Annex IV
Tanzania

1 Methodology

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

In compliance with the official methodology presented to the Secretariat, the report follows as far as possible the OECD/DAC baseline indicators and uses as terms of comparison for assessing the state of Tanzania's public procurement system, internationally recognised and accepted public procurement instruments such as the UNCITRAL model law on procurement of goods, construction and services. Reference will also be made to the GPA and the EU procurement directives.

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

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

2 Structure of the report

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

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

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

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

3 General information

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

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

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

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

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

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

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

Major development partners include the International Development Association (IDA), the African Development Fund (ADF), the UK, the EC and the US Millennium Challenge Corporation.[119] It is unclear whether new donors such as India and China are also disbursing aid to Tanzania. This uncertainty is due to the fact that new donors are not members of the OECD/DAC and have no international commitments to disclose information on the level of aid they disburse.

3.1 Development reforms in Tanzania and public procurement

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

The country has undertaken reforms of its national procurement system aimed at ensuring that public funds are used in the most efficient and economic way and at guaranteeing that the system delivers value for money. Government bodies and top officials are committed to a 'reliable procurement process' and to guaranteeing that procurement money is spent in such a way that it achieves these objectives.[120]

This is extremely important, considering that sound procurement practices are necessary to ensure sustainable development and social and economic objectives.[121] Procurement is well placed at the centre of Tanzania's philosophy for development, and government institutions and officials see the establishment of a sound public procurement system as a key development strategy. In March 2009, Dr Ramadhan Mlinga, Chief Executive Officer of Tanzania's Public Procurement Regulatory Authority, stated:

> Through reliable procurement processes, in line with PPA 2004, Tanzania can achieve high quality livelihood for her people, attain good governance through the rule of law and develop a strong and competitive economy by 2025'.[122]

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

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

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

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

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

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

The PPRA has the duty of monitoring and securing compliance with the legal rules; it reports on the performance of the public procurement system and gives advice on desirable changes. It also provides advice and guidance to entities on what the rules mean and acts as an informal dispute resolution authority. It has the power to impose sanctions where the rules are not being observed. Detailed rules on the functioning, structure, objectives and role of the PPRA are laid down in Articles 5–27 of the 2004 PPA. The PPRA has a very active website available at http://www.ppra.go.tz.

Other institutional changes introduced by the 2004 PPA include changes in the composition of tender boards, with accounting officers no longer acting as their chairpersons (except in local government authorities, where the executive directors remain as the chairpersons), in order to increase accountability; and changes in the membership of the PPAA to include private sector and professional bodies. However, the Act retains the basic procurement principles contained in the 2001 Act.[126]

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

3.2 International and regional agreements and related issues

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

As an LDC member, it benefits from the special and differential treatment provisions contained in all WTO agreements. In particular, it benefits from Part IV of GATT and from the advantages of the enabling clause and the GSP schemes derived therefrom. Major preferential EU schemes for Tanzania include the EU's GSP scheme, the EU Everything but Arms (EBA) initiative (which grants zero tariffs on all LDC products excluding arms imported into the European market) and the Cotonou Agreement. Tanzania also benefits from the US and Japanese GSP schemes. Although Tanzania's exports to OECD countries enjoy low tariff levels, exports to non-OECD countries, such as China and India (two of the Tanzania's top ten export countries) still face high tariffs. Stronger efforts should be made within the WTO negotiations to encourage a reduction of tariffs from these countries in favour of LDCs.

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

At the regional level, Tanzania is a member of the East African Community [128] and the Southern African Development Community. Negotiations are also taking place to rejoin COMESA, from which it withdrew in 2000. African members of COMESA

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

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

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

As highlighted in a study on Tanzania by the World Bank, 'the fact that the EU expects the EPA regional groupings to form customs unions poses an obvious conflict for Tanzania and the East African Community, as Tanzania cannot simultaneously adopt both ECA and SADC common external tariffs, let alone implement the customs and fiscal integration that are basic components of customs unions'.[131] On this point Kabwe states: 'Since EAC has already signed the Customs Union, then negotiating EPAs in two different geographic configurations by its member countries will undermine it'. For example, if Tanzania negotiated an EPA and signed it under SADC, while Kenya and Uganda signed it under ESA, 'there will be a problem of which Common External Tariff (CET) is to be applied on goods imported from EU to EAC. SADC ones, ESA ones or EAC Customs Union ones?'[132]

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

> The elimination of customs duties on products from EU will lead to a significant decline in government revenues and to an increase in unemployment, provoking heightened economic insecurity and political instability in East Africa. Significant decline in government revenues will result in less budget funding for social and human development and would result into higher tax burden for citizens (as a way of adjustment).[133]

Similar considerations apply to an agreement involving public procurement. However, considering that 'open international competition for contracts is essential in order to maximise the development benefits of strengthened procurement systems',[134] it is possible that the loss in revenue caused by abolishing tariffs will be compensated for by the savings made through efficient procurement and reduced costs for goods purchased, as a result of international competition. Further studies are necessary to verify this latter possibility.

An interesting study by McKay *et al.*, which investigates the trade and welfare gains of a regional trade agreement between the EAC countries (Kenya, Tanzania and Uganda) and the EU, shows that in the sectors where the EU is already the dominant supplier (the study assumes that 'trade creation is allowed only via consumption expansion'), the regional economic partnership agreement (REPA) will:

> … increase imports from the EU in these sectors over current levels by about 16 per cent in the case of Tanzania and 23 per cent in the case of Uganda. This would benefit local consumers considerably, however the direct loss of tariff revenue on current imports from the EU reduces the net welfare benefit of this.[135]

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

> … results suggest that, on present patterns, the net effect on Tanzania and Uganda is likely to be adverse. And these are the countries with least to gain from the REPA; as least developed countries they would be able to retain favourable access to the EU in any case. At the very least this argues strongly that EAC countries should be allowed to liberalise vis-à-vis the EU only gradually over the ten-year permitted period.

However, they also recognise that:

> … in reality, other factors also need to be considered. Many of the benefits of a REPA may in fact come into play in a dynamic framework; formation of a REPA with the European Union may have beneficial impacts by making trade liberalisation measures undertaken by EAC countries irreversible and therefore credible. This in turn may bring significant benefits in terms of increased domestic and foreign investment in EAC countries. Secondly, the rest of the world is unlikely to stay still; other significant exporters to the EAC, notably North America, are likely to want to set up similar partnership arrangements, and this could significantly change the welfare implications of a partnership agreement with the EU. We have aimed to provide a tractable method, if adequate trade data are available, to estimate the welfare effects on ACP countries of forming a REPA with the EU. More complicated arrangements could be accommodated (data permitting). The core conclusion is that one cannot assume that the welfare effects on ACP countries will be positive; it is more likely that the static effects will be negative. This should be taken into account in negotiating a REPA.[136]

This author believes that a further question to consider is whether, and if so how, this situation would differ if Tanzania were to achieve its 'development vision' and become

a middle-income country by 2025, qualifying from the status of LDC and losing the current trade preferences granted by the EU (i.e. zero tariff rates on all products except arms). Hence the consequences of not participating in a regional agreement with the EU would be greater and Tanzania would find itself in the position of needing an EU agreement. Tanzania is currently in a good negotiating position because it already benefits from trade preferences and hence it can bargain for better concessions. This position might be lost in the future if Tanzania was no longer an LDC. It can use its current position to negotiate favourable terms of trade. Further, negotiations on procurement could be used as a bargaining tool to achieve concessions in other sectors, such as agriculture (see section 5).

4 Public procurement in Tanzania

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

4.1 Legislative framework

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

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

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

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

4.2 Transparency

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

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

The lack of transparency can cause significant losses for governments. It seems that a non-transparent system incurs excess costs in the range of 25–50 per cent (Rose-Ackerman cited in Evenett and Hoekman, 2005). Considering that public procurement can account for 10–20 per cent of GDP, it is evident that a transparent procurement system can bring significant budgetary savings. Non-transparent systems increase information costs, which in turn raises the costs of firms and so the prices of goods and services purchased (Evenett and Hoekman, 2005).

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

Trepte (2004) argues:

> The importance of transparency is that it makes visible what would otherwise be concealed and allows the actions of the participants and especially of the agent to be verified objectively. … The transparency tool is applied in a number of ways: the choice of procedure; the publicity requirements for tender and award notices; the use of technical specifications; the application of qualification and award criteria. By setting out the broad parameters of the choices to be made by the agent and by requiring the agent to make public the specific choices made and the decisions based on them, the regulator enables the interested parties to monitor and verify compliance with the public policy objectives of procurement.

