HARMONISING PUBLIC PROCUREMENT IN THE SADC

Stephen de la Harpe
Associate Professor, Faculty of Law,
North-West University, Potchefstroom Campus, South Africa

INTRODUCTION

The promotion of international trade is seen as one of the important instruments to ensure development in developing nations and regions. The history of the World Trade Organisation (WTO) and the drafting of many regional and similar international trade agreements are evidence of this. The Southern African Development Community (SADC) is no exception.[1]

It is therefore strange that many states that are members of the WTO and actively encourage the opening up of international borders to free trade do not include public procurement[2] in such free trade arrangements. This is particularly evident in developing states. If the WTO Government Procurement Agreement (GPA), which is a plurilateral agreement, is considered it is clear that many states do not wish to open their internal markets to competition in the public procurement sphere. It is therefore not surprising that public procurement has been described as the last rampart of state protectionism (Ky, 2012).

Public procurement is an important segment of trade in any country (Arrowsmith & Davies, 1998). It is estimated that public procurement represents between 10% and 15% of the gross domestic product (GDP) of developed countries and up to 25% of GDP in developing states (Wittig, 1999). Unfortunately, governments often expect private industry to open up national markets for international competition but do not lead the way.

1 This is apparent from the SADC Treaty and the Protocol on Trade.

2 'Public procurement' refers to the procurement of goods and services by the state and its institutions from private industry to enable it to fulfil its obligations towards its citizens. The public procurement sector is often the largest domestic market in developing countries. Apart from civil servants' salaries, the bulk of the government budget is used for the procurement of goods and services.

UNISA university of south africa PRESS

Journal of Law, Society and Development 90
Vol 1(1) 2014 pp 90–109
ISSN 2313-8289

Except for the limited use of pooled procurement,[3] no specific provision is at present made for the harmonisation and integration of public procurement in the SADC. In view of the proximity of the member states, the interdependency of their economies and the benefits that can be derived from opening up their boundaries to regional competition in public procurement, the possibility of harmonisation and deeper integration in this sphere needs to be given more attention.

The importance of public procurement in international trade and regional integration is twofold: first, it forms a substantial part of trade with the related economic and developmental implications; secondly, it is used by governments as an instrument to address socio-economic issues. Public procurement spending is also important because of its potential influence on human rights, including aspects such as the alleviation of poverty, the achievement of acceptable labour standards and environmental goals, and similar issues (McCrudden, 1999).

In this article the need to harmonise public procurement in the SADC in order to open up public procurement to regional competition, some of the obstacles preventing this, and possible solutions are discussed. Reference is made to international instruments such as the United Nations Commission on International Trade Law (UNCITRAL), the Model Law on Public Procurement and the GPA. In particular, the progress made in the Common Market for Eastern and Southern Africa (COMESA) with regard to the harmonisation of public procurement, which was based on the Model Law, will be used to suggest possible solutions to the problem of harmonising public procurement in the SADC.

THE NEED FOR PUBLIC PROCUREMENT HARMONISATION IN THE SADC

Through the years, the importance of procurement in the modern state has grown exponentially. It is estimated by the WTO that at present public procurement amounts to between 10% and 15% of the GDP of developed countries and up to 25% and more of the GDP of developing countries.[4] The International Monetary Fund (IMF) estimates that the GDP of South Africa amounted to US$261 897 billion in 2010, of which 33.26% (or US$ 87 106.942) was spent on public procurement.[5] In the COMESA region, it is estimated

3 This is the practice by which different states come together to procure goods in order to obtain the goods at a lower price. This is, for instance, propagated in the SADC Pharmaceutical Business Plan 2007–2013 of 27 June 2007.

4 World Trade Organisation document S/WPGR/W/39 12 July 2002 (02-3883); 'Working party on Gatts rules referring to: The size of government procurement markets', offprint from *OECD Journal on Budgeting* 1(4).

5 Seewww.imf.org.http://www.imf.org/external/pubs/ft/weo/2011/01/weodata/weorept.aspx?sy=2010& ey=2010&scsm=1&ssd=1&sort=country&ds=.&br=1&c=199&s=NGDP_R%2CGGX_NGDP&grp=0&a=&pr1.x=62&pr1.y=10. Accessed 2 June 2012.

that public procurement accounts for approximately 60% of government expenditure.[6] The GDP of the SADC amounted to US$575.5 billion in 2010.[7] A conservative 25% would amount US$143.88 billion being spent on public procurement.

In its Regional Indicative Strategic Development Plan (RISDP) the SADC envisages a number of infrastructure development plans for the region which will be implemented by the different members of the SADC. The plans include policies and strategies with regard to energy, tourism, transport, communications, meteorology and water. These have enormous financial implications for public procurement in the region. According to the Regional Infrastructure Master Plan's, Energy Sector Plan of August 2012,[8] the estimates for the planned electricity generation projects in the region amount to a minimum of US$114 billion and a maximum of US$233 billion between 2012 and 2027.[9] The related transmission investment costs to support the envisaged new generation capacity are in the region of US$540 million.[10]

For the planned petroleum and gas refineries in South Africa, Mozambique and Angola investment costs are estimated to range from US$1 billion to US$5 billion. Projects for railways and ports in Mozambique (Techobanine) and Namibia (Trans-Kalahari railway to Walvis Bay) that are intended for coal exports are estimated to total US$7 billion and US$9 billion, respectively.[11] The above figures relate to the energy sector alone. It has to be kept in mind that for the larger portion of the investment these projects will be implemented at a national level and be regulated by the particular country's public procurement regime.

