LEGAL STRATEGY FOR DEVELOPMENT IN THE POOR WORLD?

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1. INTRODUCTION

Save for limited flexibilities, such as those introduced by Article XVIII of the General Agreement on Tariffs and Trade ("GATT") at the 1954-55 GATT Review Session, few options are left for poor development-conscious members of the World Trade Organization ("WTO") that wish to nurture domestic industries in this era of intense cross-border business competition.¹ On the strength of GATT Article XVIII, developing countries that are WTO Members are allowed to advance the "infant-industry argument"² to back

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¹ Following pressure from developing countries, the contracting parties to the General Agreement on Tariffs and Trade ("GATT") recognized the folly of absolute trade rules and introduced additional flexibility with regard to GATT obligations for developing countries for the first time at the GATT Review Session held between 1954 and 1955. See General Agreement on Tariffs and Trade: Text of the General Agreement in Force 1958, Nov. 1958, GATT B.I.S.D. (3rd) at 33 (1958) [hereinafter GATT]. During this session, Article XVIII was amended to make it possible for developing countries that were experiencing problems with balance of payments to hold consultations once every two years. *Id.* at 37. Further, on more relaxed conditions, they were allowed to take measures deviating from their GATT obligations for the promotion of a particular industry. *Id.* at 38. Collectively, these amendments to Article XVIII gave birth to the concept of differential treatment of developing countries. For a careful analysis of the involvement of developing countries in the GATT, which also highlights the demands that led to the convening of the GATT Review Session in 1954, see generally ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM (1987) (noting developing countries' effort to create new protective trade barriers for infant-industry protection and to exert less pressure for reciprocal tariff concession negotiations).

² In particular, Article XVIII, section C states:

measures instituted to support particular fledgling industries.³ With a limited scope for development in the multilateral trading system and the recent decision in the European Communities—Conditions for Granting Tariff Preferences,⁴ which sounds the death knell for the Generalized System of Preferences schemes by some developed countries (i.e. the European Union and the United States) as it allows them to offer non-reciprocal market access concessions to developing countries, one could conclude that developing countries are hemmed in by the WTO and have little wiggle room to engage in seemingly discriminatory but development-oriented policies.⁵ However, given the scale and value of the gov-

If a contracting party coming within the scope of paragraph 4(a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

GATT, *supra* note 1, art. XVIII.

³ See Mehdi Shafaeddin, *What Did Frederick List Actually Say?: Some Clarifications on the Infant Industry Argument*, U.N. Conference on Trade and Development, U.N. Doc. UNCTAD/OSG/DP/149 (Discussion Paper No. 149, 2000) (noting that according to Frederick List, who originated the infant industry argument, trade policy is not a panacea, rather, it is one element in his general theory of “productive power” (development); and noting further that industrial development also requires a host of other socio-economic measures), available at http://www.unctad.org/en/docs/dp_149.en.pdf. According to Shafaeddin, the infant industry argument is not only still valid, if properly applied, but is at present even more relevant, owing to recent technological changes in the organization of production. Shafaeddin notes, however, that despite its demonstrable increase and relevance, the means to achieving it have been restricted by international trade rules. *Id.* at 20.

⁴ WTO Report on European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R (Dec. 1, 2003), available at <http://docsonline.wto.org>. The panel ruling has been appealed, however. *European Communities Condition for the Granting of Tariff Preferences to Developing Countries: Notification of an Appeal by the European Communities under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”)*, WT/DS246/7 (Jan. 8, 2004), available at <http://docsonline.wto.org>.

⁵ In a recent article, Professor Robert Howse of the University of Michigan Law School has remarked that “[t]he panel ruling on India’s challenge of the European Community’s generalized [sic] system of preferences will have vast implications for the multilateral trading system, assuming it is not reversed on appeal.” Robert Howse, *The Death of GSP? The Panel Ruling in the India-EC Dispute Over Preferences for Drug Enforcement*, BRIDGES, Jan. 2004, at 7, available at <http://www.ictsd.org/monthly/bridges/BRIDGES8-1.pdf> (last visited Mar. 26, 2004). On GSP schemes in general, please see JUAN SANCHEZ ARNAU, *THE GENERALISED SYSTEM OF PREFERENCES AND THE WORLD TRADE ORGANISATION* (2002).

ernment procurement process in most of these poor economies, it remains one of the most direct ways governments have been able to bolster and keep afloat some strategic sectors of the economy. The government procurement process has served as an ideal tool for state intervention in the economy, and has for this reason remained "at the fringe of trade liberalization efforts."⁶ According to Sahaydachny and Don Wallace, "[t]raditionally [sic] preference for domestic suppliers has dominated the government procurement domain and more often than not insulated it from the pressures to reduce or remove national barriers to entry in commerce."⁷

Efforts by some developed countries, mainly those in the Organization for Economic Cooperation and Development ("OECD"), culminated in the Agreement on Government Procurement ("GATT GPA") upon the conclusion of the Tokyo Round of trade negotiations in 1979. Subsequently, this agreement was extensively revised during the Uruguay Round, which ended in 1994 with the establishment of the WTO to administer all the resulting agreements. However, the continued plurilateral nature⁸ of the WTO Agreement on Government Procurement ("WTO GPA"), and the so far unsuccessful attempts to negotiate its multilateral equivalent, has meant that transparency and non-discrimination in government procurement remains an arrangement for a few will-

⁶ Simeon A. Sahaydachny & Don Wallace Jr., *Opening Government Procurement Markets*, in *TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS* 462 (Miguel R. Mendoza et al. eds., 1999).

⁷ *Id.* According to Vinod Rege,

[w]hen GATT was being negotiated in 1947, the countries participating in the negotiations did not want to change the practices they followed in procuring goods. These often involved requiring purchasing agencies to show preference on price or other considerations to domestic producers, or to buy from countries with which the country had historical ties, even though goods at lower prices were available in other countries.

Vinod Rege, *Transparency in Government Procurement: Issues of Concern and Interest to Developing Countries*, 35 *J. WORLD TRADE* 489, 491 (2001). Because of these concerns, which would have flouted the key non-discrimination provisions of the GATT, it was decided to include an explicit exception in Article III, paragraph 8(a), which reads: "The provisions of this Article [on non-discrimination] shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale." *GATT*, *supra* note 1, art. III.

⁸ According to Tunkin, "plurilateral" means that the agreement is of interest only to a small group of countries, while its opposite, "multilateral" simply means that the agreement is of interest to all countries. Grigory Tunkin, *Is General International Law Customary Law Only?*, 4 *EUR. J. INT'L L.* 534, 537 (1993).

ing countries.⁹ Currently, the agreement has twenty-eight members¹⁰ and twenty-three observers.¹¹ Seven countries are in the process of negotiating membership.¹² The common thread one notices when glancing through the list of subscribing countries is the domination of the developed world, mainly the OECD block. Except for Cameroon, which is an observer, there is no other African country that is in any way associated with the agreement.

What is distressing, however, is that some of the poorer countries' decision not to sign the WTO GPA seems guided by priorities that are defeated by other factors inherent in these countries, and have nothing to do with a careful and honest assessment of what the nations really stand to gain or lose by signing.¹³ In offering the explanation that they would like to shield their domestic suppliers from external competition for government tenders, and nurture various strategic sectors, these countries are deliberately missing the point. They are being bled to ruination by terribly warped procurement laws and policies.¹⁴ The poor implementation of pro-

⁹ For an excellent review of the World Trade Organization ("WTO") and the evolution and enforcement of government procurement rules, please see SUE ARROWSMITH, *GOVERNMENT PROCUREMENT IN THE WTO* (2003) and Sue Arrowsmith, *Towards a Multilateral Agreement on Transparency in Government Procurement*, 47 INT'L & COMP. L.Q. 793 (1998).

¹⁰ These are: Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, and Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, and the United States. Singapore, which was a signatory to the Tokyo Round Agreement, did not sign it in 1994 but it later joined in 1997. WTO, *Government Procurement: Plurilateral Agreement*, at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (last visited Mar. 26, 2004).

¹¹ These are: Argentina, Australia, Bulgaria, Cameroon, Czech Republic, Chile, Colombia, Croatia, Estonia, Georgia, Jordan, Kyrgyz Republic, Latvia, Lithuania, Malta, Moldova, Mongolia, Oman, Panama, Poland, Slovak Republic, Slovenia, and Turkey. Kenya, which was an observer in the GATT Agreement on Government Procurement ("GATT GPA"), did not take up observership status in the WTO GPA. *Id.*

¹² Bulgaria, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama and Chinese Taipei. *Id.*

¹³ In contrast, and for a good discussion on how Korea went about establishing whether or not to sign the GPA, please see Inbom Choi, Long and Winding Road to the Government Procurement Agreement: Korea's Accession Experience (1999) (paper presented at the World Bank-Pacific Economic Cooperation Council ("PECC") Trade Policy Forum Seminar on East Asia and Options for WTO 2000 Negotiations), available at http://www1.worldbank.org/wbiep/trade/manila/gpa_korea.pdf (last visited Mar. 26, 2004).

¹⁴ However, there are a number of other plausible reasons as to why developing countries have not been eager to sign the WTO GPA. The first is that the de-

curement laws and policies, or their absence, effectively kills competition for tender awards and makes it the exclusive preserve of a few well-connected businessmen and their contact persons in various government departments. The upshot is that even as they continue to stay out of the agreement, developing countries are not reaping the strategic economic benefits of diminished (or eliminated) external competition in the government supply sector.

Consequently, and as currently handled in most African countries, the procurement policies are pushing weak economies into further underdevelopment due to increasing budget deficits and corrupt practices that divert funds to private hands rather than meaningful development projects.¹⁵ The policies are weakening potentially sound development strategies and need to be quickly reformed. It is customarily difficult to effect positive legal changes in developing countries without external pressure, particularly in a sector such as government procurement with a potentially strong lobby in the form of a cabal of beneficiary businessmen.¹⁶ There-

veloping countries' share of the government procurement market is very small at the moment, and "the gains from exports that would flow from membership of the agreement are therefore likely to be marginal in the case of most developing countries at least in the foreseeable future." Bernard M. Hoekman & Petros C. Mavroidis, *Multilateralizing the Agreement on Government Procurement*, in *LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT 296-98* (Bernard M. Hoekman & Petros C. Mavroidis eds., 2000). The second reason, related to the first, is that developed countries will in fact benefit more from such entry of developing countries into the applicability of the agreement due to their large share of the market, general economies of scale, aggression, and easier access to information of existing government supply contracts. Thirdly, according to Vinod Rege, "[i]f there is a potential for development in trade by the developing countries in the procurement sector, it is with neighbouring countries in the region. For this membership of the [WTO] GPA is not necessary." Rege, *supra* note 7, at 495.

¹⁵ For an interesting study on the relationship between corruption and development, please see Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 *J. ECON. LITERATURE* 1320 (1997). See also John Linarelli, *Corruption in Developing Countries and in Countries in Transition: Legal and Economic Perspective*, in *PUBLIC PROCUREMENT: GLOBAL REVOLUTION 125* (Sue Arrowsmith & Arwel Davies eds., 1998) (reflecting the changes of the implementation of public procurement reform programmes and the efforts to open up procurement and international trade).

¹⁶ See Robert R. Hunja, *Obstacles to Public Procurement Reform in Developing Countries*, in *PUBLIC PROCUREMENT: THE CONTINUING REVOLUTION 17* (Sue Arrowsmith & Martin Trybus eds., 2003), noting that reform of public procurement laws in developing countries is difficult, because *inter alia*:

those in the private sector and their collaborators in the public institutions who benefit from such flawed systems have a very strong vested interest in the maintenance of the *Status quo*. Vested interests in such

fore, these countries should consider the possible benefits of a mandatory international regulatory framework that would ideally come in the "single-undertaking"¹⁷ package of the WTO. This package would compel these countries to implement more open procurement policies because of the multilateral commitments. There would be positive economic and cathartic effects of such a framework. It would expose the policies with which some governments have been covering their wasteful ways and impoverishing their peoples in the process. However, despite the recognition that a multilateral framework agreement on government procurement is necessary, its provisions will have to be subjected to careful scrutiny, especially by developing country negotiators. Such an agreement will have to be grounded on the singular objective of supporting the development priorities of the poor world. The balance between the quest for openness and governmental flexibility to foster development will have to be determined by each country making an honest assessment of corruption and the implementation costs of the agreement. The cost would include the ready availability of procurement professionals in the country, while at

systems can also manifest themselves in various other ways. They can, for example, include local business cartels who may have an interest in maintaining a legal framework that prohibits competition from foreign suppliers. In many developing countries, access to public contracts also serves as a means to reward political supporters to finance political parties.