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

However, implementing transparency rules is costly for governments. For instance, running a procurement competition through an open procedure is more costly than

running it through a negotiated procedure (Arrowsmith, 2003; Rege, 2001). Besides, fettering the discretion of procurement officials can result in inefficiencies in terms of value for money, or it can make the procurement process too burdensome and lengthy.

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

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

4.3 Horizontal policies

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

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

How do governments implement these policies in the public procurement process? Governments generally provide for a set-aside of contracts (or a percentage of them)

or for allowing a price preference at the award stage to those bidders that meet the policy requirements. Price preferences are generally to be preferred to set-aside; in fact whereas the latter may have quicker and more visible results, its costs are difficult to measure, and it can lead to less competition without any incentive to efficiency for the targeted group.[138]

As far as the protection of national firms is concerned, this author believes that before implementing horizontal policies through set-aside or price preferences, other more general instruments should be considered to ensure that procurement is used as an effective tool to help local firms. Other mechanisms may be more helpful in achieving these objectives, while implying lower costs. For example, as regards the protection of small and medium-sized enterprises (SMEs), governments can support them by adopting a more general and neutral approach that involves the elimination of all those barriers intrinsic to the procurement process[139] and that deter SMEs from participating in public procurement. Such as, for example, improving speediness of payments (surely the already *restricted access to finance* is not helped by the slowness in payments under public contract or by onerous guarantees required by governments) and/or requiring the use of standardised documents in order to reduce information problems and costs. General reforms may, of course, not be sufficient, but only after these steps are taken should more detailed programmes in terms of price preferences and/or set-aside be considered by governments as a means to support local industries or SMEs via public procurement.

Public procurement can also be harnessed to the achievement of social and environmental policies, such as labour standards and human rights. The methods used for the implementation of these policies is generally through their insertion in key passages of the procurement process, such as the specification and award stage, or through contract compliance. The insertion of these goals as contract conditions is particularly important. Procuring entities are in fact offered the possibility of availing themselves of remedies such as termination of contracts or request for damages if those conditions are breached. This latter method is used by ILO Convention No. 94. Article 2(1) of the Convention requires public entities to insert in the contract labour clauses requiring treatment to workers employed by a private contractor no less favourable than those established for work of the 'same character in the trade or industry concerned in the district where the work is carried out'. The aim is to avoid bidders economising on labour costs in order to tender the lowest price.[140] The success of contract compliance is strictly linked to the clear definition of the duties imposed on the contractor and to the mechanisms provided for enforceability once a condition has been breached.[141]

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

When secondary policies are introduced in the procurement process, higher costs

or lower quality products can be accepted to the prejudice of the primary objective of achieving value for money. In addition, the implementation of horizontal policies may result in a lower level of transparency which can significantly increase the chance of corruption. There may also be an increase in administrative costs and undue delays which compromise the efficiency of the system.[142] However, some rules can help to minimise those risks. For example, if it is feared that the discretion of the procuring entity will be too broad when considerations related to horizontal policies are admitted as criteria for the evaluation and selection of bidders, it may be helpful to set those horizontal policies considerations by law or regulation and require the authority to act within the limits established therein. This will avoid the risk that the procurement entity adopts ad hoc solutions to favour one specific bidder. The same selection criteria should be applied to all bidders so as to ensure fairness and equal treatment of bidders. Another guarantee could be to require the pre-disclosure in the tender documents of these selection criteria, forbidding the procuring entity to change them once the process has started.[143] Careful attention should also be paid at the specification stage (this is further analysed below).

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

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

Publication of the legal framework

This first part will focus on whether the procurement rules are published and readily available, and whether they are known to and implemented by the procurement agents. On the latter point, we will use the PPRA's 2009 *Procurement Audit Report*. Finally, we will assess whether capacity building programmes are in place and if so whether they seem appropriate.

Availability of information on the procurement system

The Tanzanian Government is to be praised for the quantity and quality of information available on its procurement legal framework as a result of its reform efforts. Laws and regulations pertinent to the procurement process are accessible via the internet; standard form bidding and contract documents are prepared by the PPRA, which also provides interpretative guidelines and administrative instructions.[144] Tender evaluation guidelines are also provided to procurement entities.

Public procurement laws and regulations are published in the official *Gazette*. Indeed, Article 88 of the Public Procurement Act states: 'All Regulations, rules and directions made in connection with this Act shall be published in the *Gazette*'. All

documents are also easily accessible through the PPRA website.

The Tanzanian PPRA publishes every year the *Procurement Audit Report*, which contains information on the state of implementation of the procurement law and regulations, and information on the functioning of the procurement market.

Information on the state of procurement law and plans for its reforms are published in the *Tanzania Procurement Journal*: these are set out in an editorial section by the PPRA's Chief Executive Officer. Procurement notices and, less often, information on the award of contracts are also published in the *Journal*. All these documents are easily accessible and can be downloaded from the internet.

The situation in respect of judicial and quasi-judicial decisions is more difficult to assess. Information on complaints proceedings is not easily available. Further studies should be commissioned to assess and monitor the state of the review system. For example, it would be interesting to have clear data and analysis on whether aggrieved bidders make use of the review system, and if so how they use it and how often they succeed. At present such data are not available.

Implementation

As regards implementation of the procurement law and regulations, the PPRA's *Audit Reports* show that in the past few years there has been a good level of compliance with the PPA and the regulations. Major improvements were registered in 2007/2008. The review for 2009, which refers to data for the financial year 2007/2008, shows that the average level of compliance rose to 71 per cent. Specifically, the PPRA's report on 'Follow-Up Implementation of Procurement Audit Recommendations in Forty Five Procuring Entities' states:

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

The report continues by stating that:

> [T]he performance was above average (50% and above) in twelve out of the thirteen compliance indicators including: Establishment and composition of Tender Board; Establishment and composition of PMU; Preparation of Annual Procurement Plan; Functioning of AO, TB and PMU; Complying to compulsory approvals; Advertisement of bid opportunities; Publication of contract awards; Time for preparation of bids; The use of appropriate methods of procurement; Complying with the use of Standard Tender Document as stipulated in the regulations; Quality

assurance; and Contract implementation. On the other side, the average performance on one indicator, records keeping, was below average.

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

Finally, it should be said that one of the goals of the PPRA is to ensure that the average compliance level of procuring entities reaches the target of 80 per cent by the end of the financial year 2010/2011. To this end, some capacity building programmes have been put in place.

Capacity building

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

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

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

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

from a single set of regulations. The course should be taught by professionals with both practical and theoretical/academic experience. It should aim at giving officials an understanding of broad and general procurement principles, as well as the technicalities of the particular legislation. This should be done with a view to ensuring that procurement officials are able to face any future situations. The *CPAR* 2003 pointed out that training for the reform of public procurement should not only cover the rules and regulations, but should also 'involve changes in ethical and cultural ways of doing procurement'. It is not clear if this point will be addressed by the new capacity building courses.

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

Summary of the transparency of the legislative framework

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

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

Publication of procurement opportunities

This element is said to have two components: advertising and use of open procedures, as opposed to single source procurement, which should be limited to exceptional cases.

Advertising

As far as advertising is concerned, Tanzanian rules ensure a high level of transparency. Procuring entities must prepare and advertise a tender notice before carrying out any of the open tendering procedures available. For example, Article 9 of the regulations provides that:

> To ensure the widest possible participation by suppliers, contractors, service providers or buyers on equal terms in invitations to tender for goods, works, services or disposal of assets, as appropriate, procuring entities and approving authorities shall take the necessary measures to: (a) ensure publication of invitations to tender

in the Authority's journal and website, local newspapers of wide circulation and any other appropriate information media.

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

According to Article 33 of the 2004 PPA, the accounting officer or chief executive of a procuring entity is responsible for ensuring that procurement opportunities are advertised. According to Article 61 'The approved tender notice shall be advertised by the procuring entity as set out in the Regulations made under this Act and shall ensure widest reach of potential suppliers or contractors'.

Tender opportunities are advertised in the official *Tanzania Procurement Journal*, which is available online. This has been a major innovation introduced by the 2004 PPA, aimed at addressing one of the major criticisms of the *CPAR* 2003.