The RISDP identified public finance, official development assistance (ODA), debt relief, domestic savings, foreign direct investment (FDI), foreign portfolio investment (FPI), public–private partnerships (PPPs), domestic financial and capital markets, private equity and venture capital, and an SADC development fund[12] as ways to finance development in the SADC.[13] Most of the finances so obtained will have to make use of the public procurement system to procure the planned infrastructure. In particular,

---

6 See http://programmes.comesa.int/index.php?option=com_content&view=article&id=21&Itemid=23& lang=en. Accessed 3 June 2012.

7 http://www.sadc.int/about-sadc/overview/sadc-facts-figures/#GDP. Accessed 3 June 2012.

8 The SADC regional infrastructure master plan energy sector plan, August 2012. Available from http://www.sadc.int/. Accessed 3 June 2013.

9 Master plan energy sector 9.

10 Master plan energy section 9.

11 Master plan energy sector 10.

12 Regional indicative strategic development plan (RISDP) at 75. Available from: http://www.sadc.int/documents-publications/show/936. Accessed 3 June 2013.

13 It is important to keep in mind that since 2008 the World Bank has allowed borrowers to use its own procurement systems for bank-funded projects. See CL Pallas & J Wood 'The World Bank's use of country systems for procurement: A good idea gone bad?' 2009 *Development Policy Review* 27(2):215–230.

public–private partnerships (PPPs), which are extensively dealt with in the RISDP,[14] traditionally fall squarely in the public procurement domain.

Not only is the integration of the SADC as a region at stake: COMESA, SADC and East Africa Community (EAC) plan to form a free trade area (FTA). It is envisaged that the FTA will be underpinned by robust infrastructure programmes designed to consolidate the regional market through interconnectivity facilitated by all modes of transport and telecommunications in order to promote competitiveness.[15] The FTA seeks to establish a tariff- and quota-free market, to introduce the exemption and coordination of industrial and health standards, and to work towards combating unfair trade practices and import surges and the use of peaceful and agreed-upon dispute settlement mechanisms. This will have important implications for public procurement as the success of such a FTA will also depend on whether the governments are prepared to open up public procurement to competition. This is so, not only because of the huge amounts spent on public procurement, but also because the private sector can hardly be expected to participate in regionalisation if the governments involved are not prepared to do the same and set an example. With regard to harmonising public procurement, the SADC is lagging behind, which means it will be at a distinct disadvantage if the public procurement regimes of its member states are not harmonised to the same extent as those of the COMESA member states.

Except for a lack of effective competition in some member states in the SADC, many member states need to correct weaknesses in their public procurement systems that lead to a lack of good governance and to corruption (Anderson *et al*, 2011). This can be done by implementing comprehensive legal frameworks entrenching the generally accepted principles of public procurement, including economy, competitiveness, effectiveness, transparency, the combating of abuse, the avoidance of risk, accountability, fairness and equitability, and integrity (De la Harpe, 2009). In many countries there is also the need for effective monitoring and auditing procedures as well as institutions to ensure compliance with the public procurement regime. The use of standard terms and conditions of contract, transparency, the public availability of both the rules governing the public procurement process and the procurement opportunities are also lacking. There also is a need for properly trained people with the capacity and skills required in the field of public procurement (Wittig, 2002).

The present lack of harmonisation of the public procurement policies and procedures in the SADC leads to areas of divergence, some of which are:

- different threshold levels for allowing foreign competition;
- technical specifications that are not standardised;
- differences in administrative specifications such as time limits;

14 RISDP 75.

15 See http://www.comesa-eac-sadc-tripartite.org/. Accessed 2 June 2013.

- the required number of bidders, and
- a lack of standardisation of preferential treatment which is used to achieve socio-economic goals.[16]

In order to implement the RISDP at a national level it will be imperative for member states to improve on their public finance expenditure and management systems, of which public procurement forms an integral part. Whereas the utilisation of public funds for development occurs at the national level, the development of strategies and policies to harmonise public procurement across the region needs to be coordinated at a regional level.

Infrastructure development, which is a prerequisite for economic growth, will mostly be driven through public procurement in the SADC. In view of the huge amounts involved, the potential benefits it can have for local industry and the importance of ensuring that value for money is obtained the need to harmonise and further integrate public procurement in the SADC are clear. The harmonisation and deeper integration of public procurement in the SADC will therefore go a long way to addressing the issues mentioned above.

BENEFITS OF HARMONISATION

From studies done on the accession to the GPA the following benefits that accrue by opening up states' markets to competition and by complying with the good governance principles applicable to public procurement were identified. Competition and compliance together:

- increase market access;
- promote and reinforce good governance practices;
- strengthen competition and promote value for money;
- contribute to the effective management of public resources;
- facilitate internal policy coordination and harmonisation within countries;
- are seen as an international 'stamp of approval' that encourages inbound FDI in entities that want to participate in construction and other areas of public procurement;
- provide an opportunity to participate in and influence the future evolution of public procurement;

16 The use of preferential procurement in South Africa to achieve Broad Based Black Economic Empowerment (BBBEE) is a typical example.