¹⁷ The "single undertaking" approach in multilateral trade negotiations was first introduced in Section B(ii) of the 1986 Punta del Este Ministerial Declaration launching the Uruguay Round, which provided as follows:

The launching, the conduct and the implementation of *the outcome of the negotiations shall be treated as parts of a single undertaking*. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, GATT B.I.S.D. (33rd Supp.) at 20 (1985-1986) (emphasis added). Under WTO practice, it has been explained to mean that virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. WTO, Doha Declaration Explained, at http://www.wto.org/English/tratop_e/dda_e/dohaexplained_e.htm (last visited Mar. 26, 2004). For a very useful discussion on the concept of "single undertaking," and in particular, the concerns of developing countries in its application, see CHANDRAKANT PATEL, TITLE 1 (South Centre, Trade-Related Agenda, Dev. and Equity, Working Paper No. 15, 2003) and Robert Wolfe, *Global Trade as a Single Undertaking: The Role of Ministers in the WTO*, 51 INT'L J. 690 (1996) (discussing the importance of a new principle of the trade regime).

the same time, subscribing to the desires of a multilateral order. However, under no circumstances should the agreement contain any provisions or imply any obligations that work against genuine efforts to bring about development. In this regard, it must leave a measure of flexibility governments can use to promote local industry and provide a mechanism by which such actions can be properly quantified and accounted for at the international level. It should outline certain minimum standards that must be met before derogation from the international framework is allowable. *A fortiori*, it should provide a remedy for potential tenderers or suppliers, local or international, who wish to challenge the process or the outcome of the government procurement process. Governments should therefore have the possibility, within defined limits, to require successful foreign tenderers to form joint ventures with local enterprises or subcontract to a certain extent by, for example, requiring a certain preferential percentage of the supplies to be locally sourced.

2. PUBLIC PROCUREMENT AND DEVELOPMENT

Public procurement can, and does, have a large impact on the development goals of poor countries due to its sheer size relative to the economies of most developing countries, ranging from eight to twelve percent of the gross domestic product.¹⁸ There is a direct correlation between government procurement and development.¹⁹ This direct relationship is demonstrable in a number of ways. First, public procurement is the interface at which public demands, such as infrastructure and medical supplies, meet the private sector suppliers, such as construction companies and pharmaceutical drugs suppliers. Most of the large-scale public requirements that must be met through public procurement are classic development needs, such as roads, railways, bridges, hospitals, medical supplies, and others. In this sense, public procurement provides the direct avenue, with high levels of expertise, for governments to meet their development challenges. As Wittig notes, “the more fo-

¹⁸ Federico Trionfetti, *Discriminatory Public Procurement and International Trade*, 23 *WORLD ECON.* 57, 73 (2000).

¹⁹ According to Vinod Rege, “[i]t is a widely held view in most . . . [developing countries] that central and local authorities can make *significant contributions to the development of national industries* and employment by awarding contracts to domestic suppliers and contractors or by giving preferences to the procurement of domestically produced goods, services or works.” Rege, *supra* note 7, at 496 (emphasis added).

cused the management of public procurement, the better a country can take advantage of its purchasing power to help development efforts."²⁰

The second direct way in which public procurement interfaces with national development needs is through the "value for money," and hence, higher savings goal of public procurement.²¹ Getting "value for money" is established as a basic component of sound public sector management, which emphasizes performance efficiency, cost cutting, and general fiscal discipline.²² In this way, government and public sector management entities are able to avoid unnecessary and wasteful spending, hence lowering operational costs and increasing the rate of savings. In the end, this translates into general lower government spending and lower budget deficits, a fundamental problem throughout the developing world. It also translates into a less acute need for external financial injections from multilateral lending institutions such as the World Bank and the International Monetary Fund. It thereby reduces debt-servicing commitments, which have been shown to have disastrous economic effects because of escalating and unsustainably high interest rates.

Third, governments can use public procurement as a direct social and economic development tool. Imaginative and develop-

²⁰ WAYNE WITTIG, INTERNATIONAL TRADE CENTRE, PUBLIC PROCUREMENT AND THE DEVELOPMENT AGENDA 3 (2003), available at http://www.wto.org/english/tratop_e/groc_e/wkshop_tanz_jan03/itcdemo1_e.pdf (last visited Mar. 30, 2004).

²¹ See Hunja, *supra* note 16, at 13, noting that:

in the face of shrinking budgets and the need to fight corruption, governments are realizing that significant savings can be gained by a well-organized procurement system."); see also REPUBLIC OF KENYA MINISTRY OF FINANCE AND PLANNING, PUBLIC PROCUREMENT USER'S GUIDE 2 (2002) (stating that in public procurement, "while price paid is important, what is far more important is obtaining value for money When selecting a candidate [for a public procurement contract], the procuring entity should try to find an organization that will meet its needs in quality, quantity and timing at the lowest cost

²² According to Professor Steven Schooner, in the United States, for instance, the "procurement policy aspires to obtain quality supplies, services, and construction economically, efficiently, and in a timely manner. Federal procurement law, regulation, and policy seek to procure the best value for the taxpayer in a system that is transparent, maximizes competition, and ensures integrity." *Are Big Businesses Being Awarded Contracts Intended for Small Businesses?: Before the House Comm. on Small Business*, 105th Cong. 12 (2003) at 10 [hereinafter *House Hearing*] (statement of Prof. Steven L. Schooner, George Washington University Law School), available at <http://www.law.gwu.edu/facweb/schooner/smallbiz-03.pdf> (last visited Mar. 26, 2004).

ment conscious poor governments can formulate a public procurement strategy that gives preference to suppliers from certain sectors and nurture their development and long-term competitiveness.²³ Governments can use public procurement as a tool for lending support to small and medium scale enterprises, for overcoming regional or sectoral unemployment problems, providing support to minority or disadvantaged communities or workers, ensuring fair treatment of employees and so on.²⁴ Many countries do have such policies, but in much of Africa such policies need to be systematized and mainstreamed into a coherent national development, transparent, and efficient strategy.²⁵ The United States²⁶ and

²³ Sahaydachny and Wallace have written describing the preference of domestic suppliers as a “cruder tool” for fostering developing. However, they arrive at the same conclusion in general that public procurement can indeed be used to promote economic development. Arguing for a “new” conception of public procurement, they note:

With a new view of how government procurement can be harnessed in the service of economic development, decreasing emphasis is placed on the cruder tools of exclusion of foreign bidders and margins of preference in favor of domestic bidders; instead, more recognition is given to the economic development benefits of measures such as the following: Training and monitoring public entities to upgrade their procurement skills and to reduce faulty implementation procedures Training the private sector, especially SMEs, in the skills required for effective participation in public procurement. Using procurement packaging techniques that permit SMEs to “get the foot in the door” of procurement markets. More effectively disseminating information about procurement opportunities and distributing bid solicitation documents in a more timely fashion. Facilitating the availability of bid and performance securities for SMEs or in certain cases waiving such requirements. Providing information to failed bidders as to the reasons for their failure so that they can improve their competitiveness Promptly paying amounts due under procurement contracts.

Sahaydachny & Wallace, *supra* note 6, at 463-64.

²⁴ See *House Hearing*, *supra* note 22, at 10 (“Government contracts further goals such as fostering small businesses, overcoming regional unemployment, assisting minority workers, ensuring fair treatment of employees, protecting the environment, and, where appropriate, providing preferences to domestic and other special sources of supply, such as the blind and severely handicapped.”).

²⁵ See Hunja, *supra* note 16, at 9 (suggesting the introduction of standard bidding documents and use of electronic announcement of contract awards to improve transparency and efficiency).

²⁶ See *House Hearing*, *supra* note 22, at 1-2 (noting that the “Small Business Administration Reauthorization Act of 1997 raised the government-wide goal for small business participation from 20 percent to 23 percent [F]iscal year 2001 was a terrific year for small businesses in federal procurement. Small businesses received an additional \$5.3 billion in contract awards—an increase of more than twelve percent.”). Small Business Administration Reauthorization Act of 1997, 15

South Africa are examples of countries that have employed a systematic public procurement policy to support, respectively, small enterprises and a hitherto disenfranchised black business community. For savvy developing countries, even signatory status in the WTO GPA should not prevent them from supporting their domestic industry. They can use the fairly flexible provisions under Article V of the WTO GPA to argue for preference of domestic suppliers. The "broad preference provisions in favour of domestic bidders"²⁷ in procurement policies in the Common Market for Eastern and Southern Africa ("COMESA") region have been described by some commentators as "a deficiency . . . in practices and procedures."²⁸ However, it is certainly within the rights of any responsible state to favor its nationals, particularly when in a competitive and open manner. Properly done, this is a useful development tool for poor countries.

3. ABUSE OF PUBLIC PROCUREMENT LAWS: THE CASE OF KENYA

Kenya is in the process of preparing a new law on government procurement. It is part of the anti-corruption efforts of a new democratically elected government that came into power in December 2002. While it may be too early to judge the commitment of the new government to meaningful and consistent anti-corruption initiatives, one can already discern either a definite unwillingness to move forward with serious reforms or an implicit acquiescence of corrupt practices, especially within the government procurement process.

This Section of the Article will examine Kenya's public procurement laws and their practical application. In examining their practical application, two recent examples will be considered, one by a government ministry and the other by a parastatal body. The first example is the recent controversy over the procurement of HIV/AIDS testing equipment by the Ministry of Health. The second is the procurement of cranes by the Kenya Ports Authority. This Section will end with a brief examination of the proposed

U.S.C. § 644(g) (1997).

²⁷ Stephen Karangizi, Regional Procurement Reform Initiative 10 (Jan. 14-17, 2003) (paper presented at Joint WTO–World Bank Regional Workshop on Procurement Reforms and Transparency in Public Procurement for English Speaking African Countries), available at http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/karangizi1_e.doc.

²⁸ See *id.*

Public Procurement and Disposal Bill ("Procurement Bill")²⁹ that is currently before the Kenyan Parliament and how it may revolutionize Kenya's government procurement process. This bill has already received the approval of the Cabinet of Ministers and is due for a second reading in Parliament.³⁰ The government has stated its commitment to getting the bill enacted into law.³¹

3.1. Public Procurement in Kenya

There are key features of Kenya's current public procurement system. First, it is decentralized—it has a three-tier system with procurement procedures spelled out for the central government, local authorities, parastatal organs, and other bodies such as universities, colleges, schools, and cooperative societies.³² Second, it provides a procedure to review tender awards by unsuccessful bidders.³³ The administration of the public procurement system in Kenya is the responsibility of the Public Procurement Directorate, a small department within the Ministry of Finance. The department was created in 2001 following the enactment of the Exchequer and Audit Act (Public Procurement Regulations) on the order of Legal Notice No. 51 on March 30, 2001. The department is headed by a

²⁹ Public Procurement and Disposal Bill, Kenya Gazette Supp. No. 59 (June 24, 2003) [hereinafter Procurement Bill].

³⁰ Honorable John Mutua Katuku, Assistant Minister, Ministry of Finance, Opening Speech at the Stakeholders Workshop to Review the Public Procurement and Disposal Bill 2003 (Nov. 4, 2003) (on file with author).

³¹ See *id.* ("[T]he government is committed to having the Public Procurement Law enacted [T]he Public Procurement and Disposal Bill 2003 has already been approved by the Cabinet and is in Parliament. It is due for the second reading.").

