REFORMING THE LAWS ON PUBLIC PROCUREMENT IN THE DEVELOPING WORLD: THE EXAMPLE OF KENYA

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I. INTRODUCTION

Kenya is one of the countries that are currently in the process of preparing a new law on government procurement as part of the anti-corruption efforts of a new democratically elected government which came into power in December 2002. Whereas it may be too early to judge the commitment of the new government to meaningful and consistent anti-corruption initiatives, one may already discern either a definite unwillingness to move forward with serious reforms or an implicit acquiescence towards corrupt practices, particularly in the government procurement process. In this paper, we shall examine Kenya's government procurement laws, and their practical application. We focus on two recent examples of the procurement process, one by a government ministry and the other by a parastatal body. The first example of application we shall look at is the controversy over the procurement of HIV-Aids testing equipment by the Ministry of Health, and the second is the procurement of cranes by the Kenya Ports Authority. We shall end with a brief examination of the proposed Public Procurement and Disposal Bill (2003)[1] which is currently before the Kenyan parliament and how it may revolutionalize the government procurement process in Kenya. This Bill has already received the approval of the Cabinet of Ministers and is due for the second reading in Parliament.[2] Despite the Government having stated its commitment to have the bill enacted, the bill has not been passed yet.[3] In the last substantive part of the paper, we assess the relevant international agreements and standards such as the UNCITRAL Model Law on Public Procurement and the WTO's Agreement on Government Procurement, and also highlight the regional procurement law

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[1] For the proposed bill, please see Republic of Kenya, *Kenya Gazette Supplement No 59* (Bills No 21) (2003).

[2] See *Opening Speech delivered by the Honourable John Mutua Katuku, Assistant Minister, Ministry of Finance, to the Stakeholders Workshop to Review the Public Procurement and Disposal Bill 2003*, held at the Kenya School of Monetary Studies, Nairobi, Tuesday, 4 November 2003 (on file with the author).

[3] ibid, with the Minister stating in his address as follows: 'Ladies and Gentlemen, the government is committed to having the Public Procurement Law enacted. As you may already know, the *Public Procurement and Disposal Bill* 2003 has already been approved by the Cabinet and is in Parliament. It is due for the second reading.'

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reform processes going on, for example, in the Common Market for Eastern and Southern Africa (COMESA), and in the context of the negotiations for Economic Partnership Agreements between the European Union and the African Caribbean and Pacific (ACP) countries.

II. PUBLIC PROCUREMENT LAW IN KENYA

A. Public procurement in Kenya

The first of two key features of Kenya's public procurement process is that it is decentralized, meaning, it is three-tiered, with procurement procedures spelt out for the central Government, local authorities, parastatals and 'other bodies' such as universities, colleges, schools and cooperative societies.[4] Secondly, it provides a procedure for review of tender awards by unsuccessful bidders.[5] The overall administration of the public procurement system in Kenya is the responsibility of the Public Procurement Directorate, a small department within the Ministry of Finance.[6] The department, which is headed by a director, assisted by two deputy directors: one for monitoring, training and evaluation; and one for legal and policy affairs, was created in 2001 following the coming into force of the Exchequer and Audit Act (Public Procurement Regulations) on the strength of Legal Notice No. 51 of 30 March 2001. The directorate plays a coordination and oversight role for all the levels of public procurement, and according to the regulations, is 'the central organ of the policy formulation, implementation, human resources development, and oversight of the public procurement process in Kenya'.[7] It does not itself engage in procurement.

According to the public procurement regulations, the Directorate's mandate includes the overall monitoring of the functioning of the public procurement process in Kenya;[8] to develop, and support the training and professional devel-

[4] See generally, above n 12, *Public Procurement User's Guide*. For an excellent and concise overview of Kenya's procurement system please see W Odhiambo and P Kamau *Public Procurement: Lessons from Kenya*, *Tanzania and Uganda*, OECD Technical Papers No 208 (2003) also available at <www.oecd.org/dev/technics>.

[5] See generally, G Ikiara *Public Procurement: Strengths, Weaknesses and Implications for Economic Governance*, a paper submitted to the Kenya Constitutional Review Commission available at <www.kenyaconstitution.org> (last visited on 27 Nov 2003); and see GK Ikiara 'The Role of Government Institutions in Kenya's Industrialization' in P Coughlin and GK Ikiara (eds) *Industrialization in Kenya: In Search of a Strategy* (J Currey Heineman London 1988).

[6] According to a recent paper by the director, the department is understaffed, lacks the necessary funds for effective operation, and lacks necessary equipment such as fax machines, photocopiers, computers and vehicles, particularly necessary for its inspection activities. See L Obiri *Public Procurement Reforms Strategy: The Kenya Experience*, a paper presented at the WTO Symposium on Government Procurement, Geneva, Switzerland (Jan 2003), at 7–8.

[7] See Reg 7 of the *Exchequer and Audit Act* (*Public Procurement Regulations*), *Legal Notice No 51* of 30 Mar 2001. See *Public Procurement User's Guide*, above 14 n 12.

[8] See paragraph 1 of the *Duties and Responsibilities of the Public Procurement Directorate*, above n 12, Annex IV. Cited in above n 20.

opment of officials and other persons engaged in public procurement including their adherence to ethical standards;[9] to organize and participate in administrative review procedures;[10] to plan and coordinate technical assistance in public procurement; maintain and update a list of all procuring entities and members and secretaries of the various tender committees;[11] to inspect procurement agencies for compliance with the public procurement regulations; to receive and process from any person, comments of a general or specific nature pertaining to public procurement;[12] and to act as a secretariat to consultative meetings consisting of individuals from the public or private sectors with a stake in the procurement process.[13] The Directorate also plays an advisory role to the Ministry and prepares annual reports detailing major national developments in the procurement process.[14] In its advisory role, the Directorate is also responsible for formulating Kenya's position with regard to possible negotiations at the WTO on a multilateral agreement on government procurement. Hence, the director is a member of the National Committee on the WTO, a 14-member committee bringing together both government officials and civil society for deliberations on Kenya's current and future WTO commitments and their implementation.

Quite importantly, Legal Notice No 51 of 30 March 2001 (*Kenya Gazette Supplement* No 24) and *Legislative Supplement* No 16 create the Public Procurement Complaints, Review, and Appeals Board. The purpose of this Board is to provide an avenue to review and possibly resolve any complaints by unsuccessful tenderers. It is empowered to develop its own rules of procedure and those of the secretariat, which supports its activities. It has jurisdiction over both legal and procedural issues and is constrained to render its decision within 30 days of the date of the complaint notice. It is obliged to arrive at a well-reasoned and well-explained decision and award remedies, if indeed any are due. The decision must be rendered in the presence of the parties.

The Board has a rather wide arsenal of remedies that it can prescribe. It can order that the procurement proceedings be completely terminated; it can revise an unlawful decision award and substitute it with its own decision save that it cannot make an actual tender award; it can annul in whole or in part an unlawful act or decision of the procuring entity, but it cannot take a decision bringing the procurement contract into force; it can require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision; it can prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure; and it can declare the legal rules and principles that govern the subject matter of the complaint.

[9] ibid para 7. [10] ibid para 8. [11] ibid para 10.
[12] ibid para 5. [13] ibid para 13. [14] See Obiri above 8 n 24.

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The decisions of the Board are deemed final but can be subject to judicial review. The process of judicial review has to commence within 30 days of the rendering of the decision. The review has to be premised on the existing law on judicial review of administrative action. In Kenya, as in most common law jurisdictions, the courts are reposed with the power of judicial review on the basis of the understanding that the role of judges is not simply to interpret the law and settle disputes but also to monitor the exercise of governmental power. Hence, based on the principle of the 'rule of law' and the 'doctrine of separation of powers', the courts are supposed to place a check on executive extremes.[15] Through judicial review of administrative action, public bodies are restrained from an ultra vires exercise of their powers. In *R v Electricity Commissioners, ex parte London Electricity Joint Committee Co*,[16] an English case that was cited with approval by Kenya's Court of Appeal in *David Mugo t/a Manyatta Auctioneers v The Republic*,[17] it was held that 'whenever a body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the High Court exercised in its writs'.[18]

Having this in mind, in the case of the Public Procurement Appeals Board one could envisage a judicial review action based on a challenge of the legitimacy or consistency of the subsidiary legislation on which its decisions are founded. Since the Public Procurement Regulations are subsidiary legislation, they must be in conformity with the provisions of the enabling statute, in this case the Exchequer and Audit Act.[19] A failure to sustain such consistency

[15] See generally, MJC Vile *Constitutionalism and the Separation of Power*s (2nd edn OUP Oxford 1967) who describes 'separation of powers' as the concept that the legislative, judicial, and executive branches of government ought to be separate and distinct and that through this separation, each branch works according to its own authority, forming a check or balance against any abuse of power by the remaining two branches. This concept has been such a strong feature of modern-day democratic constitution making that it is also a foregone conclusion. According to James Madison, 'no political truth is certainly of greater intrinsic value', see *Federalist Papers* No 47. For the origins of the concept please see, H Taylor *The Origin and Growth of the English Constitution*, vol 1 (1889), who noted, for example, that 'Montesquieu is accepted as the oracle of political theory for that time' (60). For the influence of this concept to the framers of the American Constitution please see D Hutchison *The Foundations of the Constitution* (The Grafton Press New York 1928) 20–1. See also Y Ghai 'The Rule of Law, Legitimacy and Governance' (1987) 14 *International Journal of the Sociology of Law* 179.