- lead to standard terms and conditions being developed;
- improve transparency;
- improve opportunities and knowledge of opportunities;
- improve capacity;
- lead to the transfer of skills;
- ensure economies of scale;
- facilitate FDI, and
- promote convergence in systems (Anderson et al 2011).

All the above-mentioned benefits could also apply to the SADC should it harmonise the public procurement regimes of its member states. In particular, doing so will create a larger market with more uniform procedures and entrench important public procurement principles.[17] This will ensure an increase in competition, which will help to lower transaction costs across the region. This will in turn encourage private investment, exports and growth. It will make the region an attractive trade destination, since the private sector will be able to count on a well-regulated public procurement regime in all the SADC countries.[18]

OBSTACLES TO HARMONISING PUBLIC PROCUREMENT

The first obstacle to harmonising public procurement regulations in the region which comes to mind is the different legal systems of the member states. The harmonisation of public procurement regulation across the different legal systems should, however, not pose the same difficulty as with many other areas of the law. The reason for this is that there are some general principles on which public procurement is based that are applicable irrespective of the legal regime. These principles include:

- economy;
- competitiveness;
- effectiveness;
- transparency;
- the combating of abuse;
- the avoidance of risk;

17 These include economy, competitiveness, effectiveness, transparency, the combating of abuse, the avoidance of risk, accountability, fairness and equitability, and integrity.

18 RISDP 75–76.

- accountability;
- fairness and equitability, and
- integrity (De la Harpe 2009).

It is possible to entrench all these principles in a public procurement regime irrespective of the legal system and despite the extent to which it differs from other systems in the region. The major obstacle to harmonisation in public procurement is the reluctance of governments to open up their markets to international or even regional competition in the public procurement sphere. Many possible reasons for this exist.

It might be because of the principle of sovereignty, as no country wishes to limit its powers in awarding public procurement contracts. The civil and political nature of public procurements poses challenges since different countries have different political and civil circumstances and it is feared that these circumstances cannot be adequately dealt with if public procurement is subjected to foreign competition. When local companies may be edged out by foreign companies, they become averse to liberalisation and advocate protectionist policies, which undermines the integration process.[19]

The problem also lies in the fact that governments use public procurement to achieve their socio-economic objectives:[20] they may therefore be reluctant to open up their markets for fear that doing so may inhibit their ability to pursue such objectives.

A further aspect is one of reciprocity of benefits. If states are not at the same level of development, the fear exists that it may lead to the developed nation being in a better position to compete and that it will exploit the less-developed country.

There are also cynics who believe that those in power are afraid of losing a valuable lever to use for personal gain or as an instrument to win political or other influence.

Harmonisation also has cost implications, for instance negotiating costs, including necessary internal studies and consultation, the costs of legislative amendments, the costs of implementing principles such as transparency and review procedures, and the retraining and capacity-building of public procurement officials (Anderson et al. 2011).

Of the above, the most important obstacle to harmonisation is probably the fear of states that they will be inhibited in their ability to achieve their socio-economic goals and that local industry will be prejudiced by foreign competition.

HOW SOCIO-ECONOMIC ISSUES ARE DEALT WITH IN THE MODEL LAW AND THE GPA

One of the major obstacles to regional integration and harmonisation in public procurement is the fact that such integration could limit or jeopardise a government's attempts to achieve

19 Often local industries will be able to influence government policy on public procurement.

20 These include aspects such as job creation, affirmative action, green issues, the promotion of small and medium enterprises, the protection of infant industries, the protection of industries of national importance against competition, and similar issues.

its socio-economic goals through public procurement. It is therefore helpful to determine how international instruments such as the GPA and the Model Law on the Procurement of Goods and Construction and Services address this issue.[21]

Model Law

The UNCITRAL Model Law on the Procurement of Goods and Construction and Services was adopted in 1994.[22] The purpose of the Model Law was to help states to reform and modernise their laws on public procurement. It contained provisions aimed at achieving the principles of competition, transparency, fairness and objectivity in the procurement process, thereby increasing economy and efficiency in procurement.[23]

The UNCITRAL Working Group 1[24] investigated possible improvements to the 1994 Model Law. Towards the end of 2010 its work culminated in a proposed revision of the Model Law. At its 19th session Working Group 1, the text of the revised Model Law on Public Procurement was agreed upon. This revision was formally accepted by the Commission on 1 July 2011.[25]

As was the case with the 1994 Model Law, different provisions in the 2011 Model Law enable the state to achieve its socio-economic objectives.[26] Article 2(*n*) makes provision for the enacting state, when adopting the Model Law, to exclude certain procuring entities from the operation of the Model Law.[27] This enables the state to protect infant or vulnerable industries or sectors of the community. Socio-

21 These instruments are used as benchmarks for good governance in public procurement. COMESA based its public procurement harmonisation on the Model Law.

22 At its 27th session.

23 See in general on the origin, mandate and composition of UNCITRAL. Available from www.uncitral.org/ uncitral/en/uncitral_texts/procurement_infrastructure. Accessed 3 June 2013.

24 UNCITRAL has six working groups to perform the substantive preparatory work on topics within the Commission's programme of work. Each of the working groups is composed of all member states of the Commission. Working Group 1 deals with public procurement. Available from http://www.uncitral. org/uncitral/en/about/methods.html. Accessed 3 June 2013.