³² See generally PUBLIC PROCUREMENT USER'S GUIDE, *supra* note 21. For an excellent and concise overview of Kenya's procurement system, please see WALTER ODHIAMBO & PAUL KAMAU, PUBLIC PROCUREMENT: LESSONS FROM KENYA, TANZANIA AND UGANDA 10 (OECD Development Center, Technical Paper No. 208, 2003), available at <http://www.oecd.org/dev/technics> (last visited Mar. 26, 2004).

³³ See generally Gerrishon K. Ikiara, Public Procurement: Strengths, Weaknesses and Implications for Economic Governance (2002) (paper presented at the Conference on Constitutional Reform to Fight Corruption) ("Appropriate procurement procedures enable governments to obtain good services in a more economic and fair way and make public expenditures cost effective."), available at <http://www.kenyaconstitution.org/docs/07d045.htm> (last visited Mar. 26, 2004). See also Gerrishon K. Ikiara, *The Role of Government Institutions in Kenya's Industrialization*, in INDUSTRIALIZATION IN KENYA: IN SEARCH OF A STRATEGY 218 (Peter Coughlin & Gerrishon K. Ikiara eds., 1988) (recommending policies to enhance the beneficial impact of government involvement in the industrialization process are recommended).

director and two deputy directors. The first deputy director is responsible for monitoring, training, and evaluation. The second is responsible for legal and policy affairs.³⁴

However, the department itself does not engage in procurement. The directorate coordinates and oversees all levels of public procurement and according to the regulations is "the central organ of the policy formulation, implementation, human resources development, and oversight of the public procurement process in Kenya."³⁵ According to the Public Procurement Regulations, the directorate's mandate includes: monitoring the functioning of the public procurement process in Kenya;³⁶ developing and supporting the training and professional development of officials and other persons engaged in public procurement, including their adherence to ethical standards;³⁷ organizing and participating in administrative review procedures;³⁸ planning and coordinating technical assistance in public procurement; maintaining and updating a list of all procuring entities and members and secretaries of the various tender committees;³⁹ inspecting procurement agencies for compliance with the public procurement regulations; receiving and processing any procuring entity, the Public Procurement Complaints, Review and Appeals Board ("Appeals Board"), or any general or specific comments pertaining to public procurement;⁴⁰ and acting as a secretariat to consultative meetings with individuals from the public or private sectors who have a stake in the procurement process.⁴¹ The directorate also plays an advisory role to the Ministry and prepares annual reports detailing major national developments in the procurement process.⁴² In its advisory role, the directorate is also responsible for formulating Kenya's position at the

³⁴ Luke Obiri, *Public Procurement Reforms Strategy: The Kenya Experience 9-10* (2003) (paper presented at the WTO Symposium on Government Procurement) (on file with author). According to this recent paper by the Director, the department is under-staffed, lacks the necessary funds for effective operation, and lacks necessary equipment such as fax machines, photocopiers, computers, and especially vehicles, which are particularly necessary for the department's inspection activities. *Id.*

³⁵ PUBLIC PROCUREMENT USER'S GUIDE, *supra* note 21, at 14.

³⁶ *Id.* app. 4, at 40.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See* Obiri, *supra* note 34, at 2-3.

WTO with regard to possible negotiations on multilateral government procurement agreements. The director is a member of Kenya's National Committee on the WTO, a fourteen-member committee that brings together both government officials and civil society representatives for deliberations on Kenya's current and future WTO commitments and their implementation.

Importantly, Legal Notice No. 51 of March 30, 2001 (Kenya Gazette Supplement No. 24) and Legislative Supplement No. 16 create the Appeals Board. The purpose of this Appeals Board is to provide an avenue of review and possibly resolve any complaints by unsuccessful tenderers. It is empowered to formulate its own rules of procedure and those of the secretariat that support its activities. The Appeals Board has jurisdiction over both legal and procedural issues and is constrained to render its decision within thirty days of the complaint notice. It is obliged to arrive at a well-reasoned, well-explained decision and any remedies award. The decision must be rendered in the presence of the parties.

The Appeals Board has a wide arsenal of remedies it can prescribe. It can terminate procurement proceedings; it can revise an unlawful decision award and substitute it with its own decision, save that it cannot make an actual tender award; it can annul, in whole or in part, an unlawful act or decision of the procuring entity, save that it cannot take a decision bringing the procurement contract into force; it can 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 reach a lawful decision; it can prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure; and it can declare the legal rules and principles governing the subject matter of the complaint.

The decisions of the Appeals Board are deemed final but may be subject to judicial review, a process which must commence within thirty days of the decision. This review must be premised on existing law regarding judicial review of administrative actions. In Kenya, as in most common law jurisdictions, the courts are reposed with the power of judicial review on the basis that the role of judges is not simply to interpret the law and settle disputes, but also to monitor the exercise of governmental power. Hence, based on the principle of "rule of law" and the "doctrine of separation of powers," the courts are supposed to place a check on executive ex-

tremes.⁴³ Through judicial review of administrative action, public bodies are restrained from an *ultra vires* exercise of their powers. In *Rex v. Electricity Commissioners*,⁴⁴ an old English case cited with approval by Kenya's Court of Appeal in *David Mugo t/a Manyatta Auctioneers v. The Republic*,⁴⁵ it was held that "whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the High Court exercised in its writs."⁴⁶

Bearing this in mind, for the Appeals Board, one could envisage a judicial review action based on a challenge of the legitimacy of the subsidiary legislation on which its decisions are founded. Since the Public Procurement Regulations are subsidiary legislation, they must be in conformity with the provisions of the enabling statute, in this case, the Exchequer and Audit Act.⁴⁷ A failure

⁴³ See generally M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998) (describing "separation of powers" as the concept that the legislative, judicial, and executive branches of government ought to be separate and distinct and positing that through this separation, each branch works according to its own authority, forming a check or balance against any abuse of power by the remaining two branches). This concept has been a strong feature of modern democratic constitution-making and is also considered a foregone conclusion. According to James Madison, "no political truth is certainly of greater intrinsic value." THE FEDERALIST NO. 47, at 313 (Modern Library ed., 1941). For the origins of the concept, please see HANNIS TAYLOR, THE ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION 62 (1889) (noting, for example, that Montesquieu was accepted as the oracle of political theory for that time). For the influence of this concept on the framers of the U.S. Constitution, please see DAVID HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 20-21 (1928). See also Yash Ghai, *The Rule of Law, Legitimacy and Governance*, 14 INT'L J. SOC. L. 179, 179-208 (1987) (discussing the experiences of governments in Africa).

⁴⁴ *The King v. Elec. Comm'rs, ex parte London Elec. Joint Comm. Co.*, [1924] 1 K.B. 171, 289 (C.A.).

⁴⁵ *David Mugo t/a Manyatta Auctioneers v. The Republic*, Civ. App. No. 265 (Nairobi Ct. App. 1997) (Kenya) (unreported).

⁴⁶ *Elec. Comm'rs*, [1924] 1 K.B. at 205.

⁴⁷ In another unreported case, *Stanley Njindo Matiba v. Att'y Gen.*, the applicant sought *certiorari* in the high court to quash a decision by the Attorney General denying him permission to hire a foreign lawyer to represent him in an election petition in a Kenyan court. Civ. App. No. 42 (Nairobi Ct. App. 1994) (Kenya) (unreported), available at <http://www.uni-bayreuth.de/departments/afrikarecht/kenya64.html>. The application, lodged with leave of the court, was grounded in subsidiary legislation, that is, Legal Notice No. 164. In his ruling the judge stated:

Rules made pursuant to a statute are subsidiary legislation. They are made under delegated powers. A delegate's power is confined to the objects of the legislature. The main reason of delegation is that the legislation itself cannot go into sufficient detail. So it makes a skeleton Act. The delegate supplies meat, thus the intention of the

to sustain such consistency could lead to a declaration of the regulations as being null and void.⁴⁸ One could also foresee a challenge, based on the Appeals Board's rules of procedures, as being inconsistent with the principles of natural justice.

3.2. *The Procurement of Aids Testing Equipment by the Ministry of Health*

The first example of an application of public procurement laws in Kenya involves the procurement of HIV/AIDS testing equipment by Kenya's Ministry of Health. HIV/AIDS has been declared a national disaster in Kenya due to the number of people infected and dying daily from the disease. The government has taken various steps to control the disease including the acquisition of some high-value equipment necessary for the treatment of HIV/AIDS patients. In this regard, the government conducted a tendering process for the procurement of twenty-eight bench-top cytometry systems machines that are used to measure the count of a specific group of white blood cells, known as CD4 cells, amongst HIV/AIDS patients.⁴⁹ These machines assist in identifying patients whose immune system is low and hence help physicians determine whether such patients should be placed on anti-retroviral drugs. The machines,⁵⁰ valued at over US \$1.5 million were to be distrib-

legislation must always be the prima facie guide to the meaning of the delegated legislation.

Id. The court went on to find the purported amendment of Order 53 of the Legal Procedure Rules, by Legal Notice No. 164 of 1994, null and void to the extent of its inconsistency with Section 9 of Kenya's Law Reform Act. *Introduction to Judicial Review of Administrative Action*, East Africa Legal Resource Center (Jan. 22, 2002), at http://www.eastafricanlaw.com/LawArticle/judicial_review.htm.

⁴⁸ *Id.*; *Koinange Mbiu v. Republic*, Chancery Reports 440 (1921) (Kenya) (citing a Kenyan case which held that a regulation on the growing of coffee in colonial Kenya was made in a manner that was inconsistent with the parent statute and therefore null and void).

⁴⁹ The Acquired Immune Deficiency Syndrome ("AIDS") virus attacks the CD4 cells and multiplies within the cells, gradually reducing their numbers in the human body and thus weakening the immune system. See generally Robert S. Hogg et al., *Rates of Disease Progression by Baseline CD4 Cell Count and Viral Load after Initiating Triple-Drug Therapy*, 286 JAMA 2568 (2001).

⁵⁰ The Author has been unable to verify whether twenty-eight or thirty machines were ordered. News reports use both numbers. Compare Luke Mulunda, *Red Flags Raised over Procurement of HIV/Aids Equipment*, FIN. STANDARD, Oct. 7-13, 2003 (quoting a figure of thirty), available at <http://www.eastandard.net/archives/October/tue07102003/financialstandard/news/news07102003009.htm>, with *Why the DMS was Replaced*, DAILY NATION, Nov. 19, 2003 (quoting a figure of twenty-eight), available at <http://www.nationaudio.com/news/dailynation/19112003/>

uted to various hospitals throughout the country.

As in numerous other instances when the Kenyan government has had a need for procurement, Crown Agents was engaged by the Ministry of Health to conduct the procurement process on its behalf. The Kenya government has had a long-running relationship with Crown Agents, a self-described "international development company delivering capacity-building and institutional development consultancy," providing services in public sector transformation, particularly in revenue enhancement and expenditure management, banking, public finance, training, and procurement.⁵¹ The Crown Agents went on to invite bids through their head office in the United Kingdom, for the supply of the equipment from two firms: Becton, Dickinson and Company ("Becton"), a medical technology firm based in Franklin Lakes, New Jersey;⁵² and Partec GmbH, a German company that pioneered cytomics and cell analysis by flow cytometry.⁵³

It is noteworthy that Crown Agents did not advertise the tender in the media. The reason given for this was that it "was a restricted tender due to its exigency."⁵⁴ Crown Agents evaluated the submitted bids and drafted a report for the Ministry of Health that took into account the "technical specification of the equipment offered, the landed cost including delivery to site, installation and training . . . [and] whether the systems offered were open or closed . . . as well as the costs of the reagents."⁵⁵ Since government procurement in Kenya is decentralized, further evaluation of the agent's report and decision for the final tender award fell for determination in the nine-member Ministerial Tender Committee within the Ministry of Health. This committee is chaired by the Director of Medical Services, a civil servant directly appointed by the

News/News1911200336.html.

⁵¹ Crown Agents website, at <http://www.crownagents.com> (last visited Mar. 26, 2004).