[16] [1924] 1 KB 171, 205 (per Lord Parker CJ).

[17] Civil Appeal No 265 of 1997 (Judgment of Chesoni CJ).

[18] ibid.

[19] In another unreported case, *Stanley Njindo Matiba v The Attorney-General*, the applicant applied for an order of *certiorari* to bring into the High Court, for purposes of quashing, a decision by the Attorney General denying him permission to hire a foreign lawyer to represent him in an election petition in a Kenyan court. The application, lodged with leave of the court, was grounded in subsidiary legislation, that is, *Legal Notice No 164*. In his ruling the judge stated: 'Rules made pursuant to a statute are subsidiary legislation. They are made under delegated powers. A delegate's power is confined to the objects of the legislature. The main reason of delegation is that the legislation itself cannot go into sufficient detail. So it makes a skeleton Act. The delegate supplies meat, thus the intention of the legislation must always be the prima facie guide

could lead to a declaration of the regulations as being null and void.[20] One could also foresee a challenge based on the Procurement Appeals Board's Rules of Procedures as being inconsistent with the principles of natural justice. Both of these possibilities are open to unsuccessful or aggrieved tenderers in the Kenyan public procurement system.

B. The procurement of Aids testing equipment by the Ministry of Health

The first of the examples we focus on involves the procurement of HIV-Aids testing equipment by Kenya's Ministry of Health. HIV-Aids has been declared a national disaster in Kenya owing to the number of people infected and dying daily from the disease. The Government has taken various steps to control the disease including the acquisition of some high-value equipment necessary for the treatment of Aids patients. In this regard, the Government conducted a tendering process for the procurement of 28 bench-top cytometry systems machines used to measure the count of a specific group of white blood cells, known as CD4 cells, amongst Aids patients.[21] These machines assist in identifying patients whose immune system is low and hence help physicians determine whether such patients should be placed on anti-retroviral drugs. The machines,[22] valued at over US$1.5 million, were to be distributed to various hospitals throughout the country.

Like in a lot of other instances when the Kenyan Government has had a need for procurement, Crown Agents Ltd was engaged by the Ministry of Health to conduct the procurement process on its behalf. The Kenyan Government has had a long-running relationship with Crown Agents, a large multinational which describes itself as an 'international development company delivering capacity-building and institutional development services in public sector transformation, particularly in revenue enhancement and expenditure management, banking, public finance, training and procurement'.[23] The agents went on to invite bids, through their head office in the United Kingdom, for the supply of the equipment from two firms, Becton Dickinson and

to the meaning of the delegated legislation.' The court went on to find the purported amendment of Order 53 of the *Legal Procedure Rules* by *Legal Notice No 164 of 1994* null and void to be extent of the inconsistency with s 9 of Kenya's *Law Reform Act*.

[20] See, for instance, the case of *Koinange Mbiu v Republic* (1921) 1 Chancery Reports 440 in which a regulation on the growing of coffee in colonial Kenya was made in a manner that was inconsistent with the parent statute and therefore held null and void.

[21] The Aids virus attacks the CD4 cells and multiplies within the cells gradually reducing their numbers in the human body and thus weakening the immune system. See generally R Hogg et al 'Rates of Disease Progression by Baseline CD4 Cell Count and Viral Load after Initiating Triple-Drug Therapy' in (2001) 286 Journal of the American Medical Association 2568–77.

[22] I have been unable to verify whether 28 or 30 machines were ordered. News reports have both numbers. See Luke Mulunda 'Red Flags Raised over Procurement of HIV-Aids Equipment', *Financial Standard* (Nairobi, 7–13 Oct 2003) (quoting a figure of 30), and see, 'Why the DMS was Replaced', *The Daily Nation* (Nairobi, 19 Nov 2003) (quoting a figure of 28).

[23] See <www.crownagents.com) (last visited on 26 Nov 2003).

Company, a medical technology firm based in Franklin Lakes, New Jersey;[24] and Partec GmbH, a German company that 'pioneered cytomics and cell analysis by flow cytometry'.[25]

It is noteworthy that Crown Agents did not advertise the tender in the media. The reason given for this was that this 'was a restricted tender due to its exigency'.[26] Crown Agents then proceeded to evaluate the submitted bids and drafted a report for the Ministry of Health which took into account the 'technical specification of the equipment . . . offered, the landed cost including delivery to site, installation and training . . . [and] . . . whether the systems offered were open or closed . . . as well as the costs of the reagents'.[27] Since government procurement in Kenya is decentralized, further evaluation of the agent's report and decision for the final tender award fell for determination by the nine-member Ministerial Tender Committee within the Ministry of Health. This committee is chaired by the Director of Medical Services, a civil servant directly appointed by the President. The Ministerial Tender Committee rendered its decision in favor of Becton Dickinson, reportedly after consultations with the 'relevant technical departments and the University of Nairobi'.[28] However, some senior government officials were dissatisfied with the award of the tender, having expressed preference for Partec. Partec then appealed to the Public Procurement Appeals Board but no decision has been issued yet. [29]

Shortly after the tender award, the Director of Medical Services that chaired the committee that awarded the tender was replaced in circumstances that have been tied to that particular tender award. Some observers have attributed the replacement to 'errors in the drawing up of specifications for the supply of anti-retroviral drugs for use in Kenya's pioneering Aids treatment programme, as well as in the awarding of another KSh. 100 million tender for the supply of 28 CD4 machines for use in the treatment programme'.[30] In effect, the original specifications of the machines were altered to correspond to the particular product of the eventual winner of the bid *during* the tendering process.[31] According to a letter from a company representative from

[24] See <www.bd.com> (last visited on 26 Nov 2003). In Kenya, this company is represented by Faram East Africa Ltd., a company that is reputed to have 'strong links with top officials at Afya House' which is the headquarters of the Ministry of Health. See Luke Mulunda, 'Red Flags Raised over Procurement of HIV-Aids Equipment', *Financial Standard* (Nairobi, 7–13 Oct 2003). The machine it was to supply is known as a 'FACSCount Machine'.

[25] See <www.partec.de> (last visited on 26 Nov 2003). In Kenya, this company is represented by Flambert Holdings Ltd. The machine it was to supply is known as a 'Cyflow Machine'.

[26] Above n 42, quoting the remarks of a Mr Alan Pringle, of Crown Agents.

[27] ibid.

[28] ibid.

[29] See 'Why the DMS was Replaced', *The Daily Nation* (Nairobi, 19 Nov 2003) noting that the Director of Medical Services (Dr Richard Muga) came under intense pressure from some government officials to revoke the tender award but declined.

[30] See D Kimani 'Opposition to Meme Led to Muga's Removal', *The East African* (Nairobi, 24 Nov 2003).

[31] Above n 42.

Partec which was quoted by journalists, Partec's competitor had been 'closely informed concerning the details and the final amount of Partec's offer [and was therefore] in a comfortable position to submit an offer slightly below that of Partec'.[32]

Aside from the irregularities in the tendering process hinging on undue disclosure of information to a rival bidder, the Becton machines were also revealed to have extremely high maintenance and operation costs. There were also significant price differences between the two bids. The Becton machine was valued at KShs 2.7 million a piece while one Partec machine was valued at KShs 1.9 million, a difference of KShs 0.8 million in favour of the unsuccessful bidder. Besides this price differential, the Becton machines had some serious technical limitations in the sense that they were 'a closed system',[33] that is, they could only use one type of reagent supplied only by Becton. In contrast, the Partec machines could use reagents and accessories available through various manufacturers. Finally, there was a significant difference in the cost of the tests conducted by the two types of machines. An Aids patient tested on a Becton machines would pay KShs 720 while on a Partec machine it would cost KShs 160. This has serious implications for the availability of the testing facility that the Government had the intention of providing in a more accessible manner.[34]

In this case it appears that the tender specifications were tailored to suit one particular supplier, a clear flaw in the tendering procedures. The consequence is that the Government made a terrible loss in revenue. Could a scrupulous regard for the laid procedures have mitigated such loss? Clearly, the answer must be 'yes'. Could an external oversight or possibility of external challenge, say through the WTO dispute settlement process if Kenya was a signatory to the WTO Agreement on Government Agreement, have helped? Perhaps, at least because international standards would then have come into play and the process in Kenya would have been found to be compromised.