25 See http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html. Accessed 1 June 2013.

26 These are 2(*n*), 3, and 11(4) and (5).

27 The Model Law in article 1(2) provided for the possibility of excluding certain sectors from its operation and in article 2(*b*) for the exclusion of procuring entities. In terms of article 1(2)(*c*), states can also exclude certain types of procurement by issuing regulations to this effect.

economic policies are defined in article 2(*o*).[28] Article 25(1)(i) allows socio-economic objectives to be taken into account. If such socio-economic policies were considered in the procurement, the procuring entity must include in the record of proceedings the information relating to such policies and the manner in which they were to be applied. Single-source procurement is allowed subject to the approval of the designated organ of state. This would follow public notice and adequate opportunity to comment, if it is necessary in order to implement a socio-economic policy of the state, provided that procurement from other suppliers is not capable of promoting such a policy.[29]

States' obligations are deferred to in terms of regional and international agreements.[30] These international obligations – for instance, loan agreements with specific provisions regarding procurement and the procurement directives of regional bodies – prevail over the provisions of the Model Law to the extent that they are inconsistent with them.

Discrimination based on nationality is also allowed on condition that the procuring entity does this on the grounds specified in the procurement regulations or other provisions of the law.[31]

In the Model Law provision is also made for a margin of preference to be allowed in favour of domestic suppliers and contractors:[32] the procuring entity can award the tender to a more expensive local tenderer as long as the price difference between the local tenderer and the lowest tender falls within the margin of preference. The effect of this provision is that it allows the procuring entity to favour local suppliers and contractors without simply excluding foreign competition.

From the above it appears that there are ample measures available to allow states to pursue their socio-economic objectives if the provisions of the Model Law are used as a template for harmonisation.

The Government Procurement Agreement (GPA)

One of the most prominent and important instruments influencing the liberalisation of international trade was the General Agreement on Tariff and Trade (GATT) of 1947 (Lowenfeld 2008). The present-day WTO[33] was established in 1995 and builds on the former GATT.[34]

---

28 Article 2(*o*) 'Socio-economic policies' means environmental, social, economic and other policies of this state authorised or required by the procurement regulations or other provisions of law of this state to be taken into account by the procuring entity in the procurement proceedings. (*The enacting state may expand this subparagraph by providing an illustrative list of such policies.*)

29 Article 30(5)(*e*).

30 Article 3.

31 Article 8.

32 Article 11(3)(*b*) and (5)(*b*).

33 For a general background on the WTO see M Matsushita, TJ Schoenbaum & PC Mavroidis *The World Trade Organisation: Law practice and policy* (2003) and Lowenfeld, (2008).

34 F Ortino *Basic legal instruments for the liberalisation of trade. A comparative analysis of EC and WTO law* (2004) 1.

During the discussions in 1946 which led to GATT, the United States proposed that government purchases and contracts should also be subject to the general principles on which the GATT were based, including that of non-discrimination. No consensus could be reached on the issue and public procurement was excluded from GATT. Discussions on including public procurement under GATT were, however, ongoing, in particular through the work of the Organisation for Economic Co-operation and Development (OECD). The discussions culminated in the first Government Procurement Agreement (GPA), which was signed during 1979 and entered into force in 1981. This agreement formed the basis of the present GPA (Trepte 2004).

The GPA was negotiated in parallel with the Uruguay Round[35] in 1994, and entered into force on 1 January 1996.[36] Although the GPA falls under the umbrella of the WTO, it does not form part of the single undertaking which constituted the WTO in January 1995. A commitment to further negotiations – in order to improve and update the GPA in view of developments in information technology and procurement methods, to extend the coverage of the GPA and to eliminate remaining discriminatory measures – was included in the GPA.[37] In December 2006 the text of the revised GPA was conditionally agreed upon.[38] On 30 March 2012 the revised GPA was formally adopted.[39] The GPA is a plurilateral agreement[40] and is concerned exclusively with trade in goods and services for government consumption.

One of the principles of the agreement is that of non-discrimination, which is specifically recognised in the preamble to the GPA.[41] The procurement covered by the agreement is based on the principle that a party to the agreement will afford the products, services and suppliers of the other parties to the agreement no less favourable treatment than they give to their domestic products, services and suppliers.[42] Parties are not allowed to discriminate between the goods, services or suppliers of other parties.[43]

---

35 The WTO was established on 1 January 1995 by the Uruguay Round of negotiations, which commenced in 1983 and lasted until 1994. See Matsushita et al 6–9.

36 See http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm 9. Accessed 1 June 2013.

37 GPA article XXIV:7(*b*) and (*c*).

38 WTO document GPA/W/297 dated 11 December 2006.

39 Decision on the outcomes of the negotiations under article XXIV:7 of the agreement on government procurement.

40 'A "plurilateral" agreement in the context of the GATT/WTO is an agreement which imposes obligations only on a subset of WTO/GATT Members, while a "multilateral" agreement sets out disciplines which are applicable to all Members' (Trepte 2004, 374), On the origin of these terms, see A Reich 'The new GATT agreement on government procurement – the pitfalls of plurilateralism and strict reciprocity.' 1997. *Journal of World Trade* 165.

41 '*Recognizing* that measures regarding government procurement should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods or services, or to discriminate among foreign suppliers, goods or services.'