⁵² BD website, at <http://www.bd.com> (last visited Mar. 26, 2004). In Kenya, this company is represented by Faram East Africa Ltd., a company that is reputed to have "strong links with top officials at Afya House," which is the headquarters of the Ministry of Health. Mulunda, *supra* note 50. The machine it was to supply is known as a FACSCount Machine.

⁵³ Partec website, at <http://www.partec.de> (last visited Mar. 26, 2004). In Kenya, this company is represented by Flambert Holdings Ltd. The machine it was to supply is known as a Cyflow Machine.

⁵⁴ Mulunda, *supra* note 50 (quoting the remarks of Mr. Alan Pringle of Crown Agents).

⁵⁵ *Id.*

President. The Ministerial Tender Committee chose Becton, reportedly after consultations with the "relevant technical departments and the University of Nairobi."⁵⁶ However, some senior government officials, having expressed preference for Partec, were dissatisfied with the award of the tender. Partec then appealed to the Appeals Board but no decision has been issued yet.⁵⁷

Shortly after the tender award, the Director of Medical Services of the awarding committee was replaced under circumstances that were tied to that particular tender award. Some observers have attributed the replacement to errors "in drawing up specifications in two tenders for the supply of anti-retroviral [drugs] for use in Kenya's pioneering A[IDS] treatment programme, as well as in awarding another Ksh 100 million ([US] \$1.3 million) tender for the supply of [twenty-eight] CD4 machines for use in the treatment programme."⁵⁸ The original specifications of the machines were altered to correspond to the particular product of the eventual winner of the bid *during* the tendering process.⁵⁹ According to a letter from a company representative from Partec that was quoted by journalists, Partec's competitor had been "closely informed concerning the details and the final amount of Partec's offer [and was therefore] in a comfortable position to submit an offer slightly below that of Partec."⁶⁰

Aside from the irregularities in the tendering process caused by undue information disclosure to a rival bidder, the Becton machines also had extremely high maintenance and operation costs. Moreover, there were significant price differences between the two bids. The Becton machine was valued at KSh 2.7 million a piece while the Partec machine was valued at KSh 1.9 million a piece, a difference of KSh 0.8 million in favor of the unsuccessful bidder. Besides this price differential, the Becton machines had some serious technical limitations. They were "a closed system"⁶¹ – that is,

⁵⁶ *Id.*

⁵⁷ See *Why the DMS was Replaced*, *supra* note 50 (noting that the Director of Medical Services came under intense pressure from some government officials to revoke the tender award, but he declined).

⁵⁸ Dagi Kimani, *Opposition to Meme Led to Muga's Removal*, THE E. AFR., Nov. 24, 2003, available at <http://nationaudio.com/news/eastafrican/24112003/regional/regional2411200318.html>.

⁵⁹ See Mulunda, *supra* note 50 (reporting that original specifications for the CD4 counting machines were altered to suit BD's FACS Count machine).

⁶⁰ *Id.* (quoting a letter written on the behalf of Partec GmbH by a Mr. Roland Goehde).

⁶¹ *Id.*

they could only use one type of reagent supplied by Becton. In contrast, the Partec machines could use reagents and accessories available through various manufacturers. Finally, there was a significant difference in the cost of the tests conducted by the two types of machines. An AIDS patient tested on a Becton machine would pay KSh 720, while on a Partec machine it would cost KSh 160. This has serious implications for the availability of the testing facility the government had the intention of providing in a more accessible manner.⁶²

In this case study, the tender specifications were tailored to suit one particular supplier and as a result, the government suffered a terrible loss in revenue, among other faulty procurement practices. If Kenya was a signatory to the WTO GPA, the specifications would have to be in accordance with international standards.

3.3. The Procurement of Cranes by the Kenya Ports Authority

The Kenya Ports Authority is a parastatal created following the collapse of the East African Community and the regional East Africa Harbours Corporation in 1977 and was established following the enactment of the Kenya Ports Authority Act.⁶³ The authority is based in Mombasa, the main Kenyan seaport and a major international maritime link. The deep water port in Mombasa has twenty-one berths, two bulk oil jetties, ample dry-bulk wharves and can service ships of all sizes and all types of cargo. It has specialist cold storage and warehousing facilities and is well linked to the inland ports in three of Kenya's major towns, including Nairobi, the capital city. The authority is responsible for all maritime port activities.

Irregularities have been a common feature of the procurement process at the Mombasa port, particularly due to the sheer sums of money involved in port activities. The latest irregular tendering process centered on a tender for the supply of six cranes for use at the port valued at US \$20 million and advertised by the Kenya Ports Authority. The international tender advertisement was issued on August 12, 2003 and was to close on September 26, 2003. The bid bond was lowered from US \$300,000 to US \$70,000, prompting the postponement of the tender opening process. There

⁶² *Id.*

⁶³ For information on the establishment of the Kenya Ports Authority, see *Procurement and Tendering System at the Port*, Kenya Ports Authority, at <http://www.kenya-ports.com/procurement.htm> (last visited Mar. 26, 2004).

were other postponements that will be discussed in detail later where irregular and direct government interference was evident.

It is important to note that since the public procurement process in Kenya is decentralized, the Kenya Ports Authority has its own procurement committee, which is functionally independent and not subject to the control of the government.⁶⁴ If a bidder is aggrieved by the decision of this committee, they have the right to appeal to the Appeals Board. Recent jurisprudence also allows an aggrieved bidder to apply to the High Court for an injunction, pending the outcome of the appeal in the Appeals Board. In the recent case of *Baumann Engineering Ltd. v. Kenya Ports Authority*,⁶⁵ the plaintiff was awarded an injunction restraining the defendants from "signing, executing or endorsing a contract, deed or memorandum with Damen Shipyards Holland in pursuance of tender No. KPA/102/2002PM" until the hearing and determination of an appeal lodged with the Appeals Board. The injunction, applied for under certificate of urgency, was granted based on the applicant's plea that Baumann Engineering had filed an appeal with the Appeals Board, and if the application was not granted, the applicant's appeal with the Appeals Board "would be rendered nugatory and the whole public procurement structure and system would be brought in to public ridicule and disrepute."⁶⁶ Additionally, the applicant contended that their appeal to the Appeals Board was premised on well-founded allegations of a fundamental nature: the Kenya Ports Authority carried out a "flawed, irregular and manipulated tender process to the advantage of, and in favor of, Damen Shipyards Holland" and that there was a strong possibility that the award would be nullified by the Appeals Board.⁶⁷ In its

⁶⁴ For information on the minimum criteria required for registration as a supplier at the Kenya Port Authority, see *id.* The requirements are quite basic. All prospective suppliers are required to submit the following to the Procurement & Supplies Manager's office: an application letter; a certified copy of certificate of registration; a certified copy of a certificate of VAT; a certified copy of their PIN number; a trade license; a certificate from Ministry of Public Works for construction & civil works, or relevant certificates for other services; a business questionnaire, duly signed and stamped; for scrap dealers, a scrap dealer license and certificate of good conduct is mandatory; and a registration fee of Kshs.1,000.00 in cash or banker's check. *Id.*

⁶⁵ *Baumann Eng'g Ltd. v. Kenya Ports Auth.*, Civ. Case No. 524 (High Ct. 2003) (Kenya) (unreported) (on file with author).

⁶⁶ Boniface Kaona, *Court Stops KPA from Awarding Sh1b Tender*, E. AFR. STANDARD, June 4, 2003, available at <http://www.eastandard.net/archives/June/wed04062003/national/nat04062003009.htm>.

⁶⁷ *Id.*

ruling, the court stated:

Having regard to the matters raised in the affidavits on both sides, and arguments by the advocates for the parties, this court is satisfied that a candidate who is unsuccessful at bidding for a tender who wishes to resort to his right of appeal has a right which is protectable [sic] by injunctive relief. Its complaint through the appeal process allowed under a statute should not be frustrated by a measure, which might wrongfully pre-empt it and render it useless. A statutory appeal procedure should be allowed to run its full course and not be made futile or otherwise useless by some action that might interfere with it. A complaining candidate who fears legitimately that his right under the appeal procedure might be wrecked or otherwise rendered hollow has a right, which if it is interfered with can thereby be injured. Injury thereby likely to be occasioned may be averted by injunctive relief.⁶⁸

This is an important precedent to be used by unsuccessful tenderers whose appeals would otherwise prove worthless if the tender is executed between the initial award and the outcome of the appeals process in the Appeals Board. As was further stated by the court:

[I]f no injunction were granted, and the defendant decides to act on the questioned tender and signs the contract on that basis, and it turns out that the appeal succeeds, a third party who won the tender might be inconvenienced, and contractual obligations and rights of third parties and the [g]overnment may be adversely affected. In the alternative, it may be too late for the applicant to take part in the process. Damages might not be quantifiable.⁶⁹

It is instructive that this particular tender award that was annulled by the Appeals Board pursuant to Regulation 42(5)(d) of the

⁶⁸ *Baumann Eng'g Ltd. V. Kenya Ports Auth.*, Civ. Case No. 524, 1-2 (High Ct. 2003) (Kenya).

⁶⁹ *Id.* at 2-3.

Regulations and re-tendering was ordered because the tendering process and the evaluation were found to have been “seriously flawed.”⁷⁰

Returning to the illustrative irregular Kenya Ports Authority tender case, one of the bidders was Numerical Machining Complex, a state corporation under the Ministry of Trade and Industry.⁷¹ This corporation entered into a Memorandum of Understanding⁷² with Industrial Plant Kenya Ltd. (“Industrial Plant”), a private company, with the intention of presenting a joint bid for the supply of the cranes, required by the Kenya Ports Authority. Further, the joint bidders requested and apparently obtained a bond for their offer from the Ministry of Trade and Industry. This was an explicit endorsement of the tender by the government and one that would be difficult to ignore by the tender committee at the port. The involvement of Numerical Machining Complex in itself was the subject of controversy. There were reports that a statement from the board of Numerical Machining Complex—that it had no capacity to manufacture or in some other way supply the cranes and had no interest in doing so—was ignored, and the Ministry of Trade and Industry proceeded to issue an authorization and support for the joint bid.⁷³ There were at least another twenty-one bidders involved in this procurement bid from among other places: Asia, Latin America, Europe, and Japan.⁷⁴

Beyond this controversy, there was gross interference in the

⁷⁰ Baumann Eng’g Ltd. v. Kenya Ports Authority, Application No. 18/2003, at 4 (Public Procurement Complaints, Review and Appeals Board May 29, 2003) (Kenya) (on file with author).

⁷¹ Numerical Machining Complex is listed under the direct functions of the Ministry of Trade and Industry. *Functions*, Ministry of Trade and Industry, at <http://www.statehousekenya.go.ke/government/trade.htm> (last visited Mar. 26, 2004).

⁷² According to some sources, this memorandum of understanding was never actually executed. See, e.g., Jaiindi Kiseru, *Government Moves to End Mombasa Port’s Multi-Million Tender Controversy*, DAILY NATION, Nov. 11, 2003 (stating that in a meeting held to discuss the memorandum of understanding and the cranes supply tender, it was decided that the two issues would be separated and that the memorandum issue would be addressed on a later date), available at <http://www.nationaudio.com/News/DailyNation/Supplements/bw/11112003/story11113.htm>.

⁷³ See *id.* (noting Numerical Machining Complex’s resistance at participating in the joint bid).

⁷⁴ See Ben Agina, *Ministers Challenged on KPA Tender Saga*, E. AFR. STANDARD, Nov. 8, 2003 (discussing the accusations of interference by three cabinet ministers), at <http://www.eastandard.net/archives/November/sat08112003/headlines/news08110314.htm>.

tendering process by the government. The tender opening was postponed three times on specific requests by cabinet ministers, with the intention of facilitating receipt of more international bids. During the third postponement, which occurred only a day before the actual opening of the bids, the head of the Kenya Ports Authority was under explicit telephone instructions from the Minister for Transport and Communications not to open the bids. The ostensible reason was that the process had suffered from a lack of transparency and accountability.⁷⁵ However, according to other reports, the minister requested postponement to allow a bid by an "unknown interested party."⁷⁶ Earlier postponement had also been made at the prompting of government ministers.⁷⁷ It should be noted that the Public Procurement Regulations provide that international tenders, such as this one for the supply of cranes, have to be opened within twenty-one days of the close of submissions. This basic provision was disregarded by the interference of several cabinet ministers.