C. The procurement of cranes by the Kenya Ports Authority

The Kenya Ports Authority is a wholly owned government parastatal which came into being following the collapse of the East African Community and the regional East Africa Harbours Corporation and was established following the enactment of the Kenya Ports Authority Act.[35] The authority is based in Mombasa, the main seaport and a major international maritime link. The deep water port in Mombasa has 21 berths, two bulk oil jetties, ample dry-bulk wharves, and can service ships of all sizes and all types of cargo. It has specialist cold storage and warehousing facilities and is well linked to the inland ports

[32] ibid, quoting a letter written on the behalf of Partec GmbH by a Mr Roland Goehde.
[33] ibid.
[34] ibid.
[35] See CAP 391, Laws of Kenya.

in three of Kenya's major towns, including Nairobi, the capital city. The authority has responsibility for all maritime port activities and is an important commercial nerve-centre for the East African region.

Irregularities have been a common feature of the procurement process at the Mombasa port, particularly due to the sheer sums of money involved in port activities. The latest major irregular tendering process centred on a tender advertised by the Kenya Ports Authority for the supply of six cranes valued at US$ 20million for use at the port. The international tender advertisement was issued on 12 August 2003 and was to close on 26 September 2003. The bid bond was lowered from US$300,000 to US$70,000 which occasioned the postponement of the tender opening process at the first instance. There were other postponements which will be detailed later, in which irregular and direct government interference was evident.

It is noteworthy that since the public procurement process in Kenya is decentralized, the Kenya Ports Authority has its own procurement committee functionally independent and subject to no control from the Government.[36] If a bidder is aggrieved by the decision of this committee, the bidder has a right of appeal to the Public Procurement Appeals Board. Recent jurisprudence also allows an aggrieved bidder to apply for an injunction in the High Court to stop the process from proceeding pending the outcome of the appeal in the Procurement Appeals Board. In the recent case of *Baumann Engineering Ltd v Kenya Ports Authority*,[37] the claimant was awarded an injunction restraining the defendants from 'signing, executing or endorsing a contract, deed or memorandum with Damen Shipyards Holland in pursuance of tender No KPA/102/2002PM' until the hearing and determination of an appeal lodged with the Public Procurement Appeals Board. The orders, applied for under certificate of urgency, were granted on the basis of the applicant's plea that Baumann Engineering had filed an appeal with the Public Procurement Appeals Board and that if the application was not granted, the applicant's appeal with the Board would be rendered nugatory and 'the whole public procurement system would be brought to public ridicule and disrepute'.[38] In addition the applicant contended that their appeal to the tender appeals board was premised on well-founded allegations of a fundamental nature that the

[36] For information on the minimum criteria required for a prospective supplier at the Kenya Port Authority please see <www.kenya-ports.com/procurement> (last visited on 26 Nov 2003). The requirements are quite basic. All prospective suppliers are required to submit the following to the Procurement & Supplies Manager's office: an application letter; a certified copy of certificate of registration; a certified copy of a certificate of VAT; a certified copy of their PIN number; a trade license; a certificate from Ministry of Public Works for construction & civil works, or relevant certificates for other services; a business questionnaire, duly signed and stamped; for scrap dealers, a scrap dealer license and certificate of good conduct is mandatory; and a registration fee of Kshs 1,000.00 in cash or banker's cheque.

[37] See Civil Case No 524 of 2003 (Ruling of Judge Kuloba) (unreported), (on file with the author).

[38] See B Kaona 'Court Stops KPA from Awarding KShs. 1 billion Tender', *East African Standard* (Nairobi, 4 June 2003).

Kenya Ports Authority carried out a flawed, irregular and manipulated tender process to the advantage of and in favour of Damen Shipyards Holland and that there was a strong possibility that the award would be nullified by the board.[39] In its ruling, the Court stated:

> Having regard to the matters raised in the affidavits on both sides, and arguments by the advocates for the parties, this court is satisfied that a candidate who is unsuccessful at bidding for a tender who wishes to resort to his right of appeal has a right which is protectable [*sic*] by injunctive relief. Its complaint through the appeal process allowed under a statute should not be frustrated by a measure, which might wrongfully pre-empt it and render it useless. A statutory appeal procedure should be allowed to run its full course and not be made futile or otherwise useless by some action that might interfere with it. A complaining candidate who fears legitimately that his right under the appeal procedure might be wrecked or otherwise rendered hollow has a right, which if it is interfered with can thereby be injured. Injury thereby likely to be occasioned may be averted by injunctive relief.[40]

Suffice it to say, this is an important precedent that could be used by unsuccessful tenderers whose appeals may otherwise prove worthless if the tender is executed in between its award and the outcome of the appeals process in the tender board. As was stated further by the Court, this relief is necessary since:

> if no injunction were granted, and the defendant decides to act on the questioned tender and signs the contract on that basis, and it turns out that the appeal succeeds, a third party who won the tender might be inconvenienced, and contractual obligations and rights of third parties and the government may be adversely affected. In the alternative, it may be too late for the applicant to take part in the process. Damages might not be quantifiable.[41]

It is instructive that the tender award that was the subject of the claimant's case in this regard was annulled by the Public Procurement Complaints and Review Board pursuant to Regulation 42(5)(d) of the Regulations and re-tendering ordered because the tendering process and the evaluation were found to have been 'fatally flawed'.[42]

Going back to our illustrative irregular Kenya Ports Authority tender case, one of the bidders involved was Numerical Machining Complex, a State corporation which falls under the Ministry of Trade and Industry.[43] This

[39] ibid.
[40] Above 1–2 n 55.
[41] ibid 2–3.
[42] See Republic of Kenya, Public Procurement Complaints, Review and Appeals Board *Baumann Engineering Ltd. (Appellant) and Kenya Ports Authority (Procuring Entity)*, Application No 18/2003 of 29 May 2003 (on file with the author).
[43] Numerical Machining Complex is listed to be under the direct administration of the Ministry of Trade and Industry. See <www.statehousekenya.go.ke/government/trade.htm> (last visited 26 Nov 2003).

corporation entered into a memorandum of understanding[44] with Industrial Plant Kenya Ltd, a private company, with the intention of presenting a joint bid for the supply of the cranes required by the Kenya Ports Authority. Further, the joint bidders requested and apparently obtained a bond for their offer from the Ministry of Trade and Industry. This was an explicit endorsement of the tender by the Government and one that would be difficult to ignore by the tender committee at the port. The involvement of Numerical Machining in itself was the subject of controversy given reports that the advice of its board, to the effect that it had no capacity to manufacture or in some other way supply the cranes and no interest in doing so, was ignored, with the Ministry of Trade and Industry proceeding to issue authorization and support for a joint bid.[45] There were at least another 21 bidders involved in this procurement bid from, among other places, Asia, Latin America, Europe and Japan.[46]

Beyond this, there was gross interference in the tendering process by the Government. The tender opening was postponed three times on specific requests by Cabinet Ministers, with the intention of facilitating further receipt of international bids. In the third postponement, which occurred only a day before the actual opening of the bids, the head of the Kenya Ports Authority was under explicit telephone instructions from the Minister for Transport and Communications not to open the bids, on the ostensible reason that the process had suffered from a lack of transparency and accountability.[47] According to other reports, the Minister requested postponement to allow a bid by an 'unknown interested party'.[48] Earlier postponement had also been made at the prompting of Government Ministers.[49] It should be noted that according to the Public Procurement Regulations (2001), international tenders, such as this one for the supply of cranes, have to be opened within 21 days of the close of submissions. In simple terms, this basic provision was disregarded by the interference from highly placed Government officials.

When the tenders were finally opened, and despite the lack of clarity as to whether indeed the board of Numerical Machining had actually sanctioned its

[44] According to some sources, this memorandum of understanding was never actually executed. See, eg, J Kisero 'Government Moves to End Mombasa Port's Multi-Million Tender Controversy', *The Daily Nation* (Nairobi, 11 Nov 2003) stating that in a meeting that was held to discuss the memorandum of understanding and the cranes supply tender, it was decided that the two issues be separated and that the memorandum issue be addressed on a later date.

[45] ibid.

[46] See B Agina 'Ministers Challenged on Ports Authority Tender Saga', *The East African Standard* (Nairobi, 8 Nov 2003).

[47] Above n 63.

[48] Above n 64.

[49] These were the Minister for Economic Planning and the Minister for Trade and Industry. See Jaindi Kisero 'Curb Ministers' Appetite for Mischief', *The Daily Nation* (Nairobi, 12 Nov 2003). A third entity that was involved the second postponement was a company known as Triton Petroleum Ltd that wanted to put in its own bid which was subsequently received. See D Okwembah 'Tender Saga Man Seeks Ex-MPs Help', *The Daily Nation* (Nairobi, 13 Nov 2003) quoting information received from the personal assistant to the head of the Kenya Ports Authority.

participation in the tendering, the joint bid by Numerical Machining and Industrial Plant won the tender, an obviously unexpected and questionable result given that neither Numerical Machining nor Industrial Plant have the capacity to manufacture cranes, or even to source them in an affordable way. In fact, both entities have had credibility questions raised about them with Numerical Machining having been responsible for the loss of large sums of money in a failed project to manufacture an authentic Kenyan car which was to be known as the 'Nyayo Pioneer', and Industrial Plant or its subsidiary having been placed under receivership for non-payment of a bank loan.[50] The tender was, however, re-opened with Numerical Machining partnering not with Industrial Plant, but a South African consortium, and receiving explicit backing by the Government again on the basis that 'it was government policy to enable Numerical Machining to participate in lucrative business'.[51] As of December 2004, it was reported that 40 per cent of the cargo-handling equipment, including two of the cranes, had already been purchased and received by the Kenya Ports Authority.[52]

III. PROPOSALS FOR REFORM: THE KENYA PROCUREMENT AND PUBLIC DISPOSAL BILL 2003

As we pointed out earlier, Kenya is among the many developing countries that are currently in the process of either revising their public procurement legal framework or formulating new laws. Other countries include Tanzania, whose Parliament in 2001 enacted the Public Procurement Act No 3 of 2001 along with Procurement of Goods and Works Regulations and Public Procurement (Selection and Employment of Consultants) Regulations. In Ghana, the Public Procurement Act No 663/2003 was passed on 18 December 2003 while, in Ethiopia, the Government launched its procurement law and practice reform with the Draft Public Procurement Proclamation of the Federal Government of Ethiopia. This is still being discussed within the Ministry of Finance.