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

Further, when tenders are open to international competition, the invitation to tender must be advertised in an international newspaper. According to Article 65 of the regulations:

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

The legislation does not specify the name of the international journal or newspaper in which the tender should be advertised. This could cause some uncertainties; the provision should probably clarify that the international newspaper must have a wide international circulation. If Tanzania were to conclude a procurement agreement with the EU, procurement opportunities should be advertised in the EU's official journal.

Some further elements relating to the tender documents also need to be pointed out. For example, Article 9 of the regulations provides for strict and clear guidelines on the information that must be included in the tender documents. According to Article 54 of the regulations: 'Approval of the tender documents by the tender board is required before the tender is advertised'. This could be considered a further element aimed at avoiding abuses by the procurement entity.

Careful analysis of the provisions of the Act and the regulations shows that

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

It has been verified that tender opportunities are easily accessible on the PPRA website.

Open procedures

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

Article 7 of the regulations provides that 'Procurement of goods, works and related services through international and national competitive tendering as defined in Part VI of these Regulations shall be considered first before other methods of tendering described in Regulations 67 to 71 are used'. Hence, the use of competitive procedures is the preferred procurement method. Specific thresholds apply (and are specified in the regulations), which guide the procurement entity as to whether they should use national or international competitive bidding, or any other method of procurement.

Article 65 also provides that:

> (1) In international competitive tendering, otherwise known as international competitive bidding, a procuring entity shall invite suppliers, contractors, service providers or asset buyers *regardless of their nationality*, by means of a tender notice that shall be advertised nationally and internationally to submit priced tenders for goods, works or services or purchase of public assets.

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

Article 7 further provides that written approval by the Tender Board must be sought before a procurement entity can derogate from the competitive procedure. This is clearly a positive provision, aimed at monitoring procurement entities' decisions and avoiding (or limiting) ad hoc derogation from competitive tendering. Article 7 also

requires that 'other forms of procurement may be used whenever it can be established that this is done with due regard for transparency, economy and efficiency in the implementation of the project'.

Article 63 of the regulations states:

> (1) Except as otherwise provided for by these Regulations, a procuring entity engaging in procurement of goods, works, non-consultant services or public private partnership … shall do so by means of competitive tendering proceedings … (4) A procuring entity may select an appropriate alternative method of procurement as provided for in Regulations 72, 73 or 76 in the case where tendering would not be the most economic and efficient method of procurement and the nature and estimated value of the goods, works, or services permit.

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

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

However, on a less positive note in terms of transparency, it should be noted that the second part of Article 63(4) uses more flexible terms, namely: 'A procuring entity may select an appropriate alternative method … where tendering would not be the most economic and efficient method'. It could be questioned whether this provision provides an easy loophole for the avoidance of competitive tendering or whether instead it is aimed at enhancing the efficiency of the procurement process. However, in order to answer this question other provisions of the regulations need to be analysed.

The 2005 regulations allow the use of restricted tendering in some specific situations. These include cases where 'the goods, works, or services required are of a specialised nature or can be obtained from a limited number of specialised contractors'. The contract value must be under a certain threshold (set out in schedule 2). The possibility of using restricted tendering is restricted to situations where 'there is an urgent need for the goods, works or services such that there would be insufficient time for a procuring entity to engage in open national or international tendering, provided that the circumstances giving rise to the urgency could not have been foreseen by a procuring entity and have not been caused by dilatory conduct on its part' (Article 67).

Article 67(3) specifies that except where suppliers, contractors or service providers have already pre-qualified, a procuring entity issuing a restricted tender shall seek tenders from a list of potential suppliers, contractors, or service providers broad enough to assure competitive prices. The use of qualifications lists is common; however, it can give rise to the exclusion of potential good suppliers who have not registered.

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

Finally, Article 69 provides that:

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

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

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

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

It appears that the major safeguard in the regulations for not allowing the procurement authority to abuse its discretion and invoke urgency inappropriately is the provision that urgency should not be the result of circumstances that could have been foreseen by a procuring entity and/or that have been caused by dilatory conduct on its part. (It seems reasonable to assume that this includes bad planning.)

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

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

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

A contrary view argues that full and open competition is always the most appropriate course of action, despite any logistical hurdles that might arise, because the government has a duty to act as custodian of taxpayers' money. As one author has put it: 'In emergency contracting the challenge is to balance the need for competition and transparency with the urgent nature of the requirements'.[145]

Kelman (1990) has suggested that the way to balance the need for speed against the benefits of competition is for agencies to negotiate contracts in advance. If 'agencies know that they will need disaster-related services, such as debris clean-up and construction, they should award contracts that activate when disaster strikes. They should set prices and establish delivery terms with the best vendors. Then agencies need only place orders when the time comes.' Many authors have suggested that the use of framework contracts could be a good means of facing urgent needs of procurement entities in emergency situation, while still respecting the basic principles of competition and transparency. It is suggested here that Tanzania should explore the possibility of using such framework agreements.

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

Procedural transparency

Transparency touches on many aspects of the procurement process. For example, it relates to the bidding documents and the information provided in terms of where, when and how to submit bids. One very important factor is ensuring that the procurement entity allows sufficient time from the publication of the tender notice to the deadline for submitting the bid. A short timeframe could disadvantage some bidders (this is especially the case for foreign suppliers, as they are be less likely to be familiar with the tendering system). In this respect Article 80 of the regulations states that tender notices should be published in sufficient time 'to allow equality of access to suppliers'. Further guidance on the timeframe is provided in the schedule to the regulations.

The procedural transparency element is essential to ensure that bidders are treated fairly and to promote competition. Only if bidders have all the necessary information as to the products and/or services required and the evaluation criteria will they be able to participate in the tendering process and submit a conforming bid.

Important aspects of transparency relate to the technical specifications, the eligibility and qualification criteria and the *award criteria*.

Technical specifications

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

The UNCITRAL model law suggests that 'any specifications … that create obstacles to participation, including obstacles based on nationality' should be avoided (Article 16). The interpretation given to this article is quite restrictive. The possibility of including preferences related to the domestic origin of the product is excluded, but so are all requirements affecting the process and production methods used. The reasons for this restrictive approach are 'to make clear the importance of the principle of clarity ... to encourage participation by suppliers and contractors' (*Guide to the Law:* 50).

Article 73 (4) of the Tanzanian Public Procurement Act, under the rubric 'Conduct influencing public officers', states: 'A procuring entity shall not include in any tender document any condition or specification such as to favour any one supplier, contractor or consultant'. This principle is reiterated in Article 8 of the 2005 regulations. The regulations contain many more articles directly devoted to ensuring that technical

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

> … to ensure the widest possible participation by suppliers, contractors, service providers or buyers on equal terms in invitations to tender for goods, works, services or disposal of assets, as appropriate, procuring entities and approving authorities shall take the necessary measures to: …. eliminate discriminatory practices or technical specifications which might stand in the way of widespread participation on equal terms.

These are important provisions that seem to fully comply with international standards.

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

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

Additional guarantees are provided by the fact that any procurement by a procuring entity must be authorised by an accounting officer and endorsed by a Tender Board that must also approve tender documents and specifications (Article 40 of the regulations).

Hence the Tanzanian measures on technical specifications comply with international standards.

Eligibility and qualification

The qualification stage involves the selection of suppliers in order to consider who is eligible for the contract. Abuses at this stage could result in the procurement entity

opportunistically excluding some suppliers from the competition. This is why many systems provide for strict rules to limit abuses of discretionary powers at this stage. Manipulation by the procurement entity can be easy at this stage and so it is necessary that the criteria for the exclusion of bidders are clearly set forth in advance in the tender documents.[147] The UNCITRAL model law allows the possibility of excluding bidders that are not able to perform the contract (Article 6(b)(i)). It also provides for the exclusion of firms that are guilty of criminal offences or of infringement of tax and social security laws. However, the model law also foresees some guarantees in the application of these criteria to ensure the transparency of the process, such as the pre-disclosure of these criteria in the pre-qualification and solicitation documents, and equality of application of these criteria to all suppliers or contractors.[148] Article 6 (3) then states that 'no other criteria than that provided for in this article shall be used'.

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

Arguably, because of the prominent role played by transparency, only a provision set by law or regulation could establish what is 'objectively justifiable'. This interpretation is favoured by the fact that the article is subject to Articles 8 and 34.