When the tenders were finally opened, and despite the lack of clarity as to whether the board of Numerical Machining Complex had actually sanctioned its participation in the tendering, the joint bid by Numerical Machining Complex and Industrial Plant won the tender. This was an unexpected and questionable result given that neither company had the capacity to manufacture cranes, or even to outsource them at a reasonable price. Credibility questions were raised about both entities. Numerical Machining Complex was responsible for large financial loss because of a failed project involving the manufacturing of an authentic Kenyan car, the "Nyayo Pioneer." Industrial Plant, or its subsidiary, was placed

⁷⁵ See Jaindi Kiseru, *Curb Ministers' Appetite for Mischief*, DAILY NATION, Nov. 12, 2003 (discussing Transport and Communications Minister John Michulei's instruction to postpone the opening of bids), available at <http://www.nationaudio.com/News/DailyNation/12112003/Comment/Comment121120036.html>.

⁷⁶ See Agina, *supra* note 74 (noting that this move led to protests from representatives of the other bidders).

⁷⁷ See Kiseru, *supra* note 75 (noting that the postponing ministers were the Minister for Economic Planning and the Minister for Trade and Industry). The third entity that was involved in the second postponement was a company, known as Triton Petroleum Ltd., that wanted to put in its own bid which was subsequently received. See David Okwembah, *Tender Saga Man Seeks Ex-MPs' Help*, DAILY NATION, Nov. 13, 2003 (quoting information received from the personal assistant to the head of the Kenya Ports Authority), available at <http://www.nationaudio.com/News/DailyNation/13112003/News/News13112003136.html>.

under receivership for non-payment of a bank loan.⁷⁸ However, the tender was reopened with Numerical Machining Complex partnering with a South African consortium instead of Industrial Plant, and it received explicit backing by the government again on the basis that "it was government policy to enable Numerical Machining to participate in lucrative business."⁷⁹

3.4. *The Kenya Procurement and Public Disposal Bill 2003*

As previously noted, Kenya is among the many developing countries that are currently in the process of either revising their public procurement legal framework or formulating new laws. Kenya's Procurement Bill was published on June 24, 2003.⁸⁰ The Bill is intended to replace the regulations established in section 5A of the Exchequer and Audit Act. The Bill has received the approval of the Cabinet of Ministers and is due for the second reading in parliament. In Parliament, it will go into the committee stage for close scrutiny. In the meantime, the Ministry of Finance, which is sponsoring the Bill, has welcomed contributions from the public and encouraged debate. It convened a national stakeholders' workshop in November 2003 to discuss the Bill.⁸¹ The principal object of the Bill is to establish procedures for procurement by public entities and the disposal of unserviceable, obsolete or surplus stores and equipment by such entities.⁸² According to Section Two, its objectives are: to maximize economy and efficiency; to promote competition and ensure that competitors are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency in those procedures; and to increase public confidence in those procedures.⁸³

In Part I, the Bill provides for preliminary matters, including the objectives as noted above and definitions. It also includes provisions dealing with the application of the Bill and conflicts with

⁷⁸ See Robert Shaw, *Government Must Cancel this Murky Tender*, E. AFR. STANDARD, Nov. 9, 2003, available at <http://www.eastandard.net/reports/rep09110310.htm>.

⁷⁹ See *id.* (quoting the remarks of Dr. Mukhisa Kituyi, Minister of Trade and Industry).

⁸⁰ THE REPUBLIC OF KENYA MINISTRY OF FINANCE, REPORT ON STAKEHOLDERS WORKSHOP ON THE PUBLIC PROCUREMENT AND DISPOSAL BILL 2003, at 2 (2003) (on file with author).

⁸¹ *Id.*

⁸² Procurement Bill, Kenya Gazette Supp. No. 59, pmb1.

⁸³ *Id.* § 2.

other acts, international agreements, and conditions on donated funds. The definition of "procurement" includes the procurement of "goods, works or services and includes procurement by hiring."⁸⁴ The definition of "public entity," defined as entities subject to the Bill, is broad.⁸⁵ Section Six attempts to address the issue of possible conflict between the proposed law and international agreements. It is a curious provision and has been the subject of debate. It states: "[I]f there is a conflict between this Act, the regulations or any directions of the Authority and an agreement between the Government and one or more states or multilateral or bilateral intergovernmental organisations, the agreement shall prevail." The provision makes international agreements superior to Kenyan law. This immediately leads to questions of national sovereignty, especially given that under the Kenyan legal system, international agreements undergo a process of domestication to become applicable law. The Institute of Economic Affairs, a civil society group in Kenya, has recommended that this provision, along with Sections Five and Seven, be expunged from the Bill entirely.⁸⁶ Noting the anomaly that the Section introduces, one commentator, has remarked:

This clause is problematic . . . [it] raises several problems and, at least, in one sense casts doubts on the professional standards of the drafters and their understanding of Kenyan law and practice. The main problem is the following. Kenya's approach to International law is dualist. This means that a bilateral, plurilateral or multilateral agreement that Kenya ratifies does not automatically become Kenyan law until it is, in addition to ratification, passed into law as an Act of the Kenyan parliament. In other words, interna-

⁸⁴ *Id.* § 3(1).

⁸⁵ According to § 3(1), these definitions include: (a) the Government or any department of the Government, (b) the courts, (c) the commissions established under the Constitution, (d) a local authority under the Local Government Act, (e) a state corporation within the meaning of the State Corporations Act, (f) the Central Bank of Kenya established under the Central Bank of Kenya Act, (g) a co-operative society established under the Co-operative Societies Act, (h) a public school within the meaning of the Education Act, (i) a public university within the meaning of the Universities Act, (j) a college or other educational institution maintained or assisted out of public funds, or (k) an entity prescribed as a public entity for the purpose of this paragraph. *Id.*

⁸⁶ Memorandum from the Kenya Institute of Economic Affairs, The Public Procurement and Disposal Bill 2003, at 3-4 (on file with author).

tional agreements must be domesticated. In effect, any agreement which has not been converted into an Act of the Kenyan Parliament is not law in Kenya. Under the Judicature Act of Kenya, international, bilateral or plurilateral agreements are not sources of law and can therefore not be a basis for creating obligations or rights nor can courts look to them to resolve disputes. In this context, what Clause 6 seeks to do is to override Kenyan law with rules that are not recognised under Kenya's judicial system. This is not only astonishing, but in fact sets up a rule that is basically void. The other problem of course is that this is a blanket provisions and overrides Kenyan law with any and all future international, bilateral and plurilateral agreements which means that if we were to have a procurement agreement at the WTO it would immediately override Kenyan law even without giving the country any time to adjust policy and practices and make sure that any potential problems are looked at and resolved through couching the implementing law in Kenya appropriately.⁸⁷

Part II of the Bill creates the institutional structure that will regulate public procurement. The Public Procurement Oversight Authority ("Authority") is established as a public corporation.⁸⁸ The main functions of the Authority are to ensure that the procurement procedures established under the Bill are complied with, to monitor the public procurement system, and to assist in the implementation and operation of the system.⁸⁹ The Authority will be

⁸⁷ See Sisule Musungu, *The Kenya Public Procurement and Disposal Bill, 2003: Comments on the Draft Provisions in the Context of the WTO Discussions on Transparency in Government Procurement (2003)* (unpublished, on file with author).

⁸⁸ Procurement Bill, Kenya Gazette Supp. No. 59, § 8(1).

⁸⁹ Authority shall have the following functions—(a) to ensure that the procurement procedures established under this Act are complied with; (b) to monitor the public procurement system and report on the overall functioning of it in accordance with section 20(3)(b) and present to the Minister such other reports and recommendations for improvements as the Director considers advisable; (c) to assist in the implementation and operation of the public procurement system and in doing so—(i) to prepare and distribute a manual and standard documents to be used in connection with procurement by public entities; (ii) to provide advice and assistance to procuring entities; (iii) to develop, promote and support the training and professional development of persons involved in procure-

headed by a director.⁹⁰ An advisory board, called the Public Procurement Oversight Advisory Board ("Advisory Board"), is also established by Section 21. The Advisory Board will consist of five members appointed by the Minister from persons nominated by prescribed organizations and the director. The main functions of the Advisory Board are to give the Authority general advice; to approve the estimates of the Authority; and to recommend appointment or termination of the director. A reviewing board is also provided for.⁹¹ The existing Appeals Board will continue as the Public Procurement Administrative Review Board ("Review Board"). The composition and membership of the Review Board is provided in the Exchequer and Audit Act discussed earlier.⁹²

Part III of the Bill deals with the internal organization of public entities in relation to procurement. A public entity must establish procedures for the making of decisions in relation to procurement.⁹³ A public entity must also establish a tender committee, and other bodies as required under the Regulations.⁹⁴ A public entity is responsible for ensuring that the Bill, regulations, and directions of the Authority are followed.⁹⁵ The accounting officer is primarily responsible for ensuring that the public entity fulfills that

ment; and (iv) to issue written directions to public entities with respect to procurement including the conduct of procurement proceedings and the dissemination of information on procurements; and (d) to perform such other functions and duties as are provided for under this Act.

Id. § 9.

⁹⁰ (1) [T]he Authority shall have a Director who shall be the chief executive officer of the Authority and who shall be responsible for its direction and management. (2) The Director shall be a person recommended by the Advisory Board and approved by the National Assembly. (3) On the approval of a person by the National Assembly under subsection (2), the President shall appoint the person as the Director.

Id. § 10.

⁹¹ The functions of the Advisory Board are—(a) to advise the Authority generally on the exercise of its powers and the performance of its functions; (b) to approve the estimates of the revenue and expenditures of the Authority; (c) to recommend the appointment or termination of the Director in accordance with this Act; (d) to perform such other functions and duties as are provided for under this Act.

Id. § 23.

⁹² *Id.* § 25(1)-(3).

⁹³ *Id.* § 26(2).

⁹⁴ *Id.* § 26(3).

⁹⁵ *Id.* § 27(1).

obligation. All other employees are vested with this responsibility as well, which creates an onus for employees to act as whistle-blowers. Provision is also made in Article 28 for procuring agents.⁹⁶

Part IV sets out the general procurement rules, including rules about the choice of a procurement procedure. Sections 29(1) and 29(2) require a procuring entity to choose the open tendering or one of the alternative procedures, such as restricted tendering or direct procurement under certain conditions.⁹⁷ Procurement can not be split to avoid the use of a procedure.⁹⁸ The Bill also spells out a number of rules relating to the conduct of procurement proceedings including provisions relating to qualifications to be awarded a contract,⁹⁹ confidentiality, and communications with the procuring entity.¹⁰⁰ Provisions are included that prohibit induce-

⁹⁶ *Id.* § 27(2).

⁹⁷ *See id.* § 29(3) (“A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity—(a) obtains the written approval of its tender committee; and (b) records in writing the reasons for using the alternative procurement procedure.”).

⁹⁸ *Id.* § 30.

⁹⁹ A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria—(a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured; (b) the person has the legal capacity to enter into a contract for the procurement; (c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing; (d) the procuring entity is not precluded from entering into the contract with the person under section 33; (e) the person is not debarred from participating in procurement proceedings under Part IX; (f) such other criteria as the procuring entity considers appropriate. (2) The procuring entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied. (3) The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure. (4) The procuring entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described in subsection (3). (5) The procuring entity may disqualify a person for submitting false, inaccurate or incomplete information about his qualifications. (6) No person shall be excluded from submitting a tender, proposal or quotation in procurement proceedings except under this section.

Id. § 31.