42 Article IV.1(*a*).

43 Article IV.1.1(*b*).

Domestic suppliers may also not be treated differently because of foreign affiliation or ownership or the fact that goods or services are produced in the territory of another party.[44] The use of offsets[45] is also prohibited.[46] The GPA further provides that conditions for participation shall be limited to those that are essential to ensuring that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.[47]

It is, however, recognised that developing countries have special needs that have to be taken into account.[48] This is specifically addressed in article V of the agreement. It provides for exceptions applicable to developing countries. In terms of this article developing countries can negotiate special and differential treatment and other parties should give due consideration to the financial and trade needs and circumstances of developing countries. This can entail transitional arrangements with regard to a price preference programme,[49] the use of offsets,[50] the phased-in addition of specific entities or sectors[51] and a threshold that is higher than its permanent threshold.[52] It must, however, be applied in such a way that it does not discriminate against other parties.[53] The use of offsets is further qualified in article XVI, which provides that offsets can be used only as a criterion for qualifying to participate in the procurement process. It may not be used as a criterion for the awarding of a contract.

Parties may also agree to the application of a specific obligation under the GPA being delayed.[54] The implementation periods are limited to five years for least-developed countries and three years for other developing countries.[55] Provision is made for the

---

44 Article IV.2.

45 'Offsets' is defined in article 1.l to mean: 'any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement.'

46 Article IV.6.

47 Article VIII.1.

48 See the preamble of the GPA, where it is stated: '*Recognizing* the need to take into account the development, financial and trade needs of developing countries, in particular the least developed countries.'

49 Article V.3(*a*).

50 Article V.3(*b*).

51 Article V.3(*c*).

52 Article V.3(*d*).

53 Article V.3.

54 GPA article IV:4. The obligation provided for in art V:1(*b*) – that each party should accord immediately and unconditionally to the goods and services of any other party and to the suppliers of any other party offering the goods or services of any party, treatment no less favourable than the treatment the party, including its procuring entities, accords to goods, services and suppliers of any other party – is excluded.

55 Article IV:4(*a*) and (*b*).

extension of the transition periods given, and for new transitional measures.[56] The developing country benefiting from a transitional measure or extension of time must take steps during the transition period or implementation period to ensure that at the end of such a period it complies with the GPA.[57]

The provision[58] that most favoured nation (MFN) treatment must immediately be afforded to a developing country will favour developing countries (e Silva 2008). The provisions regarding the use of price preferences, offsets, the phased-in addition of entities and sectors, and the setting of a higher threshold than the permanent one will be attractive to developing countries. These benefits are, however, severely limited by the fact that the transitional periods have to be agreed upon.[59] The time periods provided for in article IV:4, in terms of which developing countries may delay the implementation of certain obligations, are also too short to be of assistance to small economies, as it will probably be difficult to implement the GPA in the three years given in the case of developing countries and the five years given in the case of least-developed countries (e Silva 2008).

The GPA acknowledges the principle that developing countries need to use public procurement to address their socio-economic objectives. This need is specifically addressed by providing for the special and differential treatment of developing countries when they acceed to the GPA. The use of the mechanisms of price preference and offsets is in principle available to developing countries in order to enable them to achieve their socio-economic objectives.

The GPA does address some of the concerns of developing countries but there is still a reluctance to enter into a legally binding agreement. Some of the reasons are: that many developing countries believe it will limit their ability to use public procurement as a policy tool; that they are afraid of the effect on their balance of payments; they are afraid of the costs; that they believe the developed countries will be the beneficiaries and the developing countries the losers; and that they do not see clear benefits for themselves.[60] Sceptics even believe that some developing countries are reluctant to accede to the GPA as it will limit corruption (Hunja 2003; Arrowsmith 2003; Mosoti 2004).

The provisions of the GPA can, however, serve as examples of how in a harmonised system provision is made for developing countries still to achieve their socio-economic objectives.

As in the case with the Model Law, many provisions of the GPA provide for the possibility for developing countries to pursue their socio-economic objectives during

56 Article IV:6.
57 Article IV:7.
58 Article IV:2.
59 GPA art IV:3.
60 See the discussion on the economic benefits of transparency in public procurement by SJ Evenett & BM Hoekman 'Government procurement: Market access, transparency, and multilateral trade rules.' 2005 *European Journal of Political Economy* 163–183.

the transitional period. Although the time frames may be unrealistically short, the basis on which provision is made for developing countries to pursue their socio-economic objectives can be adopted in the process of harmonising public procurement regulation in the SADC.

THE POSITION IN COMESA

COMESA was established in 1994 to replace the PTA, which had been in existence since 1981.[61] COMESA was established as an organisation of free, independent sovereign states which have agreed to cooperate in developing their natural and human resources for the good of all their peoples. As such it has a wide-ranging series of objectives which necessarily include in its priorities the promotion of peace and security in the region.[62]

COMESA's main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers faced by individual states. COMESA's current strategy can be summed up in the phrase 'economic prosperity through regional integration' (Karangizi 2005, 52). The FTA was achieved on 31 October 2000, when nine of the member states, including Djibouti, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe, eliminated their tariffs on COMESA-originating products, in accordance with the tariff reduction schedule adopted in 1992. This followed a trade liberalisation programme that commenced in 1984 on the reduction and eventual elimination of tariff and non-tariff barriers to intra-regional trade. Burundi and Rwanda joined the FTA on 1 January 2004. These 11 FTA members have not only eliminated customs tariffs but are working on the eventual elimination of quantitative restrictions and other non-tariff barriers.