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

As regards Tanzania, in respect of discrimination on the ground of nationality it suffices to say at this point that Article 6 of the 2005 regulations provides that:

> (1) Any supplier, contractor, service provider or asset buyer who qualifies for consideration further to Regulations 10 and 14 of these Regulations shall be eligible to take part in procurement or disposal proceedings, regardless of their nationality except where this is limited further to Regulations 25 and or by other provisions of other written Laws.

Hence the general principle in Tanzania is that there are no restrictions in relation to nationality (in full compliance with the UNCITRAL model law), but some exceptions to this principle are laid down in the regulation itself. This also complies with the model law, i.e. the requirement that exceptions should be set by law and not left to ad hoc decisions of the procurement entity. These exceptions will be analysed in section 4.3.

Other provisions which might affect trade and foreign suppliers' participation in relation to the qualification stage could be, for example, measures requiring inscription in professional registries. It is very important that these provisions are not constructed in such a way as to conceal barriers to trade. As regards registration with appropriate professional bodies, Article 46 of the 2004 PPA provides that 'local firms wishing to participate in any procurement proceedings must satisfy all relevant requirements for registration with appropriate professional or any other statutory bodies in Tanzania. Foreign bidders are exempted from this requirement, but if they win a tender they must register as appropriate.' The fact that Tanzania does not require foreign suppliers to sign up to professional bodies before they are awarded the contract avoids discouraging foreign suppliers from participating in tender opportunities.

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

> Any requirement established pursuant to this Regulation shall be set forth in the pre-qualification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations, and shall apply equally to all suppliers, contractors, service providers or buyers (Article 14(3)).

Article 14(4) also states that a procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers, contractors, service providers or buyers other than those provided for in the regulation. Article 14(5) provides that the procuring entity shall evaluate the qualifications of suppliers, contractors, service providers or buyers 'in accordance with the qualification criteria and procedures set forth in the pre-qualification documents, if any, and in the solicitation documents or other documents for solicitation of proposals, offers or quotations'. Records of qualifications must be kept.

It is extremely positive to note that Tanzanian procurement rules on qualifications accord with internationally accepted principles of transparency, because in the qualification stage discriminatory behaviour could be concealed.

Evaluation and award criteria

The award criteria could be the lowest price or the 'lowest evaluated tender'. In the latter case, the procuring entity is authorised to use in the awarding of contracts criteria other than simply the lowest price on the basis of the criteria specified in the qualification document. However, the way in which these other criteria are laid down

and applied needs careful scrutiny. For example, Article 34 of the UNCITRAL model law allows the adoption of the lowest evaluated tender award criteria, but it states that the criteria must be objective and quantifiable and must be given a relative weight or be expressed in monetary terms. This provision is clearly aimed at enabling tenders to be evaluated objectively and compared on a common basis. It is also necessary, in order to prevent abuse of discretionary powers, that all the evaluation criteria are set out in the solicitation documents and that no criteria other than those there specified can be used. Article 34 then states in subparagraph (c) what the procurement entity can consider while examining which is the lowest evaluated tender. Paragraph (4)(c) lists such criteria. Number (ii) states that the public authority can take into account: 'The cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods, construction or services. Number (iii) covers industrial policies and (iv) deals with national defence and security. The criteria set forth in Article 4(c)(iii) relate to economic development objectives. The guide to the UNCITRAL model law makes recommendations on the list of non-price criteria taking into account the risks that these criteria may pose to the objective of good procurement practice. This is because criteria other than price (and criteria linked to horizontal policies) are regarded as less objective and more discretionary, and their use can reduce confidence in the procurement process. The model law does not leave space for the adoption of horizontal criteria with a non-economic character.[149] Article 34(d) allows the procuring entity to grant a margin of preference in favour of local suppliers and contractors, and/or locally produced goods and locally provided services, but only if this is authorised in the procurement regulations and approved by an external body. This is seen as 'a mechanism for balancing the objectives of international participation and fostering national industrial capacity, without resorting to purely domestic procurement' (*Guide to the Law*).

Article 65 on evaluation criteria seems to fulfil the transparency principles. It states: 'The basis for tender evaluation and selection of the lowest evaluated tender shall be clearly specified in the instructions to tenderers or in the specifications to the required goods or works'. Similarly, Article 9 of the regulations also requires the procurement entities to ensure that 'all the selection criteria are specified in the tender documents; and the tender selected conforms to the requirements of the tender documents and meets the selection criteria stated therein'.

As regards the criteria for the evaluation of tenders, Article 90(17)(c) states that:

> … in determining the lowest evaluated tender, the procuring entity may consider the following: (i) the tender price, subject to any margin of preference applied; (ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods, completion of construction or provision of the services, the functional characteristics of the goods or construction, the terms of payment

and of guarantees in respect of the goods, construction or services; (d) in determining the highest evaluated tender for disposal of asset the preferred evaluation method shall be the evaluation based on price only unless other factors, such as end-user or export restrictions, or a need to attach conditions to a sale are taken into consideration, and stated clearly in the solicitation documents; (e) in evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for works by Tanzanian contractors, for the benefit of tenders for domestically produced goods, for benefit of Tanzanian service providers, or for benefit of Tanzanian asset buyers provided that the margin of preference shall be calculated in accordance with Regulations 91 to 96 and reflected in the record of the procurement proceedings.

Finally, contracts must be approved and awarded by the Tender Board (Article 96).

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

Transparency of contract awards

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

Article 21 of the regulations provides that 'Where an award of contract is made, the secretary to the tender board shall notify the Authority stating who has been awarded the contract, the contract amount and the date when the award was made'. The Tender Board that approved the issue of the tender documents shall receive tenders, which shall wherever possible be placed in a locked tender box or in a secure office space (Article 89(1). Article 89(8) further states that all tenders submitted before the deadline for submission shall be opened in public, in the presence of the tenderers or their representatives and other parties with a legitimate interest in the tender proceedings. Another important provision is laid down in Article 89(12) and (13), which states 'Discounts offered by tenderers must be read out and announced in public during the process of tender opening. Any discount which is not read out at the formal tender opening ceremony shall not be taken into account in the evaluation and comparison of tenders.'

Article 90(1) states that a procuring entity shall establish a tender evaluation committee comprising not less than three and not more than five members. The tender evaluation must be consistent with the terms and conditions set forth in the tender documents and such evaluation will be carried out using the criteria explicitly stated in the tender documents (Article 90(4)). Tenders shall be comparable among themselves in order to determine the lowest evaluated cost for procurement of goods, works or services or the highest evaluated price for disposal of asset by tender (Article 90(5)). Prior to the detailed evaluation of tenders, the tender evaluation committee shall carry out a preliminary examination of the tenders to determine whether or not each tender is substantially responsive to the requirements of the tender documents, whether the

required guarantees have been provided, whether the documents have been properly signed and whether the tenders are otherwise generally in order (Article 90(6)). A substantially responsive tender is one which conforms to all the terms, conditions and specifications of the tender document(s) without material deviation or reservations (Article 90(7)). If a tender is not responsive to the tender document, it shall be rejected (Article 90(16)).

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

Transparent dispute settlement

Any sound system of procurement regulation needs to have in place provisions for enforcing the public procurement law. This is important in order to discourage violation of the rules and to protect the rights of aggrieved bidders. As Trepte (2004) has pointed out, an adequate review system and complaints procedures are important elements of a transparent procurement system.

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

The 2004 PPA established the Public Procurement Appeals Authority as an organ of the Ministry of Finance. This institutional innovation complies with one of the major recommendations of the *CPAR* 2003. Its role is to 'entertain appeals against tender boards, clarify the issues in dispute between the parties and shall endeavour to bring about agreement between the parties' (Article 78). 'Any supplier, contractor or consultant who claims to have suffered or that may suffer any loss or injury as a result of a breach of a duty imposed on a procuring entity or an approving authority may seek a review.' The Act provides for a broad deadline for bringing complaints, within 28 days of the supplier, contractor or consultant becoming aware of the circumstances giving rise to the complaint or when the supplier, contractor or consultant should have become aware of those circumstances. An important provision is contained in Article 79(2), which states that the possibility of making a review complaint does not apply to 'the selection of a method of procurement or in the case of services the choice of a selecting procedure; the limitation of procurement proceedings on the basis of nation-

ality in accordance with section 49'. If Tanzania were to agree to an international agreement on procurement, these provision would need to be revised. Indeed, one of the core objective of an international/regional agreement would be forbidding discrimination, is such an act cannot be reviewed and challenged by suppliers the scope of the agreement would be undermined.