¹⁰⁰ *Id.* § 44.

ments,¹⁰¹ misrepresentations,¹⁰² collusion, and influence on evaluations by persons not officially involved¹⁰³ and conflict of interest.¹⁰⁴ Procuring entities are prohibited from entering into procurement contracts with certain persons, including employees of the procuring entity, public servants, or persons and corporations related to such employees or public servants. There are also a number of rules that apply after procurement proceedings have been completed. These rules include requirements relating to records and the publication of notice of contracts.¹⁰⁵ The amendment of contracts after they have been awarded is also regulated, including interest on a contract's overdue amounts.¹⁰⁶ Provisions are also made for inspections and audits in relation to both the procuring entity and the contractor.¹⁰⁷

Part V deals with open tendering. Under an open tender, the procuring entity must prepare an invitation to tender as well as tender documents. If the value of the procurement is over a prescribed threshold, the invitation must be brought to the attention of those who may wish to submit tenders by advertisement in newspapers.¹⁰⁸ Other provisions deal with how much time must be allowed for the submission of tenders, production of copies of tender documents, and tender security. A number of other provisions relate to the tenders themselves, including how they are to be submitted and received. Particularly, the tenders will be opened by a tender opening committee subject to specific rules.¹⁰⁹ Provisions are made for changes to tenders, clarifications, and corrections of

¹⁰¹ According to section 40(1),

[n]o person seeking a contract for a procurement and no employee or agent of such a person shall give or offer anything, directly or indirectly, to an employee or agent of the procuring entity, a member of a board or committee of the procuring entity or any government official as an inducement relating, in any way, to the procurement.

In the event of inducements, the tenderer shall be disqualified and if the contract has already been awarded, such a contract shall be voidable at the option of the procuring entity. *Id.* § 40(1).

¹⁰² *Id.* § 41.

¹⁰³ *Id.* § 42(1)-(2).

¹⁰⁴ *Id.* § 43.

¹⁰⁵ *Id.* §§ 45-46.

¹⁰⁶ *Id.* § 47.

¹⁰⁷ *Id.* § 49.

¹⁰⁸ *Id.* § 51.

¹⁰⁹ See *id.* § 60 (establishing the rules for the opening of tenders).

arithmetic errors. Part V also specifies when a tender is responsive and when it is to be evaluated. For instance, the procuring entity will be able to extend the validity period of tenders, subject to any restrictions prescribed in the regulations.¹¹⁰ Provisions are made for notification to the person submitting the successful tender and for entering into the ensuing contract. Consequences are imposed for a refusal to enter into a contract.¹¹¹ Procuring entities are also prevented from imposing additional responsibilities as a condition of being awarded a contract. A provision is also included requiring international tendering if there would not be effective tendering otherwise.¹¹²

Part VI provides for alternative procedures to open tendering. The first is restricted tendering, which is available if the costs of open tendering would be disproportionate to the value of the con-

¹¹⁰ See *id.* § 61 (discussing the rule of extending the tender validity period).

¹¹¹ According to this section:

(1) If the person submitting the successful tender refuses to enter into a written contract as required under section 68, the procuring entity shall notify, under section 67(1), the person who submitted the tender that, according to the evaluation under § 66, would have been successful had the successful tender not been submitted. (2) Section 67(2), section 68 and this section apply, with necessary modifications, with respect to the tender of the person notified under subsection (1). (3) This section does not apply if the period during which tenders must remain valid has already expired.

Id. § 69.

¹¹² This section states:

If there will not be effective competition for a procurement unless foreign persons participate, the following shall apply — (a) the invitation to tender and the tender documents must be in English; (b) if the procuring entity is required to advertise the invitation to tender under section 54(2), the procuring entity shall also advertise the invitation to tender in one or more English-language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement; (c) the period of time between the advertisement under paragraph (b) and the deadline for submitting tenders must be not less than the minimum period of time prescribed for the purpose of this paragraph; (d) the technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade; (e) a person submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used; and (f) any general and specific conditions to which the contract will be subject must be of a kind generally used in international trade.

Id. § 71.

tract and the value of the contract is below the prescribed maximum.¹¹³ Restricted tendering is also available if there are only a limited number of suppliers. It is similar to open tendering, except that the invitation is given only to selected persons. The second is direct procurement, which is available if there is only one supplier, if there is an urgent need, or if the procurement is for goods or services in addition to those already supplied under another contract.¹¹⁴ In this procedure the procuring entity negotiates directly with the supplier. The third is the request for proposals, which is available to procuring services that are advisory or are of a predominately intellectual nature.¹¹⁵ In this procedure, the procuring entity invites expressions of interest by advertisements in the press. The procuring entity determines which people, who express interest are qualified to be invited to submit proposals. The proposals are evaluated, and the procuring entity negotiates a contract, subject to set limitations, with the successful applicant. The fourth is the request for cost quotes, which are available to procure goods that are readily accessible and for which there is an established market.¹¹⁶ In this procedure, the procuring entity prepares a request for quotes and gives it to selected persons. The successful quote is the one with the lowest price that meets the requirements. The fifth is the procedure for low-value procurements, which will only be available for procurement if the estimated values of the goods, works, or services are at or below the prescribed maximum.¹¹⁷ The final alternative procedure is the specially permitted procurement procedures to be employed in exceptional cases when the directorate may give special permission to use a procurement procedure not otherwise available.¹¹⁸

Part VII provides for the review of procurement proceedings. A person who submitted a tender, proposal, quotes, or who might have wished to do so, may request a review by the procuring entity, which once received, initiates the procurement proceedings.¹¹⁹ The decision of the procuring entity is given by the accounting of-

¹¹³ *Id.* § 73.

¹¹⁴ *Id.* § 75.

¹¹⁵ *Id.* § 77.

¹¹⁶ *Id.* § 89.

¹¹⁷ *Id.* § 91.

¹¹⁸ *Id.* § 93.

¹¹⁹ *Id.* § 94(1).

ficer.¹²⁰ The person who requested the review may request a further review by the Review Board.¹²¹ The Review Board's decision can be appealed to the High Court.¹²² Time limits apply for each step in the review process.¹²³ Part VIII gives the Authority power to ensure compliance with the Bill's regulations and directions of the Authority. The director can order an investigation of procurement proceedings and, after receiving the report, can make an order that gives directions to the procuring entity, cancels the procurement contract, or terminates the proceedings.¹²⁴ The Review Board can be requested to review such an order and there is a further right of appeal to the High Court.¹²⁵ Part IX allows the Director to debar persons from participating in procurement proceedings for up to two years on specified grounds.¹²⁶ A debarred person can request a review by the Review Board and there is a further right of appeal to the High Court.¹²⁷

Part X provides for the disposal of unserviceable, obsolete, or surplus stores and equipment. A public entity must establish a committee to recommend a method of disposal to the accounting

¹²⁰ This section states as follows:

(1) Unless the matter is resolved to the satisfaction of the person who requested the review, the accounting officer of the procuring entity shall give the decision of the procuring entity within fourteen days after the procuring entity received the request for the review. (2) The decision given by the accounting officer shall be in writing and shall set out reasons for the decision and the accounting officer shall ensure that a copy of the decision is given to the person who requested the review.

Id. § 96.

¹²¹ *Id.* § 97(1)-(4).

¹²² *Id.* § 103.

¹²³ *Id.* §§ 101, 103.

¹²⁴ *Id.* §§ 106, 107.

¹²⁵ *Id.* §§ 110, 127.

¹²⁶ This section provides possible grounds for such disbarment as follows:

(1) The Director may debar a person from participating in procurement proceedings on the ground that the person—(a) has committed an offence under this Act; (b) has committed an offence relating to procurement under any Act; (c) has breached a contract for a procurement by a public entity; (d) has, in procurement proceedings, given false information about his qualifications; or (e) has refused to enter into a written contract as required under section 68. (2) The Director may also debar a person from participating in procurement proceedings on a prescribed ground. (3) A debarment under this section shall be for a period of time, not exceeding two years, specified by the Director.

Id. § 119.

¹²⁷ *Id.* § 127.

officer in particular cases.¹²⁸ The accounting officer is not bound by the recommendations, but if not accepted, written reasons for the rejection must be submitted to the committee.¹²⁹ Except as allowed under the regulations, the stores or equipment cannot be disposed of to an employee.¹³⁰ The Authority and the Director have the power to ensure compliance with Part X as they did under Part VIII. Special provisions are made for certain procurements and disposals by the armed forces, police, the Kenya Security Intelligence Service, and the Kenya Prisons Service.¹³¹ The Director is required to convene consultation meetings at least twice a year.¹³² Part XI concludes with provisions relating to regulations, offences, transitional matters, and consequential amendments.

4. IMPLEMENTING INTERNATIONAL STANDARDS IN PUBLIC PROCUREMENT

4.1. *The WTO Agreement on Government Procurement*

4.1.1. *Some Antecedents and Negotiations*

The OECD was the earliest forum for discussions of a possible multilateral framework agreement on government procurement, and this perhaps explains why the issue has always been perceived by developing countries as too closely associated with developed-country interests. The discussions within the OECD began in the 1960s and by 1973 had yielded a Draft Instrument on Government Purchasing Policies, Procedures and Practices.¹³³ The early Tokyo Round GATT draft was based on this OECD draft.¹³⁴ The GATT Tokyo Round negotiations, concluding in 1979, resulted in a plurilateral GATT GPA. The GATT GPA had nineteen signatories, who acceded through a process of negotiations that paralleled the "request and offer" style.¹³⁵ By 1994, the number of signatories had

¹²⁸ *Id.* § 132.

¹²⁹ *Id.* § 133.

¹³⁰ *Id.* § 125.

¹³¹ *Id.* § 137.

¹³² *Id.* § 138.

¹³³ See DENIS AUDET, OECD, OECD PUBLIC PROCUREMENT REPORT 13, available at <http://www.oecd.org/dataoecd/34/14/1845927.pdf> (last visited Mar. 26, 2004).

¹³⁴ *Id.*; see also Choi, *supra* note 13, at 5 (noting the history of the GPA).

¹³⁵ *Id.*; see also Arie Reich, *The New GATT Agreement on Government Procure-*

only risen to twenty-three.¹³⁶

Given the very small number of countries that signed the GATT GPA, its impact on the removal of trade distortive measures was minimal. Further, the GATT GPA had a minimal coverage and "minimal impact,"¹³⁷ since it was limited only to goods actually procured by central governments, with the services sectors, including utilities and transportation, excluded from coverage. Further, there was a threshold level of contract value initially pegged at SDR 150,000 but later lowered to SDR 130,000 following amendments to the agreement in 1988.

The GATT GPA signatories engaged in negotiations for its revision and expansion during the Uruguay Round. However, according to Reich, these negotiations were not really part of the Uruguay Round.¹³⁸ Upon conclusion of the negotiations in 1994, the signatories agreed to sign a new, more expansive but still plurilateral agreement. The new agreement, WTO GPA, was signed at Marrakech in April, 1994 and entered into force in January, 1996.¹³⁹ The new agreement broke the limitations of its predecessor and extended its reach to sub-central government entities such as local authorities, state governments, and other public bodies such as corporations and parastatals. However, the agreement is held to apply only to those entities whose signatories would have been listed in the commitment. Another significant feature is that the new agreement includes the procurement of services, which are usually a major part of government spending, such as construction services, utilities, and transportation. However, in the case of services, only those listed in the agreement are covered. The threshold of coverage remains SDR 130,000 for central governments' pro-

ment: The Pitfalls of Plurilateralism and Strict Reciprocity, 31 J. WORLD TRADE 125, 126 (1997) (discussing the state of plurilateralism of GATT upon the passage of the GPA).

¹³⁶ See Choi, *supra* note 13, at 5 (detailing how countries became signatories of the GPA).

¹³⁷ See Reich, *supra* note 134 (citing an influential report by the U.S. Accounting Office estimating that the total value of government purchases covered by the Uruguay Round GPA was around US \$20 billion annually).

¹³⁸ *Id.*

¹³⁹ For some excellent background information on the agreement and its negotiation, see LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT (Bernard M. Hoekman & Petros C. Mavroidis eds., 1997); Patrick A. Messerlin, *Agreement on Government Procurement*, in OECD DOCUMENTS: THE NEW WORLD TRADING SYSTEM 65 (1994); Charlene Barshevsky et al., *Developments in EC Procurement Under the 1992 Program*, 4 BYU. L. REV. 1269, 1326-36 (1990).

curement of goods and services, SDR 200,000 for local governments, and SDR 400,000 for "other entities." Construction contracts are singled out with a threshold of SDR 5,000,000.