In the case of Kenya, the Public Procurement and Disposal Bill was published on 24 June 2003.[53] The Bill is intended to replace the regulations made under section 5A of the Exchequer and Audit Act. The Bill has received the approval of the Cabinet of Ministers and is due for the second reading in Parliament, from whence it will go into the committee stage for close scrutiny. In the meantime, the Ministry of Finance, which is sponsoring the Bill, has

[50] See R Shaw 'Government Must Cancel this Murky Tender', *East African Standard* (Nairobi, 9 Nov 2003).

[51] ibid, quoting the remarks of Dr Mukhisa Kituyi, Minister of Trade and Industry.

[52] See P Beja 'Port Buys Equipment Worth KShs 100 million', *East African Standard* (Nairobi, 15 Dec 2004).

[53] See Republic of Kenya, Ministry of Finance *Report on Stakeholders Workshop to Review the Public Procurement and Disposal Bill 2003*, held at the Kenya School of Monetary Studies, Nairobi, Tuesday, 4 Nov 2003 (on file with the author).

welcomed contributions from the public and encouraged debate. It convened a national stakeholder's workshop in November 2003 to discuss the Bill.[54] The principal object of the Bill is to establish procedures for procurement by public entities and the disposal of unserviceable, obsolete or surplus stores and equipment by such entities.[55] According to section 2, its objectives are: to maximize economy and efficiency; to promote competition and ensure that competitors are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency in those procedures; and to increase public confidence in those procedures.[56]

Part I of the Bill provides for preliminary matters, including its objectives as spelt out above and some definitions. It also includes provisions dealing with the application of the Act and conflicts with other Acts, international agreements and conditions on donated funds. The definition of 'procurement' includes the procurement of 'goods, works or services and includes procurement by hiring'[57] and the definition of 'public entity', meaning the entities that are subject to the Bill, is quite wide.[58] Section 6 attempts to address the issue of possible conflict between the proposed law and international agreements. It is a curious provision and has been the subject of some debate. It states: **'**If there is a conflict between this Act, the regulations or any directions of the Authority and an agreement between the Government and one or more States or multilateral or bilateral intergovernmental organisations, the agreement shall prevail.' In effect this provision lends supremacy to international agreements over Kenyan law, which immediately would lead to questions touching on national sovereignty, especially given that, under the Kenyan legal system, international agreements have to undergo a process of domestication in order to become applicable law. The Institute of Economic Affairs, a civil society group in Kenya, has recommended that these provisions, along with sections 5 and 7, be expunged from the Bill entirely.[59] Noting the anomaly that the section introduces, one commentator has remarked:

[54] ibid.

[55] See Preamble to the *Public Procurement and Disposal Bill* (2003), which states that it is 'An ACT of Parliament to establish procedures for public procurement and for the disposal of unserviceable, obsolete or surplus stores and equipment by public entities and to provide for other related matters.'

[56] ibid s 2.

[57] ibid s 3(1).

[58] According to Art 3(1), these include, (a) the Government or any department of the Government; (b) the courts; (c) the commissions established under the Constitution; (d) a local authority under the Local Government Act; (e) a State corporation within the meaning of the State Corporations Act; (f) the Central Bank of Kenya established under the Central Bank of Kenya Act; (g) a cooperative society established under the Cooperative Societies Act; (h) a public school within the meaning of the Education Act; (i) a public university within the meaning of the Universities Act; (j) a college or other educational institution maintained or assisted out of public funds; or (k) and an entity prescribed as a public entity for the purpose of this paragraph.

[59] See *Memorandum from the Kenya Institute of Economic Affairs on the Public Procurement and Disposal Bill (2003)* at 3-4 (on file with the author).

> This clause is problematic . . . raises several problems and, at least, in one sense casts doubts on the professional standards of the drafters and their understanding of Kenyan law and practice. The main problem is the following. Kenya's approach to International law is dualist. This means that a bilateral, plurilateral or multilateral agreement that Kenya ratifies does not automatically become Kenyan law until it is, in addition to ratification, passed into law as an Act of the Kenyan Parliament. In other words, international agreement must be domesticated. In effect, any agreement which has not been converted into an Act of the Kenyan Parliament is not law in Kenya. Under the Judicature Act of Kenya, international, bilateral or plurilateral agreement are not sources of law and can therefore not be a basis for creating obligations or rights nor can courts look to them to resolve disputes. In this context, what Clause 6 seeks to do is to override Kenyan law with rules that are not recognised under Kenya's judicial system. This is not only astonishing, but in fact sets up a rule that is basically void. The other problem of course is that this is a blanket provision and overrides Kenyan law with any and all future international, bilateral and plurilateral agreements which means that if we were to have a procurement agreement at the WTO it would immediately override Kenyan law even without giving the country any time to adjust policy and practices and make sure that any potential problems are looked at and resolved through couching the implementing law in Kenya appropriately.[60]

Part II of the Bill creates the institutional structure that will regulate public procurement. The Public Procurement Oversight Authority is established as a public corporation.[61] The main functions of the Authority are to ensure that the procurement procedures established under the Act are complied with, to monitor the public procurement system and to assist in the implementation and operation of the system.[62] The Authority will be headed by a Director.[63] An Advisory Board, called the Public Procurement Oversight Advisory Board, is

[60] See S Musungu 'The Kenya Public Procurement and Disposal Bill, 2003: Comments on the Draft Provisions in the Context of the WTO Discussions on Transparency in Government Procurement', (unpublished) (on file with the author).

[61] Above n 72, s 8(1).

[62] ibid s 9, which states that the 'Authority shall have the following functions—(a) to ensure that the procurement procedures established under this Act are complied with; (b) to monitor the public procurement system and report on the overall functioning of it in accordance with section 20(3)(b) and present to the Minister such other reports and recommendations for improvements as the Director considers advisable; (c) to assist in the implementation and operation of the public procurement system and in doing so—(i) to prepare and distribute a manual and standard documents to be used in connection with procurement by public entities; (ii) to provide advice and assistance to procuring entities; (iii) to develop, promote and support the training and professional development of persons involved in procurement; and (iv) to issue written directions to public entities with respect to procurement including the conduct of procurement proceedings and the dissemination of information on procurements; and (d) to perform such other functions and duties as are provided for under this Act.'

[63] ibid according to s 10: (1) 'The Authority shall have a Director who shall be the chief executive officer of the Authority and who shall be responsible for its direction and management. (2) The Director shall be a person recommended by the Advisory Board and approved by the National Assembly. (3) On the approval of a person by the National Assembly under subsection (2), the President shall appoint the person as the Director.'

also established by section 21. The Advisory Board will consist of the Director and five members appointed by the Minister from persons nominated by prescribed organizations. The main functions of the Advisory Board are to give the Authority general advice, to approve the estimates of the Authority and to recommend appointment or termination of the Director. A Review Board is also provided for.[64] The existing Public Procurement Review, Complaints and Appeal Board is continued as the Public Procurement Administrative Review Board. The composition and membership of the Review Board is to be provided for under the Exchequer and Audit (Public Procurement) Regulations cited in our discussion earlier.[65]

Part III of the Bill deals with the internal organization of public entities in relation to procurement. A public entity must establish procedures for the making of decisions in relation to procurement.[66] A public entity must also establish a tender committee and other bodies required under the regulations.[67] A public entity is responsible for ensuring that the Act, regulations and directions of the Authority are followed.[68] The accounting officer is primarily responsible for ensuring that the public entity fulfils that obligation, but all other employees are vested with such responsibility, which effectively creates an onus for such people to act as whistle-blowers. Provision is also made for procuring agents at Article 28.[69]

Part IV sets out the general procurement rules. Included are rules about the choice of a procurement procedure. Sections 29(1) and 29(2) require a procuring entity to choose the open tendering or one of the alternative procedures such as restricted tendering or direct procurement under certain conditions.[70] Procurement cannot be split to avoid the use of a procedure.[71] The Bill also spells out a number of rules relating to the conduct of procurement proceedings including provisions relating to qualification to be awarded a contract,[72]

[64] ibid s 23 states that 'The functions of the Advisory Board are—(a) to advise the Authority generally on the exercise of its powers and the performance of its functions; (b) to approve the estimates of the revenue and expenditures of the Authority; (c) to recommend the appointment or termination of the Director in accordance with this Act; (d) to perform such other functions and duties as are provided for under this Act.'