The first stage for complaints is via the procedure for settlement of complaints or disputes by procuring entities and approving authorities (Article 80(1)). Complaints or disputes between procuring entities and suppliers, contractors or consultants which arise in respect of procurement proceedings and awards of contracts and which cannot be resolved by mutual agreement are reviewed and decided upon through a written decision by the accounting officer or chief executive of a procuring entity, unless the procurement has been reviewed and approved by an approving authority, in which case that approving authority shall review and decide on the dispute and give reasons for its decision in writing.

It is also interesting to note that after the procurement contract has entered into force: 'The head of a procuring entity or of the approving authority shall not entertain a complaint or dispute or continue to entertain a complaint or dispute'. (In this case, the complaint needs to be put before the appeal authority (Article 82)).

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

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

Article 82 states:

> (1) Complaints or disputes not amicably settled by the Authority shall be referred to the Public Procurement Appeals Authority. A supplier, contractor or consultant entitled under section 79 to seek review may submit a complaint or dispute to the Public Procurement Appeals Authority – (a) if the complaint or dispute cannot be submitted or entertained under section 80 or 81 because of entry into force of the procurement contract and provided that the complaint or dispute is submitted within fourteen days from the date when the supplier, contractor or consultant submitting it became aware of the circumstances giving rise to the complaint or dispute or the time when that supplier, contractor or consultant should have become aware of those circumstances; … if the supplier, contractor or consultant claims to

be adversely effected by a decision of the head of the procuring entity or of the approving authority under section 81 provided that the complaint or dispute is submitted within fourteen days after the delivery of the decision. (4) The Public Procurement Appeals Authority may, unless it dismisses the complaint or dispute, recommend one or more of the following remedies: (a) declare the legal rules or principles that govern the subject matter; (b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure; (c) require the procuring entity that has acted or proceeded in an unlawful manner, or reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision; (d) annul in whole or in part an unlawful act or decision of the procuring entity or approving authority other than any act or decision bringing the procurement contract into force; (e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force; (f) require the payment of compensation for any reasonable costs incurred by the supplier, contractor or consultant submitting the complaint or dispute as a result of an unlawful act, decision or procedure followed by the procuring entity or approving authority; or (g) order that the procurement proceedings be terminated. (5) The Public Procurement Appeals Authority shall, within thirty days, issue a written decision concerning the complaint or dispute stating the reasons for the decision and the remedies granted, if any. (6) The decision of the Public Procurement Appeals Authority shall be final unless an action is commenced under section 85 of this Act.

(Potential days passed so far 146 (28+30+14+30+14+30))

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

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

4.4 Quality of the transparency mechanisms

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

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

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

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

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

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

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

Enhancing both the efficiency of the procurement process through targeted reforms and opening up procurement to foreign competition can bring significant advantages to governments. The benefits of international competition are not only linked to better choices for the goods and services to be purchased, but also to the fact that international competition leads to internationalisation of the business community, better value goods and job creation.[151]

Studies on the effects of opening up procurement to international competition show that competitive procurement practices promote efficiency in public spending and help public authorities acquire cheaper, better quality goods and services at lower costs. A study by the European Commission (2004) suggests that the implementation of the EC procurement directives, where the principles of transparency and non-discrimination act as cornerstones, reduce prices by around 30 per cent. Open, non-discriminatory and transparent procedures can also help boost the competitiveness of firms operating in public procurement markets (Cecchini Report, 1988). Trionfetti (2003) shows that two types of inefficiencies may arise as the consequence of discriminatory procurement: 'inefficient production of government output and inefficient specialisation of the country'. Evenett and Hoekman (2005) argue that fostering either domestic competition or transparency in state contracting tends to improve national welfare. They find no clear-cut effect on market access of ending discrimination or improving transparency. The benefits will obviously depend also on the size of the procurement market. However, 'when considering the size of contestable procurement in developing countries one has to take into account that a considerable part of procurement in ACP states is financed through aid which is often tied to the procure-

ment of goods and services from the donor country (i.e. irrespective of the Government's own policy, procurement is not open)'. Whether aid is tied may influence the possibility of opening up procurement to international and regional competition (see section 5 on aid to Tanzania). Recipient countries may also hold back from participating in an agreement on the grounds that if the aid is tied, they will be unable to freely decide whether government expenditures can be open to international competition. This has consequences in terms of the scope of any agreement on procurement. This latter aspect is analysed in section 5.

The following section looks at the current status of Tanzania procurement law as far as non-discrimination on the ground of nationality is concerned. The analysis will start with the eligibility criteria of the 2004 PPA and the 2005 regulations.

Eligibility criteria of the PPA: the non-discrimination principle

As a general principle, Tanzanian public procurement law prohibits discrimination against bidders on the basis of their nationality. See, for example, Articles 6 and 10 of the 2005 regulations. However the 2004 Act and the regulations also contain 'provisions to set aside contracts not exceeding a certain value to local firms and granting a margin of preference to local firms when they compete with foreign firms in tendering'.[152] 'Bidders are permitted to participate in the procurement proceedings without regard to their nationality, except in cases where the procuring entity limits participation on account of exclusive preference for local firms as provided for in the Act or according to the provisions of any other written law.'

Hence, the general principle is one of non-discrimination between national and foreign suppliers. This principle clearly complies with a system of modern procurement based on international competition. It also implies that there would not be many obstacles based on price preferences and non-discrimination were Tanzania to enter an international agreement on procurement. It is also positive to note that exceptions to this principle can only be created by law, and so there can be no ad hoc discrimination.

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

Exceptions to non-discrimination principle

Article 4(2) of the 2004 PPA: Special rules (Article 4) apply in the eventuality of contracts awarded in the context of an international agreement and/or in the context of aid contracts which *favours external beneficiary*.

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

Article 4(2) grants exclusive rights to participate in Tanzania's funded projects to national contractors (i.e. set-aside of contracts). However, such a provision only applies in the case of procurement in the context of an international agreement and/or in the context of aid contracts which *favours external beneficiary*. The act and the regulations do not specify what these international contracts are that '*favours external beneficiary*'. These provisions seem to refer to the case of tied aid, i.e. when donors grant aid on condition that goods and services will be purchased exclusively from the donor country and/or provided by donors' national suppliers. Hence, Article 4(2), by requiring that Tanzanian money (in the context of an international agreement) is spent only in Tanzania, seems aimed at offsetting the implementation of tied aid by donors.[153]

However, limiting participation in procurement contracts to national suppliers only carries risks and disadvantages (see above). The Tanzanian authorities try to limit these possible drawbacks in Articles 4(3) and 4(4), which provide:

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

A possible criticism of this provision is that the wording is very unclear, especially in Article 4(3). It seems that the provisions convert set-aside to price preferences. If, however, national suppliers have already been considered unqualified, would it not be better to open the process to international competition?

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

According to Article 16(1):

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

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

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

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

It is also commendable that in order to avoid abuses by the procurement entity, Article 16, paragraph 2 requires that 'a procuring entity that limits participation on the basis of nationality pursuant to sub-regulation (l) shall include in the record of the procurement or disposal proceedings a statement of the grounds and circumstances on which it relied'.

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

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

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

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

(a) Margin of preference for national and international competitive for domestic contractors and service providers

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

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

Many governments like to use procurement to boost national industries and local production. The fact that price preferences are granted, rather than set-aside, is positive because the costs of price preferences can be quantified. Would these preferences be an obstacle to an international agreement? Many agreements now recognise that developing countries use procurement to boost national industries and that they are unwilling to give up this option. (See, for example, the case of South Africa.) Article 16 of the GPA allows developing countries to use offset to boost national industries, and the revised version of the GPA agreed in 2006 takes account of developing countries' development needs, with a view to encouraging more developing countries to accede to the GPA.[154] It clarifies the rules on special and differential treatment for these countries and seeks to encourage accession by 'providing expressly for various transitional measures, such as price preferences – although these remain entirely subject to negotiations'.[155]

Article 26 of the 2005 regulations provides for set-aside of contract opportunities for national suppliers when the value of the procurement does not exceed a certain thresholds. It states: '(1)Procurement of works or goods with a value not exceeding the values provided in the Fourth Schedule of these Regulations shall be reserved exclusively for local persons or firms who meet the requirements of Section 49 of the Act'. According to Article 26(2), the exclusive preference will also be granted to joint ventures or associations between foreign and local contractors or service providers. (The exclusive preference is applicable to national firms and associations of national and foreign firms in which the contribution of the national firm to the association is more than 75 per cent.)