4.1.2. *Basic Features of the WTO Agreement on Government Procurement*

The WTO GPA has two main features: transparency and non-discrimination.¹⁴⁰ The agreement requires signatories to create a transparent and openly competitive public procurement system with clear procedures and award criteria.¹⁴¹ Procurement agencies are therefore constrained to publish procurement notices in reasonable time and in an accessible manner for all potentially interested parties to know and bid,¹⁴² and they are to clearly stipulate any technical specifications, technical qualification procedures,¹⁴³ bid opening procedures,¹⁴⁴ and terms and conditions of the contract awards.¹⁴⁵ They are also required to indicate if the tendering process or post-award appeal process is exceptional.¹⁴⁶ They must keep a record of proceedings, disclose any other information that may be due to interested parties, and make public the tender award, including the name and address of the successful bidder and the value of the winning bid.¹⁴⁷ Accordingly, the WTO GPA aims at opening public procurement contracts "to international competition under equal commercial conditions free of any na-

¹⁴⁰ See Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO GPA], Annex 4(b) (setting out objectives in the introduction), available at http://www.wto.org/English/docs_e/legal_e/gpr-94_e.pdf (last visited Mar. 26, 2004).

¹⁴¹ *Id.*

¹⁴² *Id.* art. IX. Article IX further requires that the advertisement be in a previously determined publication and that the notice also be available, at least in summary form, in one of the three official WTO languages (i.e., English, Spanish or French). *Id.*

¹⁴³ See *id.* art. VI (setting out technical specifications allowed and disallowed).

¹⁴⁴ See *id.* art. XIII, para. 3 (discussing submission, receipt, and opening of tenders).

¹⁴⁵ *Id.* art. XIII, para 4; see also *id.* art. VI, para. 2(b) (requiring that any such technical specifications be based on international standards where such standards exists). This requirement will ensure that technical specifications are not used to defeat the non-discrimination element by, for instance, favoring one supplier over another or by favoring domestic over foreign suppliers.

¹⁴⁶ *Id.* art. XIII, para. 4.

¹⁴⁷ *Id.* art. XVIII. Furthermore, an unsuccessful tenderer is allowed to ask for information as to why their bid was rejected and about the qualities and advantages of the successful bid. *Id.*

tional preferences.”¹⁴⁸

The WTO GPA, therefore, requires its signatories to accord national treatment to all suppliers, meaning discrimination against products or suppliers from other signatory countries is prohibited. As a result, the non-discriminatory element in the WTO GPA, rooted in the maximization of competition, generally ensures that procuring agencies do not treat suppliers differently because they may be of different nationality, ownership, affiliation, or origin. In this regard, preferential prices and offsets are prohibited, as is any form of favoritism for domestic suppliers. In general, an open and competitive tendering process of public procurement is encouraged with limited tendering allowed for exigencies.

Another important feature of the WTO GPA is that it introduces a “private right of action” for aggrieved and unsuccessful tenderers to challenge a tender award. Signatories are required to establish bid-challenge procedures that are “non-discriminatory, timely, transparent, and effective.”¹⁴⁹ This means that the tribunal established to administer these procedures should be able to award interim measures for the stay of the tender award pending final determination if it is to be described as timely and effective. This mandatory provision on bid challenge procedures is particularly important for two main reasons. The first is that most violations of the WTO GPA take place at the individual level. For example, an individual company aggrieved by the tender award of some procuring agency may wish to challenge the award with regard to a specific contract.

Second, if the tender award is not immediately challenged and it takes the typically lengthy decision of the WTO, for example, the outcome may be rendered trivial because the party awarded the contract could simply go ahead and fulfill their obligations. In general, WTO dispute settlement remains inter-governmental, and a private company or individual must approach its government to lodge a complaint on its behalf. The WTO GPA is innovative as it mandates signatories to provide a process at the national level through which violations of the agreement may be redressed, in addition to the dispute settlement procedures of the WTO Dispute Settlement Understanding.¹⁵⁰

¹⁴⁸ Reich, *supra* note 135, at 128.

¹⁴⁹ WTO GPA, *supra* note 140, art. XX, para. 2.

¹⁵⁰ *Id.* art. XX. In addition to this opportunity for review at the national level, Article XXII, paragraph 1 clearly states that “The provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO

4.1.3. *Special and Differential Treatment*

Article V is an important derogation from the absolute nature of the non-discrimination feature of the WTO GPA. If developing countries can negotiate mutually acceptable exclusions with other signatories, they are allowed to derogate from the rules on non-discrimination. Article V is tempered by the financial and developmental challenges of developing countries. Under the article, developing countries may obtain special treatment in terms of coverage and national treatment rules by specifying exclusions in the list of offer. Technical assistance and capacity building is also included, as is a dedicated clause for the least developed countries.¹⁵¹

4.1.4. *Whither the Debate on a Multilateral GPA?*

The outcome of the Fifth WTO Ministerial Conference held in September, 2003 in Mexico confirmed that there was little agreement both on the need for a multilateral framework on government procurement, and on the actual parameters of such an agreement. After a period of quiet study of its position following failure to convince developing countries at Cancun, the European Union's ("EU") position with regard to government procurement and the other Singapore Issues, is that it "sees no reason to abandon the fundamental and longrun objective of creating rules"¹⁵² on these four areas. It would appear that the EU is under no illusions that an agreement on modalities would be reached. In this regard, the EU indicates that it will "consider each of the four issues strictly on its own merits, and no longer insist on each issue being treated identically if there is no consensus to do so."¹⁵³ A look at some of the discussions in the Working Group on Transparency in Government Procurement ("WGTGP") reveals that members were quite divided on almost all the elements under discussion.¹⁵⁴ With

Agreement shall be applicable" to disputes arising under the agreement.

¹⁵¹ *Id.* art. IV.

¹⁵² Communication from the Commission to the Council, to the European Parliament, and to the Economic and Social Committee: Reviving the DDA Negotiations – the EU Perspective, COM(03)734 at 10.

¹⁵³ *Id.* at 11.

¹⁵⁴ Working Group on Transparency in Government Procurement is a multilateral working group within WTO that was set up by the 1996 Ministerial Conference in Singapore. "[The group's] mandate is to study transparency in members' government procurement practices, and to develop elements which could be included in a future agreement on transparency." WTO, Government Procurement: Transparency, at http://www.wto.org/english/tratop_e/gproc_e/gp

the elements of an ideal procurement law framework in mind, the extent to which WTO members might come up with a framework that would support the development needs of developing countries while at the same time providing them with a procurement system that enables them to control inefficiencies shall be examined.

4.2. *The UNCITRAL Model Law on Public Procurement*

The objective of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law is "to serve as a model for States for the evaluation and modernization of their procurement laws and practices and the establishment of procurement legislation where none presently exists."¹⁵⁵ The underlying reasons for the Model Law include the conclusion that most existing national legislation on procurement "is inadequate or outdated,"¹⁵⁶ which results "in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds."¹⁵⁷

The need for the Model Law was also premised on the recognition of the particular need for sound laws and practices in public sector procurement in the developing world, "where a substantial portion of all procurement is engaged in by the public sector"¹⁵⁸ with much of such procurement being "in connection with projects that are part of the essential process of economic and social development."¹⁵⁹ The Model Law was also necessary because "[t]hose countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the mar-

tran_e.htm (last visited Mar. 26, 2004).

¹⁵⁵ See *Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods*, U.N. Commission on International Trade Law, at 42, U.N. Doc. A/CN.9/403 [hereinafter *UNCITRAL Guide*], available at <http://www.uncitral.org/English/texts/procurem/mlprocur.htm> (last visited Mar. 26, 2004).

¹⁵⁶ *Id.* at 43.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

ket orientation of the economy.”¹⁶⁰ As another reason, the UNCITRAL’s Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods (“UNCITRAL Guide”) cites the aspiration to eliminate discriminatory government procurement practices such as non-tariff barriers to trade.¹⁶¹

Among its key provisions, the Model Law recommends tendering “as the rule for normal circumstances in procurement of goods or construction”¹⁶² because tendering is “widely recognized as generally most effective in promoting competition, economy, and efficiency in procurement, as well as the other objectives set forth in the Preamble.”¹⁶³ Having recommended tendering as the choice method of procurement, the Model Law prescribes transparency as the way to achieve an efficient and beneficial tendering process. In this regard, it requires that all rules and pieces of legislation relevant to public procurement be made freely accessible to interested parties and that a record of proceedings in any committees, boards or any procurement agencies be kept and made available to parties that may need it.¹⁶⁴ According to the UNCITRAL Guide, Article 5 is therefore “intended to promote transparency in the laws, regula-

¹⁶⁰ *Id.*

¹⁶¹ It states in this regard:

Furthermore, the Model Law may help to remedy disadvantages that stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and quality benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.

Id. Introduction, para 4.

¹⁶² *Id.* Introduction, para 7.

¹⁶³ *Id.*

¹⁶⁴ In this way, the rules will:

[facilitate] the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds.

Id. art. 11, para. 1.

tions and other legal texts relating to procurement by requiring public accessibility to those legal texts.”¹⁶⁵ In the same vein, Article 14 of the Model Law requires that procurement awards be publicly announced.¹⁶⁶

In addition to transparency, the other key recommendation in the Model Law is a facility for unsuccessful bidders to challenge or seek review of the procedure and outcome of a tender award. This is considered an important policing safeguard and is included in Chapter VI of the Model Law. This also relates to the fact that the Model Law abhors any attempts by bidders to influence the outcome of a tendering process. According to the UNCITRAL Guide, the intention of Article 15 constitutes an “important safeguard against corruption: the requirement of rejection of a tender, proposal, offer or quotation if the supplier or contractor in question attempts to improperly influence the procuring entity.”¹⁶⁷ While recognizing that the effectiveness of such a provision depends on its implementation, and that generally, having a procurement law may not completely do away with corruption and other administrative excesses, Article 15 notes that, “the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption. In addition, the enacting State should have in place generally an effective system of sanctions against corruption by government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process.”¹⁶⁸

The Model Law also tackles the issue of discriminatory practices in public procurement and the preference for domestically sourced goods. This has been an important issue in the international trade negotiations context and will remain so, should WTO members enter negotiations for a multilateral agreement on government procurement. In this regard, what the UNCITRAL Model

¹⁶⁵ *Id.* art. 5, para. 1. Affirming the universality of this principle, the UNCITRAL Guide states that it should be found useful even for states that already have an elaborate administrative law that demands ready public access to legislation. For these states, “the legislature may consider that a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers and contractors on the requirement of adequate public disclosure of legal texts concerned with procurement procedures.”

¹⁶⁶ *Id.* art. 14, para. 1.

¹⁶⁷ *Id.* art. 15, para. 1.

¹⁶⁸ *Id.*

Law prescribes, including tender examination, evaluation, and comparison, is quite instructive and could constitute elements of a multilateral compromise. Even in an extremely open and entirely competitive tendering process, Article 34 of the Model Law leaves some flexibility for governments and procuring agencies to incorporate criteria other than the lowest bid, in their evaluation of who to award the tender. It allows the procuring agencies leeway to award the tender to the "lowest evaluated tender."¹⁶⁹ It should be stated, and as it is recognized in the UNCITRAL Guide, that tender price easily provides "the greatest objectivity and predictability."¹⁷⁰

The trickiest part is to decide the criteria used in addition to price, in arriving at the "lowest evaluated tender."¹⁷¹ One of the more plausible rationales proposed by governments for using a procurement policy allowing discrimination against foreign competition, is the nurturing domestic industry. Article 34, paragraph (4)(c)(ii) and (iii) have listed the criteria. Recognizing that developing countries will want to take into account economic development through sectoral promotion policies in government procurement, the criteria in paragraph (4)(c)(iii) relates to this economic development because "in some countries, particularly developing countries and countries whose economies are in transition, it is important for procuring entities to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives."¹⁷² Also, the Model Law envisages the possibility that countries may wish to list additional criteria, but urges caution:

in view of the risk that such other criteria may pose to the objectives of good procurement practice. Criteria of this type are sometimes less objective and more discretionary than those referred to in paragraph (4)(c)(i) and (ii), and therefore their use in evaluating and comparing tenders could impair competition and economy in procurement, and reduce confidence in the procurement process.¹⁷³

¹⁶⁹ *Id.* art. 34, para. 4(b).