[65] ibid ss 25(1)–(3). [66] ibid s 26(2). [67] ibid s 26(3).

[68] ibid s 27(1). [69] ibid s 27(2).

[70] ibid s 29(3) which states: 'A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity—(a) obtains the written approval of its tender committee; and (b) records in writing the reasons for using the alternative procurement procedure.'

[71] ibid s 30.

[72] ibid s 31(1) which states: 'A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria—(a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured; (b) the person has the legal capacity to enter into a contract for the procurement; (c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing; (d) the procuring entity is not precluded from entering into the contract with the person under section 33; (e) the person is not debarred from participating in procurement proceedings under Part IX; (f) such other criteria as the procuring entity considers appropriate. (2) The procuring entity may require a person to provide evidence or infor-

confidentiality, and communications with the procuring entity.[73] Provisions are included prohibiting inducements,[74] misrepresentations,[75] collusion and influence on evaluations by persons not officially involved,[76] and conflict of interest.[77] Procuring entities are prohibited from entering into procurement contracts with certain persons including employees of the procuring entity or public servants or persons, even corporations, related to such employees or public servants. There are also a number of rules which apply after procurement proceedings have been completed. These include requirements relating to records and the publication of notices of contracts.[78] The amendment of contracts after they are awarded is also regulated and interest is provided for overdue amounts under contracts.[79] Provision is also made for inspections and audits in relation to both the procuring entity and the contractor.[80]

Part V deals with open tendering. Under open tendering, the procuring entity must prepare an invitation to tender as well as tender documents. The invitation to tender must be brought to the attention of those who may wish to submit tenders, by advertisement in newspapers if the value of the procurement is over a prescribed threshold.[81] Other provisions deal with how much time must be allowed for the submission of tenders, the provision of copies of tender documents and tender security. A number of provisions are included relating to tenders including how they are to be submitted and received. The tenders will be opened by a tender opening committee subject to specific rules.[82] Provision is made for changes to tenders, clarifications and corrections of arithmetic errors. The Part also specifies when a tender is responsive and how the responsive tenders are to be evaluated. The procuring entity will be able to extend the validity period of tenders, subject to any restrictions prescribed in the regulations. Provisions are made for the notification of the person submitting the successful tender and for entering into the ensuing

mation to establish that the criteria under subsection (1) are satisfied. (3) The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure. (4) The procuring entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described in subsection (3). (5) The procuring entity may disqualify a person for submitting false, inaccurate or incomplete information about his qualifications. (6) No person shall be excluded from submitting a tender, proposal or quotation in procurement proceedings except under this section.'

[73] ibid s 44.

[74] ibid s 40(1) which states: 'No person seeking a contract for a procurement and no employee or agent of such a person shall give or offer anything, directly or indirectly, to an employee or agent of the procuring entity, a member of a board or committee of the procuring entity or any government official as an inducement relating, in any way, to the procurement.' In the event of inducements, the tenderer shall be disqualified and if the contract has already been awarded, such a contract shall be voidable at the option of the procuring entity.

[75] ibid s 41.

[76] ibid ss 42(1) and (2).

[77] ibid s 43.

[78] ibid ss 45 and 46.

[79] ibid s 47.

[80] ibid s 49.

[81] ibid s 51.

[82] ibid s 60.

contract. Consequences are imposed for a refusal to enter into a contract.[83] Procuring entities are also prevented from imposing additional responsibilities as a condition of being awarded a contract. A provision is also included requiring international tendering if there will not be effective competition unless foreign persons participate.[84]

Part VI provides for alternative procedures to open tendering. The alternative procedures consist of the following: First, restricted tendering, which is available if the costs of open tendering would be disproportionate to the value of the contract and the value of the contract is below the prescribed maximum.[85] Restricted tendering is also available if there are only a limited number of suppliers. Restricted tendering is similar to open tendering except that the invitation to tender is given only to selected persons. Secondly, direct procurement, which is available if there is only one supplier, if there is an urgent need, or if the procurement is for goods or services in addition to those already supplied under another contract.[86] In this procedure the procuring entity negotiates directly with the supplier. Third is the request for proposals which is available to procure services that are advisory or are of a predominantly intellectual nature.[87] In this procedure the procuring entity invites expressions of interest by publication of an advertisement in the press. The procuring entity determines which persons who express interest are qualified to be invited to submit proposals. The proposals that are submitted are evaluated and the procuring entity negotiates a contract, subject to limitations which are set out, with the person whose proposal is successful. Fourth is the request for quotations which is available to procure goods that are readily available and for which there is an established market.[88] In this procedure the procuring

[83] ibid s 69, which states: 'If the person submitting the successful tender refuses to enter into a written contract as required under section 68, the procuring entity shall notify, under section 67(1), the person who submitted the tender that, according to the evaluation under section 66, would have been successful had the successful tender not been submitted. (2) Section 67(2), section 68 and this section apply, with necessary modifications, with respect to the tender of the person notified under subsection (1). (3) This section does not apply if the period during which tenders must remain valid has already expired.'

[84] ibid s 71, which states: 'If there will not be effective competition for a procurement unless foreign persons participate, the following shall apply—(a) the invitation to tender and the tender documents must be in English; (b) if the procuring entity is required to advertise the invitation to tender under section 54(2), the procuring entity shall also advertise the invitation to tender in one or more English-language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement; (c) the period of time between the advertisement under paragraph (b) and the deadline for submitting tenders must be not less than the minimum period of time prescribed for the purpose of this paragraph; (d) the technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade; (e) a person submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used; and (f) any general and specific conditions to which the contract will be subject must be of a kind generally used in international trade.'

[85] ibid ss 73 and 74.

[86] ibid ss 75 and 76.

[87] ibid ss 77 ff.

[88] ibid ss 89 and 90.

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entity prepares a request for quotations and gives it to selected persons. The successful quotation is the one with the lowest price that meets the requirements in the request for quotations. Fifth is the procedure for low-value procurements which will only be available for procurement if the estimated values of the goods, works or services are at or below the prescribed maximum.[89] Finally, one is the specially-permitted procurement procedures to be employed in exceptional cases when the Directorate may give special permission to use a procurement procedure not otherwise available.[90]

Part VII provides for the review of procurement proceedings. A person who submitted a tender, proposal, or quotation, or who might have wished to do so, may request a review by the procuring entity which, once received, puts the procurement proceedings on hold.[91] The decision of the procuring entity is given by the accounting officer.[92] The person who requested the review may request a further review by the Review Board.[93] The Review Board's decision can be appealed to the High Court.[94] There are time limits for each step in the review process. Part VIII gives the Authority powers to ensure compliance with the Act, regulations and directions of the Authority. The Director can order an investigation of procurement proceedings and, after receiving the report, can make an order giving directions to the procuring entity, cancelling the procurement contract or terminating the proceedings. The Review Board can be requested to review such an order and there is a further right of appeal to the High Court. Part IX allows the Director to debar persons from participating in procurement proceedings for up to two years on specified grounds.[95] A debarred person can request a review by the Review Board and there is a further right of appeal to the High Court.

Part X provides for the disposal of unserviceable, obsolete or surplus stores and equipment. A public entity must establish a disposal committee to recommend a method of disposal to the accounting officer in particular cases. The accounting officer is not bound by the recommendations but if he does not accept them he must give the disposal committee his written reasons for not doing so. Except as allowed under the regulations, the stores or equipment

[89] ibid ss 91 and 92. [90] ibid s 93. [91] ibid s 94(1).

[92] ibid s 96, which states as follows: 'Unless the matter is resolved to the satisfaction of the person who requested the review, the accounting officer of the procuring entity shall give the decision of the procuring entity within fourteen days after the procuring entity received the request for the review. (2) The decision given by the accounting officer shall be in writing and shall set out reasons for the decision and the accounting officer shall ensure that a copy of the decision is given to the person who requested the review.'

[93] ibid ss 97(1) to 97(4). [94] ibid s 103.

[95] ibid, the grounds for such disbarment according to s 119. '(1) The Director may debar a person from participating in procurement proceedings on the ground that the person—(a) has committed an offence under this Act; (b) has committed an offence relating to procurement under any Act; (c) has breached a contract for a procurement by a public entity; (d) has, in procurement proceedings, given false information about his qualifications; or (e) has refused to enter into a written contract as required under section 68. (2) The Director may also debar a person from participating in procurement proceedings on a prescribed ground. (3) A debarment under this section shall be for a period of time, not exceeding two years, specified by the Director.'

cannot be disposed of to an employee. The powers of the Authority and the Director under Part VIII to ensure compliance are extended to disposals under Part X. Part XI provides for a number of miscellaneous matters. Special provisions are made for certain procurements and disposals by the armed forces, police, the Kenya Security Intelligence Service and the Kenya Prisons Service.[96] The Director is required to convene consultation meetings at least twice a year. The Part concludes with provisions relating to regulations, offences, transitional matters and consequential amendments.