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

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

Given the fact that the option to set aside contracts for national suppliers is linked to thresholds, it is important to ensure that rules on splitting up of contracts are in place. In this respect Article 49(1) of the 2005 regulations provides that 'a procuring entity shall not divide its procurement into separate contracts for the purpose of avoiding international or national competitive tendering'. In order to disincentivise procurement officials from splitting up contracts, the article also provides that the head of that procuring entity and such other officer shall be held personally responsible for the splitting up of contracts. However, there is an important exception to this principle: paragraph (3) states 'Notwithstanding provisions of sub-regulations (1) and (2), a procuring entity shall be allowed, with prior approval of the Authority, to split

contracts to enable participation of local firms or persons'. If an international agreement were to be signed by Tanzania, such a provision would have to be tightened and the requirement not to split up contracts should either become absolute or the reasons for granting such an exception should be clarified and agreed up by all the parties to the agreement. Related to the prohibition against splitting contracts is Article 45(d) of the PPA, which states that procurement entities should avoid splitting procurement to defeat the use of appropriate procurement methods unless the purpose of such splitting is to enable wider participation of local consultants, suppliers or contractors. In this case, the authority shall determine such an undertaking. This latter measure seems derogate, to a great extent, from the principle of non-splitting up of contracts.

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

In order to avoid the risk that limiting participation to national suppliers would affect the quality of the goods purchased, Article 26(3) states: 'In applying exclusive preference to local contractors or service providers, the procuring entity shall have the responsibility of ensuring that selected persons or firms *are capable of providing quality of* works or services'. (Emphasis added)

However, is this provision really sufficient to ensure that procurement entities do not buy low quality goods? It only states 'quality' of goods but what quality? The risk that the goods purchased will be of a worse quality than those that would be purchased if the procurement was open to international competition probably still exists and is inherent in any procurement that is exclusively limited to national suppliers. Furthermore, the risks are greater because preferences for national suppliers are granted through set-aside of contracts. However, it should be remembered that set-aside is allowed only when the provisions of Article 26(1) is met, namely for contracts with 'a value not exceeding the values provided in the Fourth Schedule of these Regulations'.

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

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

Other trade-related measures

Other relevant provisions which might affect foreign suppliers' participation are those related to qualification of suppliers, inscription in professional registries and/or meeting national standards. It is very important that these provisions are not constructed in such a way as to conceal barriers to trade. We have analysed these provisions above in

the section dealing with the analysis of qualifications and specifications.

However, some requirements specific to the country where the procurement takes place can instead be classified as 'natural/inevitable' barriers to trade. These are related to differences intrinsic to the market and inherent in participating in procurement opportunities in a different country. For example, language can be a barrier to trade. However, some conditions are often expected and accepted to be different from country to country.

Language

Tanzania is very favourable to foreign suppliers in this respect, as Article 52 of the 2004 PPA states:

> (1) Except as provided for in sub-section (2) of this section, pre-qualification documents and tender documents shall be written in English and tenders shall be invited in that language. (2) In case a procuring entity has limited participation in the procurement to Tanzania nationals in addition to sub-section (1) of section 22, tender documents may be written in either Kiswahili or English and tenderers may be requested to tender in either language.

5 Development issues

5.1 Supporting production through negotiations for an agreement on procurement

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

Table 1. Sectoral contributions to GDP

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

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

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

Policy options

Table 1 shows that the agricultural sector is the most important production sector in Tanzania; hence any agreement on procurement should be used to stimulate this sector and encourage local production.

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

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

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

5.2 Bilateral aid to Tanzania

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

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

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

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

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

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

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

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

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

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

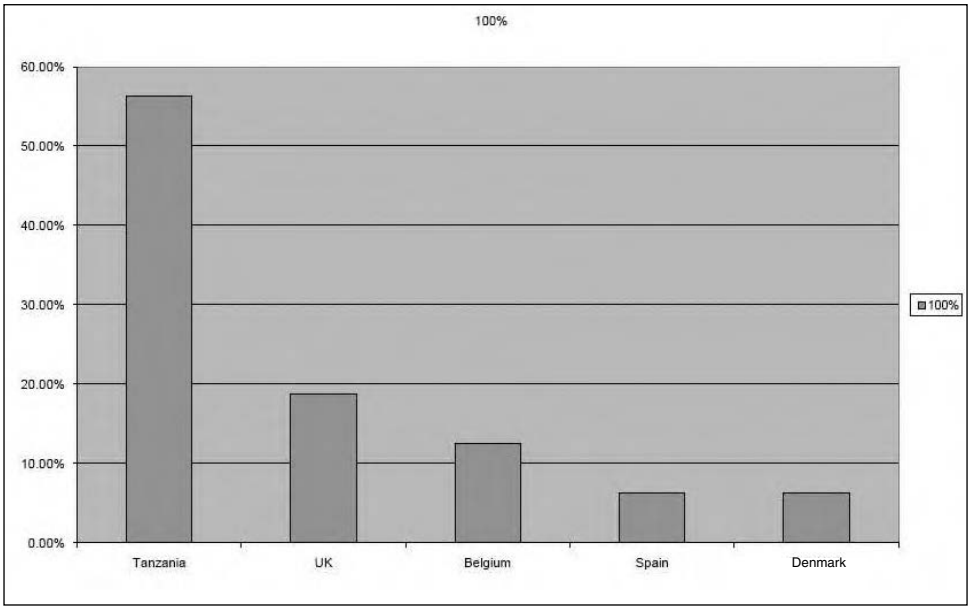
conducted by this author on the allocation of EU aid to Tanzania (i.e. a study on the nationality of suppliers who have been awarded EU aid contracts) reveals that EU aid classified as 'contracts' has seen a significant successful rate of Tanzanian suppliers (or at least suppliers based in Tanzania).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

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

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

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

Figure 1. Classification of awarded aid contracts by nationality



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

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

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

The Millennium Challenge Account

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

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

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

Aid projects financed by the MCC are divided into **compacts** and **threshold programmes**. The former are the biggest and most prestigious form of aid granted by the MCC.

Compacts are large, five-year grants for countries that pass the compacts allocation requirements. So far only 19 countries have been awarded compacts contracts. Tanzania is one of these countries. (A further 19 countries have received grants under threshold programmes; these are smaller grants awarded to countries that come close to meeting the MCC's criteria and are firmly committed to improving their policy performance.)

The MCC states on its website that the 'MCC is a prime example of smart US Government assistance in action, benefiting both developing countries and US taxpayers'. Beneficiary countries are selected and funds allocated following rigorous procedures. For a country to be selected as eligible for an MCC assistance programme, it must demonstrate a 'commitment to policies that promote political and economic freedom, investments in education and health, the sustainable use of natural resources, control of corruption, and respect for civil liberties and the rule of law, as measured by 17 different policy indicators'.[163]

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

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

Tanzania is a beneficiary of one of these grants, confirming the positive relationship in Tanzania between procurement and development and the perception that it is well on the way to achieving a sound procurement system. This project is also a testament to the importance of donor influence in the country in the public procurement sector. The major aim of the project is to eradicate corruption in public procurement.

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

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

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

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

Main procurement principles under MCC (according to the guidelines)

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

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

It is not possible to make a detailed analysis of these guidelines here and this does not fall within the terms of reference of this report. However, it is interesting to focus briefly on the eligibility criteria for participating in contract award opportunities. These criteria can be found in Article 1 of the *Guidelines*. Article 1 establishes that: 'The MCA Entity is responsible for implementing the Projects, and therefore for selecting the contractors and suppliers, and awarding and subsequently administering the contracts'. As regards nationality of suppliers, the eligibility criteria are as follows:

Eligibility: Article 1(7) states that in order to foster competition 'MCC permits firms and individuals from almost all countries to offer goods, works, and non-consultant services for MCC-funded Projects'. There are, however, some exceptions to this principle. Article 19 states:

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

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

As already stated in the compact, Article 4 of the PPA applies. According to Article 4, if there is any contradiction between the Tanzanian procurement rules and an international agreement, the international rules prevail. Specifically, Article 4 states:

1) To the extent that this Act conflicts with an obligation of the United Republic under or arising out of – (a) any treaty or other form of agreement to which the United Republic is a party with one or more other states or political sub-divisions of such states; or (b) any grant agreement entered into by the United Republic with an inter-governmental or international financing institution in which the United Republic is the beneficiary, The requirement of such treaty or agreement shall prevail, but in all other respects, the procurement shall be governed by this Act.