The need to open up public procurement opportunities in member states to all COMESA private-sector players was soon identified.[63] Some member states suggested that the public procurement practices in some of the member states were a deterrent to increased trade in the COMESA region. COMESA therefore recognised the need to

61 The member states are: Angola, Burundi, Comoros, the Democratic Republic of the Congo (DRC), Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

62 See the COMESA website at www.comesa.int.

63 Two public procurement reform projects were supported by the African Development Bank (AfDB). They are the Public Procurement Reform Project, approved in 2001 and completed in 2004, and the Enhancing Procurement Reform and Capacity Project, approved in 2006 and which is still ongoing.

embark on the project on public procurement reform as part of a comprehensive thrust to develop a regional competition policy.[64]

The COMESA public procurement project started in 2001 with two main objectives: the first was to contribute to the liberalisation of trade in goods and services in the COMESA region; the second was to ensure good governance in public procurement the member states. This included entrenching the principles of accountability and transparency, combating corruption, and creating an enabling legal infrastructure in public procurement in the COMESA countries (Karangizi 2005).

The first activity carried out under the project was a study of the existing public procurement laws, institutions and practices. The study was followed by a validation workshop by the stakeholders from the public and private sectors of the member states, which took place in December 2002. The four pillars of procurement reform were identified as:

- political endorsement and commitment;
- enabling legislation and regulations;
- well-trained and competent procurement officials, and
- an informed, willing and supportive business and professional sector, both local and international (Karangizi 2005).[65]

---

64 The COMESA proposal to reform public procurement was based on the treaty objectives as set out in the COMESA Treaty as follows:

a) Article 3(*c*), which provides that one of the aims and objectives of COMESA is to cooperate in the creation of an enabling environment for investment;

b) Article 4(6)(*b*), which provides for the harmonisation or approximation of the laws of the member states for the proper functioning of the common market, and

c) Article 55, under which the member states have agreed that any practice which negates the objective of free and liberalised trade shall be prohibited. Under this provision the member states have established a comprehensive regional competition policy. (Karangizi 2005).

65 He further states that:

'The project on public procurement therefore set out to achieve the following objectives: (a) strengthen the capacity of member states in public procurement; (b) enhance competition in the procurement of goods and services within the COMESA free trade area; (c) harmonisation of public procurement rules and regulations in COMESA; (d) encourage more awareness of procurement opportunities; (e) improve national procurement systems through transparent rules, regulations and procedures; (f) promote efficient and optimal utilisation of government resources; (g) enhance intra-COMESA trade; and (h) ensure sustainability of goods practices in public procurement.' (p.54)

The Public Procurement Reform Project[66] was completed in 2004 and resulted in the adoption of the COMESA Directive. This directive was largely based on the Model Law (Kovacs 2005). COMESA member countries were expected to frame their national procurement laws, regulations and practices within the framework of the directive, which provided for member states to:

- upgrade their procurement systems to international standards;
- harmonise their procurement policies and procedures, and
- build capacity for the efficient management of public procurement systems.

In a follow-up to this project, the Enhancing Procurement Reform and Capacity Project (EPRCP), which was also funded by the African Development Bank (AfDB), was embarked upon. This project resulted in the COMESA Procurement Regulations being adopted by the COMESA Council of Ministers in June 2009. Under the new regulations, all member states were expected to work towards the establishment of a common financial threshold for regional competitive bidding within a period of five years from the date of adoption of the regulations. Each member state was expected to fix its own threshold for allowing other COMESA countries to compete in the local procurement market on an equal footing with nationals within the period of five years.

The EPRCP in particular addressed the following: training in public procurement;[67] capacity-building in the private sector;[68] and the establishment of a Procurement Management Information System (PROMIS).[69]

During 2012, the Operations Evaluation Department of the AfDB issued a report on

---

66 Karangizi (2005) states:
'The main features of the Public Procurement Reform Project were: (a) the adoption of a public procurement Act based on the UNCITRAL Model, COMESA and WAEMU Directives; (b) the establishment of oversight authorities; (c) the strengthening of operational efficiency, transparency and accountability; and (d) ensuring that a procurement information system is integrated into national financial systems. Its aim was to promote good governance of public procurement in all member states. This could be done by harmonising public procurement rules and regulations in COMESA, improving national procurement systems and creating capacity in the implementation thereof and by enhancing awareness of the public procurement opportunities in COMESA' (2005, 54)

67 This will address the capacity needs for public procurement. It aims to develop a dedicated cadre of professionals with strong technical know-how, which is a prerequisite for an open, competitive and transparent procurement system.

68 The private sector in many countries does not have the required capacity to compete effectively for public procurement opportunities. Many of them find it difficult to prepare responsive bids as they have limited experience, human resources, equipment and capital.