IV. SOME LESSONS FROM THE INTERNATIONAL CONTEXT

A. The WTO Agreement on government procurement

The OECD was the earliest forum at which discussions on a possible multilateral framework agreement on government procurement took place, which perhaps explains the fact that the issue has always been perceived by developing countries to be too closely associated with developed country interests. The discussions within the OECD began in the 1960s and by 1973 had yielded a *Draft Instrument on Government Purchasing Policies, Procedures and Practices*. The early Tokyo Round GATT draft was in fact based on this OECD draft. The GATT Tokyo Round negotiations resulted in a plurilateral Government Procurement Agreement (GPA) upon conclusion of the round in 1979. The GATT GPA had 19 signatories who acceded to it through a process of negotiations that paralleled the 'request and offer' style. By 1994, the number of signatories had only risen to 23.

Given the very small number of countries that signed the GATT GPA, its impact on the removal of trade distortive measures was minimal. Further, the GATT GPA had a very minimal coverage and 'minimal impact'[97] since it was limited only to goods actually procured by central governments, with the services sectors, including utilities and transportation, being excluded from coverage. Further, there was a threshold level of contract value initially pegged at SDR150.000 but later lowered to SDR130.000 following amendments to the agreement in 1988.

The GATT GPA signatories engaged in negotiations for its revision and expansion during the Uruguay Round, although according to Reich, these negotiations were not really part of the Uruguay Round. Upon conclusion of the negotiations in 1994, the signatories agreed to sign a new more expansive but still plurilateral agreement. The new agreement was signed at Marrakech

[96] ibid s 137.

[97] See A Reich 'The New GATT Agreement on Government Procurement: The Pitfalls of Plurilateralism and Reciprocity, Journal of World Trade' (1997) 32 JWT 125, 129 citing a study an influential report by the US Accounting Office estimating that the total value of government purchases covered by the Uruguay Round GPA was around US$20 billion annually.

in April 1994 and entered into force in January 1996.[98] The new agreement broke through the limitations of its predecessor and extended its reach to sub-central government entities such as local authorities and state governments and also other public entities such as corporations and parastatals. However, the agreement is held to apply only to those entities that signatories would have listed in the commitment. Another significant feature is that the new agreement includes the procurement of services, especially construction services, utilities and transportation, which are usually a major portion of government spending. However, in the case of services, only those listed in the agreement are covered. The threshold of coverage remains SDR130.000 for central governments' procurement of goods and services while the agreement establishes SDR200.000 for local governments and SDR400.000 for 'other entities.' Construction contracts are singled out with a threshold of SDR5 million.

The WTO GPA has two main features: transparency and non-discrimination.[99] The agreement requires signatories to create a transparent and openly competitive public procurement system, with clear procedures and award criteria. Procurement agencies are therefore constrained to publish procurement notices in good time and in an accessible manner for all potentially interested parties to know and bid,[100] and to clearly stipulate any technical specifications, technical qualification procedures,[101] bid opening procedures,[102] terms and conditions of the contract awards.[103] They are also required to indicate if the tendering process or post-award appeal process is exceptional in any way and how.[104] They must keep a record of proceedings, disclose whatever other information may be fairly due to interested parties, and make public the tender award including the name and address of the successful bidder and the value of the winning bid.[105] Accordingly, the GPA

[98] For some excellent background information on the agreement and its negotiation please see B Hoekman and P Mavroidis (eds) *Law and Policy in Public Purchasing: The WTO Agreement on Government Procurement* (University of Michigan Press Ann Arbor 1997); P Messerlin 'Agreement on Public Procurement' in OECD *The New World Trading System: Readings* (OECD Paris 1995) at 65; and C Barshevsky, A Sutton, and A Swindler 'Developments in EC Procurement Under the 1992 Program' (1990) 4 Brigham Young University Law Review 1269 at 1326–6.

[99] See Art III GPA.

[100] See Art IX GPA. It is further required that the advertisement be in a previously determined publication and that the notice also be available, at least in summary form, in one of the three official WTO languages, ie English, Spanish, or French.

[101] See Art VIII GPA.

[102] See Art XIII:3 GPA.

[103] See Art VI:2(b). It is also required that any such technical specifications be based on international standards where such standards exists. This will ensure that technical specifications are not used to defeat the non-discrimination element, by for instance favouring one supplier over another or by favouring domestic over foreign suppliers.

[104] Art XIII:4 GPA.

[105] Art XVIII GPA. The unsuccessful tenderer is allowed to ask for information as to why their bid was rejected the qualities and advantages of the successful bid.

aims at opening public procurement contracts 'to international competition under equal commercial conditions free of any national preferences'.[106]

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

Another important feature of the GPA is that it introduces a 'private right of action' for aggrieved and unsuccessful tenderers to challenge a tender award. Signatories are required to establish bid-challenge procedures that are non-discriminatory, timely, transparent and effective.[107] This means that the relevant tribunal established to administer these procedures should be able to award interim measures for stay of the tender award pending final determination if it is to be described as timely and effective. This provision on bid challenge procedures is mandatory and is particularly important for two main reasons. The first is that most violations of the GPA provisions would take place at the individual level, say an individual company aggrieved by a tender award of some procuring agency and wishing to challenge that, and with regard to a specific contract.

Secondly, if the tender award is not challenged right away, and it takes as long as it takes to arrive at a decision in the WTO for example, the outcome may be rendered nugatory by circumstances simply because the party awarded the contract may simply go ahead and fulfil their obligations. In general, WTO dispute settlement remains intergovernmental in nature and a private company or individual would have to approach its government to lodge a complaint on its behalf. The GPA is therefore innovative in the sense that it makes it mandatory for signatories to provide a process at the national level through which violations of the agreement can be redressed in addition to the dispute settlement procedures of the WTO *Dispute Settlement Understanding*.

Article V is an important derogation from the otherwise absolute nature of the non-discrimination feature of the GPA. If they can negotiate mutually acceptable exclusions with the other signatories, developing countries are allowed to derogate from the rules on non-discrimination. In essence, Article V is informed by the financial and development challenges of developing countries. Under the article, developing countries may obtain special treatment in terms of coverage and national treatment rules by specifying exclusions in

[106] See Reich above 128 n 114.
[107] See Art XX:2 GPA.

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the list of offer. Technical assistance and capacity building is also included, as is a dedicated clause for least developed countries.

The outcome of the Fifth WTO Ministerial Conference held in September 2003 in Mexico confirmed that there was little agreement first on the need for a multilateral framework on Government Procurement and secondly on the actual parameters of such an agreement. After a period of quiet study of its position following its failure to convince developing countries at Cancun, the EU's position with regard to government procurement and the other Singapore Issues in general is that 'there is no reason to abandon the fundamental and long-run objective of creating rules . . . '[108] on these four areas. It would appear that the EU is under no illusions however that an agreement on modalities would be reached. In this regard, the EU indicates that it will 'consider each of the four issues strictly on its own merits and will no longer insist on each issue being treated identically if there is no consensus to do so'.[109] A look at some of the discussions in the Working Group on Transparency in Government Procurement (WGTGP) reveals that Members were quite divided on almost all the elements under discussion. With the elements of an ideal procurement law framework in mind, we hope to tease out the extent to which WTO Members might actually come up with a framework that would support the development needs of developing countries while at the same time providing them with a procurement system that enables them to control inefficiencies. In the so-called 'July Package'[110] adopted by the WTO General Council on 1 August 2004, it was decided that, along with the other 'Singapore Issues', government procurement 'will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round'.[111]

Despite this failure by the EU to include government procurement as a negotiating issue in the ongoing Doha Round of multilateral trade negotiations, it has not shied away from including it in the other major set of negotiations with African, Caribbean and Pacific (ACP) countries. In negotiations between the EU and the ACP for Economic Partnership Agreements (EPAs), the EU has demanded the inclusion of government procurement, competition policy, investment, trade facilitation and data protection as negotiating issues. Of these, it should be remembered that the Cotonou Agreement, which spells out the road-map for the EPA negotiations, only envisaged negotiations on investment and competition policy. Section 6.2 of the EU's Negotiating Instructions explicitly states: 'In addition the parties will seek progressive liberalization of their procurement markets on the basis of the principle of non-

[108] Commission of the European Communities, Communication from the Commission to the Council, to the European Parliament, and to the Economic and Social Committee (Brussels, 26 Nov 2003).
[109] ibid.
[110] WTO, *Decision Adopted by the General Council on 1 August 2004*, WT/L/579.
[111] See ibid para 1(g).

discrimination and taking into account their development levels.' The ACP's Negotiating Mandate only mentions competition policy, giving the impression that the ACP are not ready to negotiate on these additional issues. Many ACP countries have taken the view, as expressed for example in the Negotiating Mandate of the Eastern and Southern Africa region, that, regarding the Singapore issues, 'there is a need to continue with the educative process at the all-ACP level' and not to include them in the regional EPA negotiations.[112]