Bidding challenge system under MCC financed project

Another interesting aspect of the MCC compact project is that in order to fulfil the compact contract requirements the MCA-Tanzania has established a bid challenge system with specific rules in order to address bidders' complaints and to review 'alleged inappropriate acts and decision taken by MCA-Tanzania'.[164] There are two levels of review: a first level dealt with by the review panel and a second level dealt with by the independent appeal board. This body conducts the second and final review of claims. The specific rules for bringing claims and composition of these bodies are available at http://mca-t.go.tz

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

ment process for projects sponsored by MCC, specific sets of rules and procedure also apply to the challenge and review system.

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

5.3 Development issues and liberalising the procurement market

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

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

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

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

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

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

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

This author has been trying to obtain data on the award of Tanzania procurement contracts, and specifically on the nationality of suppliers winning public contracts. Unfortunately, however, it has been impossible to collect such data because they are not available on the PPRA website and/or in the *Tanzania Procurement Journal*. One recommendation for the future would be to urge Tanzania to provide full data on contract awards, including information on the nationality of the contractors that have won tenders. Information on contract awards should be as comprehensive as possible.

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

The data show that Tanzanian suppliers (or suppliers based in Tanzania) were very successful in winning aid contracts in 2007. However, the data need to be accepted with extreme caution because they are limited to one donor only, namely the EC; to contracts awarded in 2007 only; and to the study of one particular form of aid, contracts aid. The data cannot be used to reach any general conclusions on the strength of Tanzanian suppliers. Nonetheless, they are interesting as they show that Tanzanian suppliers have been successful and won 56 per cent of EC aid contracts in 2007. They are encouraging, especially when one considers that 'one of developing countries' major concerns for reaching an agreement on procurement is related to market access, in particular the perception that they are unlikely to derive any benefit from EU procurement while exposing their own firms to competition from the EU'.[165]

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

Notes

1 This was perhaps one of the mistakes made by the WTO negotiators, who subsequently split the discussions into separate negotiations on: (i) transparency; and (ii) market access.

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

3 These may, for the purposes of this paper, be supposed to be acting in the interests of the electorate and/or taxpayers. In some respects, the taxpayer might be considered to be the ultimate 'principal'.

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

5 In economic terms, the principal/agency relationship creates 'informational asymmetries'.

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

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

8 Of course, the award may be based not only on price, but on a mix of price and product quality.

9 See, for example, case *C-275/98 Unitron Scandinavia et al. v Ministeret for Fødvarer, Landbrug og Foskeri ('Unitron')* [1999] ECR I-8291; *Case C-324/98 Telaustria and Telefonadress v Telekom Austria ('Telaustria')* [2000] ECR I-10745.

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

11 No market economy does so and even hardline communist states such as North Korea cannot do without some foreign imports, however hard they try.

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

13 For example, section 150 of the federal general financial rules; this is replicated in all the Indian states and applied vigorously.

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

15 S Woolcock, *Public Procurement and the Economic Partnership Agreements (EPAs): Assessing the Potential Impact on ACP Procurement Policies*, Commonwealth Secretariat, May 2008.

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

40 F Hayek, 'The Use of Knowledge in Society' (1945), *American Economic Review*, 35: 519–30, cited in McAffee and McMillan (1987), 'Auctions and Bidding', *Journal of Economic Literature*, 25: 699.
41 Schumpeter, *The Theory of Economic Development*, Harvard University Press, 1934.
42 Of course, the politicians that make up the 'principal' in this characterisation of the relationship may also have their own personal interests, so that the picture is not always as simple as it at first appears. Corrupt politicians and regulatory capture can also seriously affect the achievement of social welfare.
43 As a body of politicians it may well have other priorities, not least of which will be the desire for re-election and this may well affect its regulatory policies.
44 This is not always a question of market access, because national governments will frequently seek bids from overseas, either because they recognise that international competition is beneficial or because there is no domestic supply base.
45 *A Report on the Functioning of Public Procurement Markets in the EU: Benefits from the Application of EU Directives and Challenges for the Future*, 03/02/2004.
46 Domberger and Jensen (1997), 'Contracting Out by the Public Sector: Theory, Evidence, Prospects', *Oxford Review of Economic Policy*, 13(4).
47 See the OECS website at: http://www.oecs.org/about-the-oecs
48 Woolcock (op. cit., p. 5) suggests that developing countries and even countries such as Australia and New Zealand did not sign up to the GPA because of the high compliance costs.
49 That is, by measuring the difference between the higher prices paid in a non-competitive system and the prices paid using a competitive system.
50 As stated above, however, the costs of creating a sound legal framework could be significant.
51 In most reform countries, standard form bidding documents would be prepared as part of the overall legal framework.
52 From an environmental perspective, equipment which consumes less energy (i.e. which is energy efficient) may be less expensive when life-cycle costs are taken into account, for example.
53 For a brief overview, see Woolcock, op. cit., pp. 7–9.
54 The older agreements are less consistent.
55 A model prepared by the United Nations Commission on International Trade Law (1994, UNCITRAL Model Law on the Procurement of Goods, Construction and Services), adapted by many countries for their own domestic systems.
56 Although membership of the GPA has in some instances, e.g. China, been made a condition of membership of the WTO.
57 For a more extensive treatment, see Trepte, 'Government Procurement', in Macrory, Appleton and Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis*, Springer, 2004.
58 *Government Purchasing in Europe, North America and Japan: Regulations and Procedures*, OECD, 1966.
59 A Blank and G Marceau (1996), 'The History of the Government Procurement Negotiations since 1945', *Public Procurement Law Review*, 5: 77.
60 M Pomeranz (1980), 'Towards a New International Order in Government Procurement', *Law and Policy in International Business*, 11: 1263.
61 A Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing*, Kluwer Law International, 1998, p. 107.
62 For an account of the negotiations, see de Graaf and King (1995), 'Towards a More Global Government Procurement Market: The Expansion of the GATT Government Procurement Agreement in the Context of the Uruguay Round', *International Lawyer*, 29: 435.
63 See also Halford, 'An Overview of EC-US Relations in the Area of Public Procurement' (1995), *Public Procurement Law Review*, 4: 35; Trepte (1993), 'The EC-US Trade Dispute: Negotiation of a Partial Solution', *Public Procurement Law Review*, 2, CS82.
64 De Graaf and King, op. cit., p. 445.
65 Except for the USA, which adopted a negative list approach.
66 Article XXIV: 7(b) and (c).
67 See Arrowsmith (1996), 'Developing Multilateral Rules on Government Procurement', *Public Procurement Law Review*, 6, CS154; Dischendorfer (2000), 'The Existence and Development of Multilateral Rules on Government Procurement under the Framework of the WTO', *Public Procurement Law Review*, 9: 1 at 29 et seq.