¹⁷⁰ *Id.* art. 34, para. 3.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

With the objective of bridling the discretion or arbitrariness in the formulation of the additional criteria by governments, it is suggested that such criteria should be quantifiable and in the evaluation process, they should be expressed in monetary terms.¹⁷⁴ Article 34, paragraph (4)(d) and Article 39, paragraph (2) are important provisions because they allow procuring agencies to grant the "margin of preference" to domestic tenders. Although the availability of such a preference is subject to the rules of its calculation as previously set forth in procurement regulations, and further subject to a pre-disclosure requirement, it should have been included in the documents calling for tender bids, and should also be reflected in the record of proceedings of the procuring agency.¹⁷⁵ According to UNCITRAL, the margin of preference technique is beneficial because it,

[p]ermits the procuring entity to select the lowest-priced tender or, in the case of services, the proposal of a local supplier or contractor when the difference in price between that tender or proposal and the overall lowest-priced tender or proposal falls within the range of the margin of preference. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition.¹⁷⁶

UNCITRAL has an important cautionary remark, that:

¹⁷⁴ *Id.* art. 34, para. 4. In this regard, the UNCITRAL Guide states that one way of properly using the quantification process is "to quantify in monetary terms the various aspects of each tender in relation to the criteria set forth in the solicitation documents and to combine that quantification with the tender price. The tender resulting in the lowest evaluated price would be regarded as the successful tender." *Id.*

¹⁷⁵ The UNCITRAL Guide provides an example of implementing the margin of preference. It states:

As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the tender prices of all tenders import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting tender prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less.

Id. art. 34, para. 6.

¹⁷⁶ *Id.* Introduction, para. 26.

It is important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. Accordingly, the margin of preference could be a preferable means of fostering the competitiveness of local suppliers and contractors, not only as effective and economic providers for the procurement needs of the procuring entity, but also as a source of competitive exports At the same time, the Model Law recognizes that enacting States may wish in some cases to restrict foreign participation with a view in particular to protecting certain vital economic sectors of their national industrial capacity against deleterious effects of unbridled foreign competition.¹⁷⁷

As stated earlier, the Model Law prescribes certain limitations to the leeway of countries to discriminate against foreign suppliers. According to Article 8, paragraph 1, any such discrimination must be on the basis of pre-determined grounds already included in the country's procurement law. For most developing countries that are beneficiaries of loan facilities by multilateral lending agencies such as the World Bank, or even bilateral aid, there are certain conditionalities that attach to these funds. Some explicitly limit or eliminate the flexibility of the beneficiary government to discriminate against foreign tenderers. Article 3 of the Model Law recognizes the "the primacy of international obligations of the enacting State" and that often, the bilateral or other loan arrangements "would require that procurement with the funds should be from suppliers and contractors in the donor country."¹⁷⁸

4.3. *The COMESA Transparency in Government Initiative*

It is essential that laws, regulations and procurement policies be harmonized if COMESA is to effectively realize its objective of deeper regional integration.¹⁷⁹ Owing to the obvious linkages be-

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* art. 25. The Model Law also allows restrictions on the basis of nationality that may result from regional economic integration groupings that accord national treatment to suppliers and contractors from other States' regional economic groupings, as well as to restrictions arising from economic sanctions imposed by the United Nations Security Council. *Id.*

¹⁷⁹ See Karangizi, *supra* note 27, at 2 (noting that the Common Market for

tween government procurement, regional free trade and development, and following "requests by member states that the public procurement practices in some of the member states was a deterrent to increased trade in the COMESA region,"¹⁸⁰ COMESA has taken a keen interest in issues of government procurement in the region.¹⁸¹ Its objectives in this regard are premised on provisions of the COMESA Treaty, Articles 3(c),¹⁸² 4(6)(b),¹⁸³ and 55.¹⁸⁴

In a meeting of the COMESA Council of Ministers held in Kinshasa in June 1998, it was decided that "the Secretariat embarks on a comprehensive study of the procurement rules and practices"¹⁸⁵ in the region with the view "to attain their harmonisation."¹⁸⁶ The project received funding support from the African Development Bank and is due for completion in April, 2004.¹⁸⁷ The overall aim

Eastern and South Africa's ("COMESA") interest in public procurement reform was part of its wider strategy of having a cohesive regional competition policy).

¹⁸⁰ *Id.*

¹⁸¹ See *The Fifteenth Meeting of the Council of Ministers, COMESA* (Mar. 2003) (discussing public procurement reform in COMESA), available at <http://www.comesa.int> (last visited Mar. 26, 2004).

¹⁸² Article 3 outlines the aims and objectives of COMESA, including the desire to cooperate in the creation of an enabling environment for investment. The "enabling environment" in this regard would definitely include an open and transparent government procuring system. Treaty of the Common Market for Eastern and Southern Africa, Dec. 8, 1994, art. 3 [hereinafter COMESA Treaty], available at <http://www.comesa.int>. For an excellent summary of the COMESA history and objectives, please see Stephen Karangizi, *Customs Enforcement in a Regional Integration Arrangement: The Case of COMESA*, in TREATY ENFORCEMENT AND INTERNATIONAL COOPERATION IN CRIMINAL MATTERS 322-30 (Rodrigo Yepes-Enriquez & Lisa Tabassi eds., 2002).

¹⁸³ Article 4, paragraph 6(b) of the COMESA Treaty provides for the harmonization of laws throughout the COMESA region. COMESA Treaty, *supra* note 182, art. 4, para. 6(b). This should make for an open and predictable system of obligations on the part of businessmen in the region. *Id.*

¹⁸⁴ Article 55 is a more general provision in which all COMESA member states agree not to take any actions or put in place any measures that defeat the objectives of free trade. *Id.* art. 55.

¹⁸⁵ *Id.*; see also Karangizi, *supra* note 27, at 3 (recognizing the importance of harmonizing procurement policies).

¹⁸⁶ *Id.*

¹⁸⁷ The Fifteenth Meeting of the COMESA Council of Ministers states as follows:

The representative of African Development Bank made a statement. He congratulated the Government of Sudan and COMESA Secretariat for the successful arrangements made for the meetings. He pointed out that COMESA was an important building block to the African Union and was glad that it was making great strides in achieving vision (sic) on African integration. He pointed out that ADB maintains very close cooperation

of the project was to "lay the groundwork for ensuring accountability and transparency, combating corruption, and creating an enabling legal infrastructure in public procurement"¹⁸⁸ in the region. More particularly, the project envisaged a legal reform component, with the evolution of a set of model laws, regulations, and procedures "rooted on the principles of good governance,"¹⁸⁹ the creation of a Procurement Technical Committee of Heads of National Procurement Agencies, and the formulation of Procurement Directives by February, 2003.¹⁹⁰ The evolution of a regional transparency in government procurement campaign should be a welcome initiative. More particularly, if well managed and financed, it is likely to yield a regionally cohesive procurement legislative framework. According to the COMESA Council decision, "a consolidated approach to public procurement reform would help to prevent unnecessary divergences between the procedures applicable to different types of procurement and to ensure that a single high standard of economy and efficiency, competition, transparency and fairness applies throughout the procurement system."¹⁹¹ Citing some of the benefits of a regional approach to reform of the legal framework on government procurement, the Council noted that "[c]onsolidation and harmonisation of the legal framework also renders procurement systems more user-friendly, both to the concerned public officials and to the private sector. Such consideration assumes added importance in the context of regional integration of procurement markets."¹⁹² In light of this, the Council

with COMESA, which was sealed in 1999 when the two organisations signed a cooperation agreement. ADB has so far provided funding totalling about US \$4.6 million to COMESA. Council noted that the ADB current direct support to COMESA was US \$1.5 million grant for public procurement reforms. Council also noted that ADB was considering some COMESA pipeline projects including an agriculture trade project and seminar for COMESA staff.

The Fifteenth Meeting of the Council of Ministers, supra note 181, para. 322 (emphasis added).

¹⁸⁸ Karangizi, *supra* note 27, at 3.

¹⁸⁹ *Id.* at 6.

¹⁹⁰ See Yacine Fal, Public Procurement Reform: The Role of the ADB, Presentation at the Joint WTO–World Bank Regional Workshop on Procurement Reforms and Transparency in Public Procurement for English Speaking African Countries (Jan. 14-17, 2003) (describing the components of the COMESA Public Procurement Reform), available at http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/fal1_e.ppt#1 (last visited Mar. 26, 2004).

¹⁹¹ *The Fifteenth Meeting of the Council of Ministers, supra* note 181, para. 85.

¹⁹² *Id.*

proceeded to endorse a decision reached in an earlier regional meeting of Ministers of Justice and Attorneys-General, which had decided that public procurement reform in the COMESA region would be attained through four main strategies: the adoption of modern national legislation on public procurement for countries that did not have such legislation or the revision and improvement of national legislation for countries with outdated legislation;¹⁹³ "the adoption of the principles and essential components of national legal frameworks as contained in Document No. COM/IC/XV/3(a) for supporting the project on public procurement reform in COMESA and enhancing regional integration;"¹⁹⁴ "the establishment of a technical committee on public procurement" as highlighted earlier;¹⁹⁵ and "the adoption of the institutional and organizational arrangements contained in document COM/IC/XV/3(a)."¹⁹⁶

5. CONCLUSION

There is an ongoing wave of reform of public procurement laws and policies around the world. In Africa, these reforms are conducted at the national and regional levels. At the national level, the discussion has focused on Kenya. Additional examples would include the East African countries of Uganda, Tanzania,¹⁹⁷ Guinea Bissau,¹⁹⁸ and Gambia.¹⁹⁹ At the regional level, this Article has highlighted the ongoing COMESA public procurement initiative that aims to harmonize public procurement laws and policies throughout the region. There are other examples of regional strategies including the Maghreb harmonization efforts involving Algeria, Libya, Mauritania, Morocco, and Tunisia, and supported

¹⁹³ *Id.* para. 86.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See ODHIAMBO & KAMAU, *supra* note 32 (noting Tanzania laws and regulations recently passed by Parliament addressing public procurement).

¹⁹⁸ According to Wittig, new regulations are being formulated with national and international stakeholders in Guinea Bissau. It is intended that "[a] new central procurement office will develop policies, training programs, oversee selected contract award decisions, and install management information systems." See Wittig, *supra* note 20, at 9.

¹⁹⁹ In the Gambia, the intended changes are supposed to yield a new "legal framework, organizational infra-structure and training programs affecting public procurement." *Id.*

by the Geneva-based International Trade Centre.²⁰⁰ All these reforms efforts will lead to a fairly open public procurement system in most of the developing world. These resultant public procurement systems seem to converge quite comfortably with respect to the basic design principles of efficiency, non-discrimination, and transparency. Regarding transparency, it may closely resemble the requirement of WTO GPA and what has so far crystallized from the discussions in the WGTGP. Hopefully, developing countries should then find it less costly to become signatories to the WTO GPA and in the process avail themselves of a lock-in facility for their reform gains through adherence to the multilateral process. This is crucial in particular for African countries where weak or deliberately lax enforcement of laws and policies allow some government officials to compromise the effectiveness and integrity of the public procurement process. Although it may be deemed undesirably intrusive, developing countries that have unique challenges, particularly those in Africa, should consider becoming signatories to the WTO GPA and should engage in a thorough cost-benefit analysis of the agreement.

²⁰⁰ This exercise will involve "harmoniz[ing] the legal frameworks, financing mechanisms, electronic procurement systems and a comprehensive training programme." *Id.*