B. The UNCITRAL Model Law on public procurement

The objective of the UNCITRAL Model Law is 'to serve as a model for States for the evaluation and modernization of their procurement laws and practices and the establishment of procurement legislation where none presently exists'.[113] The underlying reasons for coming up with the Model Law included the conclusion that most existing national legislation on procurement 'is inadequate or outdated'[114] which results 'in inefficiency and ineffectiveness in the procurement process, patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds'.[115]

The need for the Model Law was also premised on the recognition of the particular need for sound laws and practices in public sector procurement in the developing and transitioning world, 'where a substantial portion of all procurement is engaged in by the public sector . . . '[116] with much of such procurement being 'in connection with projects that are part of the essential process of economic and social development'.[117] Quite accurately in our view, the Model Law was also necessary because

> those countries in particular suffer from a shortage of public funds to be used for procurement. It is thus critical that procurement be carried out in the most advantageous way possible. The utility of the Model Law is enhanced in States whose economic systems are in transition, since reform of the public procurement system is a cornerstone of the law reforms being undertaken to increase the market orientation of the economy.[118]

The guide also cites the aspiration of elimination of discriminatory government procurement practices as non-tariff barriers to trade as another reason.[119]

[112] See, Eastern and Southern Africa: Negotiating Mandate, at <http://ncb.intnet.mu/mfa/download/negoesa.doc> (last visited 30 Dec 2004).

[113] See UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction, and Services*, UN Doc No A/CN.9/403 at 46.

[114] ibid. [115] ibid. [116] ibid.

[117] ibid. [118] ibid.

[119] ibid 46–7, it states in this regard: 'Furthermore, the Model Law may help to remedy disadvantages that stem from the fact that inadequate procurement legislation at the national level creates obstacles to international trade, a significant amount of which is linked to procurement. Disparities among and uncertainty about national legal regimes governing procurement may contribute to limiting the extent to which Governments can access the competitive price and qual-

Among its key provisions, the Model Law recommends tendering 'as the rule for normal circumstances in procurement of goods or construction'[120] because tendering is 'widely recognized as generally most effective in promoting competition, economy and efficiency in procurement, as well as the other objectives set forth in the Preamble'.[121] Having recommended tendering as the choice method of procurement, the model prescribes transparency as the way to achieve an efficient and beneficial tendering process. In this regard, it requires that all rules and pieces of legislation relevant to public procurement be made freely accessible to interested parties and that a record of proceedings in any committees, boards or any procurement agencies be kept and made available to parties that may need it.[122] According to the guide, Article 5 is therefore 'intended to promote transparency in the laws, regulations and other legal texts relating to procurement by requiring public accessibility to those legal texts'.[123] In the same vein, Article 14 of the Model Law requires that procurement awards be publicly announced.

In addition to transparency, the other key recommendation in the Model Law is a facility for unsuccessful bidders to challenge or seek review of the procedure and outcome of a tender award. This is considered an important policing safeguard and is included in Chapter VI of the Model Law. This also ties in well with the fact that the Model Law abhors any attempts by bidders to influence the outcome of a tendering process. According to the UNCITRAL guide, the intention of Article 15, which is the relevant provision here, constitutes an 'important safeguard against corruption: the requirement of rejection of a tender, proposal, offer or quotation if the supplier or contractor in question attempts to improperly influence the procuring entity'.[124] While recognizing that the effectiveness of such a provision depends on its implementation and that, in general, having a procurement law may not completely do away with corruption and other administrative excesses, it notes however that

> the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce

ity benefits available through procurement on an international basis. At the same time, the ability and willingness of suppliers and contractors to sell to foreign Governments is hampered by the inadequate or divergent state of national procurement legislation in many countries.'

[120] ibid 49.

[121] ibid.

[122] ibid in this way, the rules will 'facilitate [. . .] the exercise of the right of aggrieved suppliers and contractors to seek review. That in turn will help to ensure that the procurement law is, to the extent possible, self-policing and self-enforcing. Furthermore, adequate record requirements in the procurement law will facilitate the work of Government bodies exercising an audit or control function and promote the accountability of procuring entities to the public at large as regards the disbursement of public funds', 63.

[123] ibid 60–1. Affirming the universality of this principle the guide states that it should be found useful even for States that already have an elaborate administrative law that demands ready public access to legislation. For this states, 'the legislature may consider that a provision in the procurement law itself would help to focus the attention of both procuring entities and suppliers and contractors on the requirement of adequate public disclosure of legal texts concerned with procurement procedures.'

[124] ibid 55.

> corruption. In addition, the enacting State should have in place generally an effective system of sanctions against corruption by Government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process.[125]

The Model Law also tackles the issue of discriminatory practices in public procurement and the preference for domestically sourced goods. This has been an important issue in the international trade negotiations context and is bound to remain so should WTO Members at any point decide to go into negotiations for a multilateral agreement on government procurement. In this regard, what the UNCITRAL Model Law prescribes, including with regard to tender examination, evaluation, and comparison, is quite instructive and could constitute elements of a multilateral compromise. Even in an extremely open and entirely competitive tendering process, Article 34 of the Model Law leaves some flexibility for governments and procuring agencies to incorporate criteria other than the lowest bid into their evaluation of who to award the tender by allowing the procuring agencies leeway to award the tender to the 'lowest evaluated tender.' It should be stated, and it is recognized in the UNCITRAL guide to the Model Law, that tender price easily provides 'the greatest objectivity and predictability'.[126]

The trickiest part to strike a balance on is the criteria that should be used in addition to price in arriving at the 'lowest evaluated tender'. One of the more plausible rationales that governments use for having a procurement policy that allows them to discriminate against foreign competition is that they would like to nurture domestic industry. Article 34 paragraphs (4)(c)(ii) and (iii) have listed what such criteria should be. Recognizing that developing countries will want to take into account their economic development through sectoral promotion policies in government procurement, the criteria in paragraph (4)(c)(iii) relates to economic development because

> in some countries, particularly developing countries and countries whose economies are in transition, it is important for procuring entities to be able to take into account criteria that permit the evaluation and comparison of tenders in the context of economic development objectives.[127]

Quite encouraging is also the fact that the Model Law envisages the possibility that countries may wish to list additional criteria but urges that this be done with caution

> in view of the risk that such other criteria may pose to the objectives of good procurement practice. Criteria of this type are sometimes less objective and more discretionary than those referred to in paragraph (4)(c)(i) and (ii), and therefore their use in evaluating and comparing tenders could impair competition and economy in procurement, and reduce confidence in the procurement process.[128]

[125] ibid. [126] ibid 76.
[127] ibid. [128] ibid.

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With the objective of bridling the discretion or arbitrariness in the formulation of the additional criteria by governments, it is suggested that such criteria should as far as possible be quantifiable and that in the evaluation process, they should be expressed in monetary terms or given relative weight in the evaluation procedure.[129]

Articles 34 (4)(d) and 39(2) are important provisions in the sense that they allow procuring agencies to grant the so-called 'margin of preference' to domestic tenders although, in fact, the availability of such a preference is subject to the rules of its calculation as formerly set forth in procurement regulations, and further subject to a pre-disclosure requirement in that it should have been included in the documents calling for tender bids, and should also be reflected in the record of proceedings of the procuring agency.[130] According to UNCITRAL, the margin of preference technique is beneficial because it:

> permits the procuring entity to select the lowest-priced tender or, in the case of services, the proposal of a local supplier or contractor when the difference in price between that tender or proposal and the overall lowest-priced tender or proposal falls within the range of the margin of preference. It allows the procuring entity to favour local suppliers and contractors that are capable of approaching internationally competitive prices, and it does so without simply excluding foreign competition.[131]

UNCITRAL has an important cautionary remark, however, that:

> It is important not to allow total insulation from foreign competition so as not to perpetuate lower levels of economy, efficiency and competitiveness of the concerned sectors of national industry. Accordingly, the margin of preference could be a preferable means of fostering the competitiveness of local suppliers and contractors, not only as effective and economic providers for the procurement needs of the procuring entity, but also as a source of competitive exports. At the same time, the Model Law recognizes that enacting States may wish in some cases to restrict foreign participation with a view in particular to protecting certain vital economic sectors of their national industrial capacity against deleterious effects of unbridled foreign competition.[132]

As stated earlier, the Model Law prescribes certain limitations to the leeway for countries to discriminate against foreign suppliers. According to Article

[129] ibid. In this regard, the guide states that one way of properly using the quantification process is 'to quantify in monetary terms the various aspects of each tender in relation to the criteria set forth in the solicitation documents and to combine that quantification with the tender price. The tender resulting in the lowest evaluated price would be regarded as the successful tender.'

[130] ibid 77. The UNCITRAL guide provides an example of implementing the margin of preference. It states: 'As to the mechanics of applying the margin of preference, this may be done, for example, by deducting from the tender prices of all tenders import duties and taxes levied in connection with the supply of the goods or construction, and adding to the resulting tender prices, other than those that are to benefit from the margin of preference, the amount of the margin of preference or the actual import duty, whichever is less.'