68 See Dischendorfer, ibid., p. 32.
69 WTO Document WT/MIN(96)/DEC/W of 13 December 1996.
70 WTO Documents WT/WGTGP/W/10 and 11. See also Priess and Pitschas (2002), 'The Proposed WTO Agreement on Transparency in Government Procurement – Doha and Beyond', *Public Procurement Law Review*, 11, NA13, p. 14.
71 WTO Document WT/WGTGP/W/27.
72 WTO Document WT/WGTGP/W/26.
73 Meaning that a domestic bidder is given the option of matching the price offered by another (foreign) bidder and of then being preferred over the latter.
74 Or at least those sections of it which it is in the politicians' interest to protect.
75 S Evenett and B Hoekman, 'International Cooperation and the Reform of Public Procurement Policies', World Bank Policy Research Working Paper No. 3720, 2005.
76 S Evenett and B Hoekman, 2004, op. cit.
77 S Evenett and B Hoekman, 2005, op. cit. As the European Commission discovered (note 45 above), even within the single procurement market of the EU, direct cross-border trade was less common than the practice of bidding through locally established subsidiaries.
78 See, notably, Trionfetti, op. cit.
79 S Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?', in S Arrowsmith and A Davies, *Public Procurement: Global Revolution*, Kluwer Law International, 1998.
80 See section 2.2.
81 *The Size of Government Procurement Markets*, OECD, 2002.
82 R Falvey, A La Chimia, O Morrissey and E Zgovu, 'Competition Policy and Public Procurement in Developing Countries', CREDIT Research Paper 08/07, 2007.
83 Woolcock, op. cit., referring to World Bank *CPAR*s for Uganda and Tanzania.
84 See note 76 above.
85 See section 2.2.
86 As in the EU, though, it could be that foreign bidders would set up shop in local markets in order to conduct business there. This would clearly have positive welfare effects on the national economy, for example, through job creation, domestic production and technology transfer.
87 http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm
88 See note 76 above.
89 Though it may change depending on other trade-related barriers such as customs duties and tariffs, as well as the existence of domestic preferences.
90 Hence the importance of Article III(2)(a) of the GPA 1994, which provides that the parties must ensure that their procuring entities do 'not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership'.
91 This is less the case for contracts funded by multilateral development banks, which present different opportunities in the case of very large contracts. Bidding for MDB contracts is an industry in itself.
92 Such benefits may be lost, however, where domestic preferences are based, as appears to be the case in Tanzania, not on domestic goods or labour, but on domestically owned companies.
93 What those are will, of course, depend on the state of the local economy.
94 The conflict raised by membership of so many regional organisations is, however, itself an impediment to trade negotiations: see the country report in Annex 4.
95 'Small Pacific States', background paper prepared by the Pacific Asian Development Bank for 'Mobilizing Aid for Trade: Focus Asia and the Pacific', 19–20 September 2007, Manila, Philippines.
96 See Falvey *et al.*, op. cit.
97 Most procurement systems contain an exception allowing funded contracts to be governed by the rules of the funding organisation. If not, the funding organisations, notably the multilateral development banks, will not entertain the grant or loan. The national procurement system may also be overridden by way of the legal agreement granting the loan or grant.
98 It recently removed the same obligation in respect of aid coming from the general budget: see, further, Trepte, 'Regulating Procurement: Understanding the Ends and Means of Procurement Regulation' OUP, 2006, chapter 10.

99 The question of the control exercised by a federal state over states also became an issue in the context of the GPA, for example, in relation to the ability of the US Federal Government to impose the procurement rules required by the GPA on individual US states. A WTO dispute panel was established in 1997 to consider a law enacted by the State of Massachusetts, which essentially sought to prohibit state public authorities, covered by the GPA, from procuring goods or services from any companies, whether from the USA or elsewhere, who engaged in business with Burma (Myanmar) and who were listed in the law (United States – Massachusetts State Law prohibiting contracts with firms doing business with or in Myanmar, WT/DS88/1-5, WT/DS95/1-5 and WT/DSB/M/49). The law also imposed a 10 per cent price penalty on bids submitted by listed companies. The work of the panel was suspended following a US court ruling preventing the implementation of the law.

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

101 Negotiations were abandoned on a fourth category of entities (Group D), which consisted of entities not substantially controlled by, dependent on or influenced by central, regional or local government, such as private utilities operating on the basis of special or exclusive rights.

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

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

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

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

106 Contained in Article XXIV: 6.

107 BISD 26S/203-205.

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

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

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

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

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

113 Tenders Board Guidelines (Goods and Works).

114 Experience and past performance are in principle relevant only as indicators of current capability, but treating them as a category in their own right is quite common internationally.

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

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

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

118 See note 117.

119 See UN-OHRLLS.

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

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

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

123 Ibid.
124 Ibid.
125 Dr Ramadhan Mlinga, Chief Executive Officer of the PPRA, 'What Engineers Need to Know about the Public Procurement Act No. 21 of 2004', available at http://www.ppra.go.tz/papers/What%20Engineers%20Need%20to%20Know%20About%20Public%20Procurement%20Act%202004.pdf
126 Ibid.
127 The PFMRP is Tanzania's main programme for improving public financial management. The programme has been in place since 1998 and Phase III was launched in November 2008. The funding for the programme for 2008/2009 was approximately US$30 million. Current active donors to the programme are the World Bank (currently in the lead in the public financial management donor group), theEuropean Commission and eight bilateral development partners. The principles and terms for the partnership between the Government of Tanzania and the partners are set out in a Memorandum of Understanding signed in April 2009.
128 The original three partner states of the EAC – Kenya, Tanzania and Uganda – signed a new Treaty for East African Co-operation in November 1999. Rwanda and Burundi joined the Community in 2007.
129 See Nwogwugwu (2005), 'Towards the Harmonisation of International Procurement Policies and Practices', *Public Procurement Law Review*, 14: 131.
130 Na Zitto Z Kabwe, 'The Economic Partnership Agreement (EPA): Challenges for Tanzania', available at www.chadema.net/makala/kabwe/zitto_4.html
131 Extract from World Bank, 'Tanzania: Regional and Global Integration', available at http://siteresources.worldbank.org/INTTANZANIA/Resources/WB_Regional_Global_Integration_Factsheet.pdf
132 Kabwe, op. cit.
133 Kabwe, op. cit.
134 DAC, op. cit.
135 A McKay, C Milner and O Morrissey, 'The Trade and Welfare Effects of a Regional Economic Partnership Agreement', CREDIT research paper 00/08, University of Nottingham, UK.
136 Ibid.
137 Dr Ramadhan Mlinga, Chief Executive Officer of the PPRA, 'What Engineers Need to Know about the Public Procurement Act No. 21 of 2004', available at http://www.ppra.go.tz/papers/What%20Engineers%20Need%20to%20Know%20About%20Public%20Procurement%20Act%202004.pdf
138 S Arrowsmith, G Meyer and M Trybus, 'Non-commercial Factors in Public Procurement', unpublished report for the UK Office of Government Commerce, 2000, pp. 4–5 .
139 UNCTAD/WTO International Trade Centre, 'Improving Access of Small and Medium Enterprises to Public Procurement: Experience of Selected Countries', draft, pp. 9–53.
140 HK Nielsen (1995), 'Public Procurement and International Labour Standards', *Public Procurement Law Review*, 4: 94.
141 S Arrowsmith, 2003, pp. 242.
142 Arrowsmith, Meyer and Tribus, op. cit., pp. 3–13.
143 S Arrowsmith, J Linarelli and D Wallace, *Regulating Public Procurement: National and International Perspectives*, Kluwer Law International, 2000, pp. 298–301.
144 Article 89 of the PPA states 'The Authority shall issue guidelines from time to time for the better carrying out of the objectives or any functions under this Act'.
145 Schwartz (2006), 'Katrina's Lessons for Ongoing US Procurement Reform Efforts', *Public Procurement Law Review,* 6: 362–373; Yukins, 'Feature Comment: Hurricane Katrina's Tangled Impact on US Procurement', The George Washington University Law School Public Law And Legal Theory Paper No. 161, also published in *The Government Contractor,* 479(34), 2005, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=333989; Linarelli, 'Public Procurement in Times of War and Catastrophe: Iraq and Other Cases', Paper presented at the Conference on Public Procurement: Global Revolution III, University of Nottingham, UK, 19 June 2006; US General Accountability Office; 'Hurricane Katrina: Improving Federal Contracting Practices in Disaster Recovery Operations', *Journal of Public Procurement*, 7: 105–116, 2007.
146 Arrowsmith, Linarelli and Wallace, op. cit., pp. 253–256.
147 Ibid., pp. 296–301.

148 'Those provisions aim at equal treatment and prevention of arbitrariness, the procurement entity is afforded sufficient flexibility to determine the exact extent to which it is appropriate to examine qualifications in a given procurement proceeding' (*Guide to the Law*).
149 Arrowsmith, Linarelli and Wallace, op. cit., pp. 286–298.
150 Data reported in the *Tanzania Procurement Journal* (March 2009) and in *Volume of Contracts Awarded by the Procuring Entities (PEs) in F/Y 2007/08*, available at http://www.ppra.go.tz/reports/Volume%20of%20Contract%20Awarded.pdf
151 Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?', in Arrowsmith and Davies, *Public Procurement: Global Revolution*, Kluwer Law International, 1998, chapter 1.
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161 Japan's high level of ODA could be due to debt forgiveness, which also counts as ODA. In 2007 Japan recorded a total US$1,601 million granted as debt relief to HIPCs.
162 EU data on aid contracts exclude aid classified as 'grants' in the very peculiar EU aid terminology.
163 From http://www.mcc.gov/mcc/selection/index.shtml
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