69 Under the PPRP, a website for the IT-based Procurement Information System (CPIS) was launched in 2004 to enhance the capability for disseminating and compiling information on procurement activities.

the COMESA Public Procurement Reform and Capacity Building Projects.[70] The most important findings in the report were that:

- public procurement reforms aimed at regional integration and good governance must be addressed with a long-term perspective;[71]
- adequate financial resources are needed in order to implement such a complex regional reform project effectively;[72]
- the political will and continued commitment to reform from all participating member states is a prerequisite for successful implementation of regional procurement reforms; to achieve the procurement reform objectives at the regional level it is necessary to ensure effective implementation at the national level; capacity must be built not only in the public sector but also in the private sector to ensure the effective functioning of and participation in public procurement;
- the human resource constraints, aggravated by high staff turnover in the public procurement institutions, must be addressed,[73] and
- regional reform implies complex policy reform issues that cannot be fully addressed through short-term projects or technical assistance.[74]

70 Project performance evaluation report, Operations Evaluation Department, African Development Bank Group 2012 Evaluation Task Manager: Madhusoodhanan Mampuzhasseril, 2012 – AfDB.

71 The coordinated actions of governments, political parties, the electorate, the media, civil society organisations, the private sector and donor partners are essential. The reforms must be adapted to the specific countries' contexts and challenges.

72 A lack of resources will jeopardise lasting institutional and capacity improvements.

73 This can be done by progressive career paths, attractive compensation and professional recognition.

74 A long-term engagement and partnership with the governments involving continuous dialogue and capacity-building is necessary.

Karangizi (2005) identified several benefits flowing from the COMESA public procurement reform. They include increased regional trade among the member states,[75] obtaining value for money, the combating of corruption[76] and enhanced competition.[77]

These efforts made by COMESA can serve as a good example for the SADC region of how to address harmonisation and regionalisation in the public procurement sphere.

CONCLUSION

Public procurement forms an important part of trade in any country and even more so in developing countries. As economic cooperation usually forms the basis of regional cooperation, public procurement is an important part of such cooperation. It would be strange if governments were to seek closer economic cooperation between states but were not prepared to open up their own procurement markets in the process. Governments should lead by example.

The regionalisation and harmonisation of public procurement has, of course, both advantages and disadvantages. The possible advantages are that through increased competition better value for money may be obtained by the procuring entity. This can relate to both the price and the quality of the product. The possibility for skills and technology transfer to different countries within the region will be enhanced. With the increase in trade within the region business confidence and investment flows will increase. It can lead to an increase in economic growth in the countries within the region due to the exporting of goods and services. A regional regulatory framework for public procurement which will harmonise procurement regulation will have to be established. This will both deepen and improve regional integration. It will build capacity in various fields, including that of the supply chain. Transparency in public procurement will be entrenched in the region as a whole as the collective pressure to adhere to the principles of transparency will carry much weight. It will lead further to an improvement in capacity in the supply chain management of many of the countries in the region.

---

75 This will happen when suppliers in the private sector become more aware of public procurement opportunities through publicly advertised tenders for goods and services that are required by the different levels of government in the region.

76 Fair, non-discriminatory and transparent procurement procedures will make perpetrating fraud and corruption more difficult.

77 Specific procedures which ensure that procurement contracts above a certain value are awarded in a competitive, transparent and non-discriminatory manner will provide the necessary incentives for suppliers to pursue opportunities in markets outside their national boundaries. This will allow suppliers to derive the full benefits of the regional market. Procurement authorities will be able to choose from a more competitive and wider range of bids.

It should be kept in mind that premature trade and regional agreements with regard to the harmonisation of public procurement may make it difficult to reverse policies in future. Regional requirements for development may conflict with national priorities. Sensitive industries of a particular country may be put at risk because of the increased competition. Local service providers may be crowded out by more competitive providers from a neighbouring country. Difficulties may arise with regard to regulatory issues because of a lack of legal regulation in a specific field. A more developed and economically stronger partner may dominate other countries in the region.

There are therefore legitimate reasons to limit free trade in public procurement. One reason is that governments need to achieve their socio-economic goals through public procurement. There are, however, different ways in which regimes can provide for the achievement of such objectives, as is evident from the Model Law and the GPA. Ample provision is made in the Model Law to enable countries adopting this law to still achieve their secondary procurement objectives. This can be done by:

- excluding certain types of procurement or certain procuring entities from the operation of the Model Law;
- providing that obligations in terms of international agreements take precedence over the Model Law;
- allowing discrimination based on nationality in order to protect local industry, and
- providing for the possibility of a margin of preference to achieve socio-economic policies.

The GPA also acknowledges this need and makes ample provision for state parties, in particular developing and least developed countries, to attain their secondary objectives through public procurement. It provides for a price preference programme, offsets, the phased-in addition of specific sectors, a threshold that is higher than the permanent threshold, and the delay of the implementation of an obligation in terms of the GPA.[78]

It is accepted worldwide that public procurement is a legitimate way for governments to achieve their socio-economic objectives. Regional integration and harmonisation may have a negative effect especially on certain socio-economic aspects of a particular country. This can be managed and ameliorated by the use of different mechanisms in the public procurement regime, as is provided for in the regimes discussed above. The need for developing countries to achieve their socio-economic goals through public procurement therefore does not have to be an obstacle to the harmonisation of public procurement in the SADC. In fact, governments should lead by example by opening up their public procurement to competition in the region.

78 GPA article IV:3.

REFERENCES

Anderson, RD, Pelletier, P, Osei-Lah, K & Müller, AC 'Assessing the value of future accessions to the WTO Agreement on Government Procurement: Some new data sources, provisional estimates, and an evaluative framework for WTO members considering accession' 2011 *Public Procurement Law Review* 4:113–138.