[131] ibid 52–3.

[132] ibid 52–3.

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8(1), any such discrimination should be on the basis of pre-determined grounds already included in the country's procurement law. For most developing countries that are beneficiaries of loan facilities by multilateral lending agencies such as the World Bank, or even some bilateral aid, there are certain conditions that attach to these funds, some of which explicitly limit or even totally do away with the flexibility of the beneficiary government to discriminate against foreign tenderers. Article 3 of the Model Law therefore recognizes the 'the primacy of international obligations of the enacting State' and that often the bilateral or other loan arrangements 'would require that procurement with the funds should be from suppliers and contractors in the donor country'.[133]

C. The COMESA transparency in government procurement initiative

It is essential that law, regulations and procurement policies be harmonized if the Common Market for Eastern and Southern Africa (COMESA) is to effectively realize its objective of deeper regional integration.[134] Owing to the obvious links between government procurement, regional free trade and development, and following 'specific requests by Member States that the procurement practices in some of the member states were deterrent to increased trade in the region . . .'[135] COMESA has taken a keen interest in issues of government procurement in the region.[136] Its objectives in this regard are premised on provisions in the *COMESA* Treaty, that is, Article 3(c),[137] Article 4(6)(b),[138] and Article 55.[139]

[133] ibid. The Model Law also gives to restrictions on the basis of nationality that may result from regional economic integration groupings that accord national treatment to suppliers and contractors from other States members of the regional economic grouping, as well as to restrictions arising from economic sanctions imposed by the United Nations Security Council.

[134] See S Karangizi *Regional Procurement Reform Initiative*, Paper presented at the Joint WTO-World Bank regional workshop on procurement reforms and transparency in public procurement for English speaking African countries (Dar-es-Laam, Tanzania 14–17 Jan 2003), which notes also that COMESA's interest in public procurement reform was part of its wider strategy of having a cohesive regional competition policy (1).

[135] ibid.

[136] See COMESA Doc COM/CM/V/2 (especially at para 54). See also *Report of the Fifteenth Meeting of the COMESA Council of Ministers*, held 13–15 Mar 2003 at the Friendship Hall, Khartoum Sudan. The document is available online at <www.comesa.int> (last visited on 27 Nov 2003).

[137] Art 3(c) outlines the aims and objectives of COMESA, including the desire to cooperate in the creation of an enabling environment for investment. The 'enabling environment' in this regard would definitely include an open and transparent government procuring system. For an excellent summary of the COMESA history and objectives, please see S Karangizi, 'Customs Enforcement in a Regional Integration Arrangement: The Case of COMESA' in R Yepes-Enriquez and L Tabassi (eds) *Treaty Enforcement and International Cooperation in Criminal Matters* (2002) 322–330.

[138] Art 4(6)(b) provides for the harmonization of laws throughout the COMESA region. This should make for an open and predictable system of obligations on the part of businessmen in the region.

[139] Art 55 is a more general provision in which all COMESA Member States agree not to take any actions or put in place any measures that defeat the objectives of free trade.

In a meeting of the COMESA Council of Ministers held in Kinshasa in June 1998, it was decided that 'the Secretariat embarks on a comprehensive study of the procurement rules and practices'[140] in the region with the view 'to attain their harmonisation'.[141] The project received funding support from the African Development Bank and was completed in April 2004.[142] The overall aim of the project was to 'lay the groundwork for ensuring accountability and transparency, combating corruption, and creating an enabling legal infrastructure in public procurement'[143] in the region. More particularly, the project envisaged a legal reform component, with the evolution of a set of Model Laws, regulations and procedures 'rooted in good governance',[144] the creation of a Procurement Technical Committee of Heads of National Procurement Agencies, and the formulation of Procurement Directives by February 2003.[145]

The evolution of a regional transparency in government procurement campaign should be a welcome initiative. More particularly, if well managed and financed, it is likely to yield a regionally cohesive procurement legislative framework. According to the COMESA Council decision,

> a consolidated approach to Public Procurement Reform would help to prevent unnecessary divergences between the procedures applicable to different types of procurement and to ensure that a single high standard of economy and efficiency, competition, transparency and fairness applies throughout the procurement system.[146]

Citing some of the benefits of such a regional approach to reform of the legal framework on government procurement, the Council noted that

[140] ibid. See also Karangizi, above 3 n 148.

[141] ibid.

[142] See also *Report of the Fifteenth Meeting of the COMESA Council of Ministers*, held 13–15 Mar 2003 at the Friendship Hall, Khartoum Sudan (para 322) reporting as follows: 'the representative of African Development Bank made a statement. He congratulated the Government of Sudan and COMESA Secretariat for the successful arrangements made for the meetings. He pointed out that COMESA was an important building block to the African Union and was glad that it was making great strides in achieving vision on African integration. He pointed out that ADB maintains very close cooperation with COMESA, which was sealed in 1999 when the two organisations signed a cooperation agreement. ADB has so far provided funding totalling about US$4.6 million to COMESA. *Council noted that the ADB current direct support to COMESA was US$1.5 million grant for public procurement reforms*. Council also noted that ADB was considering some COMESA pipeline projects including an agriculture trade project and seminar for COMESA staff . . .' (emphasis added).

[143] Karangizi, above 3 n 148.

[144] ibid 6.

[145] See Y Fall *Public Procurement Reform: the Role of the ADB*, Paper presented at the Joint WTO–World Bank regional workshop on procurement reforms and transparency in public procurement for English speaking African countries held in Dar-es-Laam, Tanzania 14–17 Jan 2003. The presentation is available online at <www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/fal1_e.ppt#1>.

[146] Above n 156, para 85.

> consolidation and harmonisation of the legal framework also renders procurement systems more user-friendly, both to the concerned public officials and to the private sector. Such consideration assumes added importance in the context of regional integration of procurement markets.[147]

In view of this, the Council proceeded to endorse a decision that had been reached in an earlier regional meeting of Ministers of Justice and Attorneys-General which had decided that Public Procurement Reform in the COMESA region would be attained through four main strategies: the adoption of modern national legislation on public procurement for countries that did not have such legislation in place or the revision and improvement of national legislation for countries that have outdated legislation; [148] the adoption of the principles and essential components of national legal frameworks as contained in Document No COM/IC/XV/3(a) for supporting the project on public procurement reform in COMESA and enhancing regional integration;[149] the establishment of a technical committee on public procurement as highlighted earlier;[150] and the adoption of the institutional and organizational arrangements contained in document COM/IC/XV/3(a).[151]

V. CONCLUSION

There is an ongoing wave of reform of public procurement laws and policies around the world. In Africa, these reforms are being conducted at both the national and regional levels. Much of our discussion has however been at the national level, taking the example of Kenya. Other countries that have recently reformed or that are in the process of reforming procurement law and policy include Tanzania,[152] Guinea Bissau,[153] The Gambia,[154] Ghana, and Ethiopia, to name a few. At the regional level, we have highlighted the ongoing COMESA public procurement initiative which aims to harmonize public procurement laws and policies throughout the region. There are other examples of regional strategies including the Maghreb harmonization efforts involving Algeria, Libya, Mauritania, Morocco, and Tunisia and supported by the Geneva-based International Trade Centre.[155] All these reform efforts, will,

[147] ibid. [148] ibid para 86).
[149] ibid. [150] ibid. [151] ibid.
[152] See W Odhiambo and P Kamau *Public Procurement: Lessons from Kenya, Tanzania and Uganda*, OECD Technical Papers No 208 (2003) also available at <www.oecd.org/dev/technics>.
[153] According to Wittig, in Guinea, new regulations are being formulated with national and international stakeholders. It is intended that a new 'central procurement office will develop policies, training programs and also oversee selected contract award decisions, and install management information systems.' See Wayne Witting *Public Procurement and the Development Agenda*, International Trade Centre, at 9 available at <www.intracen.org>.
[154] In the Gambia, the intended changes are supposed to yield 'a new legal framework, organizational infra-structure and training programs affecting public procurement.' See ibid.
[155] This exercise will involve the 'harmonization of legal frameworks, electronic procurement and a comprehensive training program.' See Witting, above n 167.

once completed, lead to a fairly open public procurement system in most of the developing world. These resultant public procurement systems seem to converge quite comfortably with respect to the basic design principles of efficiency, non-discrimination and transparency and, in this regard, may not look much different from what is required by the WTO Government Procurement Agreement and what has so far crystallized from the discussions in the Working Group on Transparency in Government Procurement. Hopefully, developing countries should then find it less costly to become signatories to the GPA and in the process avail themselves of a lock-in facility for their reform gains through adherence to the multilateral process. This is crucial, in particular for African countries where sometimes weak or deliberately lax enforcement of laws and policies in general allows some government officials to compromise the effectiveness and integrity of the public procurement process. Much as it may be deemed undesirably intrusive, therefore, our view is that developing countries, particularly those in Africa like Kenya, which have rather unique challenges, should seriously consider becoming signatories to the WTO GPA and should in this regard immediately kick off a genuine cost and benefit analysis of the agreement.