Arrowsmith, S. 'Transparency in public procurement: The objectives of regulation and the boundaries of the World Trade Organisation' 2003 *Journal of World Trade* 283–303.

Arrowsmith, S. & Davies, A. (eds) *Public procurement: Global revolution* (London: Kluwer Law International 1998).

Arrowsmith, S. & Trybus, M. (eds) *Public procurement: The continuing revolution* (New York: Kluwer Law International 2002).

De la Harpe, SP le R 'Public procurement: A critical analysis' (LLD Thesis, Pretoria, UNISA 2009).

e Silva, VGDL 'The revision of the WTO agreement on government procurement: To what extent might it contribute to the expansion of current membership?' 2008 *Public Procurement Law Review* 2:61–98.

Evenett, SJ & Hoekman, BM 'Government procurement: Market access, transparency, and multilateral trade rules' 2005 *European Journal of Political Economy* 21(1): 163–183.

Available at http://programmes.comesa.int/index.php?option=com_content&view=article&id=21&Ite mid=23&lang=en (accessed 3 June 2012).

http://www.comesa-eac-sadc-tripartite.org/. Accessed 2 June 2013.

http://www.sadc.int/about-sadc/overview/sadc-facts-figures/#GDP (accessed 3 June 2012).

http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html. Accessed 1 June 2013.

http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm 9. Accessed 1 June 2013.

Hunja, RR. 2003. Obstacles to Public Procurement Reform in Developing Countries. In: Arrowsmith, S. & Trybus, M. (eds.) *Public Procurement: The Continuing Revolution.* New York, Kluwer Law International. Ch 2, 13–22.Karangizi, S.R. (2005) The COMESA public procurement reform initiative. *Public Procurement Law Review*, *(*3), 51–61.

Karangizi, SR. 'The COMESA public procurement reform initiative' 2005 *Public Procurement Law Review* 3:51–61.

Kovacs, A 'The global procurement harmonisation initiative' 2005 *Public Procurement Law Review* 1:15–38.

Ky, EP. Integration by public procurement: Harmonisation of public procurement policies in order to promote the regional integration. The experience in public procurement policies reform in West Africa and Monetary Union (WAEMU) in the aim to promote the regional trade between the members states. Paper delivered at the 5th International Public Procurement Conference Seattle, United States, August 2012 at 2149.

Lowenfeld, AF. *International economic law* (Oxford: Oxford University Press 2008).

Matsushita, M. Schoenbaum, TJ & Mavroidis, PC *The World Trade Organisation: Law, practice and policy.* (Oxford: Oxford University Press 2003).

McCrudden, C. 'International law and the pursuit of human rights: A framework for the discussion of the legality of "selective purchasing" laws under the WTO Government Procurement Agreement' 1999 *Journal of International Economic Law* 3–48.

Mosoti, V. 'The WTO Agreement on Government Procurement: A necessary evil in the legal strategy for development in the poor world?' 2004 *University of Pennsylvania Journal of International Economic Law* 25(2):593–638.

Ortino, F. Basic legal instruments for the liberalisation of trade. A comparative analysis of EC and WTO law. Regional Indicative Strategic Development Plan (RISDP) (2004). Available at http://www.sadc.int/documents-publications/show/936. Accessed 3 June 2013.

Pallas, CL. & Wood, J. 'The World Bank's use of country systems for procurement: A good idea gone bad?' 2009 *Development Policy Review* 27(2):215–230.

Reich, A. 'The new GATT Agreement on Government Procurement – the pitfalls of plurilateralism and strict reciprocity' 1997 *Journal of World Trade* 31(2):125–151.

The SADC Regional Infrastructure Master Plan Energy Sector Plan August 2012. Available at http://www.sadc.int/. Accessed 3 June 2013.

Trepte, P. *Regulating procurement: Understanding the ends and means of public procurement regulation*. (New York: Oxford University Press 2004).

UNCITRAL: Origin, mandate and composition. Available at www.uncitral.org/ uncitral/en/uncitral_texts/ procurement_infrastructure. Aaccessed 3 June 2013.

UNCITRAL Public Procurement. Available at http://www.uncitral.org/uncitral/en/about/methods.html. Accessed 3 June 2013.

Wittig, WA. Building value through public procurement: A focus on Africa. UNCTAD/WTO(ITC) (1999). Available at http://www.acp-eu-trade.org/library/files/ Wittig%20-%201999%20-%20Building %20Value%(20Through%20Public%20Procurement %20A%20Focus%20on%20Africa.pdf. Accessed 2 June 2013.

Wittig, WA .'Public procurement and the development agenda' 2002 *Public Procurement Law Review* 3:71–83.

World Trade Organisation 'Working party on Gatts rules referring to: The size of government procurement markets' WTO document S/WPGR/W/39 12 July 2002 (02-3883), offprint from *OECD Journal on Budgeting* 1(4).

www.imf.org.http://www.imf.org/external/pubs/ft/weo/2011/01/weodata/weorept.aspx?sy=2010&ey=2010&scsm=1&ssd=1&sort=country&ds=.&br=1&c=199&s=NGDP_R%2CGGX_NGDP&grp=0&a=&pr1.x=62&pr1.y=10 (accessed 2 June 2012).